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THE PACIFIC REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 131
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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYÓMING
UTAH, NEW MEXICO, OKLAHOMA, COURTS OF APPEAL
OF CALIFORNIA AND COLORADO, AND CRIMINAL
COURT OF APPEALS OF OKLAHOMA

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED
AND
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Rules Governing Petitions from Persons Twice Convicted of Felony Under Section 1, Article VII, of the Constitution.

The justices of the Supreme Court will hereafter require all persons who have been twice convicted of felony to comply with the following rules in presenting their petitions for a recommendation by the justices for the granting of a pardon or commutation of sentence.

I.

There shall be filed by or on behalf of the person seeking such recommendation a petition in writing setting forth the grounds upon which he claims the pardon or commutation. Such petition must be accompanied by proof that copies thereof have been served upon the judge of the superior court and the district attorney of the county in which the last conviction of the petitioner was had, and also by proof that notice of said intended application has been published in a daily paper of said county for ten days prior to the filing of the petition. If no daily paper is published in the county the notice must be published in two successive issues of a weekly paper. If no paper is published in the county the notice must be posted at the court house and at the post office of the county seat for two weeks.

II.

There shall be filed with the petition a typewritten copy of the evidence upon which

said last conviction was had if any written transcript of such evidence is in existence, provided that if there was an appeal from said conviction upon a bill of exceptions showing the substance of the evidence—a copy of the transcript of the record may be used or referred to. If there was no appeal, a copy of the transcript of the official reporter's notes, certified by the county clerk, must be furnished, if a transcript is on file. If not there must be a statement of the substance of the evidence accompanied by proof of service of such statement on the judge of the superior court and the district attorney of the county in which the conviction was had. If any affidavits as to newly discovered evidence or other new matters are presented in support of the petition, proof of similar service must be made.

III.

There must also be presented with the application a duly certified copy of the petitioner's prison record under his last and all prior convictions, as well as a statement of the time and place of such convictions.

W. H. BEATTY, C. J.
LUCIEN SHAW, J.
M. C. SLOSS, J.
F. W. HENSHAW, J.
W. G. LORIGAN, J.

Adopted August 28, 1907.

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THE
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VOLUME 131

**WITTENBERG v. NORTHERN IDAHO
PINE LUMBER CO., Limited
(RICHARDS, Intervener).**

(Supreme Court of Idaho. Nov. 29, 1912. On Rehearing, April 11, 1913.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONFLICTING EVIDENCE.

Where a contract is made between N. I. P. L. Co. and R., whereby R. agrees to advance money to said company to be used by the company in its business of manufacturing lumber and the delivery of logs and lumber to R., and an action is brought by W., a creditor of the N. I. P. L. Co., to recover a debt, and a receiver is appointed, and R. intervenes and sets up the advances he has made and claims a lien upon said property taken possession of by the receiver, under a contract, and in the trial of the case the court finds that the company is in no way indebted to R. and denies the lien, and there is a conflict in the evidence, this court will not reverse the action of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. LOGS AND LOGGING (§ 33*)—LIEN FOR ADVANCES—SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, and held to be sufficient to sustain the findings and judgment of the trial court.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 89-103; Dec. Dig. § 33.*]

On Rehearing.

3. APPEAL AND ERROR (§ 835*)—REHEARING—NEW PARTY.

Where the trial court makes findings upon all the issues in the case and enters judgment, and upon appeal the findings and judgment are affirmed, and a rehearing is granted in this court, and upon the rehearing the appellant contends that a new trial should be granted, and that a new party be made a party defendant and brought into the case by proper service, and it appears from the record filed on appeal that the subject-matter alleged in the application to have a new party brought in was not involved in the case appealed and decided in the former opinion, such opinion will be affirmed and a new trial will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8241-8243; Dec. Dig. § 835.*]

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Action by William Wittenberg against the Northern Idaho Pine Lumber Company, Lim-

ited, and Harry A. Richards intervenes. From the judgment and denial of new trial, intervener appeals. Affirmed, and new trial denied on rehearing.

John P. Gray and Frank M. McCarthy, both of Cœur d'Alene, for appellant. Elder & Elder, of Cœur d'Alene, for respondent receiver. C. H. Potts, of Cœur d'Alene, for respondent Wittenberg.

STEWART, C. J. This action was instituted in the district court of Kootenai county by William Wittenberg against the Northern Idaho Pine Lumber Company, Limited, a corporation, to recover the amount due on two promissory notes and for the purpose of having a receiver appointed to take charge of the property owned and possessed by the company. The suit is founded on two promissory notes, the first of which is dated May 25, 1907, for the sum of \$750, due in six months, payable to F. T. Camp, and signed by the Northern Idaho Pine Lumber Company, Limited, and indorsed, "Pay to William Wittenberg. F. T. Camp." The second note is dated June 1, 1907, for the sum of \$4,000, and is payable to William Wittenberg, and executed by the same company, and indorsed, "\$2,000, March 12, 1911." The complaint also alleges that such notes are due and have not been paid, and asks judgment.

The complaint, in addition to the above allegations, sets forth the facts upon which a receiver is asked to be appointed to take charge of the property of the Northern Idaho Pine Lumber Company. The grounds alleged for the appointment of such receiver in brief are: That the sawmill owned by the company was destroyed by fire, and that the insurance upon said property had been paid to one Harry A. Richards and applied on his own personal account, and had not been applied to the payment of creditors of the company, and that mortgages have been given upon the property of the company, and debts created, and that such company is insolvent; that the president and secretary of the company and Harry A. Richards have conspired together for the purpose of plac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—1

ing all the property and assets of the company in the possession of Richards for the purpose of defrauding the plaintiff and other creditors. An affidavit was also filed supporting the allegations of the complaint, and upon the hearing the court appointed George Ott receiver of the company, on the 24th of August, 1911, and the receiver qualified and took possession of the assets and property which he found located at the place where the defendant company was doing business. Thereafter the receiver filed an answer to the complaint in intervention, and in such answer denied any right, title, or interest of Richards in or to said property. A petition in intervention was filed in said cause by Harry A. Richards, the appellant, and in this petition Richards sets forth that on the 26th of January, 1910, he made a contract with the lumber company, under the terms of which he was to make advances to said company of sums of money as required by the company in the conduct of its business, and in pursuance of the terms and conditions of the contract took possession of the property conveyed thereby, and sold and disposed of such property as partial payments of advances, before the rights of creditors of the company attached. In accordance with such contract, between the 26th of June, 1910, and the 29th of August, 1911, he advanced, on behalf of defendant, the sum of \$32,211; that he received from the sales of lumber and other timber products \$9,566.47, which amount was credited upon the advances made; that on the 23d of August, 1911, the defendant was indebted to said Richards in the sum of \$22,644.53, and that at such times he held invoices for goods which were then on the premises of defendant, and the indebtedness was in the nature of advances; that during said periods of time he was in possession of and entitled to the possession of all the white pine and western pine No. 4 and other pine and lumber and logs afloat in the river, and had the right to enter upon the premises of defendant and to remove any and all of said lumber and logs and to dispose of the same in accordance with the contract, together with the right to sell and dispose of all lumber in pile in the yards of the defendant and all logs, together with all unfinished lumber products, and apply the same upon advances; that all the money advanced was used in the business of acquiring said property described in the contract; that all the property taken possession of by the receiver was acquired by the company by reason of such advances, and that the receiver was so informed at the time he took such possession; that the petitioner in intervention claimed the right, title, and interest in and to said property by reason of his contract; that the possession of the receiver was unlawful and wholly without right; that the value of said property is about \$18,000. Other facts

are alleged in the application for intervention, but they are not material upon the consideration of the questions presented upon appeal.

The complaint in intervention was permitted, and the facts alleged in the answer made by the intervener to the complaint were substantially in the language of the application of the petition in intervention, as above referred to. The receiver also filed an answer to the complaint in intervention, and denied the material allegations of the complaint in intervention. The plaintiff also filed an answer, denying the allegations of the complaint in intervention. Upon these issues the cause was tried to the court, and findings of fact and conclusions of law were made in favor of the receiver, and it was decreed that the intervener, Harry A. Richards, had no lien upon the property of the Northern Idaho Pine Lumber Company, Limited, in the possession of the receiver, and that said intervener is estopped from asserting or claiming any lien upon the property of the defendant company, or any portion thereof in the possession of the receiver. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling a motion for a new trial.

[1, 2] Many errors are assigned, but the principal argument of counsel for appellant is based wholly upon the proposition whether, under the evidence, the appellant is entitled to an equitable lien against the property involved and taken possession of by the receiver, and whether he has power to take possession of such property and sell and dispose of the same and apply the proceeds thereof in payment of sums due him for advances made under the terms of the contract entered into between Harry A. Richards and the Northern Idaho Pine Lumber Company.

The court found that on the 26th day of January, 1910, the Northern Idaho Pine Lumber Company, Limited, had a large lumber manufacturing plant situated at Lane in the county of Kootenai, Idaho, at which place was also located many of its tangible assets; that it continued its lumber manufacturing operations subsequent to said date and up to the month of December, 1910, and carried on a large and extensive business in the manufacture of lumber and in buying and handling lumber products for manufacture; that on the 26th day of January, 1910, Richards and the lumber company entered into a certain contract, under the terms of which Richards advanced to the company large sums of money; that he did not apply all of the proceeds of the sales of lumber under said contract in payment of the advances made by him to said company; that all of the logs and lumber mentioned in the contract remained in the possession of the company, and car load shipments were made from time to time on the order of Richards

to the Falls City Lumber Company, and that Richards never took possession of the property described in the contract before the rights of creditors of the company or third persons attached; that Richards, between the 26th day of January, 1910, and the 29th day of August, 1911, advanced to the company the sum of \$18,711, and during said time he credited to the company, from the proceeds of sales of lumber shipped to him under said contract, the sum of \$9,566.47; that the company is entitled to credit for cars shipped to the Falls City Lumber Company on Richards' order; that the company is entitled to credit for numerous car loads of shipments of lumber made on his order under said contract, for which Richards failed to allow the company credit; that 22 car loads of lumber were shipped under said contract in May, June, and July, 1911, to Richards, for which he failed to give defendant credit, and that lumber to the value of at least \$18,610.18 was shipped to the Falls City Lumber Company under the order of Richards, which has never been credited to advances made under said contract; that the accounts of Richards and the Falls City Lumber Company were so intermingled and confused by Richards and under his orders that it was his duty to make complete showing as to the whole transaction; that the total amount of money advanced by Richards to the company was \$32,211; that \$8,500 was advanced on what was termed the "tie" contract, and was separate from the contract sued upon; that \$5,000 of this was advanced on the cut of 1909, and is not a proper claim under the contract sued on; that Richards was never in the possession or entitled to the possession of the lumber in piles in the yards of the company and never in possession or entitled to the possession of the lumber in the shop or in the cars or manufactured at the lumber manufacturing plant, and was never entitled to the possession of the logs, or any of the logs, belonging to the company; that the money received by Richards was used in the business of the company; that the company never dedicated the property owned by the company or the proceeds of the same to the payment of advances made by Richards; that the contract entered into by Richards and the company described in the complaint was not authorized by the board of directors of the corporation or by a majority thereof or by any executive committee of said board of directors; that said contract was executed by P. G. Sullivan, the president of the company, and I. W. Feighner, the secretary, and that the company shipped lumber to Richards on his order under said contract; that there was no conspiracy between Feighner, Sullivan, and Richards; that Richards has the control and management of the Falls City Lumber Company, and has a large financial interest in the company and the

controlling interest; that the company is a corporation organized and existing under the laws of the state of Washington and doing business in the state of Washington, and does not transact any business in the county or state, and that said company is not within the jurisdiction of the court; that Richards, between the 26th day of January, 1910, and the 25th day of August, 1911, for the purpose of securing large financial gains for himself and the Falls City Lumber Company, wrongfully and without right and authority caused a large portion of the assets, lumber, and property of the lumber company to be delivered to the Falls City Lumber Company, and that the receiver has no information or any way of determining the amount of the assets, lumber, and property which were delivered to the Falls City Lumber Company, and that there is now due the lumber company by reason of the acts of Richards in delivering the property and assets of the said company to the Falls City Lumber Company, from said Richards and the Falls City Lumber Company, the sum of at least \$18,610.18; that said property was delivered to the Falls City Lumber Company under the orders of Richards; that during the month of December, 1911, the sawmill of the defendant was destroyed by fire; that there was insurance on the same for the sum of \$22,900; that Harry A. Richards received the money paid upon said insurance and paid it out on behalf of defendant; and that he has received from the proceeds of the sales of lumber shipped to him, and under his orders under the contract, an amount more than sufficient to reimburse him for all advances.

From these facts the court made the following conclusions of law: That the intervenor, Harry A. Richards, has no lien upon the property of the Northern Idaho Pine Lumber Company now in the hands of the receiver, and is estopped from asserting or claiming any lien upon the property of the defendant company in the hands of the receiver. Judgment was rendered accordingly.

The contention of the appellant is based wholly upon the contract dated January 26, 1910, made between the Northern Idaho Pine Lumber Company, Limited, and Harry A. Richards, and the evidence showing the acts of the parties under such contract. By the terms of this contract, the company agrees to sell to Richards the entire output of its mill, situated at Lane, consisting of white pine and western pine No. 4 and better, and the company agrees to handle all fir and tamarack that may be among the logs of party of the first part by selling and disposing of the same, and the balance of the fir and tamarack is to be cut into dimensions and handled by Richards. It is further provided that, when the company sells the fir and tamarack and receives a price of \$10.50 or

better per thousand feet, then the party of the second part shall be entitled to a commission of 50 cents per thousand feet for all logging so sold by the company, and is entitled to deduct the same from any moneys which come into his possession under the terms of the contract. The party of the second part agrees to advance \$5 per thousand feet on all logs afloat in the river bearing the brand of the company (describing the brand). Richards also agrees to make a maximum advance on lumber as the same goes in pile in accordance with the contract (specifying the rate per thousand feet). It is further provided that such advances on lumber are to be made, less the advances already made on logs, and different grades of lumber are to be piled in such a way as to enable the parties to conveniently made estimates and grades. Then follows a provision that the company will give its notes, payable on demand, to cover all advances made by Richards, which notes are to be absorbed by the company making credits thereon upon the proceeds of sales as follows: (Then the rate per thousand is prescribed)—remitting the balance of the proceeds to the company. The lumber was to be billed in the name and under the orders of Richards, and Richards was to receive 8 per cent. net commission on the lumber, after deducting the freight, except on lath, on which he was to receive 10 cents per thousand. Then follows a number of provisions with reference to grading the lumber and shipping it and commissions paid and other provisions, immaterial in the consideration of the question involved in this case. Then follows this provision: "The party of the first part further agrees that the legal title to the said logs and to the said lumber shall pass to the party of the second part as soon as advances are made thereon by the said party of the second part, and the same shall then become and be the property of the party of the second part. And the said party of the first part agrees to guarantee all logs hereunder to be free from laborers' liens, or other liens, and further agrees to hold the party of the second part harmless from any and all liability arising from liens, mortgages, or claims of any kind, by outside parties against the said party of the first part, and against any loss thereof. * * *". This is followed by another general provision covering the subject which in effect provides that, in the event the party of the first party should fail to remove the lumber upon which advances have been made, the party of the second part might enter upon the premises and remove the lumber at such times and in such a way as the party of the second part might see fit, and place the same on board cars and dispose of the same in accordance with the terms of the contract. And in case the company fails or refuses to manufacture the

logs, on which the party of the second part made advances, into lumber in accordance with the terms of the contract, then the party of the second part has the right to sell lumber and logs sufficient to satisfy any and all claims arising thereunder.

Counsel for appellant contend that the evidence shows that Richards advanced to the defendant company, under this contract, the sum of \$32,211; that the sum of \$9,566.47 was paid on that indebtedness, leaving a balance due Richards, evidenced by notes held by him in the sum of \$22,644.53, subject to adjustment.

The respondent contends that under the evidence it is shown that Richards advanced under the contract the sum of \$18,711; that the company delivered lumber to Richards and was credited with the sum of \$9,566.47; that there was delivered to the Falls City Lumber Company lumber, at the request of Richards, to the value of \$18,610.18, making a total value of lumber received by Richards to the amount of \$28,176.65; deducting from this sum the amount advanced by Richards to the company, \$18,711, would leave due from Richards to the company the sum of \$9,465.65. If the evidence supports this contention, it must be admitted that Richards has no standing in this court upon his claim of a lien upon the property involved in this action, for the reason that he has nothing due him to support such lien. If the appellant's contention is correct as to the advances received, and there is due the sum of \$22,644.53, then there is a debt due from the company to Richards which may be the basis of a lien, if a lien can be claimed under the contract.

It will be observed from the foregoing statement that the two items of \$8,500 and \$18,610.18 are the items of credit in dispute. The trial court found that the sum of \$8,500, claimed to have been advanced by Richards, was not advanced upon the contract sued upon in this action, and the court also found that the lumber shipped to the Falls City Lumber Company in the sum of \$18,610.18 was shipped upon the credit and by the order of Richards, and therefore chargeable to Richards' account, and not chargeable to the Falls City Lumber Company. We have carefully examined the evidence offered in support of and against the findings made by the trial court upon these two items, and we feel satisfied that there is evidence in the record supporting the findings of the trial court. While there is evidence contradicting the proof offered in support of the findings, still there is sufficient evidence in the record to support the findings of the trial court. This being true, the question of a lien is of no consequence, and the judgment of the trial court will have to be affirmed. We have examined the alleged errors of the court in admitting and denying evidence, and other er-

rors assigned, and find none of them well taken.

The judgment is affirmed. Costs awarded to respondent.

AILSHIE and SULLIVAN, JJ., concur.

On Rehearing.

STEWART, J. [3] A petition for rehearing in this case was filed and granted. In the original opinion this court discussed and approved the findings of the trial court. The findings dealt with the contract sued upon, and the amount advanced by the intervener, Richards, to the respondent under said contract, and the value of lumber received by Richards from the company; and this court approved the trial court's findings to the effect that Richards was indebted to the respondent in the sum of \$9,465.65, and that, by reason of such fact, Richards had no claim against the respondent company, and the respondent company was not indebted to Richards, and therefore no lien existed in favor of Richards. In the petition for rehearing, however, and in the argument upon rehearing, counsel for appellant contend that the trial court erred in finding that Richards was indebted to the defendant company, and that this error occurred by reason of the fact that the trial court charged Richards with lumber delivered to the Falls City Lumber Company by the respondent, when such amount should have been charged to the Falls City Lumber Company upon account of advances made by the Falls City Lumber Company to the respondent, and that the Falls City Lumber Company was not a party to the suit, and the court should not have litigated the rights of the Falls City Lumber Company or the liability of the respondent to the Falls City Lumber Company for such advances.

It will be observed, from an examination of the original opinion, the lumber delivered to the Falls City Lumber Company was so delivered, under the contract sued on, upon the order of Richards, and the trial court found that the value of such lumber was chargeable to Richards upon the advances made by him to the respondent.

The issues made by the pleadings and the theory upon which the trial court proceeded was that the complaint in intervention alleged that Richards made advances of money to the company for the use and benefit of the company, and for which the property of the defendant company, in the possession of the receiver, was surrendered to him as security for such advances, and upon which he had a lien under said contract. Upon these issues, the trial court made its findings and entered judgment, and, in making such findings, the trial court determined: First, the amount

Richards advanced to the defendant company upon said contract; and, second, the value of the property Richards received under said contract, and found that Richards was indebted to the company in the sum of \$9,465.65, and because of that fact was not entitled to any lien upon the property in the possession of the receiver. In determining the status of the account between Richards and the company, the court determined how much money Richards had advanced to the company under the contract sued on. The advances made by the Falls City Lumber Company to the defendant or the value of property sold and delivered by the defendant to the Falls City Lumber Company was not involved in this action, and there was no error in the ruling of the court in not requiring the Falls City Lumber Company to be made a party to the suit, or that an accounting should be had between the Falls City Lumber Company and the defendant company, or in the sustaining of an objection to evidence in support of the appellant's contention for an accounting. The relation between these companies was not involved in this case. If the Falls City Lumber Company was indebted to the respondent, or the respondent was indebted to the Falls City Lumber Company, an adjustment of the account between such companies can be effected by the presentation by the Falls City Lumber Company of such claims as may exist in its favor against the receiver and having the same allowed as claims of other creditors of the respondent are allowed. The Falls City Lumber Company, if it has a claim against the respondent, stands in the same relation to the defendant company, so far as it appears in this case, as other creditors.

The original opinion is affirmed, and a new trial denied.

AILSHIE, C. J., and SULLIVAN, J., concur.

STRAND v. CROOKED RIVER MIN. & MILL CO. et al. (HANSON, Intervener).

(Supreme Court of Idaho. March 29, 1913.)

1. APPEAL AND ERROR (§ 624*)—FILING OF TRANSCRIPT—DISMISSAL OF APPEAL.

Where an order has been made by a justice of this court upon a proper showing, extending the time within which the transcript may be filed beyond the period fixed by the statute and the rules of this court, and such transcript is filed within the time prescribed by the order, the appeal will not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. § 624.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 553*)—SETTLEMENT OF STENOGRAPHER'S TRANSCRIPT—NECESSITY.

Under the provisions of section 4434, Rev. Codes, as amended by chapter 119, Laws of 1911, c. 119, p. 379, in order to review the matters contained in the stenographer's transcript, such transcript must be settled by the judge, and when so settled has the force and effect of a bill of exceptions duly settled and allowed, and will be deemed adequate to present for review any ruling appearing therein to have been excepted to, and, when not so settled, the same will be stricken from the transcript upon proper motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.*]

3. APPEAL AND ERROR (§ 663*)—FILING OF UNDERTAKING—CERTIFICATE.

The certificate of the clerk of the district court that an undertaking on appeal has been filed within the time allowed by law is sufficient when no showing is made to the contrary that the same was not filed within the time prescribed by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

4. APPEAL AND ERROR (§ 632*)—SERVICE OF TRANSCRIPT—NECESSITY—DISMISSAL OF APPEAL.

Where it appears from the record on appeal that the transcript was not served upon the adverse party, and a motion is made in this court to dismiss the appeal upon the ground that such transcript was not served, said motion will be sustained as such statute is mandatory and requires the transcript to be served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2771; Dec. Dig. § 632.*]

5. APPEAL AND ERROR (§ 607*)—DISMISSAL OF APPEALS—GROUNDS—PRÆCIPUE.

The fact that an appellant does not file a præcipe designating the papers desired to be included in the transcript with the clerk within five days, as required by section 4820a, Rev. Codes, under an act approved February 25, 1911 (Laws of 1911, p. 375, c. 117), is not a ground for dismissing an appeal, where the record shows that the attorneys certify that the transcript does contain all the papers desired to be included in the transcript, and the clerk certifies that the transcript contains all the files and records of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665-2672; Dec. Dig. § 607.*]

6. APPEAL AND ERROR (§ 773*)—DISMISSAL OF APPEAL—GROUNDS—BRIEFS.

The failure to file briefs within the time specified by the rules of this court is not a ground for dismissing the appeal, except that, where other grounds exist, such fact may be taken into consideration in determining whether the appeal has been prosecuted with due diligence, and not for the purpose of delay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by N. O. Strand against the Crooked River Mining & Milling Company and others, and E. H. Hanson intervenes. From the

judgment, Peter Marren appeals. Appeal dismissed.

John P. Gray and Frank A. McCarthy, both of Cœur d'Alene, for appellant. P. E. Stookey, of Lewiston, and A. S. Hardy, of Grangeville, for respondents.

STEWART, J. The respondent, E. H. Hanson, filed in this court on March 17, 1913, a motion to dismiss the appeal. On the same day a motion was filed by the other respondents to dismiss the appeal. The motion made by the respondent Hanson assigns several grounds, and includes the grounds set forth in the motion of the other respondents, and the two motions will be considered together.

[1] The first ground for dismissal is that the transcript was not filed in the Supreme Court or with the clerk thereof within the time provided by law and the rules of said court. This objection is overruled, for the reason that it appears that an order was made granting 20 days additional time to that prescribed by law for the filing of such transcript, and the transcript was filed within the time fixed by the order.

[2] The second ground for dismissal is that the stenographer's transcript of the proceedings and reporter's transcript of the trial contained therein were never settled or approved by the judge who tried the cause. Upon the argument of this motion an oral motion was made that the transcript of the evidence as certified by the stenographer should be stricken from the transcript upon the ground that the same had not been settled and allowed by the trial judge. This oral motion will be sustained. In the case of *Grisinger v. Hubbard*, 21 Idaho, 469, 122 Pac. 853, this court had under consideration the provision of the Rev. Codes, § 4434, as amended by chapter 119 (Laws of 1911, p. 379), and held: "This section requires that, in order to review the matters contained in such transcript on appeal in the Supreme Court, the same must be settled by the judge, and, when so settled, has the force and effect of a bill of exceptions duly settled and allowed, and shall be deemed adequate to present for review any ruling appearing therein to have been excepted to, etc.; that is, this section clearly requires that the trial judge shall settle the reporter's transcript, and that such settlement is a requisite to give to the transcript the effect of a bill of exceptions." This case was also approved by this court in the case of *Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676. The second ground is not a ground upon which an appeal will be dismissed, and should not be presented upon motion.

[3] The third ground is that there is no certificate in said transcript filed in said court showing the date of filing the undertaking with the clerk of the district court of the Second judicial district, or that said un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dertaking was filed within the time allowed by law. An examination of the record in this case shows that it contains a certificate of the clerk that an undertaking in said cause in the sum of \$800 for the costs was duly filed in said court, and, inasmuch as the record does not contain the undertaking and no showing to the contrary being presented in opposition thereto, this court will presume that the bond was filed within the time prescribed by law. In this connection counsel for respondent has filed a certificate of the clerk of the district court showing the filing of the bond on December 21st.

[4] The fourth ground is that the transcript was not served upon this intervenor nor upon any of the respondents within the time required by law and the rules of the court. The record does not show that the transcript was served on any of the parties. We call special attention to section 2, Laws of 1911, p. 380. The latter subdivision of said act provides that the party procuring the transcript to be made, or his attorney, is required to serve one copy together with a notice particularly describing by page and line any errors or omissions he claims to be disclosed by the transcript, in the event that there are any such errors or omissions upon the adverse party or his attorney, or, if there be more than one adverse party appearing by separate attorneys, then on one of those attorneys, in which latter case, however, he shall notify, in the manner that notices are required to be served, the other adverse parties or their attorneys of the party on whom he has made such service. There is no record or receipt or showing made that the transcript filed in this court was ever served upon the adverse parties or their attorneys as required by the foregoing section. The failure to comply with section 2, Laws of 1911, p. 380, is an omission which is jurisdictional, and renders the appeal to this court ineffectual by reason of the fact that there is no record which has been furnished this court in accordance with the requirement of the statute, and there is nothing before this court upon which this court can pass upon appeal.

[5] The fifth ground is that the appellant never filed any præcipe for the papers he desired to be included in the transcript with the clerk within five days, as required by law. This objection is not well taken. This section of the statute is not mandatory, but directory, and in this case the record contains a certificate of the attorney of the appellant that the transcript contains all the papers and records in the case which were required by the præcipe, and the clerk's certificate to the transcript shows that the transcript contains all the files in said cause.

[6] The sixth ground is based upon the fact that no brief has been filed or served on the respondents, and that 30 days have elapsed since the filing of the transcript and the service of the same. We do not believe that the failure to file a brief alone is sufficient ground to justify the dismissal of an appeal, except that the delay in filing the brief may be considered by the court in determining whether an appeal has been prosecuted with due diligence and not for the purpose of delay.

The seventh ground is stated as follows: "That all of said matters have prejudiced the respondents and resulted in delay, and have shown a manifest disregard of the law and the rules of said court." This objection appears to be well founded as shown herein in the discussion of the different grounds upon which the motion is based. The judgment was signed on the 31st day of May, 1912, and was filed on the 24th day of October, 1912; the notice of appeal is dated November 26, 1912, and was served, and filed on November 29, 1912. The transcript was filed in this court on February 17, 1913. Counsel for appellant in his oral argument, in opposition to the motion, admitted that counsel for appellant did not see the transcript from the time the judgment was rendered to the filing of the same in this court, and that no brief has been prepared or filed by the appellant. The only presumption that can be indulged in by this court is that the failure to prepare a transcript and have the stenographer's record settled as provided by law, and the failure to furnish a complete record of the case within the time prescribed by law and the rules of this court, show that such appeal is taken for delay.

The record in this case is of such a character that this court feels that it is its duty to call attention to the duty of counsel for appellant to pursue the necessary steps required to complete and present appeals speedily in good faith, and without unnecessary delay. Counsel for appellant should not overlook the duty due the client, and should not depend wholly upon the diligence of the clerk of the court or the stenographer, or counsel for respondent. The appellant is the aggressive party upon an appeal, and it is the duty of such counsel to proceed with such appeals in accordance with the requirements of the statute and the rules of this court, and, if this is done, there will be less criticism of delays in judicial proceedings, and cases will be in such a position that the court may dispose of all cases on appeal.

For the foregoing reasons the appeal is dismissed. Costs awarded to respondents.

AILSHIE, C. J., and SULLIVAN, J., concur.

JOHNSON et al. v. FISHER, Sheriff, et al.
(Supreme Court of Idaho. March 13, 1913.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where there is substantial evidence to sustain the verdict of a jury, it will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. INSTRUCTIONS.

Held, that the giving of certain instructions was not error.

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by Gilbert Johnson and Ervan Johnson against John T. Fisher, sheriff, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

N. D. Jackson, of St. Anthony, for appellants. C. W. Poole, of Rexburg, and B. H. Miller, of St. Anthony, for respondents.

SULLIVAN, J. This action was brought by the appellants against the respondent Fisher, as sheriff of Fremont county, and the National Surety Company, as surety on said sheriff's official bond, to recover the value of certain wheat and oats alleged to have been taken by said sheriff on execution against the father of said appellants, Martin Johnson. The main question involved was the ownership of said grain. The cause was tried by the court with a jury, and resulted in a verdict and judgment for the respondents. The appeal is from the judgment.

[1] The assignments of error go to the sufficiency of the evidence to sustain the verdict, errors of law occurring at the trial, and errors in giving certain instructions. After a careful examination of the evidence, we are satisfied there is substantial evidence to sustain the verdict of the jury.

The real question involved was the ownership of said grain, and it appears from the evidence that the father of appellants entered into a contract for the purchase of the land on which the grain was grown some time in 1910; that thereafter an attachment was levied thereon, and he surrendered his right to purchase said land, and thereafter, on January 9, 1911, the appellants entered into a contract for the purchase of said land. At that time the appellants were not of age, and it appears that the father and family resided on said land, and that the father assisted thereon. From all of the evidence the jury evidently believed, and had reason to believe, that an effort was being made to defeat the creditors of the father in collecting the judgment, for the enforcement of which said execution was levied. There was considerable evidence introduced in regard to the contract for the purchase of

said land, and we are not inclined, on a consideration of all of the evidence, to disturb the verdict of the jury.

[2] Under all of the evidence, we do not think there was reversible error in giving the two instructions complained of.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondents.

AILSHIE, C. J., and STEWART, J., concur.

CITY OF NAMPA et al. v. NAMPA & MERIDIAN IRR. DIST.

(Supreme Court of Idaho. Feb. 22, 1913.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF CASE.

A question considered and passed upon on a previous appeal in the same case, which was necessary or essential to the determination of the case on appeal, becomes the law of the case in all subsequent proceedings in the same action, from the consequences of which the appellate court cannot depart.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. WATERS AND WATER COURSES (§ 242*)—IRRIGATION DISTRICT—POWERS—MUNICIPAL CORPORATION.

An irrigation district organized under the general statutes of the state (Sess. Laws 1903, p. 150), which is authorized to include within its corporate limits lands and lots lying within a town or village, has the implied power conferred upon it by the Legislature to enter the streets and alleys of such town or village, or of that portion of the town or village included within the district, for the purpose of constructing ditches, canals, and laterals, in order to carry out the purpose of its creation and deliver water to the consumers therein.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.*]

3. WATERS AND WATER COURSES (§ 242*)—IRRIGATION DISTRICT—LIMITATION ON POWERS—MUNICIPAL CORPORATIONS.

The power conferred upon irrigation districts to enter the streets and alleys of towns and villages included within the boundaries of such district for the construction of its ditches, canals, and laterals, in order to deliver water to consumers, does not repeal or in any way interfere with the power and authority of such towns and villages to exercise control of their streets and alleys, and to regulate the manner and method of their use, and to direct the manner and method in which such irrigation district shall construct and maintain its ditches, canals, and laterals within such municipality.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.*]

4. MANDAMUS (§ 73*)—DELIVERY OF WATER—IRRIGATION DISTRICT—MUNICIPAL CORPORATIONS.

A water consumer within an irrigation district, who is also within the corporate limits of a town or village, may have his writ of mandate to compel the district to deliver water to him in accordance with and under the

regulations prescribed by the town or village in which his lot or land is situated.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 115, 135, 144–149; Dec. Dig. § 73.*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by the City of Nampa and others against the Nampa & Meridian Irrigation District for a writ of mandamus. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 19 Idaho, 779, 115 Pac. 979.

Hugh E. McElroy, of Boise City, for appellant. G. W. Lamson, of Nampa, for respondents.

AILSHIE, C. J. This action was instituted by the city of Nampa and J. H. Walling, George Everett, and G. W. Lamson, the former as a municipal corporation and the individuals as water users within the corporate limits of the city, praying for a writ of mandate against the defendant irrigation district to compel the district to deliver water to its water consumers within the corporate limits of the city of Nampa through underground pipes. A demurrer to the complaint was sustained, and an appeal was taken by the plaintiffs to this court, and the judgment of the lower court was reversed (*City of Nampa v. Nampa & Meridian Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979), and the cause was remanded for further proceedings. An answer was filed in the trial court, and the case was tried on its merits, and judgment was entered in favor of the plaintiffs, granting a writ of mandate against the district.

[1] Practically all the questions of law essential to be determined in the case on this appeal were passed upon in the former appeal. In so far as any question considered and passed upon in the previous appeal was necessary or essential to the determination of that appeal, it becomes the law of the case in all subsequent proceedings in the same action, from the consequences of which the appellate court cannot thereafter depart. *Hall v. Blackman*, 9 Idaho, 555, 75 Pac. 608; *Hunter v. Porter*, 10 Idaho, 86, 77 Pac. 434; *Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363; *Palmer v. Utah & Northern R. R. Co.*, 2 Idaho (Hasb.) 382, 16 Pac. 553; *Lindsay v. People*, 1 Idaho, 438; *Gerber v. Nampa & Meridian Irr. Dist.*, 19 Idaho, 765, 116 Pac. 104. On the former appeal (*City of Nampa v. Nampa & Meridian Irr. Dist.*) the court decided the following propositions, which seem to have been necessary and essential to the proper determination of that appeal:

(1) That the irrigation district was lawfully and rightfully engaged in the irrigation business within the corporate limits of the city of Nampa, and that a portion of the city, including the lots of the users who were

parties to that action, was included and incorporated within the Nampa & Meridian Irrigation District. (2) That the irrigation district had a legal right to run and operate its ditches, canals, and distributing laterals within the corporate limits of the city of Nampa, and that such right is subject to the power of the city to regulate the manner of the exercise thereof, and that the city has a right to change its street grades and thereby require a corresponding change in the conduit or means of delivery of water, and that in exercising this right vested in the city to grade its streets it may remove and destroy ditches and require the delivery of water through pipe lines beneath the surface of the street.

The foregoing legal propositions were fairly involved in the previous appeal, and their determination by this court adversely to the contention of the irrigation district has become the law of the case, and is binding upon the courts in all subsequent proceedings in the case.

[2] The appellant company is a quasi public corporation, organized to conduct business for the private benefit of the owners of lands within its limits, and of such a character as to concern and interest the public generally. It was organized under the general statute of March 9, 1903. Sess. Laws 1903, p. 150; *Nampa, etc., Irr. Dist. v. Brose*, 11 Idaho, 474, 83 Pac. 499. Under the statute it was authorized to incorporate within its limits lots and lands lying within a town or village. *Nampa, etc., Irr. Dist. v. Brose*, 11 Idaho, 475, 83 Pac. 499. Now it is clear to us that, when the Legislature authorized an irrigation district to include within its boundaries lots and lands within a municipal corporation, the Legislature thereby granted and conferred the necessarily implied power upon such irrigation district to enter the town or village and build and construct its irrigation works. In other words, the act of the Legislature in authorizing the incorporation of such a district necessarily carried with it the franchise to enter the streets and alleys of such towns and villages, or the streets and alleys of the portion of a town that might be included within such irrigation district.

[3] On the other hand, the legislative act granting the right to include town lots within an irrigation district and the implied power to enter the streets and alleys for the purpose of delivering water does not take away or diminish the power of the town or village to control and supervise its streets, and to direct the manner and method of their use by such a district. The municipality still has the right to regulate the use of its streets, and to prescribe the manner and method to be pursued by an irrigation district in conducting water over or through the streets, in order to deliver it to water

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

users and consumers at its canal or lateral nearest the land or lot to be irrigated. If the city authorities deemed it necessary to have the water conducted through underground pipes instead of being delivered through open ditches, it was clearly within the power and authority of the city to take such action and prohibit the use of the streets in a different manner. Of course, the city could not compel the irrigation district to build a pipe line, but it could prohibit it carrying water through an open ditch.

[4] The water consumer, on the other hand, who has acquired a right to the use of water from this system, may have his writ to compel the delivery of water to him at the most available points on the line of the main or lateral nearest him. If the city can prescribe the method in which water may be delivered through its streets, and the water user, on the other hand, has acquired a constitutional right to have water delivered to him from the canal or lateral of the district system, then it would seem that the irrigation district is left only the one alternative, namely, to construct a pipe line and deliver water to the consumers through such line.

It is clear that the district must construct its necessary canals and laterals within the corporate limits of the city and pay for such construction as the law directs. As was stated in the opinion in this case on a former appeal (19 Idaho, 779, 115 Pac. 979): "Under these facts the lot owners have become entitled to the use of water from the defendant's system, and the defendant must, in the first instance, construct its system within its franchise limits at its own expense. It cannot compel the user of water to pay for any part of the system." However, as we understand it, the users of water were required to construct their own laterals from the main canal and laterals of the district, and the district would not be required to pay for the construction of such private laterals as supply each of the users from the laterals that constitute the district system.

The judgment of the district court should be affirmed; and it is so ordered. Costs awarded in favor of respondents.

SULLIVAN and STEWART, JJ., concur.

CLEVELAND v. WALLACE et al.

(Supreme Court of Idaho. March 19, 1913.)

1. ANIMALS (§ 100*)—TRESPASSING—DAMAGES—TWO-MILE LIMIT LAW.

Under sections 1217 and 1218, Rev. Codes, known as the "two-mile limit law," a right of action is given against any person owning or having in his charge any sheep that are allowed to herd or graze within two miles of a dwelling house; and, where the owner thereof is not known or cannot be ascertained, the person who has sustained damages by reason of the trespass may proceed against the property

under sections 1294 and 1296 of the general trespass law of the state.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 395, 397-401, 409-419; Dec. Dig. § 100.*]

2. ANIMALS (§ 100*)—TRESPASSING—ESTRAYS.

Section 1219 of the Rev. Codes provides that, where the owner of trespassing sheep is unknown to the party injured, such party may at his option treat the trespassing animals as estrays, but under the estray laws no damages can be collected; such laws providing only for the disposition of the estray and the collection of the necessary costs and expense incurred in taking up and disposing of the animal.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 395, 397-401, 409-419; Dec. Dig. § 100.*]

3. ANIMALS (§ 100*)—TRESPASSING—ASSESSMENT OF DAMAGES—PROCEEDINGS IN REM.

Section 4230 of the Rev. Codes authorizes the prosecution of an action against a defendant whose name is unknown, and allows the plaintiff to proceed against a defendant without giving his true name, where he has been unable to ascertain the true name, and section 1294 of the general trespass law recognizes the same principle, and authorizes a proceeding for the assessment of damages against the trespassing animals, and provides that the amount assessed shall not be a personal judgment against the owner of the animal, but can only bind the property itself.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 395, 397-401, 409-419; Dec. Dig. § 100.*]

4. ANIMALS (§ 100*)—TRESPASSING—DAMAGES—PROCEEDINGS—JUSTICE OF THE PEACE.

Section 3925, Rev. Codes, provides that, when jurisdiction is conferred upon a court or judicial officer, all means necessary to carry the statute into effect are also given, and that in the exercise of that jurisdiction, if the course of proceedings is not specifically pointed out by the statute, the court may adopt any suitable process or mode of proceeding which may appear most conformable to the spirit of the law, and in pursuance of the authority of this statute and the right of action conferred by sections 1217 and 1218, Rev. Codes, it is proper for a justice's court to proceed under the provisions of sections 1294 and 1296, Rev. Codes, in a case where it is charged that the owner of trespassing sheep is unknown to the plaintiff, and that he is unable to ascertain the name of the owner, and the animals are taken into the possession of the plaintiff in the action, and subsequently delivered to the officer who levies upon them under the execution issued by the justice.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 395, 397-401, 409-419; Dec. Dig. § 100.*]

5. ANIMALS (§ 100*)—TRESPASSING—DAMAGES—PROCEEDINGS—APPOINTMENT OF APPRAISERS.

It is not necessary in this state to fence against sheep, and so in an action under the provisions of section 1294, Rev. Codes, for the recovery of damages for the trespass of sheep in violation of the provisions of sections 1217 and 1218, Rev. Codes, it is unnecessary to appoint appraisers therein provided for.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 395, 397-401, 409-419; Dec. Dig. § 100.*]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by W. C. Cleveland against Jack Wallace and others for damages. From a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment for plaintiff, defendants appeal. Reversed.

J. W. Edgerton, of Soldier, and Sullivan & Sullivan, of Boise, for appellants. Frawley & Block, of Boise, and McFadden & Brodhead, of Hailey, for respondent.

AILSHIE, C. J. This action involves the validity of certain judgments and execution sales had under sections 1217 and 1218 of the Rev. Codes, popularly known as the "two-mile limit law." A band of sheep which subsequent events have disclosed belonged to respondent herein were herded and grazed for something like a week within two miles of the dwelling house of the appellants Couch and Wallace. The band of sheep numbered something like 2,500, and was herded by a Basque, who either could not or would not speak English. Couch and Wallace endeavored to learn the name of the owner of the sheep, but were unable to do so. On June 5th Couch and Wallace each commenced an action in the justice's court of the precinct wherein the trespass was committed for the recovery of damages under the two-mile limit law. Their actions were commenced and summonses were issued against John Doe, whose real name was alleged to be unknown to the plaintiffs. The summonses were served on the Basque herder, and a return was made that service had been made on the defendant named in the complaint and summons. Upon the return day, no appearance was made on behalf of the defendant, and the true name of the defendant was still unknown to the plaintiffs. They introduced their evidence, and judgments were entered in favor of the plaintiffs. The judgments were entered as judgments in rem against the sheep, and there were no personal judgments against any one. In these judgments the justice of the peace recited the fact that it appeared to him that a band of sheep had been taken charge of by the respective plaintiffs Couch and Wallace on the 6th day of June, which was the day following the filing of the complaints, and that they had been in possession of the sheep from that date until the date of the entry of judgment, and the judgment thereupon ordered and adjudged that a sufficient number of the trespassing sheep be sold to satisfy the judgments and costs. Executions were issued to the constable, reciting the amounts of the respective judgments, and directing him to levy upon the sheep and sell a sufficient number to satisfy these judgments. The constable thereupon proceeded in accordance with the statute, directing the manner of execution sales, and sold some 85 head from which he realized sufficient to pay the judgments and costs and expenses of sale. Thereafter the respondent Cleveland commenced this action against Couch and Wallace and the constable to recover damages

representing the loss alleged to have been sustained by reason of the sale of these sheep. Judgment was entered in favor of Cleveland, and this appeal was thereupon prosecuted.

[1] The question presented on this appeal is the jurisdiction of the justice of the peace to enter the judgments in favor of Couch and Wallace and to issue execution thereon and the regularity of the proceedings had thereon. The appellants proceeded in the lower court upon the theory that sections 1217 and 1218, known as the "two-mile limit law," gave them a right of action against the owner of these sheep, whether known or unknown, and that under those provisions of the statute they were entitled to recover a judgment for the trespass committed. They took the further position that since those statutes prescribe no procedure for obtaining relief where the owner of the trespassing sheep is unknown that they might then have recourse to the general trespass law of the state dealing with trespassing animals generally, and pursue the remedy therein prescribed to be pursued where the owner of the animals is unknown. They accordingly rely upon the provisions of sections 1294 and 1296, Rev. Codes, dealing with the subject of trespassing animals. The respondent contends, however, that appellants failed even to comply with the provisions of section 1294, in that the owner of the animals was not served with process, and that the justice of the peace failed to appoint the appraisers therein provided for to examine the fences and testify concerning their condition.

Appellants admit that no appraisers were appointed, and they justify the action of the justice of the peace in failing to appoint appraisers, upon the ground that it is not necessary in this state to fence against sheep (*Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459), and on the further ground that sheep are trespassing animals when herding on the public domain anywhere within two miles of a dwelling house. It is clear to us in the outset that if sections 1294 and 1296 of the Rev. Codes are applicable, and may be resorted to as a remedy in such a case under the two-mile limit law, it was unnecessary for the justice of the peace to appoint appraisers in this case. The reason is apparent. The matter of a sufficiency fence or no fence at all would have been entirely immaterial, and it was unnecessary to have any evidence produced on that question. The only question was as to whether the animals had herded or grazed within two miles of the dwelling house of the plaintiff in the action, and, if so, the amount of damages sustained thereby.

Now, then, the question remaining to be determined is: Did the appellants here pursue the right remedy in the justice court in procuring their judgments and causing the respondent's property to be seized and sold?

It is clear that sections 1217 and 1218, known as the two-mile limit law, gave them a right of action, and, if they could make their proofs, entitled them to recover damages. If, however, they could not ascertain the name of the owner of the property and could not secure service on him, then they could obtain no personal judgment against him. The question then recurs, Is there any other remedy to be found in the statutes applicable to this case and which might be invoked in aid of the right of action granted by these sections of the statute?

[2] Section 1219 recognizes the fact that the owner or agent of the owner may be "unknown to the party injured by such trespass," and that section authorizes such trespassing sheep to be dealt with under the estray laws if the party so chooses. The estray laws, however (sections 1299 to 1301, inclusive), do not provide for or contemplate the recovery or collection of any private damages by the taker-up of estrays or by any one. *Those statutes provide only for the disposition of the estrays and the payment of the necessary costs and charges incident thereto.* Turning, however, to the statutes dealing with trespassing animals generally, we find that sections 1294 and 1296 provide a remedy for all cases where the owner of the trespassing animals is unknown, and section 1294 specifically provides that "such judgment only binds said property."

[3] Section 4230, Rev. Codes, recognizes the fact that it may sometimes be necessary to prosecute an action against a defendant whose name is unknown to the plaintiff, and it accordingly authorizes such a proceeding.

[4] Section 3925 of the Rev. Codes provides that: "When jurisdiction is, by this Code or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this Code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." It would seem, therefore, that where a party is given a right of action under sections 1217 and 1218, but, owing to his inability to ascertain who is the owner of the trespassing animals and is really responsible for the injury, he cannot therefore procure a personal judgment against the owner, he may avail himself of the appropriate remedy provided by statute in cases where the owner is unknown, whereby the relief is sought and the remedy is had against the property alone. In such a case, while the party injured cannot ascertain the name of the owner, he can lay hold upon and identify the property which has caused the injury. The procedure provided by sections 1294 and 1296

gives a judicial hearing, requires proofs, gives public notice both of the hearing, and of the seizure and sale of the property. This accords the party, whoever he may be, that is the owner of the property due process of law in so far as the judgment affects the specific property involved.

[5] In cases where it is charged that animals have trespassed against which it is required to maintain lawful fences, then it is necessary for the justice of the peace to appoint the appraisers provided for by section 1294. In case, however, where the charge is a violation of the two-mile limit law by the trespassing of sheep, the appointment of such appraisers would be a useless thing and could accomplish no purpose whatever, and such appraisers would be unable to testify to any essential or material fact in the case.

The trial court erred in ruling that the proceedings of the justice's court were without jurisdiction, and that the sale of the sheep on execution issued from the justice court was unauthorized and void.

For the foregoing reasons, the judgment of the lower court must be reversed, and it is so ordered, and the cause is remanded, with direction to grant a new trial or take such further proceedings in accordance with the views herein expressed as may be necessary to a proper disposition of this case. Costs awarded in favor of appellants.

STEWART, J., concurs. SULLIVAN, J., did not sit at the hearing and took no part in the case.

WILSON et al. v. JARRON.

(Supreme Court of Idaho. March 18, 1913.)

1. TAXATION (§ 764*)—TAX DEEDS—SUFFICIENCY OF DESCRIPTION—CERTIFICATE.

A tax sale certificate describing lands sold as "S. $\frac{1}{2}$ N. W. 4, sec. 1, twp. 4, range 2," is insufficient and invalid for the purpose of furnishing a description on which a valid tax deed can be executed, and a tax deed executed on such certificate after the expiration of the time allowed for redemption which describes the property conveyed as "The South $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of sec. one (1), twp. four (4) north, range two (2) West of Boise Meridian, Canyon county, state of Idaho," is not a substantial compliance with the provisions of sections 1763 and 1764 of the Rev. Codes, which require a tax deed to contain the same description and recitals contained in the tax sale certificate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

2. TAXATION (§ 686*)—TAX DEED—SUFFICIENCY OF DESCRIPTION—CERTIFICATE.

In issuing a tax deed, the officer executing the same in describing the property may extend abbreviations contained in the certificate, and make a fuller and more complete description of land which was sufficiently described in the tax sale certificate, but he has no right or authority to add to or complete an incomplete and insufficient description contain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed in the tax sale certificate, and he has no authority to go beyond the certificate for extraneous evidence describing the property intended to be described in the certificate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1377-1379; Dec. Dig. § 686.*]

2. EVIDENCE (§ 387*)—TAXATION (§ 764*)—ASSESSMENT—SUFFICIENCY OF DESCRIPTION—VALIDITY OF SALE—PAROL EVIDENCE.

More strictness is required in the description in an assessment, where the property is to be sold for delinquent taxes, than is required in a deed of conveyance from the grantor to the grantee. In the former case parol or extraneous evidence is not admissible, while in the latter case it may become admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1698-1713; Dec. Dig. § 387;* *Taxation*, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by Albert E. Wilson and another against W. B. Jarron to quiet title. From judgment for defendant, plaintiffs appeal. Reversed.

B. F. Neal, of Boise City, for appellants. Rice, Thompson & Buckner, of Caldwell, and Cordiner & Cordiner, of Spokane, Wash., for respondent.

AILSHIE, C. J. This case involves the validity of a tax deed. It appears that the land belonging to appellant's grantor was sold for taxes and the property was bid in by the county, and subsequently the respondent purchased the tax certificate from the county, and at the expiration of the time allowed for redemption received a deed from the assessor and ex officio tax collector of Canyon county. The appellants commenced their action in the district court to quiet their title to this land, and the respondent answered, denying appellant's title, and set up his own title deraigned through the tax deed. After a trial the court found in favor of the defendant, and the plaintiffs appealed.

[1] A great many errors have been assigned, but, as we view the case, it is only necessary for us to consider one assignment. The tax certificate recites that the property was sold on the 8th day of July, 1907, to Canyon county for the sum of \$18.75, and 50 cents for assessor's and tax collector's certificate, and that the taxes had been levied and assessed against the property for the year 1906, and that the property assessed and sold was described as "S. ½ N. W. 4, sec. 1, twp. 4, range 2." It will be noticed that this description does not recite the county in which the property is situated, nor does it state whether the township is north or south, nor does it show whether the range is east or west, nor does it give the meridian from which these numbers are computed. After the expiration of the three-year period for redemption from this sale, the taxes not having been paid, the assessor upon application of the owner and holder of the tax

sale certificate issued to him a tax deed. This tax deed, which, by the way, was executed by the successor in office of the assessor who executed the tax sale certificate, describes the property conveyed as follows: "The South ½ of the Northwest ¼ of sec. one (1), twp. four (4) north, range two (2) West, Boise Meridian, Canyon county, state of Idaho." It is apparent, and must be admitted, that the description contained in the deed is a good description of the particular tract of real estate described in the deed. It is equally clear that the assessor who executed this deed could not, and did not, get this full description from the tax sale certificate which had been previously issued by his predecessor. It was necessary for him to ascertain in some other manner and from some other source that the township was north, instead of south, and that the range was west, instead of east, and that the county in which the property was located was Canyon. He might have been justified in assuming that the computation was made from "B. M." or Boise meridian. We know, and we take it that the assessor was justified in taking notice of the same fact, that the public surveys in this state are computed from the Boise meridian.

[2] He was also justified in taking notice of abbreviations used in the certificate, and in extending them in full in his deed. We are not apprised as to where or how the assessor obtained his information so as to enable him to complete this description. On the other hand, the statute (sections 1763 and 1764 of the Rev. Codes) require the deed to contain the same description and recitals contained in the tax sale certificate.

This court has had occasion to consider these provisions of the statute in *White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674, and *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102, and it was there held that "a substantial compliance with the statute is sufficient." It would, however, be a wide sweep of the imagination to say that, notwithstanding this variance, there has nevertheless been a substantial compliance with the statute, and that the description contained in this tax deed is substantially the same as that contained in the certificate. It is not substantially the same—the first description fails to locate or describe any tract of land. Reverting to the description found in this certificate, and analyzing it for a minute, it will be seen that it would have been just as competent and equally as substantial a compliance with the statute for the assessor to have made a deed describing this property as being in township 4 south as 4 north, or in range 2 east as in range 2 west, either north or south of the base line.

[3] In *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788, the Supreme Court of California had occasion to consider the admission of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

evidence to show the intention of the parties in order to determine the correctness of the description contained in a tax deed, and the court discussed the difference between the rule of law applicable to a description contained in a tax deed and one contained in a deed of conveyance made by a vendor to a purchaser, and said: "A description which would suffice in an agreement to convey or in a deed may be bad in an assessment. In the first case, the court might inquire as to the intention of the parties, but in the other the owner has no part in the proceeding, which is hostile, and to every step in which he is objecting. The assessment is made with a view to a possible sale, and the property should, therefore, be so described as to enable the owner to know what land is charged with the tax, and also to enable a possible purchaser to know what land is offered for sale. * * * To decide this matter, there should be no uncertainty as to what land he is dealing with. Hence the description should be sufficient in itself to identify the land, or, if reference to a map or record is required, that should be indicated in the assessment."

It seems to us that the foregoing statement of the law is a reasonable and fair distinction to be observed and rule to be applied in these cases. *Miller v. Williams* has been followed in several subsequent cases in California, among which are *Lantz v. Fishburn*, 3 Cal. App. 662, 91 Pac. 816, and *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007. The same court in *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293, and *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352, has drawn the distinction between introducing evidence for the purpose of completing or correcting an insufficient or indefinite and uncertain description and that of introducing evidence for the purpose of showing that the description contained in the certificate or deed is complete, and does describe a certain tract or parcel of land, so as to enable any one by the aid of such description to locate the land therein conveyed. This latter rule is just and salutary, and has been heretofore recognized and adopted in at least one case by this court. *Allen v. Kitchen*, 16 Idaho, 133, 100 Pac. 1052, 18 Ann. Cas. 914.

In the case at bar it must be remembered that the appellants were not the owners of the land at the time it was assessed, and the tax for which the sale was made was levied against the property. Appellants occupy the position of innocent purchasers. If they went to the records of Canyon county for the purpose of examining the title to the property they purchased, and which is described in this tax deed, and found a description such as is contained in the tax sale certificate, that description would not be sufficient to put them on notice of an outstanding tax lien or deed against the partic-

ular tract of land purchased and which was subsequently described in the tax deed. For the reasons above stated, the judgment in this case must be reversed.

It is extremely doubtful if the return made by the assessor who sold this property at delinquent tax sale is a sufficient or substantial compliance with the provisions of section 1748 of the Rev. Codes. That section specifies the facts which must be shown in such a return. Those facts are not all shown in the return in this case.

The judgment will be reversed, and the cause is remanded, with direction to the trial court to enter judgment in favor of the plaintiffs, quieting their title to the property described in their complaint upon payment to the respondent, or to the clerk for his benefit, the amount paid by him to the county for the tax sale certificate, together with penalties and interest allowed on tax sale certificates. Costs of this appeal are awarded in favor of appellants.

SULLIVAN and STEWART, JJ., concur.

PRIMROSE v. ARMSTRONG MACHINERY CO.

(Supreme Court of Idaho. March 12, 1913.)

1. APPEAL AND ERROR (§ 695*)—INSUFFICIENT RECORD.

Where the record sent up on appeal leaves it in doubt as to whether all the evidence in the case has been sent up, and there is reason to believe from the contents of the record that material exhibits have been omitted, an appellate court will not examine such record, with a view to determining and passing upon the case upon its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.*]

2. APPEAL AND ERROR (§ 612*)—INSUFFICIENT RECORD—DISMISSAL.

Record examined in this case, and held, that it is so indefinite and uncertain, and the settlement and certification thereof is so irregular, as to require a dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.*]

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by J. H. Primrose against the Armstrong Machinery Company. Judgment for plaintiff, and defendant appeals. Dismissed.

James H. Wise, of Twin Falls, for appellant. F. A. Hutto, of Twin Falls, for respondent.

AILSHIE, C. J. In this case a motion has been made to dismiss the appeal on numerous grounds, and a motion has also been made to strike from the transcript the greater portion of the record therein contained on numerous grounds, among which is that the contents is not properly identified or certified. We do not deem it necessary or import-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant that we set out in a written opinion the various reasons presented for dismissal of this appeal. The condition of the record in this case, however, renders it necessary that the appeal be dismissed.

[1] An appellate court could not with safety to litigants enter upon the consideration of a case on its merits, where the record is so uncertain and indefinite as is the case here. Indeed, it is extremely doubtful, judging from the recitals of the record itself, if the transcript contains all the evidence introduced in the case and all the exhibits referred to both by the witnesses in open court and other witnesses who testified through depositions. A number of exhibits have been certified up by the clerk of the district court. They correspond in numbering and marks of identification to the exhibits introduced on the trial. We find, however, that a number of exhibits were referred to in a deposition which was taken long before the trial and which was used upon the trial of the case. That witness refers to exhibits, some of which appear to have borne the same marks of identification as the exhibits introduced upon the trial. We have no means of knowing whether those are some of the same exhibits that were introduced at the time of the trial, or were different exhibits marked by the commissioner who took the deposition. None of them disclose any marks of identification made by the commissioner who took the deposition.

[2] Presuming, as we must, that the proper procedure was adopted both upon the taking of the deposition and the trial, we would be compelled to assume that a paper marked "Exhibit A" by a commissioner upon the taking of a deposition long before the trial would not be the same paper marked "Exhibit A" upon the oral examination of another witness in open court at the trial of the case. None of these exhibits contain two sets of markings for identification.

In this case a judgment was entered on May 31st. Notice of appeal was filed and served on the 29th day of June, and on the same date the trial court made an order directing the court reporter to make a transcript of the evidence. This transcript, according to the certificate of the court reporter, was completed on the 5th day of July, and was filed with the clerk of the district court on July 24th. The record does not disclose when the transcript was served. The transcript of the record appears to have been made up prior to the 8th day of August, and the whole record is certified by the clerk of the district court under the seal of the court on the latter date. In this certificate the clerk refers to the reporter's transcript filed with the clerk on July 24th. The record certified to by the clerk of the district court contains no certificate from the judge settling the transcript of the evidence or bill

of exceptions. Following the certificate by the clerk of the district court, and pasted on the inside of the back cover to the record, is a certificate, signed by the judge of the district court, under date of August 24th, purporting to settle and certify the transcript of the evidence "as a bill of exceptions in the case." This certificate does not disclose whether counsel were present or had any notice of this purported settlement of the bill of exceptions, nor does the record anywhere show when service of the transcript had been made. Counsel for respondent has attached his own affidavit to his motion to dismiss, wherein he states that on July 25th he was served with that part of the record bearing page numbers from 39 to 114—that includes the transcript of the evidence—and that on August 8th he was given a copy of the record comprising pages 1 to 38, and that no other record or purported record was ever served on him, except that on August 26th and August 28th he was served with copies of the certificates made by the judge, one of which is attached to the back of the transcript as hereinbefore indicated, and the other attached to the exhibits sent up to this court.

In the condition of the record as it comes to us, we would not feel justified in entering upon its examination, with a view to considering the judgment of the lower court on the merits of the case. The appeal will therefore be dismissed. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

BRESHEARS et al. v. CALLENDER.

(Supreme Court of Idaho. Feb. 10, 1913.)

1. CONTRACTS (§ 324*)—FRAUD—ELECTION OF REMEDIES.

It is a general rule of law that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud. If he elects the former course, he must not sleep on his rights, but must move promptly.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

2. CONTRACTS (§ 265*)—RESCISSION—CONDITION PRECEDENT.

A party electing to rescind a contract on the ground of fraud and misrepresentation must place the other party as nearly as possible in statu quo. To do this, if he has received anything under the contract, whether it be property or securities, he must restore it. This rule, however, does not apply to all cases, especially where property is worthless, and where the defrauded party has so dealt with the subject-matter of the contract that it has become impossible to put the other in statu quo.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1187; Dec. Dig. § 265.*]

3. EXCHANGE OF PROPERTY (§ 11*)—RESCISSION OF CONTRACT—GROUNDS.

Where an action is brought to rescind a contract and recover what the party suing part-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed with or its value and to restore what was received, and the complaint alleges that the rescission of the contract resulted from the fact that the defendant had made statements at the time the contract of exchange was made that were false and fraudulent and known to the defendant to be false and fraudulent, and that such statements were relied upon by the plaintiff, and by reason of fraud and deceit the plaintiff was induced to make the contract which resulted in the exchange of the property from one to the other, the complaint is sufficient to state a cause of action.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 20, 20½; Dec. Dig. § 11.*]

4. CONTRACTS (§ 94*)—RESCISSION—GROUNDS—MATERIAL REPRESENTATIONS.

Where a complaint states that a contract was entered into by reason of certain representations made of the existence of certain facts, and the plaintiff relies upon such representations, and such representations are the inducement which led the plaintiff to enter into said contract, and such representations are made directly affecting the subject-matter of the contract and without which the contract would not have been made, then in that case the representations are material.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

5. EVIDENCE (§ 151*)—STATE OF MIND—INTENT.

A party to a contract may testify as a witness to the fact that he would not have entered into the transaction had he known the truth, or had not the representations been made, where such facts and statements are peculiarly within the knowledge of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

6. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The general rule in this state is that a judgment will not be reversed for the reason that an instruction does not state within its provisions all the law applicable to the facts of the case, where it appears that other instructions given in connection with the objectionable instruction state the law applicable to the facts of the case when taken into consideration with the instruction to which the objection is made, and the jury has not been misled or misdirected, when all the instructions are considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

7. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS.

Where instructions are requested and refused, and such refusal is assigned as error upon appeal, this court will not reverse the judgment where it appears that the trial court gave to the jury instructions which state the essence and substance of the instructions offered and refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

8. EXCHANGE OF PROPERTY (§ 13*)—RESCISSION OF CONTRACT—SUFFICIENCY OF EVIDENCE—BURDEN OF PROOF.

The evidence in this case examined, and held, that the plaintiffs were led to enter into and were induced to make said contract by the examination of the plaintiffs made before the contract was entered into as to the conditions and validity of the property exchanged by the terms of the contract, and that there is no evidence supporting the verdict and judgment, that the plaintiffs relied wholly upon the representations alleged to have been made by defendant, and that the plaintiffs were in no way

misled or deceived by any statements of the defendant.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 25-29; Dec. Dig. § 18.*]

9. APPEAL AND ERROR (§ 1002*)—CONFLICTING EVIDENCE—REVERSAL.

The rule that the Supreme Court will not reverse a judgment where there is a conflict in the evidence, does not apply where the evidence is conflicting upon a question which under all the proof is shown not to be the controlling question which governs the right of recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from District Court, Canyon County; Ed L. Bryan, Judge.

Action by Frank Breshears and others against W. T. Callender. From judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Finley Monroe, of Emmett, and Rice, Thompson & Buckner, of Caldwell, for appellant. W. A. Stone, of Caldwell, and E. J. Dockery, of Boise City, for respondents.

STEWART, J. This action was instituted in the district court of Canyon county by plaintiffs, respondents here, for the recovery of \$3,600 alleged to be the value of a certain German coach horse stallion which plaintiffs traded to the defendant for six first mortgage bonds of the Easter Gold Mining & Milling Company, Limited, of the par value of \$500 each, with interest coupons attached representing interest at the rate of 10 per cent. per annum payable annually on the 1st day of February of each year. The action is based upon a transaction occurring on or about the 15th day of January, 1910, and it is alleged in the amended complaint that the defendant represented that the coupons of 1908 and 1909 had been promptly paid by the company, and that the interest due on said bonds upon February 1, 1910, would be promptly paid; that such statements made by the defendant were false, and that interest due on said bonds on February 1, 1908, and February 1, 1909, had not been paid, and said statements were so made by the defendant with the purpose and intent to deceive and mislead the plaintiffs; that the plaintiffs relied upon the truth of such representations and statements and believed the same to be true and sold and exchanged the horse and took as payment therefor the said six bonds of the Easter Gold Mining & Milling Company; that said statements were made to plaintiffs by the defendant in order to influence and induce the plaintiffs to purchase the said six bonds of the company and to give in exchange therefor the said horse; that after the interest on said bonds for the year ending February 1, 1910, had become due and payable and plaintiffs had presented the said coupons representing the interest due on said bonds for said year for payment to the treasurer of the company, the pay-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment of said interest coupons was by said treasurer refused, and said treasurer has ever since said date failed and refused to pay the same; that said horse so exchanged by plaintiffs to the defendant in the purchase of said bonds was of the reasonable value of \$3,600, and by reason of the false and fraudulent representations of the defendant as to the fact that interest on said bonds due February 1, 1908, and February 1, 1909, had been promptly paid, and by reason of the purchase of said bonds by giving in exchange therefor the said horse, plaintiffs had been damaged in the sum of \$3,600; that said damage was occasioned by said false and fraudulent representations; that plaintiffs bring the said bonds with interest coupons attached thereto into court, and offer to return and deliver the said property to the defendant. The amended complaint upon which the case was tried was not verified, and the defendant, appellant here, filed an answer to this complaint, and generally and specifically denied all the allegations of the complaint. The cause was tried to a jury and a verdict rendered in favor of the plaintiffs for the sum of \$3,000. A judgment for plaintiffs was rendered accordingly. This appeal is from the judgment.

Thirteen errors are assigned, and we will consider them in order. The first is that the trial court erred in overruling the objection of the defendant to the introduction of any testimony, for the reason that the amended complaint does not state a cause of action. This alleged error is based upon the allegations of the complaint. Counsel for appellant contend that the complaint "contains no allegation that the defendant anywhere represented the bonds to be good, or made any representations with reference to the security for the bonds, or any representation whatever with regard to the bonds." The allegations with reference to misrepresentations found in the complaint are that the defendant represented that the coupons of 1908 and 1909 had been promptly paid by the company and that the interest due on said bonds upon February 1, 1910, would be promptly paid, and that such statements made by the defendant were false, and that interest due on said bonds on February 1, 1908, and February 1, 1909, had not been paid, and said statements were made by the defendant with the purpose and intent to deceive and mislead the plaintiffs. It is also alleged in the complaint that after the interest on said bonds for the year ending February 1, 1910, had become due and payable, the plaintiffs presented the said coupons representing the interest due on the bonds for said year for payment, and such payment was refused.

The contention of counsel for appellant is that the alleged representation that the interest coupons of February 1, 1908, and February 1, 1909, had been paid is immaterial,

for the reason that it is not alleged as a basis for representing that the bonds were of any value, nor is it connected in any way with such a representation, nor is it alleged that defendant intended to represent by said statement that the bonds were of value, and that the statement that interest coupons had been paid for two years is immaterial, as whether they had been paid could in no way benefit the plaintiffs in this case, nor could their not being paid in any way be detrimental to the plaintiffs, for they had no interest in the detached coupons.

It is true that they had no interest particularly in the payment of the interest coupons of February 1, 1908, and 1909, and the plaintiffs make no allegations of any particular interest in the payment of said interest coupons, other than the fact that such payments were made, and the appellants no doubt made the inquiry, and the defendant made the statement, if made, with a view of judging the probable value of the bonds. The fact that the interest had been paid in 1908 and 1909, and the statement that the interest due on February 1, 1910, would be paid promptly, may have satisfied the plaintiffs that the bonds had a value sufficient to be a consideration for the transfer of the horse. From the allegations of the complaint it is apparent that the plaintiffs relied upon the truth of such representations and statements and believed the same to be true, and sold and exchanged the horse and took as payment therefor the bonds; and it was these representations as to the payment of interest coupons that were relied upon by the plaintiffs in accepting the bonds in exchange for the horse, as alleged in the complaint. It was upon that ground, and for the fraud that occurred by such false and deceitful representations, that plaintiffs elected their remedy, which the law provides for damages based upon fraud and deceit.

[1, 2] The remedies announced by the authorities in such cases are as follows:

"Rescinding Contract for Fraud. It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud. If he elects the former course, he must not sleep on his rights, but must move promptly. No rule is better settled than this, that equity will refuse relief where the delay in seeking redress has been so considerable that laches is fairly imputable, and both at law and in equity long acquiescence with full knowledge of the fraud will be deemed a waiver of the right to rescind. * * * So, dealing with what has been acquired by the contract in a manner inconsistent with an intention to rescind will be deemed a waiver of the right; as where corporation shares, which the party finds have been fraudulently sold to him, are afterward put by him on the market. The party

electing to rescind must also place the other party as nearly as possible in statu quo. To do this, if he has received anything under the contract, whether it be property or securities, he must restore it." Cooley on Torts, p. 962. There are exceptions to this general rule under the latter statement of the authority, where the property received is worthless; but the burden in such a case is on the party who has failed to restore it. Another exception is where the defrauded party has so dealt with the subject-matter of the contract that it has become impossible to put the other in statu quo. In such cases a suit at law for damages will then be found to be the only remedy.

A very well considered case upon the election of remedies where a person has been induced to enter into a contract by fraud is announced by the Supreme Court of Oregon in the case of *Scott v. Walton*, 32 Or. 460, 52 Pac. 180, in which that court, through justice Bean, holds: "A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may affirm the contract and sue for damages, or disaffirm it, and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in possession of the property received by him under the contract and dealing with it as his own, will be evidence of his intention to abide by the contract."

[3, 4] From the allegations in this case it is apparent that the respondents made their election to rescind the contract and restore what they had received and recover what they parted with, or its value, and such rescission of the contract resulted from the fact, as alleged in the complaint, that the appellant made statements at the time the contract of exchange was made that were false and fraudulent and known to be so by appellant, which were relied upon by the respondents, and by reason of such fraud and deceit the respondents were induced to make the contract which resulted in the exchange of property from one to the other.

In the case of *Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206, this court very fully discussed the pleadings and representations in an action to recover damages on the grounds of deceit and false and fraudulent representations, and in that case this court held: "In an action by the vendee of personal property for deceit and false and fraudulent representations made by the vendor, upon the sale of such property the complaining

party must allege the particulars in which the representations and warranty were false and the extent and nature of the falsity and deception, so that the court may determine therefrom whether it was of a material and essential fact or immaterial and a matter of opinion and belief. It must also be alleged that the representation was false and fraudulent and that the purchaser believed and relied upon the same and purchased on the strength of such false and fraudulent representation."

The doctrine announced in that case we think is correct, and that the complaint in the present case is sufficient under the rule thus announced. The plaintiffs and defendant were exchanging from the plaintiffs to the defendant a horse; the defendant returned in exchange the six bonds. It is alleged that the defendant represented to the plaintiffs that the interest maturing previous to the time of the contract had been paid and the coupons taken up, and that the interest due a few days after the contract was made would be paid. It is also alleged that such representations were false and fraudulent, and that the plaintiffs believed and relied on the same and made the exchange because of such false and fraudulent representations. The particulars in which the representations were false and the extent and nature of the falsity and deception are that the interest coupons maturing before the contract was made were never paid, and that the interest due a few days after the contract was made was not promptly paid, and that the company executing the bonds refused to pay the same. These, in our judgment, were material and essential facts, and were not matters of opinion and belief. They were statements which the plaintiffs had a right to believe, that the bonds were of value, and that the interest which would mature in the future would be paid according to the interest coupons, and the facts alleged are clearly within the rule announced above by this court.

The author, in 14 Am. & Eng. Ency. of Law, p. 60, lays down two rules with reference to the materiality of a representation: "Whether a representation was material or not must necessarily depend upon the facts and circumstances of the particular transaction; and no very satisfactory general rule can be laid down for determining the question. * * * It may be said generally that representations as to a fact directly affecting the subject-matter of a contract, and without which the contract would not have been made, are material."

The rule here announced by the author specially applies to the representations alleged and upon which the evidence was taken in this case, for the purpose of showing the fraud relating to a mere material fact affecting the subject-matter of the contract and without which the contract would not have been made.

There are no facts alleged in the complaint which impose any duty upon the plaintiffs, at the time the contract was made, to ascertain the facts as to whether the interest for the years 1908 and 1909 had been paid. It is alleged that the payment of the interest coupon due on the 1st day of February, 1910, was demanded at the time it was due and thereafter, and the company refused to pay the same.

[8] The second error urged is that the court erred in permitting a witness to testify to what the defendant said with reference to the payment of the interest coming due the 1st of February, 1910. Under the allegations of the complaint, we think this evidence was proper. What this witness was called upon to testify to were statements made by the defendant at the time the contract was made. They were statements made as an inducement which led the plaintiffs to make the contract. The bonds were exhibited to the plaintiffs, and the coupons for the years 1908 and 1909 were detached, and the plaintiffs asked the defendant whether those coupons had been paid. This evidence was in support of the value and integrity of the bonds, as it is alleged in the complaint that the plaintiffs relied upon such statements. These circumstances and the knowledge that interest would fall due soon, on February 1, 1910, influenced the plaintiffs in believing the truth of the defendant's statement that the interest due February 1, 1910, would be paid.

20 Cyc., at page 117, announces the rule as follows: "By the weight of authority, testimony of plaintiff that he would not have entered into the transaction had he known the truth or had not the representations been made is competent as being the statement of a fact peculiarly within the knowledge of the witness and hardly susceptible of proof in any other way, and this notwithstanding the objection that the testimony is a mere conclusion."

In the case of *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503, this court, in discussing a similar question, held: "Where M. states to W. that certain things pertaining to the sale of shares of stock in a canal company are true, also facts pertaining to the sale of his interests in certain lands are true, and is informed by W. that he will rely upon his statements, and purchases such shares of stock and the interest of M. in the land wholly relying upon the representations of M., and such statements are afterward found to be false and resulted in inducing W. to purchase, held, that M. must respond in damages for his false and fraudulent statements."

There was no error in the court's admitting such evidence.

[8] The next error assigned for reversal is instruction No. 8 given by the trial court, and to which the appellant excepted: "If you believe from the evidence that the de-

fendant, W. T. Callender, made false statements to the plaintiffs, or either of them, as to the fact that the interest coupons on the bonds described in the complaint had been paid, and that the interest coupons about to mature would be paid by the company issuing such bonds, and if you believe from the evidence that the plaintiffs relied on such statements made by the defendant and were induced thereby to part with the stallion described in the complaint, then the plaintiffs would be entitled to recover such damages as the evidence shows they have sustained, if any."

The objection to this instruction is that it does not state that the damages should result to the plaintiffs by reason of the false and fraudulent representations, and that the instruction is ambiguous and does not state the law and in no way refers to the materiality of the representations, and that the instruction in no way makes a condition as to whether these statements were made with the knowledge of the defendant that they were false.

This instruction, if standing alone, would perhaps be ambiguous and would not state the law upon the right to recover in an action of this kind; but, when taken with the other instructions that were given, we think the error is not one which should justify a reversal. In other instructions the court instructed the jury that to entitle the plaintiff to recover they must not only show by preponderance of evidence that the representations were made and that they were false and fraudulent, but they must also show affirmatively by preponderance of evidence that the plaintiffs have been injured thereby; that they were in some way placed in a worse condition than they would have been had the statements been true; that the defendant, Callender, made false statements to the plaintiffs to the effect that the interest coupons on the bonds described in the complaint had been paid and that the interest coupons about to mature would be paid by the company issuing such bonds; and that if they believed from the evidence that the plaintiffs relied upon such statements made and were induced thereby to part with the stallion described in the complaint, then the plaintiffs would be entitled to recover such damages as the evidence shows they sustained, if any, and if they believed from the evidence that the defendant made the representations and that the plaintiffs made inquiry before accepting said bonds and knew that such representations were false, then the plaintiff could not recover in the action.

These instructions, when taken in connection with instruction No. 8, cure the objections urged for reversal. It is the general rule adopted by this court that, when an instruction does not state within its provisions all the law applicable to the facts of the case, a judgment cannot be reversed for that

reason, where it appears that other instructions given in connection with the objectionable instruction state the law applicable to the facts of the case when taken into consideration with the instruction to which the objection is made, and where the jury has not been misled or misdirected when all the instructions are considered. *Harvey v. Alturas Gold Min. Co., Ltd.*, 3 Idaho (Hasb.) 510, 31 Pac. 819; *Rowley v. Stack-Gibbs Lumber Co.*, 19 Idaho, 107, 112 Pac. 1041; *Just v. Idaho Canal & Imp. Co.*, 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140.

[7] Error is assigned on account of the trial court's refusing to give to the jury a number of instructions offered by defendant. Several of the instructions tendered, and to which exceptions were taken, state a correct rule of law, and it would be error to refuse to give the same to the jury, were it not for the fact that the substance and essence of each of said instructions had been given by the trial court in its instructions to the jury. The particular instructions are those which relate to the misrepresentations made by the defendant to the plaintiffs at the time the contract of exchange of property was made, and which have been discussed above in dealing with the sufficiency of the allegations of the complaint.

As an illustration we quote instruction No. 2: "The jury are instructed that, to constitute fraud, a misrepresentation must be as to a material fact; a representation in relation to a fact that is not material to a contract, though it may be false and known to be false by the person making it, and though it may be acted upon by the other party, is not fraud." And, likewise, instruction No. 4: "That if a misrepresentation is not material, a person has no right to act upon it, and if he does he is not entitled to relief or redress on the grounds of fraud; the question is not whether the person to whom the representation was made deems it material, but the question is whether it was in fact material, and if the defendant in this case made representations which were false, and which at the time they were made he knew to be false, and if you find that such representations are not material and that the plaintiffs in this case have no right to act upon them, the plaintiffs cannot recover."

The trial court did not follow this exact language in speaking of the materiality of the false representations, as desired by the instructions offered, but did in fact present to the jury the essence of such instructions, for the court advised the jury, in instruction No. 1, that a mere fraudulent representation is not of itself actionable. To entitle the plaintiffs to recover, they must not only show by preponderance of evidence that the representations were made, and that they were false and fraudulent, but they must also show affirmatively by preponderance of evidence that they have been injured thereby; that

they are in some way placed in a worse condition than they would have been had the statements been true; and, also, that if the defendant made the false statements to the plaintiffs, or either of them, as to the fact that the interest coupons on the bonds described in the complaint had been paid, and that the interest coupons about to mature would be paid by the company issuing such bonds, and that if they further believed from the evidence that the plaintiffs relied on such statements made by the defendant and were induced thereby to part with the stallion described in the complaint, the plaintiffs would be entitled to recover such damages as the evidence showed they have sustained, if any. The court further instructed the jury that if they found by the evidence that the plaintiffs did not rely upon the statement of the defendant with reference to the bonds and the interest thereon, and made inquiry with reference to the payment of interest, and that they relied upon such information, they could not recover.

From the instructions given it clearly appears that the jury were instructed that the representations were in fact material, and were the influential inducement which caused the contract to be made, and that the defendant made the representations which were false, and at the time he made the same he knew them to be false; and, if they were not material, that the plaintiffs had no right of action.

We find no error in the court's refusing to give to the jury the instructions offered by the defendant.

With reference to the damages allowed in this case, we mention the fact that this court has previously called attention to the remedy in actions of this kind and the right to recover damages.

[8] We now come to the real and difficult question embraced in errors 11 and 12: Does the evidence sustain the allegations of fraud, and whether the evidence as a whole is sufficient to justify the verdict?

The jury by their verdict found that the defendant made false statements to the plaintiffs as to the fact that the interest coupons on the bonds described in the complaint had been paid, and that the interest about to mature would be paid by the company issuing such bonds, and that the plaintiffs relied upon such statements made by the defendant and were induced thereby to part with the stallion described in the complaint. The evidence as to whether the defendant made the statement that the interest coupons on the bonds had been paid for the years 1908 and 1909, and that the interest coupons which would mature on February 1, 1910, would be paid, is directly in conflict. One of the plaintiffs, D. D. Campbell, who was the general manager of the copartnership doing business under the firm name and style of the German Coach Horse Company, and the owner

of the horse exchanged, and Henry Newman, agent of the plaintiffs and the person who brought the parties together, both testify that these representations were made and that such representations were the inducement which led the plaintiffs to make the contract of exchange. The defendant denied the representations and testified that Newman introduced the defendant to Campbell, one of the plaintiffs, and Campbell asked what he had, and the defendant told him six bonds of the Easter Gold Mining & Milling Company, and Campbell asked him if he had one with him, and he said, "Yes," and gave one of the bonds to him to look at. Defendant testifies: "He said, 'Where is the interest paid?' I said, 'They are to be paid at the First National Bank, Emmett.' 'When are they due?' I said, 'I think the 1st of February.' He looked on the bond; I think the bond made the statement—that is the time. I asked him how many of them he would want for his horse. 'Well,' he said, 'It was a trade figured on about \$3,000 in the trade.' I told him I would give him six of those bonds for the horse. He said, 'Is the interest paid, or has the interest been paid for those coupons that are torn off the bond?' I said, 'I don't know.' He said, 'Will the next interest be paid?' I said, 'I don't know.' I told him Mr. Hayes was the treasurer and Mr. Monroe was secretary, and by calling them up he could find out whether the interest in the past had been paid and whether the future would be or not, as I did not know anything about it; the bonds were not mine, and I had no interest in the company in any way; when the trade was made the bonds belonged to my father; that I had no interest in the bonds. I offered him the six bonds, we to retain the coupons that were coming due in February; retain them for my father. I know I explained. I was only there a few minutes, and I said, 'If there is anything further, call me up,' and left the bond with him. He asked me if I wanted a receipt, and I said, 'No,' and I went home, and as I was going along the road about a mile from my place a neighbor called me in and said that there was a telephone message for me from Caldwell, and long distance connected us with Mr. Campbell or Mr. Newman, I am not positive. I know his voice, but I understood the name Campbell. He said, 'If you leave those coupons attached, it is a trade.' I said, 'Deliver the horse in Emmett, and a man will deliver the horse and accept the other five bonds, and the trade will be closed.' He said, 'I will,' and the next day Mr. Newman came with the horse and I turned over the bonds to him, and I never heard anything more about it for six or eight months."

Hayes, who was cashier of the First National Bank of Emmett, testified that he had a call over the phone by Campbell, and he asked him about the bonds of the company.

"He asked me if they were good, and said he had a chance to trade for some of them, and wanted to find out if they were any good, or something to that effect. I told him they were backed up by the company's holdings at Pearl, the mines, and the mill; that I was unable to tell him how good they were. He asked me if the interest had been paid on them as it came due, and I said I had paid some of the interest coupons in money, and I referred him to Mr. Monroe, secretary of the company, because he kept more records. * * * At the time the inquiry was made, there was at least, up to that time, \$7,000 worth of interest coupons outstanding and matured for two years."

Campbell, one of the plaintiffs, testified that he had negotiations with Callender, started by Henry Newman, who brought Callender into the bank of Campbell in January. "And Newman told me he had some mining stock which he would like to trade for a horse, and Callender pulled out the mining stock, and the coupons were taken off for two years before, and I asked him if the interest had been paid, and we got to talking about it, and the question came up about the interest that was due or would be due February 1st, and he did not want to give up the interest that was due on the bonds; he wanted to hold that. And afterwards Newman came to the bank and told me that they would give the bonds for the horse with the interest included that was due. At the time the negotiations were going on the defendant told me that the coupons would be paid at the bank when presented. I was then acting as general manager of the company. Callender made a statement about the coupons that had matured in 1908 and 1909, and the amount of the interest due February 1, 1910, amounted to \$300." This witness also testified that, after Callender had had the conversation with Campbell in the bank at Caldwell and had returned to Emmett, he (Campbell) telephoned to Monroe, the secretary of the company, and that such telephonic communication was at the request of the plaintiffs, after the proposition of Callender had been submitted to the plaintiffs for consideration, and that he called the secretary for the purpose of getting the information with reference to the bonds and the interest, and it was made on the same day that Callender was in Caldwell. The witness says that he knew Monroe's relations with the company and that he was the secretary, and that when he called him up he knew that Monroe had information as to whether or not the bonds were good.

From this evidence it appears that the plaintiffs in making the contract did not rely entirely, if at all, upon the statements made by Callender with reference to the payment of the interest past due and the payment of the interest soon to mature, on February 1, 1910, but that they communicated with the

secretary of the company and likewise with Hayes, the cashier of the First National Bank, where the company did business, and made inquiry of such parties with reference to matters which affected the value of such bonds, and these inquiries no doubt were made for the purpose of the plaintiffs' determining whether they would accept the bonds in exchange for the horse.

It is a general rule of law, which is followed in the courts of the various states, that where a person knowingly or recklessly, without knowledge of its truth or falsity, makes fraudulent misrepresentations of material facts for the purpose of inducing another to enter into a contract, and the other person, in reliance on the representations, enters into the contract and thereby sustains loss, the person making the representations is liable to the person relying thereon, in an action for deceit. 20 Cyc. p. 44.

Under this rule as applied to the present case, before the plaintiffs can recover in this action the burden of proof is upon the plaintiffs to prove that the defendant made fraudulent representations of a material fact for the purpose of inducing the plaintiffs to enter into the contract of sale and that by reason of such representations the plaintiffs entered into the contract of sale and thereby sustained loss. The evidence, however, shows that the plaintiffs did not rely upon such representations. After such representations are alleged to have been made, the plaintiffs proceeded to investigate the character of the bonds and their validity, and the probability of the makers of such bonds complying with the terms and conditions of the bonds as to the payment of the interest that had matured prior to the making of the contract, and the interest to be paid in the future, and whether the bonds were good and valid. After such information was received, then the plaintiffs acted and accepted the bonds; and upon this question such action overcomes the evidence on the part of the plaintiffs that the plaintiffs were induced to make the contract because of the representations made by the defendant as testified to by the plaintiffs. The weight of the evidence, which is uncontradicted, shows that the acts of the plaintiffs were done after investigation.

In 20 Cyc., at page 49, the author announces the rule, and many authorities are cited to support the proposition, that the rule of caveat emptor applies under ordinary circumstances, that the purchaser is required to use reasonable prudence to avoid deception, and says: "Thus where the subject-matter of the representation is a fact not peculiarly within the vendor's knowledge, but is one to which the purchaser has

equal and available means and opportunity for information, and there are no confidential relations existing between the two, and no fraud or artifice is used to prevent inquiry or investigation, it is a general rule that the purchaser must make use of his means of knowledge, and that, failing to do so, he cannot recover on the ground that he was misled by the vendor."

Under the proof in this case, we think the evidence in support of the plaintiffs' claim as to the statements and the inducement falls clearly within the rule stated by the authority in 20 Cyc., at page 51: "In accordance with the rule of caveat emptor, if the purchaser has equal means of knowledge with the vendor and deals with him 'at arm's length,' the latter's representations as to the value of the property are usually deemed mere expressions of opinion and are not actionable, although false and fraudulent."

[8] The general rule that this court will not reverse a judgment where there is a conflict in the evidence does not apply where the evidence is conflicting upon a matter or question which under all the proof is shown not to be the controlling question which governs the right of recovery. In this case there is a conflict upon the question whether the interest due before the contract was made was paid, and whether the interest due after the contract was made would be paid. There is no conflict whatever in the evidence when taken as a whole that the plaintiffs did not rely upon such representations as the inducement which led them to enter into the contract, and that the plaintiffs relied upon their own investigation of the conditions and validity of the bonds and did not rely upon such representations with relation to the interest. There was no silence or concealment shown by the defendant, and, when all the evidence is considered, the essential elements of actionable fraud have not been shown, as the purchasers had equal and available means and opportunity for information and obtained all the information they desired, and if the means of information are alike accessible to plaintiffs as well as defendant, so that with ordinary prudence or diligence the parties might rely upon their own judgment, they must be presumed to have done so. Smith on the Law of Frauds, c. 2, § 2. This information was given at the suggestion of the defendant, showing clearly no intention on the part of the defendant to deceive or defraud the plaintiffs in any way whatever.

For these reasons the judgment in this case is reversed, and a new trial is ordered. Costs awarded to appellant.

SULLIVAN, J., concurs.

MILLER v. MILLER et al.

(Supreme Court of Montana. March 26, 1913.)

1. JUDGMENT (§ 291*)—ABSTRACT OF JUDGMENT.

An abstract of a judgment of a justice of the peace filed with the clerk of the district court does not make out a prima facie case that the justice had jurisdiction, etc., even though the docket has been lost, under either Rev. Codes, § 7071, providing, among other things, that the entries in a justice's docket, or a transcript thereof, certified by the justice, are prima facie evidence of the facts there stated, or section 7962, subds. 15 and 16, providing that it is presumed that official duty has been regularly performed, and that a court or judge acting as such was acting in his jurisdiction; the latter sections not relating to justices, as to whom proof of jurisdiction is necessary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 573-577; Dec. Dig. § 291.*]

2. STATUTES (§ 226*)—ADOPTION OF STATUTES—CONSTRUCTION.

Where a statute has been adopted from another state, the construction placed thereon by the highest court of such state before such adoption will also be held to have been adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

3. JUDGMENT (§ 950*)—PLEADING—JURISDICTION—BURDEN OF PROOF.

The only purpose of Rev. Codes, § 6571, relieving a party pleading a judgment from the necessity of setting forth at length the facts concerning jurisdiction, and providing that, "if such allegation be controverted, the party pleading must establish on the trial the facts concerning jurisdiction," is to relieve the pleader, and does not operate to relieve him of the burden of proving such facts if his abbreviated allegation is controverted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1804, 1805, 1807; Dec. Dig. § 950.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Suit by John S. Miller against F. L. Miller and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Harry H. Parsons and Henry C. Stiff, both of Missoula, for appellants. H. G. & S. H. McIntire, of Helena, for respondent.

HOLLOWAY, J. This suit was brought to quiet title to certain real estate in Missoula county. The complaint is brief and sets forth the fact that the plaintiff is the owner of the land (describing it), that each of the defendants claims some interest adverse to the plaintiff, and that such claims are without foundation or right. The defendant Miller by separate answer admitted that the plaintiff was the owner in fee of the land in question on or prior to February 6, 1904. He then alleged that in December, 1903, a judgment was duly "given and made" in the court of the justice of the peace of Hell Gate township, Missoula county, in favor of H. H. Marsh and against John S. Miller, this plaintiff; that thereafter an abstract of the judgment was filed in the office of the clerk of the district court of Missoula county and the

judgment duly docketed; that on February 6, 1904, execution was issued and levied upon the land above mentioned, and on March 1st the property was sold at sheriff's sale to Marsh, the judgment creditor, and a certificate of sale issued to him; that the property was not redeemed from the sale, and after the lapse of more than a year the sheriff executed and delivered to Marsh a deed for the property; that in December, 1903, Marsh sold and conveyed the property to defendant F. L. Miller, and thereafter defendant Miller sold and conveyed to the defendant railway company a strip of the ground for right of way. The separate answer of the railway company is to all intents and purposes the same as that of its codefendant Miller. The affirmative allegations in each answer were put in issue by reply. Upon the trial of the cause the district court ruled that the defendants had the burden of proof, and this ruling was accepted without objection. Evidence was offered from which it appeared that the docket of the justice in use at the time the case of Marsh v. Miller was in court had been lost or destroyed. An attempt was made to prove the contents in so far as they related to the case of Marsh v. Miller, but without success. The only witness called for that purpose was unable to remember what entries appeared in the docket. Counsel for defendants then offered in evidence the abstract of the judgment which had been filed in the office of the clerk of the district court, and certain other evidence, and rested. The trial court found the issues for the plaintiff, and judgment was rendered and entered. It is from that judgment and from an order denying them a new trial that defendants appealed.

[1] In their brief counsel for appellants say: "There is in fact but one really important question in this case, and that is: What effect is to be given to what is designated as 'Defendants' Exhibit A,' being the 'abstract of judgment,' given by the justice of the peace and filed in the office of the clerk of the district court?" They then state their position very succinctly as follows: "The contention of counsel for appellants was and is that, as the abstract of judgment was in conformity with the provisions of sections 7056 and 7057, Revised Codes of Montana, it should be regarded as at least prima facie evidence that it was predicated upon a regular and valid judgment; and the burden of showing the contrary falls upon the party who brings its legal effect into question."

Our attention is directed to section 7071, Revised Codes, and to subdivisions 15 and 16 of section 7962. Section 7070 provides that every justice of the peace must keep a docket, and specifies in detail the entries which must be made in any given case. Section 7071 among other things provides: "Such entries in a justice's docket, or a transcript

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated." While it is admitted that the abstract mentioned in section 7056 is not a transcript of the justice's docket, it is insisted that it should be given the same evidentiary force and effect; but with this we are unable to agree. It is only by virtue of the provisions in section 7071 above that the entries in the justice's docket, or a transcript thereof, possess evidentiary value sufficient to make out a prima facie case of the facts there recorded. In the absence of that statute no such rule of evidence could be invoked. But there is reason for the rule as applied to the docket entries; for if the docket is kept as required by section 7070, it contains a complete history of the case, and this fact justifies the rule. But in attempting to apply it to an abstract of the judgment the reason for the rule is entirely wanting, for the abstract does not contain anything but the bare recital: "Judgment entered for plaintiff (or defendant) for \$—— [stating amount], on the —— day of —— [stating the date]."

But counsel for appellants invoke the presumptions of law found in subdivisions 15 and 16 of section 7962, as follows: " * * * (15) That official duty has been regularly performed. (16) That a court or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction." However useful these rules, or however generously their language may be construed, they cannot suffice to relieve one whose asserted claim depends upon the validity of a justice's judgment, from showing affirmatively that the court which rendered the judgment had jurisdiction, when the allegation that the judgment was duly given or made is controverted. Justices' courts are courts of limited jurisdiction, and no presumption in favor of their jurisdiction is to be indulged. In *Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208, this court said: "The justice's court is a court of inferior jurisdiction, and there are no legal presumptions in favor of its jurisdiction. Its jurisdiction must affirmatively appear upon the face of the record. Proper proof of the service of the summons, by a person other than an officer, is a condition precedent to the rendition of a judgment by default, and without such proof the court has no jurisdiction." To the same effect are *State ex rel. Kenyon v. Laurandean*, 21 Mont. 216, 53 Pac. 536; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695; *State ex rel. Collier v. Houston*, 36 Mont. 178, 92 Pac. 476, 12 Ann. Cas. 1027.

[2] Our Code, § 7962, above, was evidently copied from California, which has had the same statute in force there since 1872 at least. 2 Code Civ. Proc. Cal. 1872, § 1963. Many years before its adoption in California the Supreme Court of that state had an-

nounced the doctrine that justices' courts are courts of limited jurisdiction, and that no presumption may be indulged in favor of their jurisdiction, but that the facts showing jurisdiction must appear affirmatively from the record. Notwithstanding the adoption of their Code containing the same presumptions as are found in subdivisions 15 and 16 of our section 7962 above, the same rules have been reiterated uniformly ever since their adoption of the Code provision. *King v. Randlett*, 33 Cal. 318; *Cardwell v. Sabichi*, 59 Cal. 490; *Kane v. Desmond*, 63 Cal. 464; *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647. Since the statute had been construed by the highest court of the state from which we borrowed it at the time of its adoption here, the rule that we adopted the statute as thus construed applies in this instance. *State ex rel. Doleny v. District Court*, 42 Mont. 170, 111 Pac. 731; *Deer Lodge County v. United States F. & G. Co.*, 42 Mont. 315, 112 Pac. 1060, Ann. Cas. 1912A, 1010; *State Savings Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692.

[3] But aside from the rules of law enforced by the courts above, our Codes themselves appear to reserve the final word upon the subject. Section 6571 relieves a party pleading a judgment from the necessity of setting forth at length the facts conferring jurisdiction, and authorizes him to make the bald declaration that the judgment was "duly given or made." Acting upon this authority, each of the defendants in this instance contented himself with such an allegation. The section above then continues: "If such allegation be controverted, the party pleading must establish on the trial the facts concerning jurisdiction." By reply the allegation in each of the answers that the judgment in *Marsh v. Miller* was duly given and made was controverted, and by express statutory rule the burden was then imposed upon the defendants, claiming under the *Marsh* judgment, to establish on the trial the facts which showed that the justice's court rendering that judgment had jurisdiction. This they failed to do. In the absence of a statute embodying the rule announced in section 6571 above, the defendants would have been compelled to allege and prove all facts necessary to show jurisdiction in the justice of the peace court. The only purpose of the statute is to relieve the pleader from setting forth the jurisdictional facts (*State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044; *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854); but it does not operate to relieve him of the necessity of proving those facts if his abbreviated allegation is controverted. On the contrary, that he is compelled to assume that burden the statute declares in unmistakable terms.

Since defendants' pretended claims depend altogether upon the validity of the justice's judgment and they failed to show that the

justice of the peace court had jurisdiction of the case of Marsh v. Miller, they failed to show any outstanding claim or title in either of them adverse to the plaintiff.

The judgment and order of the district court are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

PREVISICH v. BUTTE ELECTRIC RY. CO.

(Supreme Court of Montana. March 28, 1913.)

1. PLEADING (§ 165*)—REPLY—NECESSITY—STREET RAILROADS.

Where the complaint, in a passenger's action for injuries from being struck by a telegraph pole and knocked from the footboard of a crowded street car on which he was riding, stated that the pole was less than four feet from the track, an allegation of the answer that it was not less than four feet one inch from the track, though affirmative in form, was a mere traverse of the allegation of the complaint, and hence it was neither necessary nor proper that the plaintiff file a reply thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321, 323; Dec. Dig. § 165.*]

2. CARRIERS (§ 818*)—INJURY TO PASSENGER—SUFFICIENCY OF EVIDENCE.

Evidence in a street car passenger's action for injuries held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 818.*]

3. APPEAL AND ERROR (§ 1005*)—FINDINGS—CONFLICTING EVIDENCE.

Where a finding of the jury on conflicting evidence, in a street car passenger's action for injuries, has been approved by the trial judge by the denial of a new trial, it will not be disturbed on appeal, though the evidence as a whole is unsatisfactory and the reviewing court might have reached a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

4. CARRIERS (§ 815*)—INJURY TO PASSENGER—PLEADING—VARIANCE.

In an action for injuries to a passenger from being struck by a telegraph pole and knocked from the footboard of a crowded street car where he was riding, there is no material variance between an allegation of the complaint that the pole was within less than four feet of the track and evidence merely that the pole was in such close proximity to the track as to be likely to come in collision with a passenger standing on the footboard and injure him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 815.*]

5. CARRIERS (§ 847*)—INJURY TO PASSENGER—QUESTION FOR JURY—CONFLICTING EVIDENCE.

Under conflicting evidence in a street car passenger's action for injuries from being struck by a telegraph pole and knocked from the footboard of the car on which he was riding, it was a question for the jury whether he fell off or jumped from the footboard, and also whether, in the exercise of ordinary care for his own safety, he must have known that the

position which he took exposed him to danger from proximity of the pole.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 847.*]

6. TRIAL (§ 837*)—VERDICT—INSTRUCTIONS.

A verdict is contrary to law when the condition of the evidence is such that the jury may not find otherwise than in accordance with the theory of the instructions, and yet have ventured to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 790; Dec. Dig. § 337.*]

7. CARRIERS (§ 295*)—INJURIES TO PASSENGERS—NEGLIGENCE.

Where a telegraph pole is in such dangerous proximity to a street car track as to constitute it a menace to the safety of a passenger whom the company, owing to want of space inside, permits to stand on the footboard, the moving of the car without properly warning him is culpable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1191-1197, 1199, 1213-1215, 1219, 1220; Dec. Dig. § 295.*]

8. CARRIERS (§ 316*)—INJURY TO PASSENGER—BURDEN OF PROOF.

In a passenger's action for injuries from being struck by a telegraph pole and being knocked from the footboard of a crowded street car on which he was riding, the burden was on plaintiff to prove that his injury was the result of defendant's failure to exercise such precautions as the case required, including failure to warn him of the dangerous proximity of telegraph poles, and hence defendant's requested instruction placing such burden on himself was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.*]

9. CARRIERS (§ 347*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence per se for a street car passenger to ride upon a crowded car or upon the platform or footboard of such car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

10. DAMAGES (§ 181*)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

A recovery of \$5,000 for injuries consisting of a slight concussion and of contusions which readily yielded to treatment, and of a traumatic pleurisy which developed immediately following the accident, was excessive in so far as it exceeded \$2,500, where it appeared that the injured party was already or would presently be restored to full health.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 131.*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Luis Previsich against the Butte Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition as to modification.

George F. Shelton, Peter Breen, Fred J. Furman, and A. J. Verheyen, all of Butte, for appellant. William Meyer and Harry Meyer, both of Butte, for respondent.

BRANTLY, C. J. Action for damages for a personal injury alleged to have been suffered by plaintiff while a passenger upon one of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the cars of the defendant street railway company, through the negligence of its agents and servants. The corporation owns and operates a railway, the lines of which traverse certain streets of the city of Butte. One of these lines extends to the village of Meaderville, lying to the northeast. Miners who reside in Butte and are employed in the mines in Meaderville and its vicinity commonly avail themselves of this line in going to and returning from their work. For the accommodation of such as work at night, three cars reach and leave the vicinity of the mines at about 3 o'clock in the morning. These are known as "owl cars." Those in use at the time of the accident were open for one-half of their length. Along the sides of the open portions extended footboards for the use of passengers in entering and leaving them. The defendant Wharton is the manager of the railway. On the morning of August 20, 1911, the plaintiff, having finished his shift in the Leonard mine, boarded one of the cars (the first one leaving) for Butte and became a passenger thereon. The complaint alleges, in substance, that the defendants negligently permitted such a number of persons to become passengers on this car that it became greatly crowded; that it became so overloaded that there was not sufficient room inside to accommodate all those seeking passage thereon; that for this reason the plaintiff was compelled to stand on the footboard, and did so with the knowledge and consent of defendants; that the track was so constructed that it was within a distance of less than four feet from a line of telegraph or telephone poles situated on the west side thereof; that, notwithstanding this fact and the fact that it was dangerous to move cars along the track while passengers were standing on the footboards the defendants negligently moved the car upon which the plaintiff was a passenger; that the plaintiff did not know that the track was so constructed that the car would pass near the line of poles; that, while plaintiff was riding on the car, defendants allowed it to become so crowded that plaintiff, being forced to maintain his place thereon by holding to the handhold thereon on the side next to the line of poles, was struck by one of said poles and hurled to the ground; and that when he was struck he was in such a position that he could not see that the car was so near the poles, whereas the defendants knew, or in the exercise of ordinary care should have known, that the plaintiff was likely to be injured by collision with one of them. The injuries suffered by the plaintiff are described as injuries to his head, right eye, right shoulder, and other portions of his body, resulting in great mental and physical pain and suffering and permanent disability. The answer, after putting in issue the charges of negligence, alleges affirmatively that "the shortest distance between said

street car tracks and said poles was not less than four feet and one inch at any of the times mentioned in the complaint, and that the plaintiff, in the position which he occupied on the said car in question, saw, or could, in the exercise of ordinary care, have seen, each and every one of the poles in said complaint mentioned, and the distance of its position from the said street car track; said distance being, as aforesaid, in no case less than four feet and one inch." There was no replication. When the introduction of evidence by plaintiff was completed, the court sustained a motion for nonsuit in favor of defendant Wharton and directed judgment to be entered in his favor. A like motion on behalf of the corporation was denied. The jury returned a verdict in favor of plaintiff for \$5,000. From the judgment entered thereon, and from an order denying its motion for a new trial, the corporation has appealed.

[1] 1. When the plaintiff offered evidence to sustain the allegations of the complaint, objection was made to its introduction on the ground that the pleadings did not present a triable issue because the new matter alleged in the answer, standing without traverse by reply, constituted a complete defense to the action. The overruling of this objection is assigned as error, and the contention is seriously made that it is fatal to the judgment because the plaintiff, by his admission thus made, established the existence of a state of facts which precluded a recovery. The contention is without merit. The allegation in question, quoted in the statement, following the denial of the charge in the complaint that the track was constructed within a distance of less than four feet from the line of poles, and that the plaintiff did not know that the cars, in moving along the track, would come in such close proximity to them, though affirmative in form, is nothing more than a second traverse of these allegations. It is what may be termed a counter averment, the equivalent of a direct denial. Proof of circumstances tending to show knowledge by the plaintiff of the dangerous conditions, and hence that he was open to the imputation of negligence in assuming a position on the footboard, would have been admissible under the denial; hence affirmative allegations on the subject were neither necessary nor proper, and a reply to them was not required. *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409; *National Wall Paper Co. v. McPherson*, 19 Mont. 355, 48 Pac. 550; *Rand v. Butte EL Ry. Co.*, 40 Mont. 398, 107 Pac. 87.

[2] 2. It is argued that the evidence is insufficient to sustain the verdict: (1) In that it fails to show that there was not room inside of the car to accommodate the plaintiff, and hence that it was necessary for him to stand upon the footboard; (2) in that it does not tend to show that the line of poles

was within less than four feet from the line of the track; and (3) in that it does not tend to show that the plaintiff did not know, or could not by the exercise of ordinary care have ascertained, this fact. We shall not undertake to set out in detail and analyze the statements of the different witnesses with a view to reconcile them. As is usual in such cases, these statements are not in harmony upon any point with reference to which the defendant makes its contention. The testimony shows that there were some 250 men coming off shift and making ready to take cars into Butte. Of the three cars about due to leave, only one had arrived. Each man was anxious to secure passage upon it; hence there was a rush both for seats and for standing room. Plaintiff was among the last to obtain a place, and, as he testified, all the seats, as well as standing room inside, had then been taken. He obtained a place upon the footboard. The rest of it was quickly filled by those that followed. These crowded him so that he was compelled to hold onto a handhold or one of the posts supporting the roof in order to retain his place. While the car was lighted, he could not see because of the darkness outside, and the crowding of the men who were standing on the footboard, and not knowing of the proximity of the line of poles, and not being warned of this fact, he did not anticipate danger from them. He had traveled over the line before, but had on such occasions occupied a seat inside the car and had not observed conditions. There was evidence that all of the poles were beyond a distance of four feet from the track. There was also evidence that at least one of them (the one which struck plaintiff) was within a distance of less than four feet. One witness, who had occupied a seat near where plaintiff was standing, testified, in effect, that the plaintiff, having dropped his bucket, made an effort to catch it, and in doing so jumped or fell from the car. This witness stated further that he had warned the men on the footboard to look out for the poles. Another witness testified that, when the plaintiff was found by those who went back to ascertain if he was hurt, he was about midway between two of the poles, which were some 75 feet apart. The plaintiff is a foreigner, and, having little knowledge of the English language, cannot understand it when it is spoken.

[3] It may be admitted that the case made by the evidence as a whole is not very satisfactory from any point of view. Yet it presented a case for the jury, and, their finding thereon having been approved by the trial court in denying the motion for a new trial, we must accept as binding upon us, even though we should have reached a different conclusion upon it. The court proceeded upon the assumption that it was incumbent upon the plaintiff, in order to recover, to show

that the particular pole which brushed him from the car was within four feet of the track, and in the instructions so charged the jury. As we have already pointed out, there was evidence tending to establish this fact.

[4] While this feature of the case is not discussed in the brief of counsel, we venture the remark that evidence showing that the pole was in such close proximity to the track as to be likely to come in collision with a passenger standing on the footboard and injure him would not have presented such a variance from the allegation in the complaint as to preclude a recovery. *Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837. The purport of the allegation is that the line of poles was within dangerous proximity to the track, and evidence showing this condition would have been sufficient to justify a recovery, even though it were not demonstrated that any one of the poles was actually within the distance alleged.

[5] 3. The third contention is that the verdict is contrary to the law as declared in instructions 8 and 9 submitted to the jury. In the former the court advised the jury that, "in order for the plaintiff to recover in the action, it is necessary that he should have established, by a preponderance of all the evidence in the case, that it was dangerous to run cars on the track if they were crowded and passengers were standing on the footboard." The latter instruction is in part as follows: "That in order for the plaintiff to recover in this action, he must have established, by a preponderance of all the evidence in the case, that he did not know, and could not, in the exercise of ordinary care, have known, that the said street car tracks were so constructed that the car upon which the plaintiff was a passenger would come in such close proximity to said telegraph or telephone poles as set forth in said complaint; and, unless you find that this has been established by a preponderance of all the evidence in the case, the plaintiff cannot recover in this action." It is insisted that, under each of these instructions, the jury were bound to find for the defendant because there is no evidence in the case furnishing a basis for the inference that the proximity of the line of poles to the track was a source of danger to one standing upon the footboard, nor tending to show that, if plaintiff did not actually know the conditions, he could not, by the exercise of ordinary care, have gained knowledge of them.

The railway track was the property of the defendant. It was using it for the carrying of passengers. If the proximity of it to the line of poles was a fault in the construction, it was the fault of the defendant. That it was a source of danger to one standing on the footboard is shown by the fact, if it was the fact, that the plaintiff was brushed from his position by one of the poles as the car passed it, and was thus injured. It was

a question for the jury, upon the evidence, whether the plaintiff was injured in this way or whether he fell or jumped off in an effort to recover his bucket. It was also a question for the jury whether, under the circumstances disclosed by the evidence, in the exercise of ordinary care for his own safety, the plaintiff must have known that, in assuming a position on the footboard with others, he was exposing himself to the danger arising from the proximity of the poles. The instructions were both formulated to meet plaintiff's theory of the case, and since, as has already been pointed out, the evidence was sufficient to justify a verdict in his favor, it cannot properly be said that the verdict is contrary to the law. *Mette & Kanne Distilling Co. v. Lowrey*, 89 Mont. 124, 101 Pac. 966.

[6] A verdict is contrary to the law when the condition of the evidence is such that the jury may not find otherwise than in accordance with the theory of the instructions, and yet have ventured to do so. *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.

[7] 4. Complaint is made that the court erred in submitting to the jury instructions 2, 3, and 5. It is said that, while correct as abstract propositions of law, they have no application to the issues involved in this case. Instructions 2 and 3 define generally the duties of carriers of passengers, as they are laid down in sections 5302, 5303, and 5347 of the Revised Codes, with reference to overcrowding of their vehicles, the furnishing of accommodations for passengers, etc. Instruction 5 defines the rights and duties of such carriers when its cars have been permitted to become overcrowded, and declares its negligence on the part of the carrier, if it elects to move its cars while in that condition, to omit any precaution in the management of them which the circumstances require, looking to the safety of the passengers. In our opinion, they were entirely pertinent to the issues in the case and were properly given. If the line of poles was in such dangerous proximity to the track as to constitute them a menace to the safety of passengers whom the agents of the defendant, owing to the want of space inside, permitted to stand on the footboard, the moving of the cars without properly warning such passengers was culpable negligence.

[8] 5. Error is assigned upon the refusal of the court to give requested instructions 12, 13, 15, and 16. Instruction 16 is as follows: "If you believe from a consideration of all the evidence that it has been established by a preponderance thereof that the plaintiff was warned of the danger of standing upon the side board of the said car, and thereafter still continued to occupy the position, and by reason of so occupying said position was hit by the pole and knocked from the said car, and suffered the injury complained of in consequence thereof, then

you are instructed that the plaintiff voluntarily assumed the position of danger and had notice of the said danger, or, by the exercise of reasonable care, could have known thereof, and assumed the risk incident to his said position, and cannot recover in this action."

To justify a recovery, it was incumbent upon the plaintiff to show, by a preponderance of the evidence, that his injury was the result of the failure, on the part of the defendant, to observe such precautions as the exigencies of the case required. The substance of the charge in the complaint is that defendant moved its cars negligently along the line of poles in dangerous proximity to the track, knowing that the plaintiff and others were standing crowded together on the footboard. Among the precautions which the circumstances required it to observe was to warn them of the possible danger. Whether it or any one else gave warning (and knowledge from any source in plaintiff would have been effective to relieve the defendant from the imputation of negligence in this behalf) was a question of fact to be resolved by the jury. The burden rested upon the plaintiff, not upon the defendant. So that an equipoise in the evidence would have required a resolution of it in favor of defendant. The evidence offered by the defendant on this point was defensive merely and not in avoidance. The instruction cast upon it the burden of proof and was therefore not a correct statement of the rule of law applicable. Though it was offered by the defendant, and though defendant could not have complained if it had been given, the court cannot be put in error for having refused it. Instructions 12 and 15 are open to the same objection. The latter would have been an express direction to the jury that, if it appeared from the evidence, by a preponderance thereof, that the plaintiff dropped his bucket and, in order to recover it, jumped from the car and was injured, he could not recover, whereas an equipoise in the evidence on this point would have been sufficient to acquit the defendant.

[9] Instruction No. 13 is as follows: "You are further instructed that if the plaintiff voluntarily got upon the side board of said car after he knew that the said car was crowded, and that there was no opportunity for him to get inside of the car and in a position of safety, he thereby assumed the risk of the danger of being hit by the pole, even though the same was not brought to his knowledge or attention, and he cannot recover in this action." This instruction would have required the jury to return a verdict for the defendant, for the plaintiff testified that he took his position on the footboard because the car was crowded and there was no room inside. It is not contributory negligence per se for a person to ride upon a crowded car or upon the platform of

such a car; nor is it per se negligence for such person to stand on the footboard of a street car which is crowded.

In *Lobner v. Metropolitan St. Ry. Co.*, 79 Kan. 811, 101 Pac. 463, 21 L. R. A. (N. S.) 972, it was said: "The practice of inviting and permitting passengers to ride on the platform of street cars is so common that it cannot be held, as a matter of law, that a passenger in doing so is guilty of contributory negligence. One who rides on a crowded car assumes the inconvenience resulting from its crowded condition; but the company is not, for that reason, relieved from responsibility of using due care for the safety of the passengers invited upon the car."

In *San Antonio T. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, the court said: "It is not negligence per se for a passenger to stand upon the platform, steps, or running board of an electric street car which is crowded; and the weight of authority also supports the rule that it is not contributory negligence, as a matter of law, for a passenger to stand upon the platform of a car or the running board, whether there be vacant seats or not in the inside of the car. And whether the passenger be standing upon the platform, running board, or steps, the question of negligence and contributory negligence is held to be, in the majority of cases, a question for the jury to determine."

Again, in *McCaw v. Union T. Co.*, 205 Pa. 276, 54 Atl. 895, it was said: "If a passenger is permitted to enter a car having no vacant place except on the platform, and the conductor accepts his fare, he is justified in standing on the platform, if he exercises proper care in doing so; and, by receiving him, the carrier undertakes and gives him assurances that it will take care of him and guard him against accident, as far as the circumstances permit." The rule thus stated is recognized and applied by the courts quite generally, as appears from the following citations: *Geitz v. Railway Co.*, 72 Wis. 307, 39 N. W. 886; *Powers v. City of Boston*, 154 Mass. 61, 27 N. E. 995; *Lehr v. Railroad Co.*, 118 N. Y. 556, 23 N. E. 889; *Elliott v. Railway Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208; *Citizens' St. Ry. Co. v. Hoffbauer*, 28 Ind. App. 614, 56 N. E. 54; *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739; *Railway Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Doolittle v. Railway Co.*, 62 S. C. 130, 40 S. E. 183; *Dunham v. Public Service Corp.*, 76 N. J. Law, 452, 69 Atl. 1012; *Anderson v. City Ry. Co.*, 42 Or. 505, 71 Pac. 659; *Joyce, Electric Law*, § 543.

Of course, as was said in *Lobner v. Street Ry. Co.*, *supra*, a passenger may assume such an obviously dangerous position that he will be held, as a matter of law, to have assumed the hazard of so doing; but the question is generally one for the jury, and not one of law for the court. Since the instruction would have told the jury that

the plaintiff assumed the hazard of the position which he had taken upon the footboard, without reference to his knowledge of the conditions, it was erroneous and properly refused.

[10] 6. The last contention is that the verdict is excessive, and with this contention we agree. The plaintiff was, at the time of the injury, a strong, healthy man of the age of 21 years. The injury occurred on August 20, 1911. He did not call a physician until the following day. At that time he had a contusion on the right side of the head and was suffering somewhat from concussion, as was indicated by an incoherence in his speech. He complained of pains in the lumbar region, but no lesions were visible there. He also complained of pains in his right side, and there were evidences of contusions on that part of his body. No bones were broken. Judging from the testimony of the attending physician, the contusions themselves were not serious and readily yielded to treatment. All objective symptoms had disappeared by the end of six weeks. The most serious result was a traumatic pleurisy which developed in the right side immediately following the accident. This kept the plaintiff confined to his bed for some three or four weeks, during which the visits of the physician continued. Thereafter the plaintiff visited his physician at his office from time to time, until some time in December, when the visits ceased altogether. The pleurisy yielded slowly to treatment, and, while the physician expressed the opinion that the after effect of it had not entirely disappeared, he was unwilling to express a definite opinion that there was or would be a chronic diseased condition or any permanent disability whatever. A physician who was called by the defendant, but who had made no examination of the plaintiff except a superficial one in the courtroom, testified that, when a chronic condition obtains after such an injury as that sustained by the plaintiff, it is usually tubercular in character. He stated that he did not observe anything in plaintiff's appearance to indicate any tubercular symptoms, but that, on the contrary, he appeared to be free from disease. The plaintiff testified, in effect, that he still suffered from the hurt and the resulting illness, and that he had not been able to do any work since he received it. When he sent for the attending physician to administer to him, he sent also for an attorney, and notwithstanding the statement of the physician that he was not then fully conscious, owing to the concussion from which he was then suffering, according to his own story he then related to the attorney the facts touching the accident so as to enable the latter to draw the complaint in this case. It was verified by plaintiff five days later, and, though he has only a slight knowledge of

the English language, he testified, through the interpreter, that he had examined the complaint without substantial assistance from any one and thereupon verified it with a full understanding of the allegations contained in it. The fact that it contains allegations of permanent injury made at a time when neither he nor his physician, as the latter himself admitted, could possibly have foreseen what the probable result would be arouses a suspicion that his statement of his condition at the time of the trial was, to say the least, very much exaggerated. On the whole, the evidence tends to support the conclusion that the plaintiff, if such is not already the case, will presently be restored to full health. Under the circumstances, we think one-half of the amount of the award of the jury sufficient to compensate him for the injury which he appears to have sustained.

The cause is accordingly remanded to the district court, with directions to grant the defendant a new trial, unless, within 30 days after the remittitur is filed, the plaintiff shall file with the clerk his written consent that the judgment may be reduced to \$2,500. If such consent is given, the judgment shall be modified accordingly as of the date of its original entry, and, together with the order denying a new trial, will stand affirmed. That part of the judgment awarding costs in the district court is not to be disturbed. The plaintiff shall recover the costs on appeal.

HOLLOWAY and SANNER, JJ., concur.

HERSEY v. NELSON et al., County Com'rs. (Supreme Court of Montana. March 19, 1913.)

1. COUNTIES (§ 1*)—NATURE AND STATUS AS CORPORATION — "MUNICIPAL" — "MUNICIPAL CORPORATION."

The word "municipal" means pertaining to a city or to a community within a state possessing the rights of self-government. A "municipal corporation" is a public corporation created by government for political purposes, having subordinate and local powers of legislation, an incorporation by the authority of the government of the inhabitants of a particular place or district, authorizing them in their corporate capacity to exercise subordinate, specified powers of legislation and regulation over their affairs; such power of local government being the distinctive purpose and the distinguishing feature of a municipal corporation proper. In view of Const. art. 13, § 4, providing that the state shall not assume the debt of a county or municipal corporation, and article 16, § 6, providing for elections of county and municipal officers, the term "municipal corporation" does not include counties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4618-4627; vol. 8, p. 7728.]

2. MUNICIPAL CORPORATIONS (§ 64*)—LEGISLATIVE CONTROL—LOCAL SELF-GOVERNMENT.

Municipal corporations because of their enjoyment of a large measure of organic inde-

pendence are relieved to a considerable extent from officious, meddlesome legislation respecting their private or proprietary functions; the theory of local self-government for municipal corporations being established in this state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.*]

3. COUNTIES (§ 10*)—NATURE AND STATUS AS CORPORATION.

A county is one of the civil divisions of the state, created by the governing power of such state of its own will, for political and judicial purposes, without the consent of the inhabitants; the powers and functions of county organization having a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy, they are purely political in character, and are subordinate divisions or agencies of the state for governmental purposes, and Laws 1911, c. 112, providing for the creation of new counties upon petition, etc., does not affect their status as such.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 7-9; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1653-1660; vol. 8, p. 7621.]

4. COUNTIES (§ 21½*)—"COUNTY POWERS"—STATUTORY PROVISIONS.

County powers are only such as are expressly provided by law or which are necessarily implied from those expressed.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 21½.*]

5. COUNTIES (§ 24*)—LEGISLATIVE CONTROL.

The legislative control over counties is supreme, except in so far as it is restricted by the Constitution in express terms or by necessary implication.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. § 24.*]

6. COUNTIES (§ 113*)—COUNTY COMMISSIONERS — POWERS — LETTING CONTRACT FOR COUNTY PRINTING.

The board of county commissioners is a body of limited powers, and must in letting a contract for county printing, as in every action, find its authority written in the statute or necessarily implied therefrom.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

7. COUNTIES (§ 21½*)—POWERS—STATUTES.

Under the maxim, "Expressio unius exclusio alterius," counties do not have any powers other than those indicated in Rev. Codes, § 2870, which provides that every county is a body politic having the powers specified in the code or in special statutes, and such powers as are necessarily implied from those expressed.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 21½.*]

8. CONSTITUTIONAL LAW (§§ 87, 276*)—COUNTIES (§ 112*)—POWERS—CONSTITUTIONALITY OF STATUTE.

Rev. Codes § 2897, relating to the letting of printing contracts, which provides that all newspapers receiving any contract for printing, and not able to execute it, shall sublet it, or a portion of it, to some competent printing establishment within the state, does not conflict with either Const. U. S. Amends. 5, 14, or with Mont. Const. art. 3, § 8, declaring the inalienable rights of acquiring property and seeking safety and happiness.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171, 845, 846; Dec. Dig. §§ 87, 276; Counties, Dec. Dig. § 112.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS.

The Supreme Court will not determine the constitutionality of a statute, when the attack on its validity is based on an assumption of fact which is not shown by the record to have any real existence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

10. STATUTES (§ 94*)—"LOCAL LAW"—"SPECIAL LAW"—CONSTITUTIONAL RESTRICTIONS.

Rev. Codes, § 2897, which provides that a newspaper unable to complete any contract for printing shall sublet it to some competent printing establishment within the state, does not conflict with Const. art. 5, § 26, forbidding the passage of local or special laws regulating county affairs, and, since it is state wide in its operation, is not a "local law," which is an act applicable only to a particular part of the legislative jurisdiction, and, as it applies to all county printing contracts, is not a "special law," which is one operating only on particular persons and private concerns.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 104; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4208-4213; vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

11. COMMERCE (§ 54*)—REGULATION—CONTRACTS OUTSIDE STATE.

Rev. Codes, § 2897, which provides that any newspaper unable to complete any contract for county printing shall sublet it to some competent printing establishment within the state, is not a regulation of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 71, 100, 106, 108, 111, 134; Dec. Dig. § 54.*]

Appeal from District Court, Hill County; J. E. Erickson, Judge.

Action by P. H. Hersey against Ever Nelson and others, county commissioners, and J. A. Rose, county treasurer of Hill county, Mont. Judgment for plaintiff, and defendants appeal. Affirmed.

H. S. Kline and Victor R. Griggs, both of Havre, Gunn, Rasch & Hall, and W. W. Patterson, all of Helena, for appellants. C. A. Spaulding, of Helena, for respondent.

HOLLOWAY, J. On March 8, 1912, the board of county commissioners of Hill county, Mont., let a contract to B. B. Weldy, proprietor and publisher of the Chester Signal, a newspaper which had been published in Hill county for more than six months prior thereto, to do the county printing, including the furnishing of blanks, blank books, etc. Thereafter Weldy sublet to the Shaw-Borden Company, of Spokane, Wash., the contract to furnish all blank record books, warrant books, certificate books, registers, and bound books of every description to be used by the county. This action was commenced by a resident taxpayer to secure an injunction restraining the board of county commissioners from allowing the account of Weldy for supplies furnished through the Shaw-Borden Company, or from directing a county warrant to be issued to pay for such supplies, and to restrain the county treasurer from

paying for such supplies. Upon the complaint a temporary injunction was issued. The defendants demurred to the complaint and moved to dissolve the injunction. The demurrer was overruled, and the motion to dismiss denied. Defendants thereupon stood upon their demurrer, suffered judgment to be entered against them, and have appealed.

It is insisted that section 2897 of the Revised Codes is unconstitutional, and this presents the only question for our determination. After providing for letting public printing contracts, that section of the Codes proceeds: "All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such contract shall be required to sublet such contract or portion of contract to some newspaper or printing establishment within the state, which may be competent to execute such work. * * *"

[1] 1. In their brief counsel for appellants attack the statute, and say: "It is our contention that a county is a municipal corporation, having governmental and proprietary functions; that as to the former the state's control is supreme, but as to the latter the state's control is no more extensive than it is over private corporations; that county printing is a matter solely of local concern, and comes within the proprietary functions of a county, and that the above provision of section 2897 is an unconstitutional restriction upon the power of a county to contract as to its local affairs." If the statement, "a county is a municipal corporation, having governmental and proprietary functions," is true, the conclusion announced above might follow. But we are not able to agree with counsel that the premise states correctly any rule of law. The word "municipal" means "pertaining to a city or a community within a state, possessing rights of self-government." Anderson's Law Dictionary. It is derived from the Latin "municipalis," which in its origin referred to a town possessing the rights of Roman citizenship and governed by its own laws; in other words, to a free town. Webster's International Dictionary. A municipal corporation is "a public corporation created by government for political purposes and having subordinate and local powers of legislation." Bouvier's Law Dictionary. Every authority on municipal law makes clear the distinction between a municipality and a county, as the word "county" is used in the Constitution and statutes of this state. In 1 Dillon on Municipal Corporations (5th Ed.) § 32, the author says: "We may therefore define a municipal corporation in its historical and strict sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate, specified powers of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." And again, in section 34: "All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school district, or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation." That the framers of our Constitution did not intend municipal corporations to include counties is clear, for the two terms are used to distinguish different organizations (section 6, art. 16; section 4, art. 13; *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66). A county is a body corporate (section 2870, Rev. Codes), so, likewise, is a school district (section 848); but neither possesses the powers of local legislation and control which are the distinguishing characteristics of a municipal corporation (*State v. Lefingwell*, 54 Mo. 458; *State v. Barker*, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222; *Memphis T. Co. v. Board of St. Francis Levee Dist.*, 69 Ark. 284, 62 S. W. 902).

[2] Because of its autonomous character—its enjoyment of a large measure of organic independence—the municipal corporation is relieved to a considerable extent from officious, meddlesome legislation which seeks to interfere with its private or proprietary functions. The theory of local self-government for municipal corporations is firmly established in this state. *Helena Con. Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; *State ex rel. Gerry v. Edwards*, 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078, Ann. Cas. 1912A, 1063. But because of the difference in the character of a county and a municipality, the authorities which restrain the Legislature from intermeddling with the private affairs of the municipal corporation are not in point when the question for determination is the right of the Legislature to control county affairs.

[3, 4] "It is well-established law that a county is an involuntary corporation for governmental purposes, and is in no sense a business corporation; that the powers and obligations of the county are such only as the law prescribes or as arise by necessary implication therefrom. *Elkenberry v. Township* [22 Kan. 556, 31 Am. Rep. 198]; *Marion County v. Riggs* [24 Kan. 255]; 11 Cyc. 497; 7 Am. & Eng. Enc. Law, 947. Cities, however, in this state are municipal corporations, and neither their powers nor obligations are so restricted, and decisions as to their liability for negligence have no application here." *Silver v. Board of Com'rs*, 76 Kan. 228, 91 Pac. 55.

In 1 Dillon on Municipal Corporations, §

35, the author says: "With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." In section 37 of the same work the distinction between municipal corporations on the one hand and political or civil divisions of the state created for administrative purposes, such as counties and school districts, on the other, is made clear. See, also, *Shipley v. Hacheny*, 34 Or. 303, 55 Pac. 971.

"A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it. 7 Am. & Eng. Enc. Law (2d Ed.) 900. It is quasi corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed." *Independent Pub. Co. v. Lewis & Clark County*, 30 Mont. 83, 75 Pac. 880.

In *Board of Commissioners v. Watson*, 7 Okl. 174, 54 Pac. 441, it is said: "A county is but a subordinate, political subdivision of sovereignty created for governmental purposes and for greater convenience in carrying on the public affairs."

"A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." *San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78.

In speaking of a county, the Supreme Court of Oregon, in *Yamhill County v. Foster*, 53 Or. 124, 99 Pac. 286, said: "It is merely a political agent of the state created by law for governmental purposes, and is charged with the performance of certain duties for and on behalf of the state."

"Counties are not in any respect business corporations for private purposes; nor are they organized exclusively for the common benefit of citizens and property holders within their respective limits. They are of a purely political character, constituting the machinery and essential agency by which free governments are upheld, and through which for the most part their powers are exercised. Their functions are wholly of a public nature. Counties are subordinate agencies for the orderly government of the state within the scope of their authority; hence they are subject to the control and direction of the Legislature in which chiefly the sovereignty of the state is represented and exercised." 11 Cyc. 341. In *State v. Board of Commissioners*, 170 Ind. 595, 85 N. E. 518; *Id.*, 82 N. E. 482, it is said: "A county is an involuntary corporation, organized as a political subdivision of the state by the Legislature, the sovereign power, solely for

governmental purposes. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state, and act for the state." In speaking upon the same subject, and to the extent of the state's control over a county, the Supreme Court of the United States, in *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. Ed. 552, said: "The county of Calhoun is a mere political subdivision of the state, created for the state's convenience, and to aid in carrying out, within a limited territory, the policy of the state. Its local government can have no will contrary to the will of the state, and it is subject to the paramount authority of the state, in respect as well of its acts as of its property and revenue held for public purposes. The state made it, and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities." Since the enactment of chapter 112, Laws 1911, the involuntary character of counties in this state is somewhat modified, but the change thus wrought in the method of creating new counties does not affect their status as political subdivisions of the state for governmental purposes. We think it very clear that only incorporated cities and towns are municipal corporations in this state.

[5] Of course, the authority of the Legislature over the affairs of the county is not plenary. There are certain restrictions imposed by the Constitution, for instance: "The legislative assembly shall not levy taxes upon the inhabitants or property of any county." Section 4, art. 12. But legislative power over counties is supreme, except in so far as it is restricted by the Constitution in express terms or by necessary implication. 11 Cyc. 343; *State v. McFadden*, 23 Minn. 40; *Rogers Locomotive Machine Works v. American Emigrant Co.*, above. In speaking of counties and their enforced submission to legislative control the Supreme Court of Colorado said: "They are purely auxiliaries of the state, and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe the duties they owe, and impose the liabilities to which they are subject." *Board of Com'rs v. Wheeler*, 39 Colo. 207, 89 Pac. 50.

[6, 7] That the authority of the board of county commissioners of Hill county to let a contract for county printing must be found written in the statutes, or necessarily implied, or it does not exist, is well understood. *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092. In *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, this court, in speaking of the authority of the county, said: "Its board of commissioners—its executive body—is a body of limited powers, and must in every instance justify its action by reference to the provisions of law defin-

ing and limiting these powers." Indeed, the Code itself (section 2870) declares the same rule: "Every county is a body politic and corporate, and as such has the power specified in this Code, or in special statutes, and such powers as are necessarily implied from those expressed." Under the doctrine of the maxim, "*Expressio unius exclusio alterius*," the county does not have any powers other than these indicated in section 2870 above. The Legislature in its wisdom has seen fit to prescribe the conditions upon which its agents—the counties—may conduct county business, and in the absence of constitutional restriction the authority to do so cannot be doubted. In determining that the Legislature has power to control the manner in which county road work shall be done the Supreme Court of North Carolina said: "Counties are but agencies of the state government. They can be created, changed, or abolished at the legislative will. * * * They are subject to legislative authority which can direct them to do as a duty all such matters as they can empower them to do." *State ex rel. Tate et al. v. Commissioners of Haywood County*, 122 N. C. 812, 30 S. E. 352. See, also, *Jones v. Commissioners*, 137 N. C. 579, 50 S. E. 291. The manner in which printing contracts shall be let is one of legislative or governmental policy, a question with which the courts have nothing to do. *State v. Livingston Concrete B. & F. Mfg. Co.*, 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204.

2. Again counsel for appellants say: "As the provision of section 2897 under consideration bars outside competition, it prevents a county from getting the best work possible, and requires it to pay a higher price for its printing than if the newspaper to which the contract is awarded were permitted to sublet it to a printing establishment outside the state." In this instance the premise is correct, but the conclusion is unwarranted. There is not anything before us to indicate that the cost of county printing and supplies will be greater or the quality of the work poorer by reason of the restriction found in section 2897. It is admitted that there are many printing and publishing establishments within this state fully equipped and competent to supply any of the matters or things specified in Weldy's contract which he himself could not furnish; and for aught we know these Montana concerns may be willing to do the work or furnish the supplies as cheaply as any outside concern. In the absence of any showing that in its operation section 2897 imposes upon the taxpayers an arbitrary burden greater than they would otherwise have to bear, it is unnecessary to consider the effect of legislation which takes from one citizen his property and confers it upon another to swell his own private income.

[8] We fail to see wherein the statute un-

der consideration does violence to the provisions of either the fifth or fourteenth amendment to the Constitution of the United States, or section 3 of article 3 of our own state Constitution.

[9] 3. Based upon the assumption that by reason of the restriction in section 2897 county printing costs more than it otherwise would, counsel for appellants argue that the statute operates to take from the taxpayers a portion of the public moneys which might otherwise be saved, and thus indirectly operates to tax the inhabitants of the several counties, in violation of the provisions of section 4, art. 12, of our state Constitution. It is unnecessary to consider what the result would be if the fact which is assumed to exist had any real existence. Since there is not anything in the record to justify the assumption made, it is idle to pursue the inquiry further.

[10] 4. Again, it is insisted that the provisions of section 26, art. 5, of our state Constitution, are violated by the enactment of this statute, in that section 2897 is a local or special law regulating county affairs; and authorities are cited which seem to uphold the view that a statute of this character is not general or uniform in its operation. In 36 Cyc. 986, the terms "local" and "special," as applied to statutes, are defined as follows: "A special or private act is a statute operating only on particular persons and private concerns." "A local act is an act applicable only to a particular part of the legislative jurisdiction." See, also, 26 Am. & Eng. Ency. of Law (2d Ed.) 532. These definitions were approved by this court in *State ex rel. Geiger v. Long*, 43 Mont. 401, 117 Pac. 107, and we think they are correct. When we consider that section 2897 is state wide in its operation, it cannot be classed as a local statute; and, since it applies to all county printing contracts, it is not special.

[11] 5. Finally, it is insisted that the section under consideration is invalid because, by preventing outside concerns from bidding upon county contracts or furnishing the counties with necessary supplies, it amounts to a regulation of interstate commerce. Two cases are cited: *People v. Buffalo Fish Co.*, 164 N. Y. 98, 58 N. E. 34, 52 L. R. A. 803, 79 Am. St. Rep. 622, and *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776. The first is clearly not authority in this instance. In it was considered one section of the Fish and Game Law of New York, which imposes a penalty upon any one who has in his possession certain kinds of fish during certain periods of the year. The Buffalo Fish Company imported from Canada fish of the prescribed variety, and an action was commenced to recover the penalty. It was held that in so far as the statute affected the possession, by citizens of New York, of fish imported from a foreign country, it operated to regulate commerce between the United States

and a foreign country, and was therefore void. In the second case there was called in question the validity of a statute of New York which provided that all stone, except paving blocks and crushed stone, used in state or municipal works within the state of New York or which was to be worked, dressed, or carved for use, must be worked, dressed, or carved within the boundaries of New York state. By a divided court it was held that the citizens of other states having cut or dressed stone for sale had a right to complete in bidding for municipal work in New York, or at least had the right to sell their products to municipalities in New York state, and that the statute in question operated as a regulation of interstate commerce and was void. Parker, C. J., presented a vigorous dissenting opinion, the logic of which commends it to us. Of course, it would not be within the power of the Legislature of this state to say to an individual citizen, "You cannot have printing or bookbinding done unless you let the work to a Montana concern;" but, as Judge Parker points out, in his dissenting opinion above, the state could not deny to a citizen the right to say, "I will not patronize any outside concern for my printing or bookbinding," and, if an individual or a private corporation in this state should insist that his or its printing be done by a Montana concern, no one would suggest that the right thus asserted could not be insisted upon. As we have already determined, a county is but an agency through which the state transacts a portion of its business. The state speaks through its Legislature, and in our opinion has the same right that any individual citizen has to declare that it will procure its supplies, or have the supplies for one of its constituent parts procured, from a Montana concern.

In *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904, the Supreme Court of North Dakota had for consideration a statute which provided: "All county printing shall be done in the state, and if practicable in the county ordering the same." In construing this statute the court used the following language: "Again, it is argued that if section 1807, supra, is construed to prohibit county officials from procuring county supplies or printed matter from those who manufacture such supplies at places without the state, it would operate to violate section 8 of article 1 of the federal Constitution relating to commerce among the states. No authority is cited in support of this contention by counsel, and we are unaware of the existence of any such authority. Viewed as a question of principle, we are unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz., elect from whom it will purchase supplies needed in the discharge of its corporate functions. If such election may lawfully be made, it certainly is competent for the state to direct its offi-

cially by a mandatory statute to procure their office supplies from those who produce the same within its own limits, it having elected to purchase none other, either for the use of the state as such, or for the use of subordinate political bodies within the state." In considering this same objection to a statute similar to our own, the Supreme Court of Idaho, in *Ex parte Gemmill*, 20 Idaho, 732, 119 Pac. 298, Ann. Cas. 1918A, 76, reached the conclusion that such a statute does not operate to regulate or restrict interstate commerce. Whether the legislation under consideration is wise or otherwise is not a matter of concern at this time, but that in the absence of constitutional inhibition the Legislature may impose the restriction found in section 2897 is not open to doubt. Since no provision of the Constitution has been called to our attention which restricts the Legislature in its control over county affairs in the respect mentioned in this statute, our conclusion is that the section is not open to any of the objections urged against it.

The judgment of the district court is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

WHEELOCK v. CLARK.

(Supreme Court of Wyoming. April 14, 1913.)

INSURANCE (§ 130*)—RIGHT TO CANCEL APPLICATION—PREMIUM NOTE.

Where an applicant for life insurance gave his note for the first premium, to be effective when his application was accepted, and where, before such acceptance, he notified the insurer to cancel the policy and return the note, no recovery could be had on the note by the general agent of the insurer, though subsequent to such notice the application was approved, and the policy sent to the applicant and refused by him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 196–202; Dec. Dig. § 130.*]

Error to District Court, Fremont County; Charles E. Carpenter, Judge.

Action by Jesse M. Wheelock against William Scott Clark. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Fourt, of Lander, for plaintiff in error. Ralph Kimball, of Lander, for defendant in error.

BEARD, J. The plaintiff in error, Wheelock, brought this action in the district court of Fremont county against the defendant in error, Clark, on a promissory note. There was a trial to a jury resulting in a verdict for defendant, judgment was entered on the verdict, and Wheelock brings error.

The undisputed facts are: That Wheelock was the general agent at Denver, Colo., of the Northwestern Mutual Life Insurance Com-

pany of Milwaukee, Wis., and that Allen & Galloway, the payees of the note, were the special agents of the plaintiff for soliciting applications for life insurance for said company under the direction and control of Wheelock. That on November 10, 1909, Allen & Galloway procured from the defendant, Clark, an application for insurance on his life in said company in the sum of \$10,000, and at that time they took defendant's note for the amount of the first annual premium, which note is as follows:

"\$401.70. 4694—L. Lander, Nov. 10, 1909.

"Nov. 11th, 1910, after date I promise to pay to the order of Allen & Galloway, at Noble, Lane & Noble Bank, Lander, Wyo., four hundred one & 70/100 dollars, value received, with interest at the rate of eight per cent. per annum, from maturity until paid, and to pay all legal expenses and attorney's fees which may be incurred in the collection of the same. This note is given for money loaned and advanced by said payee to satisfy the premium on my policy No. — issued by the Northwestern Mutual Life Insurance Company, and as a collateral security for the payment hereof it is agreed that the owner of this note or the debt represented by it shall have a lien upon such policy and its proceeds, until this note or such debt shall be paid, and for such purpose said policy is hereby assigned to said payee.

"No. —. Due 11/11.

"William Scott Clark, Insured.

"—, Beneficiary."

At the same time said agents, Allen & Galloway, executed and delivered to Clark a receipt as follows:

"No other form of receipt for advanced premiums will be recognized by the company. An application for a \$10,000.00 policy having been made by Wm. Scott Clark to the Northwestern Mutual Life Insurance Company, there has been collected of him four hundred one & 70/100 dollars, to be considered the first annual premium on said policy, provided the application is approved by the company at its home office, and in that event the insurance as applied for will be in force from the date of the medical examination. If the application is not approved, the sum collected will be returned.

"Lander, Nov. 10, 1909.

"Allen & Galloway, Agents.

"767437. If the premium is paid in advance this receipt must be completed and given to the applicant; if the premium is not paid the receipt must not be detached."

On the same day the applicant was examined by the company's local medical examiner, and Allen & Galloway indorsed the note and forwarded it together with the application and medical examiner's report to Wheelock, who forwarded said application and re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

port to the home office of the company at Milwaukee, where they were received November 15th, and were in the hands of its medical director on the same day. November 16th Clark telegraphed the company as follows: "Northwestern Life Ins. Co., Milwaukee, Wis. Cannot accept policy applied for agent Allen & Galloway. Have written. William Scott Clark. 553 P." In the letter referred to in the telegram and mailed the same day and addressed to the secretary of the company he said: "Confirming my telegram to you of this date I wish to reiterate, that after more mature deliberation, I have determined that my circumstances at the present will not permit of my accepting the policy applied for some days ago in your company through your agents, Mess. Galloway & Allen and I will ask you to cancel the application and advise your agents to return my note for \$401.70, to the Noble, Lane & Noble bank here, when settlement receipt #767437, will be immediately forwarded to you or them." November 17th the company's medical director wrote Wheelock: "We are just in receipt of a telegram from Mr. William Scott Clark advising that he cannot accept his policy. Will you kindly advise us further relative to the case and oblige." To which Wheelock replied November 19th: "We have yours of the 17th in reference to a telegram from William Scott Clark that he cannot accept policy for which he recently applied. We would ask that you kindly issue the policy as applied for, and our agents will take the matter up with Mr. Clark." The application was not acted upon, approved, or accepted by the company until November 23d, when it was approved, and on November 26th a policy was issued and dated November 10, 1909, and was forwarded to Clark, who refused to accept it and returned it to the company.

The facts being as above stated, we have no hesitancy in holding that no contract of insurance was entered into between Clark and the company. His application was a mere proposal to enter into a contract, and until accepted by the company no contractual relations existed between them and until such acceptance he had a perfect right to withdraw his proposal. In *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653, the Circuit Court of Appeals (Eighth Circuit), speaking through Judge Sanborn, said: "An application for life insurance is not a contract. It is only a proposal to contract on certain terms which the company to which it is presented is at perfect liberty to accept or reject. It does not in any way bind the company to accept the risk proposed, to make the contract requested, or to issue a policy. * * * Until the meeting of the minds of the parties upon the terms of the same agreement is effected by an acceptance of the proposition contained in the application or of some other proposition, each party is en-

tirely free from contractual obligations. The applicant may withdraw his application and refuse to take insurance on any terms. * * * Nor is the freedom of the parties to retire from the negotiations or to modify their proposals, at any time before some proposition has been agreed upon by both, ever lost or affected by the fact that the applicant accompanies his proposal or application with a promise to pay the premium in the form of promissory notes, or even by an actual payment thereof. Until his application is accepted, such a promise or payment is conditional upon the acceptance, and his application is still no more than a proposition to take and pay for the insurance if the company accepts his terms"—citing many cases. See, also, *Northampton Mutual Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Insurance Co. v. Johnson*, 23 Pa. 72; *Globe Mutual Life Ins. Co. v. Snell*, 19 Hun (N. Y.) 560; *John R. Davis Lumber Co. v. Scottish Union & National Ins. Co.*, 94 Wis. 472, 69 N. W. 156; 1 *Cooley's Briefs on Law of Insurance*, 416. In the case from which we have quoted Travis at the time he made the application gave to the soliciting agent his notes for the premium, and the agent sent the notes to the general agents, who used them as collateral, and reported that the premium was paid. The court said: "Could the company or the agents have enforced the collection of the notes which Travis gave them for the premium in this state of facts after the agents had received his withdrawal of his original application, and after they had thus declined his new proposition? The question is susceptible of but one true answer. Would it not have been a perfect defense to those notes, in the hands of the company or its agents, that he had withdrawn his first application before it was accepted, and had made a new one, which they had declined to accept? Neither the agents nor the company could have overcome such a defense. The truth is that the minds of the parties to this negotiation never met upon the terms of any contract, and neither the notes nor the policy ever became effective." In that case Travis notified the agents before his application was acted upon and accepted that he would not accept the policy if the company was to have another medical examiner in his town, he being its medical examiner at the time he made the application. This was held to be a withdrawal of his original application; and, the company not having accepted the new terms he proposed, the minds of the parties had never met on the same terms, and hence there was no contract, and that the policy could not be enforced. In the case at bar Clark withdrew his application before it was accepted by the company, but offered no new terms; but the rule of law is equally applicable to each case. The condition on which the note in suit should become effective was that a contract

of insurance should be entered into between Clark and the company, in which case the note should be considered as payment of the first annual premium on the policy. It was for the purpose of paying such premium and for no other purpose that the note was given. But, as no contract was ever consummated, no premium ever accrued or became due or payable by the applicant or any one else. Wheelock knew the purpose for which the note was given when he received it, and that it would become effective only if the application was accepted by the company; and he must be held to have known that Clark had the right to withdraw his application at any time before it was accepted by the company at its home office. The application was approved, and the policy issued at the request of Wheelock, after both he and the company had notice that the application was withdrawn. He took the chance of being able to induce Clark to accept it, but because he failed to do so gave him no just cause to complain. His contention is that by the receipt given by Allen & Galloway to Clark, Clark was insured from the date of the medical examination, and that he could not rescind that contract without the consent of the company. But as we have shown that contention is not tenable; and the point was directly decided adversely to such contention in *Northwestern Mutual Life Ins. Co. v. Neafus*, 145 Ky. 583, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211. In that case the receipt given to the applicant by the agent was in the identical language of the receipt in this case.

It is further contended by counsel for plaintiff in error that the court erred in refusing to give to the jury certain instructions requested by plaintiff. Those instructions were based on the theory that the application and receipt constituted a contract of insurance which Clark could not rescind without the consent of the company. They were not applicable to the facts as shown by the evidence, and were properly refused. On the facts as shown by the record the court would have been warranted in instructing the jury to return a verdict in favor of the defendant. No prejudicial error being made to appear, the judgment of the district court is affirmed. Affirmed.

SCOTT, C. J., and POTTER, J., concur.

HAMILTON v. DIEFENDERFER (two cases). (Supreme Court of Wyoming. April 7, 1913.)

1. CHATTEL MORTGAGES (§ 213*)—CANCELLATION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to recover personalty which was the subject of chattel mortgage, held to sustain a finding that the mortgage was not paid.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 463-465; Dec. Dig. § 213.*]

2. BILLS AND NOTES (§ 296*)—INDORSEMENT.

Under the substantially direct provisions of Comp. St. 1910, § 3224, the indorser of a negotiable note impliedly warrants that it is genuine and valid according to its purport, and that the indorser has lawful title thereto.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 687-679; Dec. Dig. § 296.*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Actions by Alf Diefenderfer against L. P. Hamilton. Judgment for plaintiff in each case, and defendant brings error. Affirmed. See, also, 122 Pac. 88.

Metz & Sackett, of Sheridan, for plaintiff in error. Enterline & La Fleiche, of Sheridan, for defendant in error.

BEARD, J. The defendant in error, Diefenderfer, commenced these two actions against the plaintiff in error, Hamilton, to recover the possession of certain personal property, and for damages for the alleged wrongful taking and detention of the same. The cases involve the same questions, and were consolidated for the purpose of trial, and were tried to the court without a jury, and in each case the court found that the plaintiff below was entitled to the possession of the property and that he had sustained damages in the sum of \$10 and rendered judgment accordingly. From those judgments, the defendant below brings error. The cases have been submitted together in this court, and one opinion will cover both cases.

The property in question was owned by one John Schmitt, who on February 21, 1907, executed a chattel mortgage thereon to Marie Schmitt, his wife, to secure two notes of \$500 each, one due January 1, 1908, and the other due January 1, 1909. The mortgage was filed in the office of the county clerk and duly indexed February 23, 1907. On December 3, 1908, Marie Schmitt assigned the mortgage to Diefenderfer, which assignment was duly filed and indexed on the same day, and at the same time the note due January 1, 1909, was indorsed and delivered by her to Diefenderfer. The consideration, as recited in the assignment of the mortgage, being \$1 and other valuable considerations. It appears by the evidence that Diefenderfer had, on September 23, 1908, signed a note, as surety for John Schmitt, to the Sheridan National Bank, for \$600, due 90 days after date, and that, at the time the note and mortgage were so transferred to him by Marie Schmitt, he agreed with her to pay the note to the bank on which he was surety for John Schmitt, and that he did pay it on December 11, 1908, before it was due. John Schmitt had absconded a few days before Diefenderfer procured the note and mortgage from Marie Schmitt, and on the day he procured the same he took possession of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the mortgaged property, deeming himself insecure. On July 18, 1908, John Schmitt executed a chattel mortgage on the property to the plaintiff in error, Hamilton, to secure a note of that date for \$600, due November 18, 1908, which mortgage was duly filed and indexed and renewed from time to time by affidavits. A few days after Diefenderfer took possession of the property, Hamilton took possession of a part of it and Diefenderfer replevied it, and soon afterwards Hamilton took possession of the balance of it; hence the two suits.

It is not claimed that, if the mortgage held by Diefenderfer was a valid and subsisting lien upon the property, it would not be superior to the lien of the Hamilton mortgage. The defenses to it pleaded in the answer are that it was given without consideration; that it was given to hinder, delay, and defraud the creditors of John Schmitt; that the notes secured by it had been paid; and that Diefenderfer was not a bona fide purchaser. The first two defenses are not seriously contended for by counsel for plaintiff in error. The note was negotiable in form and by our statute is deemed prima facie to have been issued for a valuable consideration (section 3182, Comp. Stat. 1910); and there was no evidence offered to rebut this presumption; and the evidence fell far short of proving that the mortgage was given for the purpose or with the intent of hindering, delaying, or defrauding the creditors of John Schmitt. These matters were referred to briefly in the brief of counsel for plaintiff in error, but were practically abandoned in a supplemental brief filed after oral argument, by agreement of counsel and leave of court, in which they say: "The brief of plaintiff in error, filed in the above case, was confined to two questions, namely: That the mortgage, while in the hands of Marie Schmitt, was satisfied, paid, and should have been canceled, and that Diefenderfer was not a bona fide purchaser." In view of that statement of counsel, we deem it unnecessary to further discuss the questions previously referred to.

[1] On the question of the payment of the note held by Diefenderfer, while in the hands of Marie Schmitt, the only evidence was that she had stated to Hamilton and others, a short time before she assigned the note and mortgage to Diefenderfer, in substance, that it was paid; that she thought it was paid; that there was nothing to it; that Hamilton's mortgage was first; that it was no good; that she had neglected to cancel it; and that she would go to the courthouse and cancel it as soon as her condition would permit. Each and all of these statements, testified to as having been made by Marie Schmitt, were made within two or three weeks before she assigned the note and mortgage to Diefenderfer and long after

Hamilton took his mortgage; and there is no evidence that Diefenderfer had any knowledge at or before the time he took the assignment that she had made any such statements. On the other hand, it appears that she had the note in her possession; it was not yet due, was not marked paid or otherwise canceled; she indorsed and delivered it to Diefenderfer for a valuable consideration and signed and acknowledged an assignment of the mortgage which remained uncanceled on the record.

[2] By her indorsement of the note, she engaged or impliedly warranted that it was in all respects genuine; that it was the valid instrument it purported to be; that she had lawful title to it (1 Daniel on Negotiable Instruments [5th Ed.] § 669a); and that it was a valid and subsisting obligation. *Idem.* § 673; 7 Cyc. 831; and section 3224, Comp. Stat. 1910. All of these things are in direct conflict with the statements which it is testified she made a short time before as to payment. Assuming, but without deciding, that the statements of Marie Schmitt were competent and admissible evidence of payment, her acts and the circumstances of the transactions are so conflicting with those statements that the court may well have concluded that the defense of payment had not been established by a preponderance of the evidence. The findings of the court are general, and we cannot say that they were not based upon that ground, which to our minds was a reasonable conclusion, considering all of the evidence and the circumstances surrounding the transaction. If the note was not paid, the lien of the mortgage remained a prior and superior lien to that of the Hamilton mortgage and could have been enforced by Marie Schmitt had it remained in her hands, and was equally valid and enforceable in the hands of her assignee. Hamilton's rights were not affected, and he was placed in no worse position by reason of the assignment. The evidence being sufficient to sustain the findings and judgment of the district court on this branch of the case, and as the judgment must be affirmed for that reason, the other question, namely, whether or not Diefenderfer was a bona fide purchaser, becomes immaterial and will not therefore be considered.

The judgment of the district court in each case is affirmed.

Affirmed.

SCOTT, C. J., and POTTER, J., concur.

JUSTICE et al. v. BROCK.

(Supreme Court of Wyoming. April 7, 1913.)

1. FACTORS (§ 22*)—DUTIES OF FACTORS.

While a factor is not obliged to sell at a price which would be less than his lien for advances, commission, and just charges at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

request of his principal, unless the latter pays or tenders such charges, yet he is bound to exercise ordinary care to obtain the market price of the merchandise; and, if the sale at such price would more than pay his charges, he is bound to sell at the principal's request.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 22; Dec. Dig. § 22.*]

2. FACTORS (§ 12*)—DUTIES.

A factor does not guarantee that he will not commit error, and he is liable only for negligence, bad faith, and dishonesty, and a principal cannot recover for loss occasioned by the factor's honest mistake, and consequently he cannot recover where an uninstructed factor held the property for a rise and the market weakened.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 12; Dec. Dig. § 12.*]

3. FACTORS (§ 43*)—ACTIONS—EVIDENCE.

In an action by factors for advances, where defendant counterclaimed for amounts he claimed were due him, evidence held insufficient to show that the factors were negligent or unfaithful in selling the property consigned.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. §§ 45-57; Dec. Dig. § 43.*]

4. FACTORS (§ 43*)—NEGLIGENCE—EVIDENCE.

In an action by wool factors to recover advances where defendant counterclaimed, setting up a loss he claimed was occasioned by their negligence in failing to sell the wool, evidence of the market price at other localities is inadmissible where there was no claim that the factors' failure to sell was the result of fraud, for if the factors had transferred the goods to another market, they would have been liable for any depreciation in the price.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. §§ 45-57; Dec. Dig. § 43.*]

5. FACTORS (§ 43*)—ACTIONS—EVIDENCE.

In an action by factors for advances, where defendant counterclaimed, setting up a loss which he averred was occasioned by their negligent failure to sell at the market price, an instruction that they were under obligations to carry out all of defendant's positive instructions was erroneous because disregarding the factor's lien for advances.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. §§ 45-57; Dec. Dig. § 43.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY.

In an action by factors for advances, where defendant set up a loss occasioned by their failure to sell at the market price, where there was no evidence of any bad faith on the part of the factors, an instruction that, in considering whether any latitude was given them in handling the consignment, the jury should consider their good faith, is improper, being without foundation in the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

7. TRIAL (§ 25*)—ARGUMENT—OPENING AND CLOSING.

In an action by factors for advances, where defendant counterclaimed for loss occasioned by their failure to sell at the market price, the counterclaim being in the nature of a plea of confession and avoidance casts the burden of proof on defendant, and he is entitled to open and close.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by Theodore Justice, Henry Justice, William Warner Justice, James Bateman,

and Henry K. Kenderdine, copartners doing business as Justice, Bateman & Co., against A. L. Brock. From a judgment for defendant on his counterclaim, plaintiffs bring error. Reversed and remanded.

Enterline & La Fleche, of Sheridan, for plaintiffs in error. Metz & Sackett, of Sheridan, for defendant in error.

SCOTT, C. J. The plaintiffs in error, as copartners, brought this action in the court below as plaintiffs to recover from the defendant in error as defendant upon an alleged balance on an account for advances made by them as factor upon a consignment of wool, interest on such advances, and commission on the sale. The case was tried to a jury and a verdict returned in favor of the defendant for the sum of \$2,000 upon his counterclaim for damages for an alleged failure to sell the wool at the market price, and as directed by the defendant. A motion for a new trial was overruled, judgment was rendered upon the verdict, and the plaintiffs bring error.

1. It is assigned as error that the verdict is unsupported by the evidence, and that the trial court erred for that reason in denying a motion for a new trial. The plaintiffs were commission merchants residing and doing business as such in the city of Philadelphia in the state of Pennsylvania. On September 21, 1907, the defendant consigned to them as factor 45,852 pounds of his own wool and 10,345 pounds known as the J. O. Morgaridge wool, in all 56,197 pounds. Concurrent with the consignment and shipment he drew on plaintiffs as his factor a sight draft for advancement on the wool so consigned for the sum of \$7,535.77, which by agreement bore interest at the rate of 6 per cent. per annum until paid.

The following letter was received by the defendant from plaintiffs through due course of mail: "Justice, Bateman & Co., Wool, 122 South Front Street, Philadelphia, Sept. 25th, 1907. Mr. A. L. Brock, Buffalo, Wyoming—Dear Sir: We will receive and sell your wool for the commission of one and one-quarter cents per pound. Interest on advances at the rate of six per cent. per annum; no other charges after arrival of wool in store. Our commission includes fire insurance, premium, storage and labor for any period not exceeding six months after arrival of wool, and also guarantee of sales. While we do not guarantee insurance companies, we make ourselves responsible to keep your wool insured in first-class foreign and domestic companies. Yours truly, [Signed] Justice, Bateman & Co."

On the same day the following letter was written by plaintiffs, and sent to defendant by due course of mail: "Philadelphia, September 25, 1907. Mr. A. L. Brock, Buffalo, Wyoming—Dear Sir: We have received through Mr. Charles T. Lee invoice of your

155 bags of wool, which shall have our best attention on arrival. We note that you wish the 30 bags of the J. O. Morgarledge clip accounted for separately. The wool market is quiet at present, but we look for a better demand shortly, when we think manufacturers will find it easier to get money to finance wool purchases. Very truly yours, [Signed] Justice, Bateman & Co., Charles S. Haight."

Thereafter plaintiffs as factor sent to defendant by due course of mail the following letter: "Philadelphia, October 4, 1907. Mr. A. L. Brock, Buffalo, Johnson Co., Wyoming—Dear Sir: We to-day paid your draft for \$7,535.77. Very truly yours, [Signed] Justice, Bateman & Co., Childs."

The plaintiffs as factor received the wool, stored, exhibited it for sale, and sent weekly market quotations on that market to the defendant. The market quotations furnished on January 28 and February 4, 1908, were the same. On February 8th following the defendant wrote plaintiffs to close out his wool, so he could get his returns by April 1st following, if it could be done without making too much sacrifice. On March 5, 1908, he again wrote plaintiffs as follows: "I wrote you some time ago in regard to my wool. *I wrote you to sell my wool as I will want the money April 1* and I really fail to see any reason why the future market will be any better than it is now. One of my neighbor sheep men recently made a good sale of 25¢. I am willing to sell on present market quotations I received from you."

"* * *" The wool was classified by the plaintiffs, and of the amount so consigned 47,996 pounds was classified, graded, and sold as fine and fine medium, and the price for that grade of wool according to the market quotations furnished from time to time between the consignment on September 21st, the day of shipping, until April 1, 1908, following, was not less than 19 cents per pound. The balance of the wool was also graded and sold according to its grade. In the account rendered only 970 pounds out of the total of 56,197 pounds consigned was sold prior to April 4, 1908, and the balance was sold from time to time after that date until November 18, 1908, when the wool was finally closed out. The total gross amount for which plaintiffs sold the wool was \$9,113.18, receiving for defendant's share the amount of \$7,426.40. It is alleged that, had plaintiffs sold defendant's wool independent of the Morgarledge lot as directed by defendant, it would have brought \$9,535 net, and defendant testified that plaintiffs would have received \$9,170.40 therefor, which sum would have been sufficient to have paid the draft, interest thereon, commission, and all charges for shipping and handling the wool, leaving a balance of \$2,000 due defendant.

The plaintiffs alleged that, after receiving and making the advances on the consignment, they were unable to sell the wool at the market quotations or otherwise than at the

times and prices received for it, and that their lien for advances could not have been realized had they sold at a greatly reduced price, which would have been necessary. Their evidence tends to support these allegations with the exception that the market was a little firmer in the early part of October, 1907, when the wool was received up to the time of a financial panic which occurred soon after and during that month, and thence on through the year following the wool market was dull. The defendant gave no positive instructions to sell prior to his letter of February 8, 1908, supplemented by his letter of March 5, 1908, but up to that time had left price and time of sale to the judgment of the plaintiffs.

[1] It is the general rule that a factor is not obliged to sell at a price which would be less than his lien for advances, commission, and just charges at the request of his principal, unless the latter pays or tenders such advances and charges. *Heffner v. Gwynne-Treadwell Cotton Co.*, 160 Fed. 635, 87 C. Cl. A. 606. The evidence, however, tends to show that, had the factor here sold as instructed at the market quotations furnished, their principal there would have been \$2,000 realized from the sale over and above what was necessary to have paid such factor all advances, interest, commissions, and charges. The plaintiffs were bound to exercise ordinary care, skill, and diligence to obtain the market value of the wool, but could not withhold the wool from the market against the directions of the defendant if such ordinary care, skill, and diligence would have resulted in a sale at a price that would have secured them in their charges, and been satisfactory to the defendant. There was nothing but a simple consignment of the wool to be sold on commission, without any instruction, direction, or advice whatsoever communicated by the defendant to plaintiffs at the time. The defendant had the right to say when the wool should be sold, and at what price, so long as it did not impair the factor's right to reimbursement out of the proceeds for all his advances and charges. 19 Cyc. 126, 127, 128; *Heffner v. Gwynne-Treadwell Cotton Co.*, supra. Under such circumstances, the lien would be paid and the factor could not dictate to his principal when the wool should be sold, or impose on him the hazard of a falling market. When we say market, we mean such a market as was available to the plaintiffs.

[2, 3] We cannot go further than that within the issues in this case, for there is no allegation in defendant's answer or counterclaim that plaintiffs' failure to sell the wool at the market quotations was the result of fraud. We think the issue of failure to exercise ordinary care, skill, and diligence, and that as a consequence the defendant suffered the damage complained of, was the only one fairly made by the pleadings. *Drumm-Flato Commission Co. v. Union Meat*

Co., 38 Tex. Civ. App. 587, 77 S. W. 694, was a case somewhat similar on the facts to the one here. There the principal shipped cattle to its factor who it was claimed wrongfully sold them on a low classification. The court said that at the market to which the cattle were shipped it was the invariable custom "for the factors to whom they were consigned to exhibit them in the market for sale, and sell them at the highest price that can be obtained. The great preponderance of the evidence shows that this method of sale was adopted by the defendant, the cattle exhibited to the buyers, due care and diligence taken and good faith exercised by the defendant to sell them at the highest market price obtainable, and after the exercise of such care and diligence they were sold at the best price that could be obtained." In the case before us the evidence shows that the method of selling the wool was to exhibit it to proposed buyers, and that this was done. There is no evidence of want of diligence in this respect. There may have been wool of the same or higher quality sold at the market quotations, but that fact of itself would not be sufficient to entitle the defendant to recover if the factor was diligent and in good faith endeavoring to sell defendant's wool. In *Commission Co. v. Union Meat Co.*, supra, the following instruction to the jury was upheld, viz.: "If defendant's agent exercised ordinary care, skill, and diligence to obtain the fair market value of the cattle," defendant was entitled to a verdict, "although the jury may have believed from the evidence that the cattle were sold for less than their market value." As is said by Judge Cooley: "Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no error. For negligence, bad faith, or dishonesty he would be liable to his employer; but, if he is guilty of neither of these, the master or employer must submit to such incidental losses as may come in the course of the employment, because there are incidents to all avocations, and no one by any implication of the law, ever undertakes to protect another against them." It was further said in that case that "because the verdict on the question of negligence finds no support in the evidence the judgment is reversed and the cause remanded." The plaintiffs here were bound under their contract to exercise ordinary care, skill, and diligence to obtain the fair market value of the wool. We look in vain to find any evidence in this record showing, or tending to show, negligence in that respect on the part of the plaintiffs. They were not insurers of sale or price. The record is silent as to whether they could have sold the wool prior to the panic in October, 1907, and at the market quotations. Assuming that they could have done so, yet they were not instructed to sell at that time, and, being

agents for selling the wool without such instructions from their principal, the latter will be presumed to have approved the action of the former in not selling at that time. In such case he took the risk of any loss by reason of the market becoming demoralized, and could not be heard to complain of the failure to sell at that time and the resulting loss after it had occurred. At the most, upon the evidence the failure to sell at that time would only be a mistake in judgment made in good faith which would not render plaintiffs liable, provided always they were diligent and faithful in trying to effect a sale. *Lesesne v. Cook*, 16 La. 58; *Savage v. Birckhead*, 20 Pick. (Mass.) 187; 19 Cyc. 119. It is true that the market quotations purported to show the price of wool on the Philadelphia market from time to time, but the plaintiffs' evidence is undisputed to the effect that such quotations after the said panic in October, 1907, until after the Presidential election in November, 1908, were merely nominal, and the prices at which sellers were offering their wool, but that there were few buyers and scarce sales at such prices, and, further, that the manufacturers or customers owing to difficulty in getting money to finance purchases were buying such small quantities of wool as would enable them to fill their contracts, and owing to the unsettled financial condition were not stocking up for future orders. On November 18, 1908, plaintiffs wrote defendant that there had been a better demand for wool, and that they had closed out his wool at the prices appearing in the account rendered, a part of the fine and fine medium grade at 16 cents and a part at 16½ cents per pound, and the other grades at the prices therein stated. The market quotations theretofore furnished had written across their face, "Market quiet. Medium wool slow of sale," and similar notations. Defendant's letter of February 8, 1908, hereinbefore referred to, indicates that he understood the difficulty of selling wool at the market quotations. He says in that letter: "I would like to have you close my wool out so I can get my returns by April first if you can do so without too much of a sacrifice as I will be needing some money at that time. While I have always left the time for selling with you heretofore I would rather sell now on the market as it is than to borrow money to meet my demands on April first." The letter of March 5th following from defendant to the plaintiff, and heretofore quoted, may be deemed to have changed the condition contained in the former with reference to selling the wool, and the two letters considered together constituted the first positive direction to sell. The plaintiffs treated these letters as a direction to sell the wool on the market quotations as of those dates. Their efforts and diligence in that respect were unavailing. In order to sell at all, concessions from the

quoted price had to be made, and the direction to sell was at the quoted price. Plaintiffs' undisputed evidence tends to show that they were endeavoring all the time to sell by exposing the wool to their customers, and were for the reasons stated only able to sell small quantities from time to time. Upon the pleadings their good faith is not questioned, and the question of the amount of sacrifice to be made in selling the wool as contained in defendant's letter of February 8, 1908, until the receipt of the letter of March 5, 1908, lodged in the plaintiff a discretionary power as to when and for what price to sell. Treating the two letters as a positive instruction to sell, plaintiffs were not authorized to sell below the market quotations, nor, as already said, were they required to sell at a price insufficient to reimburse and recompense them for their advances and just charges, in the absence of any tender or a satisfactory offer to pay the same by defendant. The undisputed evidence, notwithstanding the market quotations furnished, shows that they used due diligence, and were unable to find a purchaser who would pay the market quotations for the wool or sufficient to reimburse them for their advances and charges.

[4] 2. The defendant was permitted over objection, and which is here assigned as error, to introduce evidence as to the price of wool at markets other than that to which he shipped his wool. It was within the purview of the contract that the wool should be sold upon the Philadelphia market. It was shipped to that market, and it was the failure to sell upon that market of which defendant complained. He alleges in his amended answer: "That the market price obtainable for said wool upon the said market at Philadelphia during the spring and summer of 1908 averaged about 20 cents per pound. That the said plaintiffs wholly neglected and failed and refused to sell the said wool at said market price above mentioned, but disposed of said wool, a part thereof at 10 cents per pound, and other portions thereof at 16 cents per pound. Defendant alleges that if the said plaintiffs had complied with the terms of said contract and sold said wool at the best market price, or at the average price obtainable on said market in Philadelphia that this defendant would have received \$9535.00 net." The issue was thus squarely tendered (1) that the wool could have been sold by the plaintiffs at the quoted or average market price at Philadelphia by the exercise of ordinary care, skill, and diligence; and (2) that their failure to use such ordinary care, skill, and diligence to so sell the wool upon that market resulted in damage to the defendant. If upon those issues and the evidence the plaintiffs did exercise ordinary care, skill, and diligence to obtain the quoted or average market price for wool at that market then under the rule an-

nounced in *Commission Co. v. Union Meat Co.*, supra, they would be entitled to a verdict, even though the jury may have believed from the evidence that the wool was sold for less than the quoted or average market price. The consignment was general and to a specified market, and the plaintiffs were not bound to look for any other market than the one to which the wool was consigned. *Kings-ton v. Wilson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823. The defendant selected the market upon which the wool was to be sold (*Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663), and he assumed the risk of plaintiffs being unable by the exercise of ordinary care, skill, and diligence to sell it upon that market. It was held in *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369, that, under a general consignment such as here, the factor had no authority to ship the goods to another market, and it was held in *Phy v. Clark*, 35 Ill. 377, that, if he does so, he is liable for loss incurred from selling at a less price than he could have obtained in the market where he had authority to sell. Applying these rules to the case here, it follows that plaintiffs were not bound within the terms of the contract to sell the wool other than on the Philadelphia market. In that view, evidence of the price of wool in other markets was not material or germane to the issue, and the court erred in admitting it, over objection for the plaintiffs were under no obligation to sell on those markets. That evidence under some circumstances might perhaps be admissible as tending to show the market price at the place where the wool was to be sold, and the want of care or diligence of the factor in selling the wool at the best available price, but no such circumstances are disclosed in this case as would take it out of the general rule.

[5, 6] 3. The court, over plaintiffs' objection, instructed the jury without qualifications that the plaintiffs "were under obligations to carry out any and all positive instructions of his (the defendant) with reference to the property consigned to them. If you find that any latitude was given to the said agents in regard to their handling of the property intrusted to them, then, I charge you, you should consider whether they acted in good faith and according to their best judgment in carrying out such instructions so as best to preserve the rights and interests of their principal." This instruction was erroneous for two reasons: First, it disregarded plaintiffs' lien for advances made on the consignment and their right to be reimbursed out of the proceeds of the sale; and, second, the absence of any evidence in the record upon which the good faith of plaintiffs could be challenged. Both of these questions have hereinbefore been discussed on the sufficiency of the evidence, and need not be further referred to.

[7] 4. It is urged that the court erred in

permitting the defendant over objection to open and close the argument to the jury. The defense was a counterclaim by way of confession and avoidance, and the court correctly instructed the jury that there was no dispute in the evidence as to the plaintiffs' right to recover, unless the defendant had established his counterclaim by a preponderance of the evidence, and that the burden in this case rested upon the defendant. That being the situation, the defendant had the right to open and close the argument to the jury.

Other alleged errors have been presented, but, as the judgment must be reversed for the errors hereinbefore discussed, we assume that they are not likely to occur upon a new trial. The judgment will be reversed, and the cause remanded for a new trial.

Reversed.

POTTER and BEARD, JJ., concur.

**GROVER IRRIGATION & LAND CO. v.
LOVELLA DITCH, RESERVOIR
& IRRIGATION CO.**

(Supreme Court of Wyoming. April 7, 1913.)

**1. APPEAL AND ERROR (§ 544*)—NECESSITY OF
BILL OF EXCEPTIONS—RULINGS ON PLEAD-
INGS.**

Comp. St. 1910, § 4597, provides that when a decision objected to is entered on the record and the grounds of objection appear in the entry, exception may be taken by the party causing to be noted at the end of the entry that he excepts. Section 4598 declares that when a decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the excepting party must reduce his exception to writing and present it to the court or to the judge within the time given for allowance, and when the bill is allowed and signed "it shall be filed with the pleadings as a part of the record." *Held*, that an order overruling a demurrer to the petition for want of facts was a part of the record, and with the pleadings was properly presented for review on a writ of error without a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

2. PLEADING (§ 418*)—DEMURRER—WAIVER.

Where a petition to condemn land was demurred to, not because of the form of statement of the cause of action, but because of an alleged total failure to state the substance of a good cause of action, the defect was not waived by answering after the overruling of the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

3. APPEAL AND ERROR (§ 5*)—JUDGMENT (§§ 199, 263*)—PLEADING (§§ 193, 428*)—PETITION—INSUFFICIENCY—REMEDIES.

Where a petition to condemn land is insufficient in substance, the opposite party may avail himself of such insufficiency by demurrer, by objecting to the introduction of the evidence at the trial, by motion in arrest of judgment,

by motion for judgment non obstante veredicto, or by writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 5;* Judgment, Cent. Dig. §§ 367-375, 468-480; Dec. Dig. §§ 199, 263;* Pleading, Cent. Dig. §§ 425, 428-435, 437-443, 1433-1436; Dec. Dig. §§ 193, 428.*]

**4. APPEAL AND ERROR (§ 193*)—DEFECTIVE
PETITION — QUESTION FIRST RAISED ON
WRIT OF ERROR.**

An objection, that a petition is fatally defective in matter of substance not amounting merely to a defect in the form in which the cause of action is stated, may be first made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

**5. APPEAL AND ERROR (§ 102*)—DEMURRER—
REVIEW.**

An appellate proceeding cannot be taken from an order overruling a demurrer to the petition, but only from a final judgment rendered thereon when the party stands on his demurrer without pleading further or from a final judgment rendered in the cause after the trial of the issues of fact where there has been further pleading presenting issues of fact; the order overruling a demurrer being treated as interlocutory merely reviewable on a writ of error to reverse the final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 688-698; Dec. Dig. § 102.*]

6. PLEADING (§ 418*)—DEMURRER—WAIVER.

Where a complaint or petition fails to state facts sufficient to constitute a cause of action, or there is want of jurisdiction of the subject-matter, the general rule that error in overruling a demurrer is waived by pleading over does not apply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

**7. PLEADING (§ 214*)—DEMURRER—EFFECT—
ADMISSION OF FACTS.**

A demurrer does not admit the allegations of the pleading demurred to except for the purposes of the demurrer, the effect of which is merely to deny the legal sufficiency of the facts alleged, so that on the overruling of the demurrer the demurring party may then plead to the facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

8. EMINENT DOMAIN (§ 1*)—DEFINITION.

Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses to promote the general welfare. It embraces all cases where, by authority of the state and for the public good, the property of the individual is taken without his consent to be devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen for the welfare of the public.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

**9. EMINENT DOMAIN (§ 13*) — EXERCISE OF
POWER — BENEFIT — PEOPLE OF FOREIGN
STATE.**

Where a particular improvement or use for which private property is sought to be condemned will operate as a direct benefit to the people of the state, the exercise of the power will not be prevented by the fact that the people in another state will also be benefited.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-53; Dec. Dig. § 13.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

10. EMINENT DOMAIN (§ 13*) — NATURE OF USE—LANDS IN FOREIGN STATE—INDIRECT BENEFIT.

Where land in Wyoming near the state line was sought to be condemned for a headgate and part of the ditch of an irrigation system to irrigate lands immediately across the border in Colorado, the fact that the development of such lands would indirectly redound to the benefit of the adjoining territory in Wyoming, and that the settlers that would be attracted to the land in Colorado to be improved would supply their wants largely from a city of Wyoming, did not constitute such a benefit to the public of Wyoming as to warrant a finding that the taking was for a public use of the people of that state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-53; Dec. Dig. § 13.*]

11. EMINENT DOMAIN (§ 10*)—PUBLIC USE—LAND IN FOREIGN STATE—STATUTES.

Comp. St. 1910, § 3874, provides that persons, associations, and corporations organized or doing business under the laws of the state, who in the course of their business shall require a way of necessity for reservoirs, drains, flumes, ditches, canals, or electric power transmission lines on or across lands of others for agricultural, mining, milling, domestic, electric power transmission, municipal or sanitary purposes, shall have power to condemn the land so required. *Held* that, since the statute can have no extraterritorial force, it should be construed to confine the right to condemn land for a right of way for an irrigation ditch, not only to a right of way within the state, but to a right of way for agricultural purposes within the state; and hence a foreign corporation duly authorized to do business within the state was not authorized either by such act or independent thereof to condemn land within the state for a headgate and ditch, parts of an irrigation system for the reclamation of lands solely located in Colorado.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

Error to District Court, Laramie County; Roderick N. Matson, Judge.

Petition for condemnation of land for a headgate and part of an irrigation ditch by the Lovella Ditch, Reservoir & Irrigation Company against the Grover Irrigation & Land Company. From a judgment in favor of petitioner, defendant brings error. Reversed.

Clark & Clark, of Cheyenne, for plaintiff in error. Kinkead & Mentzer, of Cheyenne, for defendant in error.

POTTER, J. The Lovella Ditch, Reservoir & Irrigation Company, a corporation organized under the laws of the state of Colorado, brought this proceeding in the district court in Laramie county by filing a petition with the clerk of that court to condemn certain land situated in this state owned by the Grover Irrigation & Land Company, a corporation also organized under the laws of Colorado, for the purpose of locating and maintaining thereon the headgate and part of the ditch of an irrigation system being constructed or about to be constructed by the plaintiff to divert water from Crow creek and thereby reclaim 10,000 acres of land situated in Weld county in the state of Colorado. It is alleg-

ed, and the fact is not disputed, that Crow creek is a natural stream flowing through the land of defendant and into and through the northern part of Colorado. That stream has its source in this state, and the land of defendant is located on or near the southern boundary line of the state in township 12, range 62. The location of the proposed headgate and point of diversion for the ditch in question is upon the east bank of the stream in this state about 700 feet from the boundary line between this state and the state of Colorado. An amended petition was filed as a substitute for and taking the place of the original petition. The defendant filed a demurrer to the amended petition stating the following grounds: (1) That said petition does not state facts sufficient to constitute a cause of action. (2) That it is insufficient in law, on its face, to authorize the appropriation of the land of the defendant as prayed for. (3) That it shows that the plaintiff is not entitled to appropriate the land of the defendant as prayed. The demurrer was overruled, and to that ruling the defendant excepted. Thereafter the defendant filed an answer putting in issue the necessity for taking the land described or locating the headgate in this state, and also the right of the plaintiff to locate the headgate, or construct the same or the ditch, or divert and appropriate the water of said stream in this state as proposed. A reply was filed denying some of the allegations of the answer which relate to matters not necessary to be considered.

Before the matter was submitted to the district court for final determination, an application made by the plaintiff for an order authorizing it to take immediate possession of the land upon executing a good and sufficient bond with sureties to be approved as provided by law was heard and granted, to which the defendant objected and excepted. It appears that upon the hearing of that application evidence was introduced by both parties, and the cause was finally submitted upon that evidence and the pleadings and record. The court found specifically, among other things, that the plaintiff has a right to divert the water of the stream aforesaid within this state for the purpose of irrigating about 10,000 acres of land situated in the northern part of the state of Colorado; and that in the construction of plaintiff's said irrigation system and its headgate it is necessary for it to have, own, and control the said land of the defendant, the same being described by metes and bounds. And it was thereupon ordered, adjudged, and decreed that the plaintiff "be and is hereby authorized to permanently appropriate" the said land "for the purpose of constructing its said irrigation system," and commissioners were appointed to determine the compensation to be paid for the taking or injuriously affecting such lands. The facts found, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

conclusions, and the order, including the appointment of commissioners, are all embraced in the same entry, and at the end thereof appears the following: "To all of which the defendant, the Grover Irrigation & Land Company, at the time duly excepted and excepts." The commissioners so appointed subsequently filed their report showing that they had met, qualified, and organized as required by law, and certifying the amount of land necessary to be taken and the damages accruing to the owner thereof. It was stated in said report that the commissioners had appointed a time and place for hearing, notified the parties thereof, and met at the time so appointed; that the said defendant did not appear; and that after viewing the premises and hearing the proofs offered by the plaintiff, the damages to be paid to the defendant had been assessed in the sum of \$84. The defendant, as permitted by statute, filed a written exception to the report of the commissioners, thereby excepting to said report on the ground "that the plaintiff herein has shown no right to appropriate for the uses and purposes set forth in the amended petition herein any of the land owned by this defendant as prayed in said petition." Upon the exceptions so filed the report was reviewed by the court, no demand being made by either party for a jury trial, and the same was confirmed, and it was ordered that the title to the land in question be confirmed in the plaintiff, it being recited in the order that the amount of the compensation assessed by the commissioners had been paid to the clerk of the court for the use and benefit of the defendant. To all of that order also, as recited therein, the defendant duly excepted.

A petition in error has been filed in this court by said defendant for the review of the proceedings, assigning as error the overruling of the demurrer to the amended and substituted petition, the overruling of the exceptions to the report of the commissioners, and the making and entering of the several orders and judgment above referred to, complaining of the judgment and each of said orders on the ground that the same is contrary to law. A motion to dismiss was filed by counsel for defendant in error, and the cause was argued and submitted upon such motion and also upon the merits without a waiver of the motion.

[1] 1. The motion to dismiss is based upon these facts: That there is no bill of exceptions in the record; that after the demurrer was overruled the defendant filed an answer and permitted a hearing upon the merits, and has brought this proceeding for a review of the final judgment. It is contended in support of the motion that without a bill of exceptions the exception to the ruling upon the demurrer is not properly preserved, and cannot therefore be considered; and, further, that by filing the answer and permitting a trial upon the merits the demurrer

was waived and also the error, if any, in overruling it. And it seems to be assumed in so contending that by waiving the demurrer the objections therein stated would also be waived. In view of the character of the objections urged against the amended petition as ground for reversal, it may not be very important in this case whether the plaintiff in error is in a position permitting it to assign as error the order overruling the demurrer. But it is not improper to consider and decide that question, and, since counsel for defendant in error have earnestly contended for a rule as to the necessity of a bill of exceptions to present for review on error a ruling upon a demurrer to a pleading in conflict with the previous decisions and the uniform and hitherto unquestioned practice in this court, we think it advisable, particularly as to that question, that the law upon the subject as we understand it should be again stated, and the reasons therefor more fully explained, especially with reference to certain statutory provisions relating to exceptions relied on by counsel in support of the motion. Properly construed and understood there should be no confusion in applying those provisions.

Originally, at common law only the errors apparent on the face of the record proper were reviewable on a writ of error; that record consisting of the pleadings, process, verdict, and judgment. To remedy that condition of the law a statute was enacted permitting a bill of exceptions. A bill under that statute was described as founded on some objection in point of law to the opinion and direction of the court, upon a trial at bar, or of the judge at nisi prius, either as to the competency of witnesses, the admissibility of evidence, or the legal effect of it, or for overruling a challenge, or refusing a demurrer to evidence, or some matter of law arising upon facts not denied, in which either party is overruled by the court. 2 Tidd's Pr. 862; *Wheeler v. Winn*, 53 Pa. 122, 91 Am. Dec. 186. It was always held that the statute contemplated a bill for the purpose and as the only means of bringing upon the record objections or points of law ruled upon by the inferior court, and that it did not affect or apply to any matter that would be shown by the record proper, since the only reason for allowing or providing for a bill of exceptions was that the ruling excepted to could not otherwise appear upon the record. Referring to the English statute, Judge Tilghman, in *Downing v. Baldwin*, 1 Serg. & R. 300, said: "The statute does not say that a writ of error shall lie on the bill of exceptions. But, inasmuch as a writ of error lies at common law, and the effect of it is to bring the record before the superior court, the judges, finding the bill of exceptions upon the record, are bound to take notice of it." In *Wheeler v. Winn*, supra, after quoting and referring to the remarks of Judge Tilghman, and speaking of a state statute

which required, when requested by counsel, that the opinion of the court with the reasons therefor be reduced to writing and filed "of record in the cause," the court said: "The judges, on return of a writ of error, finding upon the record palpable errors in a charge written and filed under the statute, are equally bound to take notice of them as if they were contained in a bill of exceptions." Since the appellate court must necessarily take notice of the record, and certain papers and proceedings in a cause either by the common law or statute constitute the record without a bill of exceptions, including by statute in this state the pleadings, as well as the judgment and orders proper to be entered upon the journal of the court, and the sole purpose of a bill of exceptions is to bring upon the record and before the court facts and proceedings which otherwise would not appear of record, a bill is unnecessary where all the facts and proceedings upon which error is alleged are shown by the record proper, and that is the firmly established rule. 3 Ency. Pl. & Pr. 404-406; 2 Cyc. 1076; 4 Standard Proc. 293, 298. In line with the general ruling upon the subject, this court has held that it is unnecessary and improper to incorporate the pleadings and journal entries in a bill, although when that is done it will not invalidate the bill or prevent that properly within it from becoming part of the record. *Sawin v. Pease*, 6 Wyo. 91, 42 Pac. 750. See, also, 3 Ency. Pl. & Pr. 404-406.

With these principles in mind there cannot be much difficulty, we think, in construing the statutory provisions on the subject, notwithstanding that they may seem to contain some confusing expressions. The provisions are found in sections 4597 and 4598, Compiled Statutes 1910; the latter prescribing when it is, and the former when it is not, necessary to reduce exceptions to writing and have them allowed and signed by the court or judge. We quote all of section 4597 and the material part of section 4598:

"Sec. 4597. When the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of the entry that he excepts.

"Sec. 4598. When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, * * * the party excepting must reduce his exception to writing and present it to the court, or to the judge * * * within the time given for allowance."

Following the generally accepted rule above stated, it has been the practice in this court from the beginning, when considering an error alleged in the sustaining or overruling of a demurrer to a pleading, to do so upon the record proper, without requiring the ruling and exception to be shown by

a bill of exceptions. A few cases only will be cited. In some, perhaps a majority, of those cited, the fact that the hearing was had upon the record without a bill is not stated, but it appears inferentially at least in most of them, and in none does it appear that the exception was preserved by bill, or that a bill was deemed necessary for that purpose. *U. P. R. R. Co. v. Byrne*, 2 Wyo. 109; *Commissioners v. Johnson*, 2 Wyo. 259; *Perkins v. McDowell*, 3 Wyo. 328, 23 Pac. 71; *Wheaton v. Rampacker*, 3 Wyo. 441, 26 Pac. 912; *France v. Connor*, 3 Wyo. 445, 27 Pac. 569; *Cone v. Iverson*, 4 Wyo. 203, 212, 33 Pac. 31, 35 Pac. 933; *State v. Commissioners*, 4 Wyo. 313, 33 Pac. 992, 35 Pac. 929; *Commissioners v. Atkinson*, 4 Wyo. 334, 340, 33 Pac. 995; *Dobson v. Owens*, 5 Wyo. 85, 37 Pac. 471. It was held in *Railroad Co. v. Byrne*, supra, and in *Dobson v. Owens*, supra, that a bill was not necessary to present the exception. In the first of these cases Judge Peck said: "This is an action of assumpsit for merchandise sold and delivered by Byrne to the company. The latter duly excepted, and duly presents to us, under section 302 of the Civil Code, an exception to an order of the district court, overruling its demurrer to the petition; but the exception has no merit." The section referred to, found on page 71 of the Compiled Laws 1876, is now section 4597 above quoted. The opinion clearly discloses that the demurrer and exception thereto were not shown by bill of exceptions. That it was intended by the learned judge to construe the section in accordance with the general rules above stated as to the purpose and necessity of a bill fairly appears from his dissenting opinion in *Johns v. Adams Bros.*, 2 Wyo., at page 203. He there said: "The record, defined by section 397 (the section stating from what the record shall be made up, now section 4630, Comp. Stat.), embraces exceptions that are preserved under sections 302 and 303 (now sections 4597 and 4598, Comp. Stat.). These two sections intended only to put the record of the district court, in respect to exception, into condition for review here, but are wholly distinct from, and independent of each other, each applying to a class of cases essentially different from that to which the other applies; and, when either has been complied with, and the other appellate provisions have been observed, the exception secures to the party the right to a review here of whatever the exception presents. The first (302) provides for only exceptions which relate to matters originating in (have their basis in) the record, and are perfected by being in the first instance entered there; the second (303) for only exceptions which relate to matters not originating in (have their basis not of) the record, and are perfected upon, and become a part of it only through, a bill of exceptions." In *Dobson v. Owens*, Chief Jus-

tice Groesbeck delivering the opinion, it was held that although the bill of exceptions was defective, and therefore could not be considered, the ruling upon the demurrer to the answer which was excepted to was open to consideration, since the transcript of the record outside the bill showed such ruling and exception, and the ruling was assigned as error; the court saying: "This is sufficient to confer jurisdiction upon this court, without regard to the matters presented in the bill of exceptions." And a motion to dismiss on the ground that the bill of exceptions was defective was denied. In *Perkins v. McDowell*, it appears that an order overruling a demurrer to the petition was reviewed upon the record proper; Chief Justice Van Devanter delivering the opinion.

Counsel for defendant in error cite the case of *Johnston v. Irrigating Co.*, 4 Wyo. 164, 33 Pac. 22, as authority for the proposition that a bill is required to preserve and present an exception to the ruling upon a demurrer. But the point was not involved in that case. It was a proceeding conducted under a statute for an adjudication of priorities of water rights, and came to the district court on appeal from the State Board of Control. Motions to dismiss the appeal were sustained on the ground of the insufficiency of the notice of appeal, and a motion for leave to file an amended notice was overruled. The cause came to this court on error without any bill of exceptions, and it was held that no question was presented for review, in the absence of a bill showing the exceptions to the ruling on the motions and the facts explaining the same; and a reference to the argument of counsel published in the report of the case shows that the point made in that respect was that the motions aforesaid were not part of the record without a bill. That we think was the point decided with reference to the necessity of a bill. The case does not hold that a matter otherwise of record must also be presented by a bill of exceptions. Other cases decided by this court might be cited which hold that a bill is not required, as to matters fully shown by the record proper, but those above cited are sufficient to show that the question has for many years been definitely and conclusively settled by this court, and we think without doubt that it has been correctly settled.

It is provided in section 4598 that when the bill has been allowed and signed it shall be filed *with the pleadings as a part of the record*, thus recognizing the purpose of the bill to bring something into the record, and that the pleadings constitute a part of the record. A demurrer is a pleading under the Code. Comp. Stat. 1910, § 4378. If there is any expression in either section at all confusing, it is that which refers to the grounds of objection appearing or not appearing in the entry. But when the object of a bill is

considered, it is clear that, in connection with the demurrer already a part of the record, the grounds of objection sufficiently appear in an entry showing a ruling upon the demurrer, either sustaining or overruling it. The purpose, and the only purpose, of the provisions of the two sections, is to have a record showing and explaining the exception. The cases from Ohio, from which state our Code was taken, so far as they touch upon the matter, show that the rule there observed is that a bill is required only in respect of matters not shown by the record proper. *Goyert v. Elcher*, 70 Ohio St. 30, 34, 70 N. E. 508; *Howell v. Fry*, 19 Ohio St. 556; *Harner v. Batdorf*, 35 Ohio St. 113; *Lockhart v. Brown*, 31 Ohio St. 431. And in *Commercial Bank v. Buckingham*, 12 Ohio St. 402, referring to the provisions covering the matter of exceptions, it is said that these provisions are found in the title which treats of and regulates the trial of causes, "and they manifestly relate to decisions which are made by the court, upon questions of law which arise during the progress of the trial." And it was held that they did not relate to the final judgment; the court saying further: "If the record shows such final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated, or modified, on petition in error, to the proper reviewing court. To note an exception to a final judgment, in the court which renders it, after the controversy is there ended, would seem to be utterly futile." That decision was cited and followed by this court in *Nichols v. Com'rs*, 13 Wyo. 1, 76 Pac. 681, 3 Ann. Cas. 543, as to the necessity for noting an exception to the final judgment.

In Indiana the Code provisions respecting this matter are expressed in the same language as that found in our statute, and they have been construed by the Supreme Court of that state as to their effect upon an exception to a ruling upon a demurrer. Referring to the provision that where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the party may cause it to be noted at the end of the entry that he excepts, and that such entry shall be sufficient, it is said in *Matlock v. Todd*, 19 Ind. 130: "Now pleadings must be entered of record. The complaint, answers, demurrers, etc., must be filed by the clerk, and they constitute a part of the record proper. The journal entry, by the clerk, of their filing, is, also, necessarily a part of the record. And where a demurrer is filed to a pleading, the demurrer, as we have said, is a natural part of the record; the entry, by the clerk, of its filing, is so also; and so is the action of the court in sustaining or overruling it. And as the demurrer must assign causes, the ground of the decision of the court upon it appears necessarily, as a general rule, in such cases, in the entry of the

decision by the clerk, considered in connection with the demurrer. Hence, a bill of exceptions, in such cases, is not necessary. It is only necessary that the party cause it to be noted that he excepts." The same principle is announced and applied in *Lucas v. Waynetown*, 86 Ind. 180; *Redinbo v. Fretz*, 99 Ind. 458, and *Lindley v. Kelley*, 42 Ind. 294. In the case last cited, after quoting the two sections like our own under consideration, the court say: "The above-quoted sections do not introduce any new practice, but simply re-enact the law as it has existed since bills of exception were introduced by statute in England." See, also, *Elliott's App. Proc.* §§ 783, 797; *Phillips on Code Pl.* § 528.

In Kansas, under a statutory provision like our own as to an exception where the grounds of objection appear in the entry, it was uniformly held that a bill of exceptions was necessary only to make a record of what would not otherwise appear in the record. In *Burns v. Burgett*, 19 Kan. 162, it was said that a bill should be confined to its legitimate purpose of only stating matters which would otherwise not be incorporated in the record. And in that state it was also held that neither a bill of exceptions nor an exception is necessary to present for review an error apparent upon the record. *Est. of Shaffer v. McKanna*, 24 Kan. 22; *Woolley v. Van Volkenburgh*, 16 Kan. 20; *McKinstry v. Carter*, 48 Kan. 428, 29 Pac. 597; *Nute v. Am. Glucose Co.*, 55 Kan. 225, 40 Pac. 279; *Burdick on New Tr. & App.* §§ 191-193. A bill of exceptions, if prepared to show an exception to a ruling upon a demurrer to a petition, would necessarily and only recite the filing of the petition and demurrer, setting them out in full, the ruling upon the demurrer, and the exception. All that appears by the record proper. None of that requires the additional authentication of the certificate and signature of the judge. To require a bill in such case would be worse than useless. The record entry of the decision and exception necessarily shows that the demurrer was sustained or overruled. The exception, if one is noted, is to that decision; the demurrer constitutes the objection. And where the entry states that the ruling was upon the demurrer, a paper which is of record in the cause, the grounds of the objection sufficiently appear in the entry, and with the same force and effect as a record as though the cause or the several causes assigned for the demurrer were copied at length in the journal entry recording the decision. But in the case at bar the entry is not confined to a statement of the decision, as it might have been, but preceding the order overruling the demurrer it recites that the court finds that the petition states a cause of action, clearly indicating thereby the ground of the objection urged against the petition. In accordance with the previous decisions of this court, therefore, we hold that the exception to the

ruling upon the demurrer sufficiently appears upon the record, if under the circumstances of the case that ruling may properly be considered in reviewing the final judgment.

[2] 2. A waiver of the demurrer would not be ground for dismissal without also a waiver of the defects suggested by the demurrer. The grounds of objection stated in the demurrer and here urged do not relate to the form of the statement of the cause of action, but the effect thereof is to charge a total failure to state the substance of a good cause of action, and that the petition is therefore insufficient to support the judgment. Such a defect is never waived either by failure to demur or by answering over after demurrer filed and overruled, unless the defect be aided or cured by the answer or the subsequent proceedings.

At common law, after the enactment of the statutes of amendments and joinders, a general demurrer was limited to defects in substance, and by pleading over, without demurring specially, defects of form were waived or cured. Defects of substance, which might be taken advantage of by general demurrer, such as want of jurisdiction of the subject-matter, or the failure to allege sufficient facts, the defect not being merely in the form of the statement, were not waived or cured by pleading over without demurring. On the contrary, such defects could be taken advantage of at any subsequent stage of the proceedings, as by objecting to the introduction of evidence, by motion in arrest of judgment, by motion for judgment non obstante veredicto, or by writ of error. There were certain exceptions to this rule. A defect in a pleading even as to matter of substance might be aided or cured by the pleading of the adverse party, as where the answer supplied a necessary fact omitted from the declaration. And the defect might be aided or cured by the verdict, that is to say, by intendment after verdict; the doctrine in that respect being that where a defect in a pleading would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict; but the thing presumed to have been proved must be such as can be implied from the allegations, by fair and reasonable intendment. 1 Chitty's Pl. (16th Am. Ed.) 705. The main rule on the subject is, as said by Chitty, that a verdict will aid a defective statement of title, but will never assist a statement of a defective title, or cause of action. Id. 713. The courts will never, in order to support a verdict, make an intendment which is inconsistent with the allegations on the record. Id. 712; *Stephen's Pl.* (3d Am.

Ed.) 164; Andrews' Stephen's Pl. (2d Ed.) § 142.

[3] The reason for the rule that a defect in substance is not waived except under the conditions stated is that a pleading of fact, such as an answer, does not admit the sufficiency in law of the facts adversely alleged in a prior pleading. If a pleading does not state a cause of action or a defense, there is none to be maintained by the proof. It follows, therefore, as said in Phillips on Code Pleading: "That where a pleading is insufficient in substance, the opposite party may, without demurring, generally avail himself of such insufficiency. He may do this in various ways, such as by objecting to the introduction of evidence at the trial, by motion in arrest of judgment, by motion for judgment non obstante verdicto, or by writ of error." Section 304. Some defects of form which at common law are grounds from special demurrer are objected to under the code practice only by motion. The various grounds of demurrer stated in the Code include want of jurisdiction of the subject of the action, and that the petition does not state facts sufficient to constitute a cause of action. Comp. Stat. § 4381. And the demurrer is required to specify the grounds of objection, although it is declared that, if the grounds are not specified, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action, or that the court has no jurisdiction of the subject-matter. Id. § 4382. Since these two defects are those reached by general demurrer at common law, a demurrer specifying those grounds is usually referred to as a "general demurrer," though that term is not employed in the Code. It is further provided in the Code as to these two substantial defects as follows: "When any of the defects enumerated in section 4381 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." Section 4383. And by section 4624 it is provided: "When, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party." This provision, it is said by the Supreme Court of Ohio, carries into the Code the substance of what was theretofore known as a motion non obstante verdicto and a motion in arrest of judgment. *McCoy v. Jones*, 61 Ohio St. 119, 55 N. E. 219.

[4] The Code, therefore, follows the rule at common law that a defect in substance is not waived by failure to demur, and that is the rule generally prevailing under code practice. In accordance with this is the

further rule prevailing in most jurisdictions that for such a defect, in substance the objection may be made for the first time on appeal; the rule excluding, of course, objections relating merely to the form or manner in which the cause of action is stated, and requiring that the pleading be construed liberally and supported by every legal intentment, and therefore upheld if the necessary facts are fairly to be inferred from the allegations. 2 Ency. Pl. & Pr. 541, 542, 365, 366, 373; 2 Cyc. 691; 2 Standard Proc. 250; Phillips on Code Pl. § 304; Elliott's App. Proc. 471; *Chicago v. Lonergan*, 196 Ill. 518, 63 N. E. 1018; *Kellogg v. School Dist.*, 13 Okl. 285, 74 Pac. 111; *Trimble v. Doty*, 16 Ohio St. 119; *Dalles L. Co. v. Urquhart*, 16 Or. 71, 19 Pac. 78; *Hartford Fire Ins. Co. v. Kahn*, 4 Wyo. 364, 34 Pac. 895; *Nichols v. Com'rs*, 13 Wyo. 1, 76 Pac. 681, 3 Ann. Cas. 543. In the last case cited, it was said by this court to be the established rule that a judgment obtained on a petition which fails to state a cause of action will be reversed, though no objection was made thereto in the lower court. *Dalles L. Co. v. Urquhart*, supra, was like this case in this, that the question was whether, on the pleadings, condemnation was authorized.

The principles above stated apply as well where a demurrer has been filed and overruled, for nothing can be clearer than that a party cannot by demurring lose the right which is his without demurring. As said in *Colorado*, "Having demurred (although no exception was taken to the ruling), appellant is not in any worse position than if no demurrer had been filed." *Board, etc., v. Leonard*, 26 Colo. 145, 57 Pac. 693. This is, indeed, clearly implied by the provisions of section 4383, supra, for it could not be intended that a defect not waived by failing to take the objection by demurrer or answer would be waived when the objection is so taken. If the demurrer remains on the record for consideration on appeal, together with the exception to the ruling thereon, then surely the objection is not waived by demurring, and if the demurrer is waived by pleading over after it is overruled, then it goes out of the record and cannot be considered for any purpose, for the theory upon which the courts adopting the rule hold that a demurrer, when overruled, is waived by pleading over, is that either expressly or impliedly the demurrer is withdrawn or abandoned by filing the subsequent pleading of fact, and when so withdrawn or abandoned the case stands as though no demurrer had been filed. Formerly, at common law, when a demurrer to the declaration was overruled, the facts were deemed to be established as alleged, and judgment was entered thereon, as is now done when a defendant stands on his demurrer, refusing to further plead. When the practice was adopted of allowing the defendant to plead after the demurrer was

overruled, he was required to withdraw his demurrer, and thereafter the case was treated the same as if there had been no demurrer. It passed out of the record and judgment thereon was avoided. By the modern practice, where the rule prevails that by pleading over after the overruling of a demurrer the latter is waived, it is not usual to require a formal withdrawal of the demurrer; but it is so treated and ceases to be considered as on the record, and the parties are left in that respect in the same situation as if the demurrer had not been filed. Phillips on Code Pl. § 307; Bliss on Code Pl. § 417; Nordhaus v. Railroad Co., 242 Ill. 166, 89 N. E. 974; Wales v. Lyon, 2 Mich. 276. Therefore, for clear and obvious reasons, whether the position be taken that the ruling on the demurrer is open to consideration when reviewing the final judgment, or that it is not, in either case the objection is not waived by filing a demurrer that has been overruled, where it would not be waived by failing to demur. This is recognized by all the authorities, as will be disclosed by reference to the cases decided in those states where the demurrer and the specific error, if any, in overruling it is held to be waived by pleading over, as well as where the contrary is the accepted rule. Wheelock v. Lee, 74 N. Y. 495; Sullenberger v. Gest, 14 Ohio, 205; City of Plankinton v. Gray, 63 Fed. 415, 11 C. C. A. 268; Marske v. Willard, 169 Ill. 276, 48 N. E. 290; Chicago v. Lonergan, supra; Catron v. La Fayette Co., 106 Mo. 659, 17 S. W. 577; Haase v. Distilling Co., 64 Mo. App. 131; Wilson v. Ry. Co., 67 Mo. App. 445; Goodrich v. Com'rs, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113; Sanford v. Weeks, 39 Kan. 649, 18 Pac. 823; Fordyce v. Merrill, 49 Ark. 277, 5 S. W. 329; White v. Stokes, 67 Ark. 184, 53 S. W. 1060; Cox v. Peoria Mfg. Co., 42 Neb. 660, 60 N. W. 933; Hopewell v. McGrew, 50 Neb. 789, 70 N. W. 397; Bank v. Pence, 59 Neb. 579, 81 N. W. 623.

It follows that it would be necessary to deny the motion to dismiss whether the ruling on the demurrer may properly be considered or not, for upon the record, without regard to the demurrer but treating it as never filed or withdrawn, the question is presented by the petition in error whether the petition upon which the judgment was rendered states facts sufficient to constitute a cause of action or to support the judgment. A consideration of the ruling on the demurrer as an alleged ground for reversal would not change the situation, or the rules to be applied in reviewing the judgment, for any error or defect in the pleadings or proceedings not affecting the substantial rights of the adverse party must be disregarded; and the defendant having answered and gone to trial upon the issues of fact, the plaintiff would be entitled at this stage of the case to the benefit of anything in the proceedings subsequent to the overruling of

the demurrer that may have aided the defect in the petition, if any, under the rules above adverted to. Davis v. Lumber Co., 14 Wyo. 517, 85 Pac. 980; Nott v. Johnson, 7 Ohio St. 270. In this case there is nothing in the intermediate proceedings that can aid the petition, if the objections are well taken.

[5] Aside from the mere technicality involved in the question, therefore, it is immaterial whether the assignment of error based upon the overruling of the demurrer be considered or the other assignments under which it is also claimed that the judgment is erroneous because unsupported by any facts alleged in the petition. And that, we think, might be a sufficient reason for disregarding the strict and technical rule at common law that the effect of answering over is to abandon or withdraw the demurrer, at least where there is no right of appeal directly from the order overruling the demurrer, but only from a final judgment rendered thereon or from the final judgment rendered in the cause. But the practice has been long established in this court of considering an exception to the order overruling a general demurrer, when reviewing a judgment rendered upon a trial involving issues of fact presented by subsequent pleadings. This is shown by many cases, some of them being cited in that part of this opinion discussing the matter of exceptions, and among others that might be cited are the early cases of Insurance Company v. Pierce, 1 Wyo. 45, and Ivinson v. Althorp, 1 Wyo. 71; and the later case of Davis v. Lumber Co., 14 Wyo. 517, 85 Pac. 980. We should hesitate in refusing to follow a practice so long established without the most urgent reasons for doing so. But we are convinced that it accords with the intent and spirit of the Code and is sustained by its provisions. As frequently decided by this court, an appellate proceeding cannot be taken from the order overruling the demurrer, but only from a final judgment rendered thereon when the party stands on his demurrer without pleading further, or from a final judgment rendered in the cause after a trial of the issues of fact where there has been further pleading presenting issues of fact.

[6] Where the order overruling a demurrer is treated as interlocutory merely, and not, therefore, an order authorizing the immediate taking of an appeal or proceeding in error, and the objection is either that the pleading, if a complaint or petition, fails to state facts sufficient to constitute a cause of action, or that there is a want of jurisdiction of the subject-matter, the general rule that error in overruling a demurrer is waived by pleading over does not apply. 6 Ency. Pl. & Pr. 365; 1 Bates, Pl. Pr. Par. & F. 423-424; Teal v. Walker, 11 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Trimble v. Doty, 16 Ohio St.

119; *Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *O'Donohue v. Hendrix*, 13 Neb. 255, 13 N. W. 215; *U. P. Ry. Co. v. Estes*, 37 Kan. 229, 15 Pac. 157; *Mo. Pac. Ry. Co. v. Webster*, 3 Kan. App. 106, 42 Pac. 845; *Cox v. Peoria Mfg. Co.*, 42 Neb. 660, 60 N. W. 933; *Schofield v. Terr.*, 9 N. M. 528, 56 Pac. 306; *Fletcher v. Dunbar*, 21 La. Ann. 150; *Hunter's App.*, 71 Conn. 189, 41 Atl. 557; *Zieverink v. Kemper*, 19 Wkly. Law Bul. (Ohio) 270. It is said in Kansas that the only effect of filing the answer and participating in the trial is that the question of error in the ruling on the demurrer cannot be taken to the reviewing court until the remainder of the case is so taken. *Railway Co. v. Webster*, supra. And it is held in that state that a defendant whose demurrer has been overruled may elect to stand on the demurrer and at once take the case to the appellate court; or an answer may be filed, and when the case is finally tried, if it is tried on the original petition, the case may then be taken to the appellate court by the party demurring, and the ruling on the demurrer will be passed on there. *Railway Co. v. Estes*, supra.

The rule is clearly stated by the Supreme Court of the United States in *Teal v. Walker*, supra, as follows: "The writ of error is not taken to reverse the judgment of the court upon the demurrer to the complaint, for that was not a final judgment, but to reverse the judgment rendered upon the verdict of the jury. The error, if it be an error, of overruling the demurrer, could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The question, therefore, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration."

The same rule is announced in the Connecticut case above cited, the court so holding on the ground that by statute the defendant had an absolute right to plead over after demurrer overruled, and therefore the right to take every objection open to him in one and the same suit, without being compelled to elect between matters of law and matters of fact in presenting the issues to be tried and determined. In *Zieverink v. Kemper*, supra, decided on error by the superior court of Cincinnati, where a demurrer on the ground that it appeared on the face of the petition that the action was barred by the statute of limitations was filed and overruled, and after the demurrer was overruled an answer was filed which did not plead the

statute, it was held that the error in overruling the demurrer was not waived, and the provision of the Code requiring that judgment be rendered in favor of the party entitled thereto upon the statements in the pleadings, notwithstanding a verdict against him, was referred to as sufficient to sustain the decision. It was further held that, having raised the question of the bar of the statute by demurrer, the facts appearing by the petition, it was not necessary to tender the same defense a second time by answer after it had been decided adversely to the defendant. The judgment was reversed for the error in overruling the demurrer.

[7] The reasons for requiring a demurrer to be withdrawn upon pleading over, or treating that as done, do not exist where an appeal or proceeding in error can only be taken from a final order or judgment in the case and a party is permitted to except to the overruling of his demurrer and then plead over. Where that practice is provided for, it is clearly intended that, after the issue of law is determined by the decision of the court adversely to the demurrant, he may then tender an issue of fact before the rendition of final judgment upon the issue of law, without waiving the error, if any, in the decision on that issue. Otherwise an election between the issue of law and a proposed issue of fact would be required without the right to present the issue of fact if electing to stand upon the demurrer, or to have the demurrer passed on by the reviewing court if electing to submit an issue of fact; that this was not intended is disclosed by the various provisions of the Code relating to the pleadings, the trial, and proceedings in error. One of the reasons assigned for a withdrawal of the demurrer upon pleading over is that a demurrer admitting the facts and an answer denying them are totally inconsistent with each other and cannot stand together. *Pickering v. Telegraph Co.*, 47 Mo. 457. But it is not true in fact that a demurrer admits the allegations of the pleading demurred to, for nothing is thereby affirmatively or expressly admitted. It merely denies the legal sufficiency of the facts alleged, and hence such facts are said to be admitted, and, impliedly, they are admitted, but solely for the purpose of testing their sufficiency in law. When the demurrer is overruled, the implied admission has served its purpose. *Brewing Ass'n v. Bond*, 66 Fed. 653, 13 C. C. A. 665; *Belden v. Blackman*, 124 Mich. 667, 83 N. W. 616; *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Bliss on Code Pl.*, § 418. It thereafter remains on the record as an overruled demurrer, at least when an exception is noted to the ruling, if it continues on the record at all, and when permitted to so remain it cannot be regarded as an admission, and therefore evidence of the facts necessary to be proved to establish the cause of action or defense up-

on the trial of the issues of fact arising upon subsequent pleadings. Since the Code allows a proceeding in error only from the final judgment, that judgment, when rendered after a trial of an issue of fact arising upon pleadings filed after the overruling of the demurrer, is to be regarded as rendered upon all the issues in the cause—the issue of law as well as the issue of fact—or, at least, as a final judgment authorizing an appellate proceeding to question the correctness of the decision on the issue of law as well as the issue of fact, for the Code contains nothing disclosing an intent to deprive a party of the right to challenge by a proceeding in error the correctness of the decision of the trial court upon both issues, or an issue of fact as well as an issue of law. *Mechanics' Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084. Of course, by pleading over and going to trial upon the merits the party takes the chances of the defect in the pleading being aided or cured, under the rules above explained. But as he cannot appeal from the mere ruling on the demurrer, and, believing that he has a good claim or defense upon the facts, may be unwilling to sacrifice the right to present an issue thereon by standing on his demurrer and allow judgment to be then rendered, the only proper and logical view, we think, is that through the remainder of the proceedings, when he has answered over, he retains the benefit of his exception to the ruling on the demurrer. Thus the same right is accorded him that would be his if allowed an appeal from that ruling, though the result may be somewhat affected by the rules for aiding or curing the alleged defect.

Unlike the statute in Connecticut, our Code does not expressly confer upon a party an absolute right to further plead after his demurrer has been overruled, but it does provide that he may do so if the court is satisfied that he has a meritorious claim or defense, and did not demur for delay. *Comp. Stat. 1910, § 4436*. And the prevailing practice here under that provision is to grant the leave almost as a matter of course upon a mere request. Although the matter is discretionary with the court, when the leave is given it is full and complete, and no reason is perceived for applying a rule different from that which would prevail under a statute giving an absolute right without requesting leave. The Code does not expressly, at least, require a withdrawal or abandonment of the demurrer or the exception to the ruling thereon on requesting leave to plead further, nor is such withdrawal or abandonment mentioned as a condition upon which the leave may be granted. Giving effect to the various provisions of the Code, no substantial reason is perceived for implying the withdrawal of a demurrer by pleading over after it is overruled and the ruling excepted to, or that the statute so requires. We think it proper, therefore, to follow the practice

hitherto established, which permits a consideration of the ruling on the demurrer when duly excepted to and assigned as error, upon a review of the final judgment. For the several reasons stated the motion to dismiss must be denied.

3. Whether the assignment of error based upon the overruling of the demurrer be considered or either of the other assignments, the same question is presented, viz., the sufficiency of the facts alleged to entitle the plaintiff below to appropriate the property of the defendant through the power of eminent domain. In addition to the facts previously stated, it is alleged: That the plaintiff has accepted the Constitution of this state and complied with the laws thereof with reference to foreign corporations doing business in this state, and is duly and legally authorized to transact business here. That the land to be irrigated and reclaimed situated in Weld county, Colo., was granted by the United States prior to the adoption and ratification of the Constitution of this state, and a large part of such land is now owned by the plaintiff. That in July, 1910, the plaintiff was granted the right and authority by the State Engineer of Colorado to divert and appropriate water from Crow creek for the purpose of irrigating said lands, and that it has the right to divert and appropriate the unappropriated water of said stream for that purpose. That it is impracticable and impossible to construct a headgate and divert the water of the stream within the state of Colorado to irrigate and reclaim said lands, "because of the lay of the land and the condition of the soil." And that there is a suitable location for the headgate for plaintiff's irrigation system on the land of defendant in this state, and about 700 feet from the southern boundary line thereof. Certain applications alleged to have been filed by the plaintiff in the office of the State Engineer of this state for a permit to divert and appropriate water from Crow creek in this state for the purpose aforesaid are set out in full, together with alleged indorsements thereon and correspondence relating thereto, whereby it is claimed and alleged that plaintiff acquired a right to so construct the headgate, and divert and appropriate water of said stream not theretofore appropriated. It appears to have been stated in one of said applications filed as an amendment, and it is alleged in the amended petition, that the proposed point of diversion is below any diversion from said stream previously authorized, or that could be made for any beneficial use within this state; that such proposed diversion will not interfere with or injuriously affect any prior appropriation within this state, nor in any way result to the detriment of the public interest or welfare; and that there is ample unappropriated water going to waste each year in said stream during flood time, which can be diverted through plaintiff's irrigation and

reservoir system to annually irrigate and successfully reclaim all the lands proposed to be irrigated and reclaimed by the means of that system.

If the purpose for which the headgate and ditch is proposed to be constructed is such as would authorize the condemnation of land in this state, the question of the necessity for locating the headgate and part of the ditch on the land in controversy and taking the land sought to be condemned is eliminated from the case by the manner in which the record comes to this court, and such necessity stands established by the judgment, in case a right to condemn for the proposed use is shown by the facts alleged. We understand it to be admitted that the amended petition states all the facts that could be stated or shown to justify condemning the land, and that they were fully and particularly stated in order that the legal issue might be fairly and clearly presented by demurrer.

Two points are urged against the right to condemn: First, that land in this state cannot be taken by condemnation where the only proposed use, as in this case, is the irrigation of lands in another state. Second, that to condemn land required for an irrigating ditch or irrigation purposes it is necessary to show a right or permit to divert and appropriate water therefor, and that the amended petition fails to show that such a right or permit was acquired by the plaintiff in this state. It is argued in support of the second proposition that it is beyond the authority of the State Engineer to grant a permit or authorize the diversion and appropriation of water in this state for the irrigation of land outside the boundaries of the state, and, further, that had he such authority the facts alleged do not show that a permit was granted or that the proposed diversion and appropriation by the plaintiff was authorized.

[8] It will not be necessary to consider the second proposition or either of its divisions suggested by the argument, for in the view we take of the case the fact that all the water to be diverted by means of the headgate and ditch is to be used exclusively for the irrigation of land in another state is sufficient to cause a reversal of the judgment. "Eminent domain" is generally defined as the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. "It embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen." 1 Lewis on Em. Domain (3d Ed.), § 1. In this respect the several states are distinct and independent of each other, respectively possessing and exercising the power for their

own purposes or their own public welfare. "The eminent domain in any sovereignty exists only for its own purposes." *Trombley v. Humphrey*, 23 Mich. 471, 476 (9 Am. Rep. 94). "It means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community." *Bloodgood v. Railroad Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313. "The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right." *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449.

[9] If the particular improvement or use will be of sufficient benefit to the people of the state to authorize an exercise of the power, it will not be prevented by the fact that the people of another state will also be benefited. *Gilmer v. Lime Point*, 18 Cal. 229; *Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682; *Columbus Waterworks Co. v. Long*, 121 Ala. 245, 25 South. 702. It was said in the California case that it is not essential that the use or benefit should be exclusively for the people of the state, or exclusively for even a portion of those people; "that the people of California have no right to complain that the people of Oregon are also benefited by a public improvement;" and that such improvement would be none the less a public use in California because it was also useful elsewhere. And in the Idaho case it was said: "But where the use for which condemnation is sought is a public use in this state, and will serve the citizens of this state—their demands, necessities, and industries—the fact that it may incidentally also benefit the citizens and industries of a neighboring state will not defeat the right of condemnation."

There is some conflict in the authorities as to the right of a state to exercise its power for the benefit of the United States government. That right was denied in Michigan. *Trombley v. Humphrey*, supra. It was upheld in California. *Gilmer v. Lime Point*, supra. But it was conceded in the Michigan case, and is now well settled, that for its own purposes the general government possesses the power of eminent domain and may acquire land by condemnation in any state; such right being sustained upon the ground that property required for the purposes of the national government, being for the use of the people of all the states, is as well for the use of the people of that state where it is located. 1 Lewis on Em. Dom. (3d Ed.) § 309; *Cooley's Const. Lim.* 526; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550. The Maryland case involved the taking of land in that state for an aqueduct to supply water to the city of Washington; the same

having been authorized not only by an act of Congress, but also by an act of the Legislature of Maryland. It was contended that the use was not a public use in Maryland, and an elaborate argument was made upon that proposition. The court held to the contrary, giving as one of its reasons that Maryland was one of the states of the Union, and, as such, "in some sense, an integral part of the great public, interested in and constituting a part of the general government," and could therefore lawfully enact the statute authorizing the condemnation proceedings. And it was said that the words "public use," in the provision of the Constitution of the state requiring just compensation to be made for property taken therefor, "do not mean merely a use of the government of Maryland, or of the state of Maryland, and its inhabitants as such, but, in our opinion, they embrace within their scope a use of the government of the United States." It was also said in the case that by its cession of the district in which the city of Washington was situated Maryland had not intended to abandon all interest in that district, and therefore the relation between the district and the state was more intimate and close than that which it bears to any other state.

It will be noticed that in the cases cited it was deemed necessary to sustain the exercise of the power that the particular use have some substantial relation to a public purpose and the public interest and welfare of the state wherein the land to be taken is located. And this thought runs through all the cases discussing the question of public use, or a use permitting or justifying the taking of private property by eminent domain. That is true in the case of *In re Townsend*, 39 N. Y. 171, upon which counsel for defendant in error, plaintiff below, strongly rely in support of the judgment. That case demands more than a passing notice, for upon the facts it seems to us to be the only one that might be supposed to lend some support to the theory upon which the right of condemnation is claimed in the case at bar. It does not, we think, support the right claimed in this case, for the statute authorizing the taking was upheld on the ground that the improvement, a canal in New Jersey, served the state of New York and contributed to the welfare of its people in precisely the same way that it benefited the people of New Jersey, or as though it had been built within the limits of New York. The canal company was incorporated in New Jersey to construct a canal to unite the Delaware river, near Easton, in the state of Pennsylvania, with the tidewaters of the Passaic, in New Jersey, and was subsequently authorized to continue the canal to the waters of the Hudson, at or near Jersey City. It was declared in the act incorporating the company that when completed the "canal shall forever thereafter be esteemed

a public highway, free for the transportation of any goods, commodities or produce whatsoever on payment of tolls." It was a canal for transportation purposes. At the outlet of a lake situated partly in New York but mostly in New Jersey, a dam was built by the company to form a reservoir as a feeder for the canal, and thereby some of the land of the appellant in the case situated on the margin of the lake in New York was flooded. By an act of the Legislature of New York the company was authorized to acquire title to any land injuriously affected by the dam or reservoir by the appointment of commissioners to appraise the compensation. The principal question in the case was whether the taking was for a public use, in view of the fact that the canal itself was not located within the limits of the state of New York.

A few quotations from the opinion, and also from the opinion of one justice who dissented from the conclusion only upon other questions in the case, will serve to show clearly that the New York statute was sustained on the ground that the benefits accruing to the people of New York were of the same character as though the canal had been constructed within the limits of that state. In the opinion of the court it was said: "It does not follow, because the canal is outside the state limits, that its construction and maintenance are not for a public use, within the meaning of our Constitution. If it were within our limits, what are the public benefits to result from its construction? Not merely that our citizens may use it for transportation and travel. Providing transportation to market and facilitating intercommunication are some of the public purposes of such improvements; but communication between our chief cities and the productive regions which lie outside our state, and intercourse with those who dwell there, are as truly objects of public interest and advantage as between two sections of the state itself. Besides, the court cannot say that the Morris Canal does not run within the reach of a portion of our own citizens, and directly aid them in the conduct of their intercourse with our eastern border, or the counties along the Hudson river to which it runs."

In the dissenting opinion the fact is referred to that the canal terminates directly opposite the city of New York, "where concentrates, not only the internal trade and business of all the states of the Union, but, to a considerable extent, the trade and commerce of the whole world. * * * Every avenue opened for the accommodation of those who have occasion to contribute to its augmenting inland trade, or facilitate the transportation of the vast amount of merchandise which is disposed of within its limits, or the entrance or departure of those who may have occasion to visit or to leave it, is of paramount importance. * * * Suppose

the depot of the Morris Canal Company had been located immediately across and adjoining the boundary line of the state of New Jersey, and within the limits of New York, could there be any doubt that the land taken for such a purpose would be for the public use? Most certainly there would not. It does not, then, alter the case, because the Hudson river separates the terminus of the canal company from immediate connection with the state of New York. It accommodates the citizens of New York precisely as much, and the public are equally benefited, and, as such, interested, as if the depot was located on the opposite side of the river, and it is quite as much for the public use." Reference is made in both opinions to the railroads of other states which are authorized to construct a part of the line in New York. And the right of condemnation appears, we think, to have been sustained on the same ground and for the same reason that the right of a railroad company is sustained whose road is mainly in another state, to condemn land in the state for a part of the line or terminal station inside the state limits. Throughout both opinions the principle is recognized that the term "public use" in connection with eminent domain has reference to the state or government within whose territorial limits is situated the land proposed to be taken, and by whose authority the same must be taken, if at all. And that principle is, we think, to be deduced from all the authorities, although distinctly stated in but few, for, as above suggested, in every case where the use as a justification for the proceeding has been questioned, the inquiry in that respect has been confined to the interest and welfare of the state or sovereignty within whose limits or jurisdiction the land sought to be condemned is located. This does not mean the interest or welfare dependent upon or affected by development and growth in another state. In the case cited and quoted from, the benefit to the people of New York held sufficient to support condemnation was not the interest or advantage to be derived from the upbuilding of the industries or development of the resources of the neighboring state of New Jersey, but the benefit to arise directly from service rendered in the operation of the canal. The canal itself would serve the people of New York, and was therefore held to be a public use in and of that state.

In *Lewis on Eminent Domain*, it is said: "The public use for which property may be taken is a public use within the state from which the power is derived." Section 310. The Supreme Court of Alabama say: "It seems to be an admitted fact generally that the power inheres in a state for domestic uses only, to be exercised for the benefit of its own people, and cannot be extended merely to promote the public uses of a foreign state." But it was held that the right is

not to be denied where public uses are subserved in the state granting condemnation, because in connection therewith public uses in another state may likewise be promoted. And the principle was applied in favor of a corporation engaged in supplying water to two cities in Alabama and to one city in Georgia; the court saying: "While a state will take care to use this power for the benefit of its own people, it will not refuse to exercise it for such purpose because the inhabitants of a neighboring state may incidentally partake of the fruits of its exercise." *Columbus W. W. Co. v. Long*, 121 Ala. 245, 25 South. 702.

In the Idaho case of *Washington Water Power Co. v. Waters*, 19 Idaho, 595, 608, 115 Pac. 682, 686, above cited, the same doctrine was stated, and while the fact that another state might be incidentally benefited was not deemed sufficient to deny condemnation for an improvement which would be a public use in Idaho, it was said: "Condemnation could evidently not be had in this state for the purpose alone of serving a public use in another state." See, also, *Walbridge v. Robinson*, 22 Idaho, 236, 125 Pac. 812. The same principle is suggested in the recent case of *Thayer v. California Development Co.* (Cal.) 128 Pac. 21, where it was said as to a water or irrigation company diverting water in California, conducting it into Mexico and back again into California: "The fact that that company is carrying on a public service in Mexico and has devoted some water to public use there does not affect the water carried into the United States nor the character of the use thereof in California." And, though it was not a condemnation case, but one involving the question whether the company had appropriated and was engaged in conducting water in its canal or canals for public use, it was said that the company in California did not possess the power of eminent domain.

It is said in *Nichols on the Power of Eminent Domain*: "It has been intimated that one state cannot condemn property within its limits for the use of another state (citing *Kohl v. U. S.*, supra), and a taking for such a purpose has never received the sanction of the courts." Section 22. In the same section, *Townsend's Case*, supra, is referred to as furnishing no exception to the proposition; the author saying that the statute considered in that case was sustained on the ground that the canal was of great benefit to New York as well as New Jersey, and "if this feature had been lacking the decision would probably have been otherwise, as there would have been no use, public to New York, to be subserved." It is also well settled that a state cannot take or authorize the taking of property or rights in property situated in another state. *Nichols on Em. Dom.* § 19; 1 *Lewis on Em. Dom.* (3d Ed.) § 385; 10 *Ency. L.* (2d Ed.) 1051; *Crosby v. Hanover*,

36 N. H. 404; U. S. v. Ames, 1 Woodb. & M. 76, Fed. Cas. No. 14,441; Ill. State Trust Co. v. St. Louis T. M. & S. Ry. Co., 208 Ill. 419, 70 N. E. 357. "One state cannot expropriate for its public purposes property within the territory of another state." *McCarter v. Hudson W. Co.*, 70 N. J. Eq. 695, 717, 65 Atl. 489, 498, 14 L. R. A. (N. S.) 197, 207, 118 Am. St. Rep. 754, 774, 10 Ann. Cas. 116, 125. "The question has arisen whether, by virtue of the right of eminent domain, one state can take, or subject to public use, land in another state, and the decisions have naturally been against such a power." *Holyoke W. P. Co. v. Conn. R. Co.*, 52 Conn. 570, 575; s. c. (C. C.) 20 Fed. 71, 79.

[10] The principles above stated seem to have been recognized by the trial court in this case, if we may refer to a quotation from the opinion of the learned judge found in the brief of counsel for defendant in error, for the ground of the decision seems to have been that the proposed irrigation of the lands, which lie just over the line of this state in the state of Colorado, will be of material benefit to a considerable part of the inhabitants of a section of this state, since it may lead to the growth of towns and the creation of new channels for the employment of capital and labor. And counsel argue that such a benefit is sufficient. In the part of the opinion of the trial court found quoted in the brief it was said that: "The court will take judicial notice of the fact that the city of Cheyenne and several incorporated towns of Wyoming are located so near the lands, which it is proposed to irrigate, that such lands may be considered tributary thereto, and that the development and settlement of these lands would be of considerable benefit to the citizens of this state residing in said city and towns. It may be that in the future a town may be located within the state of Wyoming, and within but a few hundred feet of these lands, and even should such town, or the immediate trading point for the future settlers upon these lands, be located within the state of Colorado, the central trading point for wholesale purposes, and for the larger wants of the settlers of these lands, would be the city of Cheyenne. Therefore it cannot be said that the ultimate purpose of the exercise of eminent domain in this case would not result in benefit to the people of this state. Unquestionably, the developing and settling of several miles of the northern portion of Colorado, immediately adjacent to Wyoming, would be of great benefit to the citizens living just over the line in Wyoming." This line of argument is not without some force; but we think it disregards or misconceives the theory of public interest supporting the exercise of eminent domain for irrigation works or the irrigation of land, and would, in effect, if sustained, permit the exercise of eminent domain in this state by the state of Colorado, or any

other state, for its own uses and purposes.

We are not required in this case to discriminate between a public use and a private use with reference to the taking of property under the power of eminent domain, for, whether our Constitution is to be understood as authorizing such taking for a use distinctively private, as distinguished from a public use, when the purpose thereof is irrigation, or as declaring that any taking for irrigation purposes is for a public use, it clearly authorizes a taking for such purpose. It is provided in the Constitution as follows: "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessary, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation." Article 1, § 32. "Private property shall not be taken or damaged for public or private use without just compensation." Article 1, § 33. It was said in *Washington*, referring to a provision like that contained in section 32: "Here is an inference so strong as to amount almost to an affirmative declaration that private property may be taken for private use when the use is confined to the purposes enumerated in the provision, one of which is ditches on or across the land of others for agricultural purposes; and it is no strained construction of the provision to say that this includes ditches for irrigation purposes, in view of the vast extent of arid land within our state and the benefits of irrigation thereto in the increase of its productiveness and value. The very thought of agriculture in connection with this vast arid portion of our state suggests irrigation in connection therewith." *State v. Superior Court*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893. It is, however, proper that we consider the use for such a purpose in its relation to the necessities and welfare of the state, to ascertain the reason for the provision found in section 32 and what was thereby intended to be accomplished, or what interest of the people was intended to be served, for it is not to be supposed that the intention or purpose was to take the property of one and give it to another, even upon the payment of just compensation, without some public necessity or advantage. Nor is it to be supposed that it was intended to authorize a taking for private use, which would not be a public use when participated in by all or many who could and might desire to be accommodated by the proposed reservoir, flume, or ditch. If a reservoir, or ditch constructed for irrigation purposes and to furnish water to any who might apply therefor within the district proposed to be irrigated would not, when considered as a public use, authorize a taking of property in this state, such taking would not be authorized for a private use covering the same district.

In this respect under the constitutional provisions aforesaid there is no difference between a public use and a private use. A private use for any of the purposes mentioned in section 32 is given the same force and effect as a public use, and no greater. In *State v. Superior Court*, supra, the court say: "We have quoted the constitutional provision which clearly indicates that property may be taken under the power of eminent domain for certain enumerated private uses, among which are ways for ditches for agricultural purposes. While this provision in terms seems to give the power for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose to warrant the taking; that is, though it be seemingly called a private use by these words of the Constitution, it is also in effect a public use in view of the necessities of a state like ours having vast areas of arid land." Even without such constitutional provision the taking of land for an irrigating ditch in the Western states where the lands are arid or semiarid has been upheld as for a public use, regardless of the number of acres or distinct tracts or farms to be irrigated or the number of independent owners, such taking being held permissible for the purpose of irrigating land owned by a single individual. *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 377; *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, 1 Ann. Cas. 300; *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

[11] What, then, we inquire, is the public necessity, benefit, or advantage that justifies the taking of land for an irrigating ditch or other irrigation works? Mr. Kinney, in his work on *Irrigation and Water Rights*, says that the reclamation of lands in the Western states has been declared a public use, in the aid of which the right of eminent domain may be exercised, upon the theory that although it may benefit the individual directly, the indirect benefit to the general public is greater by permitting the upbuilding and settlement of the country." Volume 2 (2d Ed.) § 1066. And again, referring to the line of authorities as to what constitutes a public use, holding that a private individual or corporation may condemn rights of way for ditches where the sole use of the water is by the individual or corporation, that author says: "This is upon the theory that the physical and climatic conditions of the state are such that the promotion of any great industry, such as irrigation, * * * is of sufficient importance in the upbuilding of the country and the developing of its natural resources, that such a use is a public benefit to the community at large, and therefore it is a public use, even if the more

direct benefit is to a private individual or corporation." Id. § 1069. Speaking on this question, another author refers to the fact that, where the state is dependent for its prosperity on the irrigation of its arid lands as a whole, it is held immaterial whether one or many proprietors are benefited by a particular enterprise. *Nichols on Em. Dom.* § 253. And, referring to the case of *Fallbrook Irr. Dist. v. Bradley*, supra, it is said that the court rested its decision on the ground that in a state, like California, embracing millions of acres of arid lands which when left in their original condition would present an effectual obstacle to the advance of a large portion of the state in material wealth and prosperity, irrigation thereof would benefit the public of the whole state, and was therefore a public use. Id. § 252. In the case so referred to, Mr. Justice Peckham, delivering the opinion of the court, said on this subject: "While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus bring into cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to one section of the state."

In the case of *Nash v. Clark*, supra, the Supreme Court of Utah sustained the right of eminent domain in cases of this character solely on the ground that the irrigation of the arid lands of the state is a public benefit. The court, speaking by Mr. Justice McCarty, say: "In view of the physical and climatic conditions in this state, and in the light of the history of the arid West, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state, would be giving to the term 'public use' altogether too strict and narrow an interpretation." The case was affirmed by the Supreme Court of the United States. *Clark v. Nash*, supra. The rule of that case, that private enterprise may constitute a public use, is summarized in *Wiel on Water Rights* (2d Ed.) § 263, as follows: "The situation of a state and the possibilities and necessities for the successful prosecution of various industries, and peculiar condition of soil or climate or other peculiarities, being general, notorious, and

acknowledged in the state so as to be judicially known and exceptionally familiar to the courts without investigation, such conditions justify a state court in upholding a statute authorizing the taking of another's private property by one individual for his own enterprise, where it believes, *by reason of the above*, that such a taking will, through its contribution to the growth and prosperity of the state, constitute a public benefit, and the Supreme Court of the United States will follow the decision of the state court in such a case."

Stating the reason and the necessity causing the enactment of statutes and the adoption of the rule in the other arid land states permitting the exercise of eminent domain for the purposes of irrigation, and applying the rule in Nebraska, the Supreme Court of that state say: "Nor were the conditions surrounding the people of the Pacific states, when the foundation was laid for the body of their laws upon the subject, materially different from those which today confront the western half of our own state. We behold what was but yesterday the public domain, occupied to the western limit of the rain belt, so called, and settlers eagerly seeking for homes in the semiarid region beyond. We behold thousands of acres of fertile land in the valleys of the Platte, the Loups, the Elkhorn, and the Republican rivers, practically worthless under existing conditions for the purpose of agriculture, but which by application of the waters of those streams may be made most productive, thus not only supporting the rapidly increasing population of that region, but adding largely to the wealth and material prosperity of the state. That an undertaking so important can be prosecuted alone through the agency of the state none can doubt. The reclamation of a region so vast, equal in extent to more than one state of the Union, is surely a legitimate function of government. And the exercise of the reserve power of the state in the promotion of an enterprise so beneficial is not even in a technical sense violative of the restrictive features of the Constitution." *Paxton & Hershey Irr. Co. v. Farmers' & Merchants' Irr. Co.*, 45 Neb. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585.

So in the Washington case above cited (*State v. Superior Court*) it is said: "The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character is not public service, *but is the development of the resources of the state*, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. Whether such development and increased wealth comes from the effort of a single individual, or the united efforts of many, in our opinion does not change the principle upon which this right of eminent domain rests."

Expressions similar to those contained in the cases above quoted from are found in all the cases relating to the exercise of the power of eminent domain for rights of way for irrigating ditches, whenever stating the principle upon which the exercise of that power for such purpose rests. In none is the exercise of the power for such a purpose based upon the necessities, or the physical and climatic conditions, of another state. But it is founded upon the conditions and necessities of the state where the power is to be exercised. And that is true also as to other purposes more or less analogous. Where the development of mines is held to be a public use, it is because of the public necessity of developing the mining resources of the state and the public benefit resulting from such development. *Dayton Min. Co. v. Seawell*, 11 Nev. 394; *Butte, etc., Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508. The building of grain elevators was held to be public use in Minnesota on the ground of public necessity in view of the magnitude of the agricultural interests of that state. *Stewart v. Great Nor. Ry. Co.*, 65 Minn. 517, 68 N. W. 208, 33 L. R. A. 427. And in sustaining a statute as a proper exercise of the power of eminent domain, which authorized the taking of a right to flow land for mill purposes without the landowner's consent, but upon making due compensation to be assessed in a proceeding provided for that purpose, the court referred to the interest of the state in the improvement of her water powers and the prosperity arising to the state from the development of those natural resources. The court said: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. * * * The present prosperity of the state is largely due to what has already been done towards developing these natural advantages." And again: "The business of manufacturers and mechanics in this state is largely dependent on the use of the water power. To create a water power in a large stream sufficient for manufacturing on an extensive scale, it is generally necessary to dam the water in the stream itself, and also to raise and retain it in natural or artificial reservoirs connected with the stream. * * * In most cases, to do this, the right to flow the land of numerous proprietors must be obtained; and an individual, or a few individuals, might defeat or greatly embarrass the whole enterprise by an unreasonable and obstinate refusal to part with this right. In such a case can it be doubted that, to remove this obstacle to a great public improvement, in which large numbers are interested, would be, in the language of the Constitution, 'for the benefit and welfare of the state,' and that a private right taken for that purpose would be

taken for a public use within the legal meaning of that term." *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444.

The irrigation of land in a neighboring state, and so also the building of a railroad in that state, or the development of its mines or other natural resources, may no doubt result in some benefit to the people of this state, but only in the general way that one state is benefited by the growth in industrial activities, population, and wealth of an adjoining state, or even of a more distant state or the nation at large. To accept that, however, as a sufficient reason for taking land in this state under the power of eminent domain, if for the purpose of irrigation, would not tend to advance the interest of this state in the reclamation and cultivation of its lands, or the development of its natural resources, but the effect might be entirely the reverse, and it would abandon the principle upon which the right to exercise the power for irrigation and other analogous purposes has been asserted and maintained. The headgate and ditch by which water for agricultural purposes is diverted and distributed is not the use for which land required for a right of way is taken; the use authorizing such a taking is the application of the water to the land. The use, whether public or private, therefore occurs where the water is applied; that is, where the land to be irrigated is located. If located in another state, the use is there, and that use must support the exercise of eminent domain for a right of way for the ditch, if it is to be supported. Since in this case it appears that no land in this state will receive for its reclamation or cultivation any of the water to be diverted or distributed by means of the ditch, but the water is to be entirely devoted to the irrigation of land in another state, the use will be in and for that state—for its uses and purposes, and not in this state or for any of its purposes. The principle above discussed, that the power of eminent domain will be exercised by a state for its own purposes, and not for the use of another state, seems therefore to be applicable. Clearly the state of Colorado cannot exercise the power in this state, and any authority conferred by its laws to do so would be void, for it is fundamental that the sovereignty of any government is limited to persons and property within the territory it controls. *Nichols on Em. Dom.* 19; *Trombley v. Humphrey*, supra; *Crosby v. Hanover*, 36 N. H. 404; 1 *Lewis on Em. Dom.* (3d Ed.) § 885.

While this state may be interested and even indirectly benefited in the manner above indicated by the reclamation and settlement of lands in another state, it would be difficult, we think, to uphold the exercise of eminent domain in this state on the ground that such reclamation and settlement in

another state is a necessity of the government of this state, in view of the fact that within its own boundaries and in all parts of the state there are vast areas yet uncultivated capable of irrigation and reclamation. And this power of eminent domain is founded upon the law of necessity, for "no government," says Judge Cooley, "could perpetuate its existence and further the prosperity of its people, if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals." That eminent jurist further says that the power to appropriate must in any case be justified and limited by the necessity; "and whenever in any instance the government or its officials shall attempt to seize and appropriate that which cannot be needful to the due execution of its sovereign powers or the proper discharge of any of its public functions, the same means of resistance and legal redress are open to the owner that would be available in case of a like seizure by lawless individuals." *Trombley v. Humphrey*, supra.

It is not necessary to rest our conclusion alone upon a consideration of these general principles, though we would feel content to do so, in the absence of authority upon the precise question here presented. With the exception of the statement found in the opinion in *Thayer v. California Development Co.*, supra, to the effect that a public use in Mexico of water appropriated and diverted in California would not authorize the exercise of eminent domain in California, the specific question as to the right to condemn land in one state for a ditch to irrigate land in another state does not seem to have been decided or considered by any court, although we think the various judicial expressions and intimations are all against such a right. But the question as relating to other uses of the water of natural streams has been considered and the right to take land in one state under the power of eminent domain for an enterprise or use in another state has been denied by the courts of the state wherein the land was located. We refer to cases arising under the so-called "Mill Acts." Those statutes, and the provisions made by them, are too familiar to require extended explanation. It is sufficient to say that the purpose thereof is the encouragement of mills by authorizing their owners to erect a dam or dams and thereby overflow the lands of other persons, by paying such damages as may be assessed in the mode prescribed. The authorized proceeding in every material respect corresponds to a condemnation proceeding, and such statutes have been generally upheld as a rightful exercise of the power of eminent domain. *Ingram v. Water Co.*, 98 Me. 566, 56 Atl. 898; 1 *Lewis on Em. Dom.* (3d Ed.) 280. We have referred to a case decided in New Hampshire stating the ground upon which a taking for such a purpose has been sustain-

ed. *Mr. Justice Clifford*, in *Holyoke Company v. Lyman*, 15 Wall. 500, 507, 21 L. Ed. 123, alluded to the matter by saying: "Authority to erect dams across such streams for mill purposes results from the ownership of the bed and the banks of the stream, or the right to construct the same may be acquired by legislative grant, in cases where the Legislature is of the opinion that the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to authorize such an interference with private rights. Lands belonging to individuals have often been condemned for such purposes, in the exercise of the right of eminent domain, in cases where, from the nature of the country, mill sites sufficient in number could not otherwise be obtained, and that right is, even more frequently, exercised to enable millowners to flow the water back beyond their own limits, in order to create sufficient power or head and fall to operate their mills."

It is apparent that with respect to the question before us there is a close analogy between the taking of land under the mill acts, where the taking is caused or required by the necessity for flowing the land to furnish power for the mill below, and the taking of land to construct a ditch to carry water for irrigation. In two cases the question arose as to the right to have the damage for such taking for mill purposes assessed under the statute of the state in which the land flowed was situated, where the mill was located in another state, and in both cases the right was denied. *Wooster v. Great Falls Mfg. Co.*, 39 Me. 246; *Salisbury Mills v. Forsaith*, 57 N. H. 124. See, also, *Gould on Waters* (3d Ed.) § 593; *U. S. v. Ames*, 1 Woodb. & M. 76, Fed. Cas. No. 14,441. Referring to the statute of Maine, the court in the case cited from that state say: "The dam which causes the flowing, the mill for the benefit of which such flowing is permitted, and the land overflowed, or the property otherwise damaged by these erections, are assumed to be within the boundaries of the state, and within legislative jurisdiction." And, stating the conclusion of the court, it is said that "mills without the jurisdiction of the state, not being subject to the terms, conditions, and regulations of the statutes, are not entitled to its benefits; and the common law remedy remains unaffected by its provisions."

In the New Hampshire case of *Salisbury v. Forsaith*, it was held that a millowner, having erected a dam on its land in another state, whereby the water was set back upon land in New Hampshire, could not by petition have the damage assessed, and the rights of flowage ascertained and fixed under the New Hampshire statute for the encouragement of manufactures. The opinion contains an interesting and able discussion of

the matter, and is particularly persuasive upon the question as it arises in this case, for it answers the argument here made, and which was made in that case, that a mill in the other state (Massachusetts) would be a benefit to New Hampshire. The court say: "In order that land may be taken for this purpose against the owner's consent, the committee, and ultimately the court, must be satisfied that such taking is and may be of public use or benefit to the people of this state. I agree with counsel for the defendant that the act goes to the verge of the constitutional power of the Legislature, and I may say that, but for the authorities by which the court thought they should be governed in the late case of *Amoskeag Co. v. Head* [56 N. H. 386], I should find great difficulty in sustaining it. But giving to the act the widest scope and effect which have been thought admissible under the Constitution, I think it must be said that the public use and benefit intended were those which would arise from the erection of mills and the employment of our water power within our own limits, and not outside. It certainly may be, in one sense, of public use and benefit to the people of this state to have so good and so rich a neighbor on the south as our sister commonwealth of Massachusetts. Doubtless it may be of benefit to our people that every stream which flows from this state into that should be skirted with manufacturing establishments from the point where it leaves our borders to where it empties into the ocean; that thriving and opulent manufacturing towns should spring up along the line, although upon the other side; and that the industry, enterprise, and thrift for which the people of that state are so justly renowned should be stimulated and encouraged by the exercise of a liberal comity in the making and administration of our laws. It may be of public benefit to the people of this state that the city of Chicago was rebuilt after the great fire which laid so large a part of it in ashes in the autumn of 1871. It perhaps would not be difficult to show that no inconsiderable benefit has resulted to our people from the rebuilding of the burnt district in Boston. I do not see that these benefits differ at all, unless, it may be in degree, from those which would result from the building of a dam and mills for the manufacture of cotton and woolen goods just over the line in Massachusetts, and I do not think they are such as could have been intended by the act."

Since the purpose is solely to irrigate lands in another state, it is not material that the headgate is to be located but a short distance above the southern boundary line of this state or that the lands to be irrigated are located just over the line in the adjoining state. It would make no difference in principle if it was proposed to divert the water from some stream in the interior or else-

where in our state much farther removed from the lands to be irrigated, or if it was proposed to irrigate lands in another state situated at a greater distance beyond our territorial limits. Nor is the fact material that the diversion will occur below that of any previous appropriation, so far as the right of eminent domain is concerned. We are not here considering, and have not deemed it necessary to consider, the right to divert and appropriate water in this state for the purpose proposed.

The statute under which this proceeding to condemn for the right of way is brought prescribes that "every person, association of persons, company or corporation (the word 'corporation' including a municipal corporation wherever appearing in this chapter), organized or hereafter organized under the laws of this state, or under the laws of any other state, and legally doing business under the laws of this state, who shall in the course of their business require a way of necessity for reservoirs, drains, flumes, ditches, canals, or electric power transmission lines, on or across lands of others for agricultural, mining, milling, domestic, electric power transmission, municipal or sanitary purposes, shall have power and are authorized. * * * " Comp. St. § 3874. The authority given is to enter upon any land for the purpose of examining and making surveys for the purposes mentioned, and to hold and appropriate so much real property as may be necessary for the location, construction, and convenient maintenance and use of such reservoir, drain, flume, ditch, canal, or electric power transmission line, and the procedure is prescribed in succeeding sections for the appropriation and condemnation of the land so required. It is a familiar elementary principle that the laws of a state have no extraterritorial effect. And it is not necessary for a state statute to contain words expressly confining its operation within the state. That it is so confined is generally understood. It is therefore not a strained construction of the statute conferring authority to appropriate and condemn land for a right of way for a ditch for agricultural purposes, that it is intended to be confined not only to a right of way within the state, but as well to agricultural purposes within the state. The authority is no doubt conferred to encourage agriculture within the state. If the legislative power exists to make the authority broader than that, and extend it to agricultural purposes beyond the boundaries of the state, it should be so extended, if at all, by the Legislature, and by words clearly showing an intention to do so. In a concurring opinion in *Salisbury Mills v. Forsaith*, supra, it was said: "It is one of the plainest elementary rules that no Legislature can extend its laws to territory beyond the borders of its own state. How, then, can the courts of this state have any

jurisdiction over dams and mills in another state?" And in *Wooster v. Great Falls Mfg. Co.*, supra, it was said by the court: "All legislation is necessarily territorial. The statutes of a state are binding only within its jurisdiction. The Legislature cannot, if they would, authorize acts to be done in a foreign territory. * * * They cannot affect or control property elsewhere, and it is not to be presumed they intended to exceed their jurisdiction." Mr. Justice Story, in *Farnum v. Blackstone Canal*, 1 Sumn. 62, Fed. Cas. No. 4,675, remarked: "Every Legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty."

Again, it might be difficult to find authority in this statute to condemn land for the benefit of the business of a foreign corporation conducted exclusively in another state. What is meant by the words "who shall in the course of their business require a way of necessity," etc., in immediate connection with the provision authorizing the taking of land for a reservoir or ditch for agricultural purposes by a foreign corporation "legally doing business under the laws of this state"? Was it intended or not that the right of way should be required only in the course of the business legally done or to be legally done by the foreign corporation under the laws of the state? Our laws do not control the affairs of a foreign corporation within the state where it is incorporated, but only its business within this state. The construction and maintenance of the ditch in this state by the petitioner would seem to be merely incidental to its business of irrigating and cultivating lands for agricultural purposes in Colorado. Is that, then, a business to which the statute refers in authorizing the taking of land for a right of way in this state when required by a foreign corporation in the course of its business, in view of the provision of the section extending the authority to a foreign corporation "legally doing business under the laws of this state," or is that authority conferred upon such corporation for any business wherever carried on? These questions seem to be pertinent, but we need not do more than suggest them, for we are satisfied upon the other grounds above stated that the petitioner has shown no right under the Constitution or statutes of this state to condemn the land in controversy. For that reason the demurrer should have been sustained, and for the same reason the facts stated in the amended petition are insufficient to support the judgment. The judgment therefore must be reversed, and the cause will be remanded, with directions to vacate the order and judgment confirming the report of the commissioners and granting the right to take and use the land of the defendant below for the purpose specified in

the amended petition, and enter the proper order or judgment denying that right in accordance with the views and conclusions herein expressed.

Reversed.

SCOTT, C. J., and BEARD, J., concur.

FREMONT LODGE, NO. 11, I. O. O. F. v. BOARD OF COM'RS OF FREMONT COUNTY.

(Supreme Court of Wyoming. April 7, 1913.)

1. APPEAL AND ERROR (§ 281*)—MOTION FOR NEW TRIAL—NECESSITY.

Where no motion for new trial was filed below, the judgment, in so far as applicable to proceedings in error, became final on the date of its entry.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.*]

2. APPEAL AND ERROR (§ 338*)—WRIT OF ERROR—TIME FOR SUING OUT.

Under Comp. St. 1910, § 5122, providing that no proceeding to reverse or modify a judgment or final order shall be commenced unless within one year after the rendition thereof, or in case the person entitled to such proceeding is under disability, but that the court rendering such judgment or making such final order may upon application of the party desiring to institute the proceeding, by an order duly entered of record, give to a party a reasonable extension of time in which to institute them, a writ of error sued out more than a year after the rendition of final judgment by a party not under any disability, and who made no application for the extension of time, comes too late and must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. § 338.*]

Error to District Court, Fremont County; Charles E. Carpenter, Judge.

Action between the Board of County Commissioners of the County of Fremont and the Fremont Lodge No. 11 of the Independent Order of Odd Fellows. There was a judgment for the first-named party, and defendant brings error. Dismissed.

E. H. Fourt, of Lander, for plaintiff in error. R. B. Landfair, Co. and Pros. Atty., of Lander, for defendant in error.

SCOTT, C. J. The plaintiff in error seeks by proceedings in error to reverse a judgment filed and entered of record on January 16, 1911, in the district court of Fremont county.

[1] It does not appear from the record here presented that there was any motion for a new trial filed or presented to the court below, and it follows that the judgment, in so far as proceedings in error are concerned, became final on the date above mentioned. *Conradt v. Lepper*, 13 Wyo. 99, 78 Pac. 1, 3 Ann. Cas. 627.

[2] The petition in error was filed in this court on April 16, 1912, or one year and three

months after the judgment was rendered. Section 5122, Compiled Statutes 1910, provides that: "No proceeding to reverse, vacate, or modify a judgment or final order shall be commenced, unless within one year after the rendition of the judgment, or the making of the final order complained of; or, in case the person entitled to such proceeding is an infant, a married woman, a person of unsound mind, or in prison, within one year, as aforesaid, exclusive of the time of such disability: Provided, however, that the court rendering such judgment or making such final order upon application of the party desiring to institute such proceeding and upon making to said court a sufficient showing that said party will be unavoidably prevented from instituting such proceeding within said time, shall, by an order duly entered of record, give to said party a reasonable extension of time, not exceeding eighteen months, within which to institute such proceeding." It does not appear from the record that this case falls within any of the exceptions contained in that section, or that there was any application made to the trial court for an extension of time within which to institute proceedings in error, as therein provided.

Upon this state of the record, this court is without jurisdiction to entertain the attempted proceedings in error, and the petition will be dismissed.

Dismissed.

POTTER and BEARD, JJ., concur.

LAUGHLIN v. STATE BOARD OF CONTROL et al.

(Supreme Court of Wyoming. April 7, 1913.)

WATERS AND WATER COURSES (§ 27*)—ESTABLISHMENT OF RESERVOIR—APPLICATION—LACHES.

Where an application to the state engineer for permission to construct a reservoir was returned for additional information concerning the title to the right of way for the supply ditch, the outlet reservoir, and the land proposed to be irrigated, a delay in furnishing such information from May 14th to June 26th following was not such laches as constituted an abandonment or forfeiture of the application as against a subsequent applicant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19; Dec. Dig. § 27.*]

On petition for rehearing. Denied.

For former opinion, see 128 Pac. 517.

SCOTT, C. J. The defendants in error have filed a petition for a rehearing. It is here urged as in their brief filed on the original hearing that Laughlin's application filed on May 14, 1908, was abandoned by him and superseded by his application filed on June 26, 1908. It was insisted on the former hearing and here that the last ap-

plication being complete in form, and not in words expressly referring to the former application, must be construed as an original application independent of the former. It will be remembered that the first application which we held sufficient in form under the statute was received and filed for record in the office of the state engineer, and then returned without approval or rejection to Laughlin with a request for additional information.

It is contended that an application such as this may be returned for correction or amendment, and will be allowed to be amended, provided that in the meantime no other valid application for a primary permit had intervened. The application of May 14, 1908, for the primary permit, was not inherently defective. As said in the opinion filed, it "measured up to the requirement of the statute," and the engineer called for no amendment, but for additional information with reference to the application. This was fully discussed, and we need not here go over the question again.

It is contended that from May 14, 1908, to June 26th following was an unreasonable time for Laughlin to take in order to furnish the information called for. It does not appear from the record that Laughlin expressly abandoned his first application, or that he was guilty of laches in furnishing the information called for. On the contrary, considering the character of the information called for and furnished, we are unable to understand how such laches could be imputed to him as would work an abandonment or forfeiture of his first application which was pending at the time the permit was granted to the administrator of the Carroll estate.

We are of the opinion that all of the questions presented in this application were discussed and decided in the original opinion, and we adhere to the conclusion reached therein.

Rehearing denied.

POTTER and BEARD, JJ., concur.

THAL v. RADKE & CO. (Civ. 1,180.)

(District Court of Appeal, First District, California. Feb. 5, 1913.)

APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Rulings as to the admission of evidence upon facts admitted in the pleadings are harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by F. M. Thal against Radke & Co.

From a judgment for plaintiff, defendant appeals. Affirmed.

Henry C. Schaertzer, of San Francisco, and D. Hadsell, of Berkeley, for appellant. Lucius L. Solomons, of San Francisco, for respondent.

MURPHEY, Judge pro tem. Action for recovery of balance due for goods, wares, and merchandise sold and delivered by plaintiff's assignor to defendant. Appeal from the judgment on a bill of exceptions.

It will be unnecessary to consider the specifications of errors pointed out by the appellant in the rulings of the trial court, as all the alleged errors have reference to the admissibility of testimony offered to controvert facts admitted by the pleadings. The purchase and receipt of the goods are admitted by the answer; the defendant contending, however, that the purchase was made upon the representation of the plaintiff's assignor that the goods would have a "ready and easy sale," and that if they did not have a "ready and easy sale" as represented, the plaintiff's assignor would "exchange other goods, wares, and merchandise of other sorts for them"; that the goods "did not and have not had a ready and easy sale, and that 85 per cent. thereof remains in defendant's possession."

Under the conditions above set out, the court proceeded to hear proofs of the sale and delivery of the goods, and in so doing committed all of the errors complained of. Manifestly any such errors would be immaterial and harmless. No complaint is made of errors in admitting evidence relative to the defense above indicated of an agreement for the return and exchange of goods. As to this issue, the court found "that the sales of merchandise were made to the defendant absolutely and unconditionally." This disposes of all of the objections made by the appellant.

The judgment is affirmed.

We concur: HALL, J.; LENNON, P. J.

PEOPLE v. LAWLOR. (Cr. 423.)

(District Court of Appeal, First District, California. Jan. 31, 1913. Rehearing Denied by Supreme Court March 31, 1913.)

1. INDICTMENT AND INFORMATION (§ 72*)—"PANDERING"—NATURE OF OFFENSE—STATUTES.

St. 1911, p. 9, provides that any person who shall procure for a female a place as inmate in a house of prostitution, or as inmate of any place in which prostitution is encouraged or allowed within the state, shall be guilty of pandering. Held that, the acts enumerated and denounced in the statute being stated disjunctively, an information stating one or more of the acts specified stated an offense and was not defective for failure to allege the commission of all the acts specified conjunctively.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 699*) — CONDUCT OF COUNSEL—CONTROL BY COURT.

Where counsel for accused, because of a "fault of his voice" and a zeal in the cause of his client, unconsciously appeared in a menacing and threatening attitude in the cross-examination of prosecutrix, it was proper for the court, in the exercise of its discretionary right to regulate the conduct of the trial, to admonish and restrain counsel with reference to his conduct toward the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.*]

3. CRIMINAL LAW (§ 656*)—TRIAL—CONDUCT—DECLARATIONS OF JUDGE.

It was improper for the court, in attempting to restrain a menacing and threatening attitude of defendant's counsel in the examination of prosecutrix, to inform her that, if necessary, the court would have all of the police force to protect her; the law having provided other less spectacular methods for effectually dealing with misconduct on the part of an attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

4. CRIMINAL LAW (§ 1044*)—TRIAL—MISCONDUCT OF JUDGE—NECESSITY OF OBJECTION.

Where the trial judge, during the cross-examination of prosecutrix by defendant's counsel, used improper language direct to counsel in admonishing him for what the court thought was improper conduct in the cross-examination of the witness, and it did not appear that the court's language had any reference to defendant, it was not available as error, in the absence of objection made thereto and a request that the court admonish the jury not to consider the same at the time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.*]

5. CRIMINAL LAW (§§ 507, 780*) — "ACCOMPLICES"—INSTRUCTIONS.

Pen. Code, § 31, provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid in its commission, are accomplices. Section 1111 declares that a conviction cannot be had on the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect him with the offense, which corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. *Held* that, where accused was charged with pandering in that he placed a female in a house of prostitution, and the keeper of the house, after having been promised immunity, testified that defendant brought prosecutrix to witness to put prosecutrix to work as a prostitute, and contracted with witness for room in her house, which with witness' knowledge and consent was to be occupied by prosecutrix for the purpose of prostitution, the witness was an "accomplice," and it was error for the court to refuse to charge on accomplice testimony and the necessity for corroboration thereof to authorize a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1062-1096, 1859-1863; Dec. Dig. §§ 507, 780.*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

6. CRIMINAL LAW (§ 1163*)—APPEAL—EFFECT OF ERROR.

Under Const. Amend. art. 6, § 4½, providing that no conviction shall be reversed for misdirection of the jury, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that

the error has resulted in a miscarriage of justice, prejudice is not presumed from error in the refusal of a request to charge, but it is the duty of the appellate court to examine the evidence and determine whether a miscarriage of justice has resulted therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

7. CRIMINAL LAW (§ 1173*) — APPEAL — REVIEW—HARMLESS ERROR.

Where, in a prosecution for pandering, there was amply sufficient evidence to sustain a conviction without that of the keeper of the house of prostitution to which prosecutrix had been taken by accused, and who was an accomplice in the crime, defendant's conviction will not be set aside for the court's error in refusing to charge on accomplice testimony, under Const. Amend. art. 6, § 4½, providing that no conviction shall be set aside for misdirection of the jury, unless the appellate court is of the opinion that it has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

James Lawlor was convicted of pandering, and he appeals. Affirmed.

Charles S. Peery, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the State.

LENNON, P. J. [1] This is an appeal from a judgment of final conviction and from an order denying a new trial in a case wherein the defendant was charged with the crime of pandering, as defined by a recent enactment of the Legislature (Stats. 1911, p. 9), one clause of which provides that: "Any person who shall procure for a female person a place as inmate in a house of prostitution or as inmate of any place in which prostitution is encouraged or allowed within this state * * * shall be guilty of a felony, to wit, pandering. * * *" This clause of the statute constituted the charging part of the information upon which the defendant was convicted. The defendant, upon his arraignment, interposed a demurrer to the information, based upon all of the statutory grounds, which was disallowed; and it is now insisted, as we understand the contention of counsel for the defendant, that the demurrer should have been sustained upon the ground that the information did not state a public offense in this: That the charging part thereof was not founded upon and did not include all of the acts and conduct which the statute enumerates and denounces in its definition of the crime of pandering. In other words, it is the contention, apparently, of counsel for the defendant that the doing of any one of the acts enumerated and denounced in the statute will not alone constitute the offense of pandering; and that, in order for the information

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the present case to state such offense, it would have been necessary to allege conjunctively the commission by the defendant of all of the acts and things enumerated in and denounced by the statute. There is no merit in this contention. Clearly the statute in question contemplates that the commission, either separately or all together, of the series of acts enumerated therein may and will constitute the offense of pandering. As was said in the Matter of Roberts, 157 Cal. 472, 108 Pac. 315, the statute in question "is written in the disjunctive throughout; and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections. In general, when such form of expression is used, the effect of the language pertaining exclusively to each offense described is not affected or modified by the words used solely in describing the other offenses; but the description of each is to be considered as if it stood alone and were read in conjunction with the general words applying to all."

The people elected in the case at bar to charge and prosecute the defendant upon that clause of the statute in question which declares every person guilty of the crime of pandering who "shall procure for a female person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state." This clause of the statute clearly contemplates and provides for a case entirely distinct from those cases provided for and denounced in the remaining clauses of the statute; and it is well settled that, where, in defining an offense, a statute enumerates and denounces a series of acts, the commission of a single enumerated act will constitute the offense. *People v. Frank*, 28 Cal. 507; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Barnovitch*, 16 Cal. App. 427, 117 Pac. 572.

Counsel for the defendant complains bitterly of a rebuke administered to him by the trial judge during the course of the cross-examination of the complaining witness, and insists that the remarks of the trial judge, although directed to counsel personally, must have operated to the prejudice of the defendant. The incident referred to is shown by the record to be as follows: "The Court: Don't yell at the witness, Mr. Peery. Mr. Peery: That is one of the faults of my voice, if your honor please. The Court [to the witness]: I don't want you to be afraid of any one here. There isn't anybody in this room that you need be afraid of, and, if necessary, we will have all the police force to protect you. [To counsel for defendant]: And I don't want any nonsense, and I don't want you to shout at this witness. Mr. Peery: I don't want to shout at her. I have never browbeaten a witness in my life, but I am going to examine this witness.

The Court: You are going to do it under the court's direction. Mr. Peery: I was never guilty of yelling at a witness or of showing disrespect to the court. The Court: Your attitude is menacing and threatening, and I don't like it. Mr. Peery: I never acted otherwise than as a gentleman, and I resent those remarks of the court. I have a reputation as a gentleman at this bar for 20 years. If I have a witness that I think is unwilling and concealing something, I have a right to bring it out. Mr. McNutt (assistant district attorney): You have not got her guessing now, so go on."

[2] It is the undoubted right of a trial court, within the limits of a sound discretion, to control and regulate the conduct of a trial; and it is the duty of such court to promptly and plainly exercise that right of its own motion for the protection of a witness under examination, whenever it appears to the court that the conduct or attitude of counsel towards the witness is "menacing and threatening." In the present case it is apparent, from that portion of the record hereinbefore quoted, that counsel for the defendant, because of a "fault of his voice" and a commendable zeal in the cause of his client, unconsciously provoked the interference and admonition of the trial judge; but, whether such provocation was conscious or unconscious, its effect upon the witness must have been the same, and therefore the trial judge is not to be censured for acting upon appearance.

[3] While conceding the right of the trial judge to control the conduct of the trial, we do not wish to be understood as commending the propriety of employing the police force of a municipality for the purpose of subduing a single, belligerent lawyer. However warlike a lawyer may be in any given case, he may, it seems to us, be speedily subdued and readily restored to reason by other means and methods within the power of the court which would be less spectacular and more in keeping with the dignity of the bench and the orderly administration of justice. "This, however, is a temperamental and ethical matter addressed to the court's own sense of propriety, and its conduct in that respect is not subject to review by the appellate court, save to consider whether it has tended to prejudice the defendant." *People v. Szafsur*, 161 Cal. 636, 119 Pac. 1083.

[4] We do not consider, and we are unable to conceive, that the jury could possibly construe the remarks of the trial judge as a personal reflection upon the defendant. Evidently the trial judge was directing his remarks solely to counsel for the defendant. That this is so is manifest from the language complained of, and from the further fact that the admonition of the trial judge was resented by counsel for defendant as a personal affront rather than as a suggestion which tended to the injury of the defend-

ant. However that may be, no objection was made at the time that the language and conduct of the trial judge might have operated to the prejudice of the defendant; and it has been repeatedly held that, if the trial court commits a supposed or an apparent infraction of the defendant's rights, it is the duty of his counsel to make immediate objection thereto upon that ground, and at the same time request the court to admonish the jury against being influenced by the irregularity objected to. In the absence of such an objection and request, the irregularity complained of will not be considered by this court. *People v. Bishop*, 134 Cal. 682, 66 Pac. 976; *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401; *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497.

The defendant urges a reversal of the judgment because of the refusal of the trial court to give the jury several requested instructions upon the rule of law concerning accomplices, and the necessity for the corroboration of their testimony before a conviction can be had.

[5] These instructions were requested because of the fact that one Madge Dell, the keeper of the house of prostitution wherein it was alleged and shown the defendant procured a place as inmate for the complaining witness, was called and sworn as a witness for the people. Under a promise of immunity from the prosecution for the same offense for which the defendant was being tried, she testified, in effect, that Lawlor, the defendant, had conversed with her about "bringing his girl [the complaining witness] from San Jose" for the purpose of putting her to work as a prostitute; that Lawlor had contracted with her [Madge Dell] for a room in her house which, with her knowledge and consent, was to be occupied, and was subsequently occupied, by the complaining witness for the purpose of prostitution. "All persons concerned in the commission of a crime whether they directly commit the act constituting the offense or aid in its commission, are accomplices" (Pen. Code, § 31); and "Whenever the commission of a crime involves the co-operation of two or more people the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation then always those agents are accomplices, even as at common law they were principals" (*People v. Coffey*, 161 Cal. 433, 119 Pac. 801, 39 L. R. A. [N. S.] 704). Section 1111 of the Penal Code, as it existed when the present case was tried, provides that: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the com-

mission of the offense or the circumstances thereof."

[6] The question as to whether or not a person in any given case is an accomplice is usually a question of fact arising from the evidence, and ordinarily must be determined by the jury. *People v. Coffey*, supra. It is the sworn duty of a trial court, in charging a jury, to state to them, either upon its own motion or at the request of the defendant, all matters of law necessary for their information (Pen. Code, §§ 1093, 1127); and whether or not Madge Dell was an accomplice of the defendant to the extent that she knowingly aided and abetted the defendant in procuring a place for the complaining witness as an inmate in a house of prostitution was, under all of the circumstances of the present case, a question of fact which should have been submitted for determination to the jury, with proper instructions from the trial court not only defining an accomplice, but declaring as well the mandatory rule of law that a defendant could not be convicted upon the uncorroborated testimony of an accomplice.

The failure of the court to charge, at the request of the defendant, upon any matter of law applicable to the facts of the case is tantamount to a misdirection of the jury. No objection can be taken to the instructions requested by the defendant upon the subject of accomplices; and for the trial court to refuse them was, in the absence of other instructions upon the same subject, clearly error. Conceding the error in this behalf, the question then arises as to whether or not it was prejudicial error which resulted in rendering the conviction of the defendant a miscarriage of justice within the meaning of the constitutional amendment (section 4½ of article 6) recently adopted by the people.

Although the Penal Code of this state declares that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and while it is clear that this is a matter of law which, when warranted by the evidence in any given case, the trial court is in duty bound to state in its charge to the jury, nevertheless the section of the Constitution just mentioned distinctly declares that: "No judgment shall be set aside or a new trial granted in a criminal case on the ground of misdirection of the jury * * * unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[7] While this provision of the Constitution is far from being self-explanatory of its scope and effect, and although it has never been construed and applied by our Supreme Court, plainly the purpose of its adoption was to expedite and make certain the administration of justice by rendering of no avail, upon appeal to this court, errors occurring during the trial of a criminal case, either in the charge of the trial court or

as to any matter of pleading or procedure which cannot be fairly said, upon a review of the evidence in the entire case, to have resulted in a miscarriage of justice. In other words, the rule formerly in vogue that prejudice is presumed to have resulted to a defendant from any substantial error or irregularity occurring during the course of a criminal trial has been effectively abrogated by the constitutional provision under consideration, which, as we read it, declares that, where error or irregularity appears in the conduct of a trial, it is the duty of the appellate court to examine the evidence upon the whole case, and, if possible, ascertain therefrom whether or not the error or irregularity complained of did in fact operate to the injury of the defendant to the extent that it may be justly said that his conviction was a miscarriage of justice. In order to comply with the mandate of the Constitution, there is no escape from the conclusion, it seems to us, that we are called upon and compelled to weigh the evidence upon which the conviction was had, and then decide whether or not the error or irregularity complained of had the effect indicated. If these views be correct, then it must follow that where, in any given case, it appears to the satisfaction of this court, from a reading of the evidence adduced upon the whole case, that the verdict found by the jury was just, and would have been the same notwithstanding the error or irregularity complained of, a new trial will not be ordered.

Applying these views to the case at bar, we have carefully examined the record before us and find therein evidence which, apart from the testimony of Madge Dell, fully supports and justifies the verdict—that is to say, the defendant could and should have been convicted of the offense charged against him without the aid of the testimony of Madge Dell—and it is certain, it seems to us, that, if the people had rested their case without calling her as a witness, the case made against the defendant would nevertheless have been so complete and conclusive that the jury could not have honestly and justly returned a different verdict. In short, we are convinced that the defendant would have been convicted, even if the requested instructions had been given, and therefore their refusal cannot be said to be a controlling, or even a contributing, cause of the verdict.

We are not unmindful of the suggestion that under the rule formerly in vogue, and often invoked in the disposition of criminal appeals, it could be said that the jury might have based its verdict solely upon the testimony of Madge Dell, and therefore prejudice would be presumed from the failure of the trial court to instruct the jury upon the subject of accomplices. The rule of the Constitution, however, does not deal in presumptive prejudice, nor permit us to speculate

upon the possibilities which may have induced the verdict of the jury. No presumption of prejudice arises from the mere fact of error. On the contrary, it must affirmatively appear to this court that the defendant has been substantially injured by the error complained of. No such showing has been made, nor, we take it, can be made under all the evidence in this case.

It follows, from what has been said, that the misdirection of the jury complained of affords no sufficient warrant to this court for the reversal of the case. The defendant complains of several rulings of the trial court made in the admission and rejection of evidence. We have carefully examined the record, especially with respect to the rulings called in question; and, without specifying each ruling in detail, it is sufficient to say that we are of the opinion that no prejudicial error was committed.

The judgment and order are affirmed.

We concur: HALL, J.; MURPHEY, Judge pro tem.

In re DAVIDSON'S ESTATE.

FERGUSON et al. v. FREY. (Civ. 1,286.)

(District Court of Appeal, First District, California. Feb. 7, 1913. Rehearing Denied by Supreme Court April 8, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 314*)—PROCEEDINGS FOR DISTRIBUTION—PLEADING.

Where an administrator filed a petition asking distribution of the entire estate to himself, but on the hearing stipulated with the other claimants that the matter should be submitted to the court on an agreed statement of facts, he thereby waived the filing of formal written objections to his petition.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 814.*]

2. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

Where, on the hearing of an administrator's petition for distribution of the estate, the matter was submitted on an agreed statement of facts covering all jurisdictional matters as well as all facts upon which the rights of the parties depended, no assignment of errors was necessary to the consideration of an appeal from the decree of distribution; the agreed statement taking the place of and having the force and effect of an unattacked finding of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.*]

3. HUSBAND AND WIFE (§ 274*)—COMMUNITY PROPERTY ON DEATH OF SURVIVOR.

Civ. Code, § 1386, subd. 8, providing that where an intestate is a widow or widower and leaves no issue, and the estate or any portion thereof was the common property of the intestate and his or her deceased spouse, while such spouse was living, the property shall go one half to the kin of the deceased spouse and the other half to the kin of intestate, applies to the property of a wife dying intestate, which was community property at the time of the hus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

band's death, although the husband left a will giving all of his estate to the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1026-1031; Dec. Dig. § 274.*]

4. STIPULATIONS (§ 18*)—AGREED STATEMENT OF FACTS—CONSTRUCTION.

Where an administrator's petition for distribution was submitted on an agreed statement of facts, stating that the administrator was the sole surviving heir at law and next of kin of the intestate, but also stating that the property in dispute had been community property of intestate and her husband up to the time of his death, and that other claimants were the next of kin of the husband, the statement that the administrator was the sole heir and next of kin was not conclusive that he was entitled to succeed to the entire estate.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by William A. Frey for the distribution of the estate of Eliza Ann Davidson, deceased. From the final decree of distribution, Helen Ferguson and others, claiming an interest in the estate, appeal. Reversed and remanded, with directions.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellants. John G. Jury, of San Francisco, for respondent.

HALL, J. This is an appeal from a final decree of distribution made and entered in the matter of the estate of Eliza Ann Davidson, deceased, whereby the court distributed the entire estate of said deceased, who died intestate, to respondent, who is the surviving brother of said deceased, to the exclusion of the appellants, who are the surviving sister and the children of a deceased brother and of two deceased sisters of Walter Park Davidson, the predeceased husband of Eliza Ann Davidson, deceased. The appeal comes to this court upon a settled bill of exceptions, from which it appears, among other things, that respondent, in the capacity of administrator of the estate of Eliza Ann Davidson, filed a petition for final distribution of said estate, in which he recognized the claim of appellants, as the sister and nieces and nephews of the predeceased husband of the deceased, to take one-half of such portion of the estate of decedent as had been the community property of decedent and her predeceased husband at the time of his death, or was the proceeds thereof. Subsequently, after a change of attorneys, respondent filed an amended and supplemental petition, in which he asked distribution of the entire estate to himself as the surviving brother of deceased.

Appellants filed no written objections to this amended and supplemental petition, but appeared at the hearing thereon, and, as appears from the bill of exceptions, "All of the parties interested in the distribution of said estate then and there stipulated that the matter of the distribution of said estate be

submitted" upon an agreed statement of facts, which is set forth in the bill of exceptions. No other evidence was introduced, and after the presentation of the agreed statement of facts, as appears from the bill of exceptions, "said petition and amended and supplemental petition for distribution of said estate was submitted to the court for decision." Respondent insists that the appellants have no right to appeal nor to be heard upon the record before this court, because they made no written objections to the amended petition, and the bill of exceptions contains no specifications of errors relied upon.

[1] Respondent is in no position to object that no written objections were filed to his amended and supplemental petition. Appellants appeared and respondent stipulated with them in open court "that the matter of the distribution of the estate be submitted upon the following agreed statement of facts," which statement of facts set out the claim of appellants to a distributive share of the estate of decedent. This was a waiver of the necessity, if any existed, for appellants' filing any formal written objections to the amended petition for distribution.

[2] Neither is any assignment of errors necessary to the consideration of this appeal. The agreed statement of facts set forth in the bill of exceptions covers all jurisdictional matters necessary to support a decree of distribution, as well as all the facts upon which the respective rights of appellants and respondent to any portion of the estate of decedent depend. Such an agreed statement of facts takes the place of, and has the force and effect of, an unattached finding of facts made by the court. *Burnett v. Pacheco*, 27 Cal. 408; *Muller v. Rowell*, 110 Cal. 818, 42 Pac. 804; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109; *Conway v. C. K. of A.*, 137 Cal. 384, 70 Pac. 223. The question is thus properly before this court as to whether or not the facts set forth in the agreed statement of facts support the judgment and decree of the court.

[3] It appears from the agreed statement of facts that decedent died intestate January 16, 1911, leaving surviving as her only next of kin a brother, William A. Frey, the respondent herein. All of the property of which she died possessed or seised, save some enumerated personal effects, had been the community property of decedent and her predeceased husband, Walter Park Davidson, at the time of his death, or was the proceeds thereof. Walter Park Davidson left surviving him at his death as his only heirs at law said Eliza Ann Davidson, his widow, and the appellants herein, who were his sister and the children of a deceased brother and sisters. He left a will which was duly admitted to probate, in which he devised all of his estate to his wife, Eliza Ann Davidson, and all the residue of his estate was distribut-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed to her by the decree of distribution made in the matter of his estate, in which decree the whole of the residue of the estate of said Walter Park Davidson was adjudged to be community property of him and his said wife.

Under the facts above stated, it is clear that the distribution of the property left by the intestate decedent, Eliza Ann Davidson, which had been and was the community property of said decedent and her husband at the time of his death, or was the proceeds thereof, should have been distributed in accordance with the provisions of subdivision 8 of section 1386 of the Civil Code, which provides that "If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was the common property of such decedent and his or her deceased spouse, while such spouse was living," such property shall go one half to certain designated kin of the deceased spouse, and the other half to certain designated kin of deceased. This section of the law determines the succession to all property left by the surviving spouse, who dies a widow or widower, without leaving descendants, which was community property of the spouses at the time of the death of the spouse who first dies. The fact that the husband, dying first, devised any or all of the community property to his wife does not divest such property of its character of community property up to the time of his death. It was community property of the two spouses at the death of the husband, and is squarely within the language of subdivision 8 of section 1386 of the Civil Code.

The case of *Estate of McCauley*, 138 Cal. 546, 71 Pac. 458, gives no support to the decree appealed from nor to the contention of respondent. In that case it was decided that property deeded by the husband to the wife became her separate property and was not a part of the community property at the time of his death, and therefore its disposition upon the death of the wife was not controlled by subdivision 9 (now subdivision 8) of section 1386 of the Civil Code. The contention in the *McCauley* Case was that property that had at any time been community property was controlled upon the death of the last surviving spouse, dying without issue, by subdivision 9 (now 8) of section 1386 of the Civil Code. The decision simply holds that the subdivision in question controls the succession to only such common property as was undisposed of at the time of the death of the husband, and does not control as to property deeded by the husband to the wife, which, of course, upon the execution of the deed became her separate property, and therefore was not a part of the community property at the time of the death of the husband. Subdivision 8 of section 1386 of the Civil Code controls the succession to property left by the widow, dying intestate, which was

community property of herself and her husband at the time of his death, though he devised all or any part thereof to her by will. After his death such property becomes her separate property whether she receive under his will or by right of survivorship. In either case it was common property undisposed of at the time of his death.

[4] Respondent makes some contention that because the stipulation as to the facts, after setting forth that respondent is the surviving brother of deceased, also states that he "is the sole surviving heir at law and next of kin of said Eliza Ann Davidson, deceased," conclusively establishes that he is entitled to succeed to her entire estate. But the stipulation of facts must be read in its entirety. And, so read, it sets forth the other facts which show that by the statement that respondent is the sole heir at law of decedent was meant no more than that he was her only next of kin. The specific facts set forth show that the property in dispute had been the community property of decedent and her husband up to the time of his death, and that appellants are the sister and the children of a deceased brother and sisters of the husband. From these facts it follows, as a matter of law, that they are entitled to take one half of the property in dispute, while respondent is entitled to take the other half. Of course the nieces and nephews are to take by right of representation.

The judgment is reversed, and the cause remanded, with directions to the court to enter a decree of distribution upon the agreed statement of facts in conformity with the views expressed in this opinion.

We concur: LENNON, P. J.; MURPHEY, Judge pro tem.

JOHNSTON v. PORTER et al. (Civ. 1,115.)

(District Court of Appeal, First District, California. Feb. 5, 1913. Rehearing Denied by Supreme Court April 6, 1913.)

1. BROKERS (§ 86*)—ACTIONS FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions against another broker, his testimony that before he introduced the purchaser to the defendant he told defendant that he was interested in the commissions in the event of a sale, and that defendant replied that he would protect him on his commissions, supported a jury finding of a contract to pay such commissions, notwithstanding the testimony of another witness in conflict therewith; such conflict being for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

2. BROKERS (§ 43*)—SALES OF LAND—AGREEMENT BETWEEN BROKERS.

An oral agreement by a broker to pay part of the commissions on a sale of land to another broker who procured the purchaser was not within the statute of frauds.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.*]

3. BROKERS (§ 43*)—EMPLOYMENT—NECESSITY OF WRITING.

Civ. Code, § 1624, subd. 6, requiring agreements authorizing or employing brokers to purchase or sell real estate for a commission to be in writing, was intended for the protection of owners against the unfounded claims of brokers, and does not apply to contracts between brokers co-operating in the sale of real property as to their commissions on such sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

4. BROKERS (§ 86*)—ACTIONS FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions against another broker, assuming that it was necessary to show a valid contract under which defendant was entitled to commissions on the sale, proof that a third broker having an exclusive contract with the owner assigned one-half interest therein to defendant under an agreement that on a sale by either the commissions would be divided sufficiently showed defendant's right to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

5. BROKERS (§ 82*)—ACTIONS FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions against another broker for a share in the commissions on a sale, where it was shown that defendant had received a commission on the sale, it was not necessary to show that he had a valid contract entitling him to such commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82.*]

6. APPEAL AND ERROR (§ 204*)—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS—NECESSITY.

Complaint could not be made on appeal of the admission of evidence not objected to at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.*]

7. BROKERS (§ 69*)—COMMISSIONS—AMOUNT.

Where a broker agreed to share his commissions on a sale with another broker who procured the purchaser, in the absence of an express agreement as to the second broker's compensation, he was entitled to recover a reasonable sum.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. § 69.*]

8. BROKERS (§ 86*)—ACTIONS FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE—AMOUNT OF RECOVERY.

In an action by a broker who introduced a purchaser to another broker for a share in the commissions on a sale, pursuant to an agreement which did not fix the amount of his share, where it appeared that defendant received a commission of \$2,250, and testimony that it was customary in that vicinity to pay the broker procuring a purchaser for another broker from one-half to two-thirds of the commission was uncontradicted, a verdict for \$2,000 reduced by the trial court to \$1,500 was not unsupported by the evidence, and hence could not be set aside on appeal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by D. W. Johnston against Warren R. Porter and others. From a judgment against defendant, and from an order deny-

ing a new trial, J. J. Morey appeals. Affirmed.

Netherton & Torchiana, of Santa Cruz, for appellant. Cassin & Lucas, of San Jose, for respondent.

LENNON, P. J. This action was instituted for the recovery of a realty broker's commission claimed to be due to the plaintiff under the terms of an oral contract alleged to have been entered into between the plaintiff and the defendant Morey, whereby it was agreed that if the plaintiff would procure a purchaser for certain real property the defendant Morey would pay to the plaintiff a reasonable commission for his services in procuring such purchaser.

The facts of the case, as revealed by the pleadings and the proof, are these: One Anzer and wife were the owners of 3,400 acres of land known as the "Aroma Ranch," situated in the county of Santa Cruz. On September 29, 1909, they entered into an agreement with one R. P. Quinn, whereby he was appointed the exclusive agent for the term of two years for the purpose of making a sale of the ranch. Quinn was authorized to sell the property for \$95,000, and in the event of a sale he was to receive as his commission for his services the sum of \$4,750, or 5 per cent. of any amount which might be agreed upon and accepted as the purchase price of the property. Quinn did not succeed in personally procuring a purchaser for the property, and on the 12th day of October, 1909, he assigned one-half interest in this contract to the defendant Morey. The consideration for the assignment was stated to be the sum of \$300; and it was expressly conditioned therein that Morey upon a sale of the property should be repaid the \$300 paid by him to Quinn as a consideration for the assignment, and that the commissions to be paid to Quinn in the event of the sale of the property, as provided in the original contract between Quinn and the Anzers, should be divided equally between the defendant Morey and Quinn. The assignment further provided that: "In the event of either of said parties (Quinn or Morey) making said * * * sale through other parties or brokers, the commission of said broker or brokers or parties making said * * * sale must first be paid, and the balance of the commissions then divided equally between said parties."

The plaintiff was engaged in the business of a real estate broker. Through the introduction of a friend of his, a Mr. Brooke, the plaintiff came in contact with a Mr. Luther, who was desirous of purchasing eucalyptus land. The plaintiff having knowledge of the Anzer property, its location, and the uses to which it could be put, gave Mr. Brooke, upon behalf of Mr. Luther, a letter addressed to a Mr. White, a real estate agent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in Watsonville, and another letter addressed to Mr. Porter, a banker of Watsonville, who was named as one of the defendants to the action. On the following day the plaintiff went to Watsonville in response to a telephone message from Mr. Luther, who said that he had seen the Anzer property and liked it very much, but that he was unable to ascertain who had the property for sale. The plaintiff thereupon said that he would introduce Luther to the proper parties. While in Watsonville plaintiff saw Mr. Porter and informed him that he had a man who wished to purchase the Anzer property. In reply Mr. Johnson said, "Let's go and see Johnny," meaning defendant Morey; whereupon plaintiff and Porter called upon defendant Morey and informed him that plaintiff had a purchaser for the Anzer property. Morey replied that plaintiff had come to the right place as he (Morey) was the only man who had the sale of the Anzer ranch. At this time the plaintiff announced that he was interested in the matter of his commissions in the event of a sale, whereupon, according to the testimony of the plaintiff, Porter said to the defendant Morey, "Johnny, you protect D. W. (the plaintiff) on his commissions," and Morey replied, "I will do so." The plaintiff then introduced Mr. Luther to the defendant Morey, and after some conversation concerning the character of the property, and the amount to be paid on the purchase price thereof, the plaintiff expressed the hope that an agreement of sale could be reached, and then departed for his home. The following day plaintiff received a letter from Mr. Luther, stating that he would leave Watsonville and seek land elsewhere if negotiations for the Anzer property did not make more progress. The letter requested plaintiff to use his influence on Morey. The plaintiff mailed this letter to Morey, and in addition wrote to him as follows: "Dear Mr. Morey: If the within letter interests you I would advise you to act at once as it explains itself." Thereafter, and as a result of plaintiff's efforts, the Anzer property was sold to Mr. Luther for \$90,000, out of which a commission of \$4,500 was paid to Quinn, who in turn paid one-half thereof to the defendant Morey. Thereupon the defendant Morey inclosed his personal check for \$250 in a letter addressed to the plaintiff, of which the following is a copy: "Watsonville, Cal., March 2, 1910. Mr. D. W. Johnston, Santa Cruz, Cal.—My Dear Sir: I am inclosing herein my personal check for \$250. The matter that was brought up through your introduction a short time ago has been closed, and I trust that this will reimburse you for your time. I am, truly yours, J. J. Morey." Plaintiff refused to accept this check in payment of his commission, and brought this suit for the recovery of the sum of \$4,500, which he alleged was the reasonable value of his services.

From the foregoing statement of facts it will be seen that the defendant Morey was not the owner of the property sold, and that the action is one for the recovery by one real estate broker from another of a commission alleged to be due under the terms of an oral contract between broker and broker. The case was tried with a jury. The plaintiff was nonsuited as to all of the defendants except Morey, and as against him the jury returned a verdict in favor of the plaintiff in the sum of \$2,000. Judgment for the plaintiff was entered accordingly. The trial court, however, deeming the amount of the verdict and judgment excessive, denied defendant Morey's motion for a new trial upon the express condition that plaintiff remit the sum of \$500 from the amount of the verdict and judgment as originally rendered and entered. The plaintiff complied with this condition, and thereupon, the lower court made and entered an order that the judgment be reduced to the sum of \$1,500. From the judgment as modified and from the order denying a new trial the defendant Morey has appealed.

In support of his appeal he urges that his motion for a nonsuit should have been granted because it was not shown upon the plaintiff's case nor at all: (1) That the defendant was authorized in writing by the owners of the property to sell the same; (2) that the contract for the commission sued for between plaintiff and defendant was in writing. In addition the defendant contends for a new trial upon the ground that the evidence does not support the verdict and judgment, in this, that the evidence as to what was said and done by plaintiff, Morey, and Porter does not show a meeting of minds between plaintiff and defendant Morey sufficient to create the contract alleged and sued on.

[1] In support of the latter contention the defendant relies upon a conflict in the evidence raised by the testimony of Mr. Porter, who was called as a witness for the defendant in an effort to rebut the testimony of plaintiff as to what was said and done at the meeting of plaintiff, Morey, and Porter. This conflict in the evidence is slight and immaterial; but even if it was pronounced and pertinent it would be a matter solely for the jury to determine. The testimony of the plaintiff, if believed by the jury, was sufficient to support the finding implied from their verdict that the plaintiff and defendant entered into the contract sued on, and therefore, notwithstanding any real or apparent conflict in the evidence, it cannot be said that the verdict and judgment upon this phase of the case are not supported by the evidence.

[2] Defendant's motion for a nonsuit was properly denied. The contract sued on does not fall within the inhibition of the statute of frauds.

[3] Subdivision 6 of section 1624 of the

Civil Code, which declares an agreement authorizing or employing an agent or broker to sell real estate for a compensation or commission to be invalid unless reduced to writing, was designed only for the protection of real estate owners against the unfounded claims of brokers; and it was never intended to be applied to contracts between brokers co-operating in the sale of real property and agreeing to share commissions earned as a result of such sale. *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289; *Casey v. Richards*, 10 Cal. App. 57, 101 Pac. 36; *Baker v. Thompson*, 14 Cal. App. 175, 111 Pac. 373.

[4, 5] Upon this phase of the case the defendant contends that it was essential to the success of plaintiff's action on the contract between plaintiff and defendant that plaintiff allege and prove the existence of a prior valid contract which could have been enforced by the defendant for the payment to him of a commission for procuring a purchaser of the property in question, out of which in turn a commission could be paid by the defendant to plaintiff for his services. In other words, it is defendant's contention that until it was shown that the defendant was entitled under a valid contract to a commission for the services which he rendered in negotiating this sale, there was legally no fund out of which plaintiff could be paid a commission, notwithstanding the fact that the defendant had actually received his commission from Quinn.

Assuming, without conceding, this contention to be correct, the plaintiff's pleadings and proof met the requirements of the contention. The assignment from Quinn, the only authorized agent of the Anzers, to the defendant Morey, is, when read and construed in its entirety, nothing more nor less than an agreement to employ the defendant Morey as the agent of Quinn for the purpose of co-operating in the procurement of a purchaser for the property of the Anzers. By this assignment Quinn agreed to share his commissions with Morey in the event of either procuring a purchaser for the property; and while it may be true that Morey's contract with Quinn would not have supported an action by Morey for his commissions against the Anzers, nevertheless it is obvious that such contract could have been enforced against Quinn if he had refused to pay Morey the commissions therein agreed upon. However that may be, it is an undisputed fact in the case that Quinn, in keeping with his contract, did pay to Morey the commissions agreed upon; and it follows that there was in existence a fund out of which Morey could have paid the commission which the jury found he had agreed to pay to the plaintiff.

The two cases of *Aldis v. Schleicher*, 9 Cal. App. 372, 99 Pac. 526, and *Saunders v. Yoakum*, 12 Cal. App. 543, 107 Pac. 1007, are not inconsistent with the views here ex-

pressed. The first of these cases was an action to recover from the defendant therein a broker's commission upon an oral agreement for services rendered in effecting a sale of real estate, which agreement, it was alleged, was made with the defendant as the agent and broker of the parties who, with the defendant, were the owners of the real estate. The scope and effect of the opinion in that case was construed in the same court in the subsequent case of *Casey v. Richards*, supra. The latter case was also an action by one real estate agent against another upon an oral contract for the recovery of broker's commission alleged to have been earned in procuring a purchaser for real estate; and in construing the opinion in *Aldis v. Schleicher*, the court said that the complaint in that case "was held to be insufficient because it did not allege that the employing real estate agent, who was defendant in the action, ever had received or was entitled to recover from the seller the commission for a share of which the plaintiff was suing. * * * In other words, until it was shown either that the defendant had received a commission, or was legally entitled to recover one from the owner, there was no commission in which the plaintiff could share."

In the present case plaintiff's complaint alleged—and it was not disputed at the trial—that the defendant had received the commission out of which in turn plaintiff's commission was to be paid; and therefore it cannot be said that plaintiff's pleadings and proof do not show the existence of a commission which could be the subject of an oral contract.

[6] Complaint is made that the testimony of Brooke, a witness for the plaintiff, was "hearsay and self-serving"; but counsel for the defendant has not favored us with a reference to the transcript in this connection. However, upon examination of the transcript, we do not find that counsel for the defendant interposed any objection to the testimony of this witness, and therefore he will not be heard to complain here of the admission of such testimony.

[7, 8] Finally it is contended upon behalf of the defendant that the amount of the verdict and judgment is grossly excessive and not wholly supported by the evidence. In the absence of an express agreement as to the compensation which should be paid plaintiff for his services, the law impliedly fixes a reasonable sum as his commission. While we are strongly of opinion, as apparently the trial court was, that the jury was extremely liberal in its allowance to the plaintiff, yet we are not prepared to say that the record is barren of competent evidence to support the judgment as reduced and finally entered for \$1,500, which is exactly two-thirds of the \$2,250 which defendant received as his share of the commissions from Quinn. In this behalf the record shows

the uncontradicted testimony of the plaintiff and one other witness to be that it was the custom in the vicinity where the contract in suit and the sale in question were made, in the absence of an express agreement providing otherwise, to pay the broker who procures a purchaser of real estate for another broker from one-half to two-thirds of the commission received from the owner of the property. This testimony was not rebutted or attempted to be rebutted by the defendant, and we must assume therefore that its correctness was conceded by the defendant at the trial. However that may be, the evidence offered and received upon the plaintiff's case as to what was a reasonable commission to be paid him as compensation for his services, standing as it does unimpeached and undisputed, is sufficient to support the judgment as finally entered; and therefore we are powerless to set it aside or further modify it, notwithstanding the fact that it may be contrary to our individual impressions as to what was the reasonable value of plaintiff's services.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; MURPHEY, Judge pro tem

GROWALL v. PACIFIC SURETY CO. (Civ. 1,184.)

(District Court of Appeal, First District, California. Feb. 13, 1913.)

1. PRINCIPAL AND SURETY (§ 82*)—LIABILITY OF CONTRACTOR'S SURETY—BUILDING CONTRACTS.

Where an owner made the partial payments called for by the contract for the construction of a building and completed the building on the contractor abandoning the work, and the amount due under the contract was sufficient to pay for the completion of the work and to pay legal liens, the surety on the contractor's bond was not liable to the owner, who voluntarily paid lien claimants in excess of what he was legally liable for.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 127; Dec. Dig. § 82.*]

2. CONTRACTS (§ 306*)—BUILDING CONTRACTS—LIABILITY OF OWNER.

An owner who has complied with a valid building contract cannot be compelled to pay anything in excess of the contract price; and where he completes the building in accordance with the original plans on the abandonment of the work by the contractor he must, under Code Civ. Proc. § 1200, be allowed credit for what is reasonably and necessarily expended therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.*]

8. PRINCIPAL AND SURETY (§ 82*)—LIABILITY OF SURETY ON CONTRACTOR'S BOND—BUILDING CONTRACTS.

The surety on the bond of a building contractor abandoning the work is not liable to the owner for attorney's fees and costs incurred by him in defending against the claims of lien claimants.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 127; Dec. Dig. § 82.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by W. L. Growall against the Pacific Surety Company. From a judgment for plaintiff, defendant appeals. Reversed.

Myrick & Deering, of San Francisco (James W. Scott, of San Francisco, of counsel), for appellant. Jordan, Rowe & Brann, of San Francisco, for respondent.

HALL, J. Plaintiff recovered judgment against defendant upon a bond given by defendant to secure the faithful performance by one Evans of a contract to erect a building for plaintiff. Defendant moved for a new trial, which being denied defendant appealed to this court both from the judgment and the order.

The building contract was in all respects valid, and was duly filed in the recorder's office.

Evans, the contractor, abandoned the contract before completion, and plaintiff completed the building according to the original plans and specifications. By this action he sought to recover the excess in the total cost of the building over the contract price, claimed to be \$833.15, and also \$250 attorney's fees paid and \$54.75 costs incurred in defending two suits brought by lien claimants against him and the original contractor.

The court found in favor of plaintiff, and gave judgment for the amount prayed for.

[1] 1. As to the finding to the effect that plaintiff was compelled to pay to complete the building any sum in excess of the original contract price, it is claimed by appellant that such finding finds no support in the evidence.

This contention must be sustained. The contract was for the payment of the total sum of \$9,291, to be made in designated installments, with a final 35-day payment of \$2,325. At the time of the abandonment of the contract by Evans, plaintiff had, in strict accordance with the contract, paid thereon \$5,705, which left a balance for the completion of the building in the sum of \$3,526. The owner expended in economically completing the building in strict accord with the plans and specifications the sum of \$1,795.15, and no more, which left in his hands the sum of \$1,790.85, which is the full amount that he was legally bound to pay to lien claimants. Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152; Raphael Co. v. Grote, 154 Cal. 137, 97 Pac. 155; Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 126 Pac. 146.

The payments due and made under the contract prior to the abandonment, amounting to \$5,705, the amount expended by the owner in completing the building, \$1,795.15, and the sum of \$1,790.85, make up the total of \$9,291, which was the contract price.

[2] An owner who has fully complied upon his part with the terms of a valid building contract cannot be compelled to pay anything in excess of such contract price. *Hoffman-Marks Co. v. Spires*, supra. When such an owner completes the building in accordance with the original plans, because of an abandonment by the contractor, he must be allowed credit for what he has necessarily and reasonably expended in so doing. This is the effect of the application of section 1200, Code of Civil Procedure, which establishes the rule in cases of abandonment by the contractor.

In the case at bar plaintiff, probably supposing that he was obliged to turn over to the lien claimants the entire amount of the final 35-day payment, voluntarily paid the amount thereof and \$100, retained from prior installment, into court for such claimants. It is only by crediting him, as against the surety, with the full amount of such payment that the finding of the court can be sustained. The surety cannot be charged with any voluntary payment that plaintiff may have made in excess of what he was legally liable for.

[3] Neither can he recover, as against the surety, the attorney's fees and costs incurred by him in defending against the claims of the lien claimants. This was so decided by this court in *Alcatraz, etc., Ass'n v. U. S. F., etc., Co.*, 3 Cal. App. 338, 85 Pac. 156. It was there said: "Whatever expense was incurred by reason of the attempt of the claimants to enforce liens to which they were not entitled is not embraced in the defendant's contract of indemnity, whether such attempt was to enforce liens for a greater amount than they were entitled to recover, or liens for which they had no claim whatever. The plaintiff, therefore, is not entitled to recover from the defendant for the services of its attorneys in defending these actions, or the expenses incurred therein, and the court properly sustained the demurrer to the complaint."

Some other points are discussed in the briefs; but, as the views above expressed appear to us to be determinative of the entire case upon its merits, we do not think it necessary to discuss the other points urged for a reversal.

The judgment and order appealed from are reversed.

We concur: LENNON, P. J.; MURPHEY, J., pro tem.

HAY v. McDONALD. (Civ. 1,189.)
(District Court of Appeal, Second District, California. Feb. 13, 1913.)

1. APPEAL AND ERROR (§ 927*)—QUESTION OF FACT—JUDGMENT ON NONSUIT.

In reviewing a judgment on a nonsuit, any reasonable construction of the testimony on be-

half of the plaintiff which will sustain the cause of action alleged must be adopted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. BANKS AND BANKING (§ 109*)—CONTRACTS OF CASHIER—PARTIES—DESCRIPTIVE WORDS.

A written contract in the form of an I. O. U. signed by defendant, and followed by the descriptive word "Cashier," did not evidence a contract on the bank of which defendant was cashier, since, where no words appear in the body of an instrument showing it to have been made on behalf of a party other than the one whose signature is attached, it will not be deemed to be the contract of another party, even though the signature may be qualified by such words as "secretary," "cashier," etc.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 257-260; Dec. Dig. § 109.*]

3. EVIDENCE (§ 459*) — PAROL EVIDENCE — PARTIES TO WRITTEN CONTRACT.

Where a written contract is signed by one describing himself as cashier, etc., parol evidence is admissible to identify the party against whom the obligation is legally chargeable.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.*]

4. BROKERS (§ 88*)—ACTION FOR COMPENSATION—QUESTION FOR JURY.

Where plaintiff in an action upon defendant's agreement, in the form of an I. O. U. signed by defendant, followed by the qualifying word "Cashier," for the payment of a certain sum upon plaintiff's completion of a sale, showed that defendant requested that he might be allowed to close the sale for the sake of giving him better prestige with the bank of which he was cashier, to which plaintiff assented upon the agreement that defendant would protect him to the extent of his commission, and as evidence thereof gave plaintiff the contract sued on, it was error without contradictory evidence, to direct a nonsuit.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George Hay against R. McDonald. Judgment for defendant, and plaintiff appeals. Reversed.

C. L. Claffin, E. W. Owen, and J. W. Wiley, all of Bakersfield, for appellant. Geo. E. Whitaker and E. L. Foster, both of Bakersfield, for respondent.

JAMES, J. Plaintiff brought this action to recover upon an agreement alleged to have been made by defendant, and which was expressed in writing and in the following form: "Bakersfield, Mar. 29-07. I. O. U. One thousand dollars on completion of sale of lots 3 & 4 in block 273 in city of Bakersfield. R. McDonald, Cashier." Other facts explanatory of the cause of action as alleged were: That plaintiff had performed and rendered valuable services to defendant in negotiating the sale of the lots of land described in the contract, and that the sale of the real property had been completed prior to the commencement of the action; that defendant had, upon demand being made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

therefor, refused to pay plaintiff the \$1,000, or any part thereof. In the answer of defendant issue was taken as to all of the material allegations of the complaint. The cause came on for trial, and after hearing the testimony of the plaintiff and considering certain documentary evidence, the trial judge granted the motion of defendant that a judgment of nonsuit be entered. From the judgment so entered this appeal has been taken.

By the bill of exceptions, in which the evidence is set forth in narrative form, it appears that plaintiff was engaged by one Mr. Redlick to secure for the latter a piece of property suitable to the erection of a store building; that the lots mentioned in the agreement we have referred to were examined, and, being satisfactory as to location, Redlick told the plaintiff that he would purchase them if the price was satisfactory; that plaintiff visited one Weill, who was the owner of the ground, and Weill stated that he would accept \$18,000 for it and allow 5 per cent. commission to plaintiff on the sale; that plaintiff communicated the amount of the price asked to Redlick, and Redlick said he would not pay that amount, but would pay \$16,000; that Redlick told plaintiff that he would not pay any commission, but that if plaintiff made anything on the transaction he must get it from the party from whom the property was purchased; that plaintiff then told Weill that he had a purchaser willing to pay \$16,000 for the lots, but that Weill would not accept that price; that Redlick told plaintiff that he understood that the Kern Valley Bank owned the property, and asked plaintiff to investigate the question of title; that plaintiff did so investigate it and found that the bank held a deed, absolute in form, conveying title from Weill to it; that he then approached the defendant, who was cashier of the bank, and asked if the bank owned the property, was told that it did, and that the property was for sale at a price of \$15,000 net to the bank; that plaintiff communicated again with Redlick, and Redlick reiterated that he was willing to pay \$16,000 for it, and requested plaintiff to get a contract from the bank to purchase the property, and to take the contract in plaintiff's name for assignment to Redlick, as the latter did not want to be known in the transaction until he had procured some other property in the vicinity; that plaintiff saw McDonald again about it, and the latter said that Weill owed the bank quite a lot of money, that if he did not repay the same within a few days the bank was authorized to sell the property, and that it would sell it at the price stated; that later defendant called plaintiff up on the telephone and told him to come to the bank, and that upon plaintiff complying with that request defendant told him that the property was then ready for sale, if he wanted to make a de-

posit on it; that plaintiff did so make a deposit, and defendant asked who the prospective purchaser was and urged plaintiff to disclose his name; that after some discussion about that matter, which included communication with Redlick, Redlick told plaintiff that he might disclose to defendant that he (Redlick) was the proposed purchaser, provided that defendant would not make public that information; that plaintiff then told defendant that Redlick was paying \$16,000 for the property and that he (the plaintiff) was to receive the difference between that amount and the amount of \$15,000 which the bank had agreed to accept as the purchase price thereof; that defendant wished to be allowed to close the transaction with the bank; and that plaintiff said to him, "I have no objection to letting you close the transaction if you wish to do so, if it will benefit you any." Plaintiff then testified as follows: "He (McDonald) said he thought it would give him better prestige with the bank if he could report it to them that he had sold it. I said: 'All right. You know what I am making. If you want to close the transaction, you are welcome to do so, providing you will protect me for what I am going to get out of it, which you know is a thousand dollars.' He said he would be glad to do it, and he took up the Kern Valley Bank check, and wrote on the back what has been introduced in evidence here, and gave it to me and I went about my business. * * * Mr. McDonald asked me to let him make the contract himself for the full purchase price of \$16,000 which Mr. Redlick was to pay, and gave me his I. O. U. as an offset against what was coming to me. Mr. Redlick had requested me to take the contract in my own name, and I had intended to do so, and told Mr. McDonald so. When he requested me to let him make, consummate the deal, he said he would make the contract for \$16,000, and that he would give me his I. O. U. to protect me for the \$1,000. That is why he gave me this I. O. U. From that time on I left the negotiations to be conducted independently of myself."

It is the contention of respondent that the contract upon which plaintiff sued was the contract of the Kern Valley Bank and not the personal contract of defendant. This view seems to have been adopted by the trial judge, hence his ruling granting the motion for judgment of nonsuit.

[1] In reviewing that judgment we need only suggest the rule, for it is too well established and settled to require support by citation of authority that, if any reasonable construction may be given to the testimony introduced on behalf of the plaintiff which will sustain the cause of action alleged in his complaint, that construction is the one which must be adopted.

[2] The written contract or memorandum in the form of an "I. O. U." cannot be said

to evidence a contract of the Kern Valley Bank when it is examined alone and for what it shows upon its face. Where in the body of an instrument no words appear which serve to define the agreement as being made on behalf of a party other than he whose signature is attached thereto, it will not be deemed to be the contract of another party, even though there may appear after the appended signature of the individual, qualifying or descriptive words, such as "President," "Secretary," or, as here, "Cashier."

[3] In such cases parol proof is admissible to identify the party against whom the obligation is legally chargeable. *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; *S. P. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650; *McCormick v. Stockton, etc., R. R. Co.*, 130 Cal. 100, 62 Pac. 267.

[4] The fact that the "I. O. U." was written upon the back or reverse side of a blank check of the Kern Valley Bank is of no significance as evidence to the point that defendant intended to contract on behalf of the bank and not on his own behalf; and we think that the oral testimony of plaintiff establishes quite clearly that the defendant in his personal capacity obligated himself to see that plaintiff was paid the \$1,000 mentioned in the writing. By the testimony of plaintiff it was shown that defendant desired to be allowed to close the transaction with the bank, as it would give him "better prestige" with the institution employing him. This was a consideration purely personal to himself. Plaintiff told him that he might do so, provided he would protect him as to the amount of plaintiff's profit of \$1,000. This condition, the evidence shows, defendant agreed to. Under these facts, it cannot be said that when plaintiff rested his case at the trial, and before defendant had introduced any testimony in his behalf contradicting the proof made by plaintiff, no liability was shown as against defendant in his individual capacity. We think the court erred in granting the motion for judgment of nonsuit.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

SCOTT v. GOODIN. (Civ. 1,228.)

(District Court of Appeal, Second District, California. Feb. 11, 1913.)

CORPORATIONS (§ 120*)—SALE OF STOCK—CONTRACT FOR REPURCHASE—CONSTRUCTION.

Where the seller of mining stock by a written contract made at the time of the sale agreed to repurchase the shares on or before 12 months from date, there was no absolute contract for repurchase, but the buyer was merely given an option which he was bound to exercise within the time limited.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Mary B. Scott against F. C. Goodin. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Affirmed.

Grant Jackson and Clark Ross Mahan, both of Los Angeles, for appellant. Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondent.

JAMES, J. Plaintiff has appealed from an order denying her motion for a new trial made after judgment rendered in favor of defendant. The record presented consists of the judgment roll and a statement of the evidence.

For a cause of action, plaintiff alleged in her complaint that defendant, in April, 1905, induced her to purchase 6,000 shares of the capital stock of a mining corporation at the price of 25 cents per share, representing to her that the company owned valuable mining property in Mexico; that defendant agreed that he would repurchase the stock "within twelve months thereafter" at the price of 30 cents per share; that the representations made by defendant as to the character and value of the mining property were false and untrue and made for the purpose of defrauding plaintiff; that the shares of stock purchased were of no value. It was further alleged that defendant had not repurchased the stock, and that prior to the commencement of the action plaintiff had demanded that he pay her the amount of 30 cents per share therefor as agreed.

We need not consider whether a cause of action for damages, arising out of the alleged false representations made by defendant through which plaintiff was induced to pay her money for worthless stock, is sufficiently stated in the complaint, because at the trial plaintiff relied wholly upon the written contract made by defendant wherein he agreed to repurchase the stock at an advance of five cents per share. A copy of that contract was set out as an exhibit attached to plaintiff's complaint and was admitted by defendant to have been executed by him. It reads as follows: "Los Angeles, April 18, 1905. I hereby agree to purchase from Mary B. Scott the following certificates of stock in the Eureka Mining and Milling Co. and pay her for same thirty (30) cents a share on or before twelve (12) months from this date: Certificate No. 21 for 2,000 shares. Certificate No. 28 for 4,000 shares. It is understood and agreed that during this period, Mary B. Scott accepts no dividends declared by the company on this stock without voiding this agreement. F. C. Goodin."

The particular date when plaintiff first demanded of defendant that he repurchase the stock was not set out in the complaint, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the evidence showed that it was not until October, 1907, that she requested him to buy back the shares. As the agreement provided that defendant would repurchase the stock "on or before twelve months from date," it is insisted by counsel for appellant that plaintiff was permitted to make demand within a reasonable time after the 12 months stipulated to had expired and then recover on the contract. In order to reach that conclusion the contract must be considered as an absolute agreement to purchase, save with a limitation of time operating in favor of defendant. In other words, that defendant agreed to repurchase the stock when 12 months had expired, or sooner if he so desired, but that plaintiff could not compel him to accept and pay for it until the 12 months' period had fully run. Counsel for appellant would make of the contract one giving the defendant an option as to the repurchase of the stock within the time limited, for in their brief it is said: "If respondent at any time within this period elected to repurchase the property, he could compel a sale, but appellant could not at any time before the expiration of this date compel him to act." We are not in harmony with the construction placed by appellant upon the contract. In our view, the contract was not a bilateral one for the resale and purchase of the stock; it was made as an inducement to persuade the plaintiff to buy the shares; she could not have been compelled to sell the stock to defendant if she did not so desire, but, on the other hand, she had the option at any time before the expiration of 12 months to compel defendant to take it at the price of 30 cents per share. Not having exercised that optional right within the time limited, no cause of action on the contract arose in her favor. We agree with the trial judge as to the correctness of the judgment entered. Whether the evidence sustains the finding that plaintiff had never demanded that defendant comply with the agreement need not be considered. The evidence at best showed such demand to have been first made in October, 1907, which was long after any liability assumed by defendant under the agreement had ceased.

Respondent has not aided the court by filing a brief or presenting oral argument, and it appears that his counsel have withdrawn from this case because of respondent's refusal (not his inability) to pay the cost of printing points and authorities in aid of his side of the case. We conclude, however, that all of the material findings of the trial court were sufficiently sustained by the evidence, and the motion for a new trial was properly denied.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

RAUER'S LAW & COLLECTION CO. v.
THIRD STREET IMPROVEMENT
CO. et al. (Civ. 1,177.)

(District Court of Appeal, First District, California. Feb. 13, 1913.)

1. LANDLORD AND TENANT (§ 109*)—SURRENDER—ACCEPTANCE.

An agreement to surrender and accept leased premises need not be shown by express agreement, but may be implied from the facts and acts of the parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 350-360, 363-365, 368-371; Dec. Dig. § 109.*]

2. LANDLORD AND TENANT (§ 110*)—SURRENDER—ACCEPTANCE—EVIDENCE.

Where a tenant of a store vacated and abandoned it because of alterations which the landlord made in the building, and thereby practically prevented the tenant from carrying on his business, and the tenant notified the landlord that the premises had been vacated and abandoned for such reason, and on the landlord's request the keys were given him, and at the time of the surrender of the keys the tenant demanded a return of the deposit as security for rent, but the landlord replied that the matter would be fixed up in a few days, there was evidence of a surrender and acceptance, terminating the lease by mutual consent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 366-369, 371; Dec. Dig. § 110.*]

3. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Rauer's Law & Collection Company against the Third Street Improvement Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Arthur W. Perry, of San Francisco, for appellant. Wm. Tomskey, of San Francisco, for respondent.

LENNON, P. J. In this action judgment was rendered and entered for the plaintiff. The appeal is from the judgment and from an order denying a new trial upon the judgment roll and a statement of the case.

The action was for money had and received by the defendants for the use and benefit of the plaintiff. The facts of the case, as developed by the evidence, show that the sum sued for was deposited by plaintiff's assignor with the defendants in lieu of a bond to secure the payment of rent reserved in a contract of lease executed by the plaintiff's assignor and the defendants.

The trial court found that the lease had been terminated by the mutual consent of the parties, and that thereupon the defendants had received and taken possession of the leased premises. From this finding the conclusion of law was deduced that the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff was entitled to the return of the money deposited, and the court gave judgment accordingly. The only point made in support of this appeal is that the evidence does not support the finding mentioned.

The evidence upon this phase of the case is to the effect that the lessee, plaintiff's assignor, vacated and abandoned the leased premises—a store—because of certain alterations which were being made by the defendants in and upon the building in which the store was located, and which practically prevented the lessee from carrying on the business for which the premises were rented and used. The lessee notified the defendants that the premises had been vacated and abandoned for the reasons stated. Thereupon the defendants requested and were given the key of the premises. At the time of the abandonment of the premises and the surrender of the key thereof the lessee made a demand for the return of the money which had been previously deposited as security for the rent, to which defendants replied: "That will be all right. * * * We will fix that up in a few days." The defendants did not then nor at any other time indicate, either expressly or impliedly, that they would continue to hold the lessee liable for the rent reserved for the term provided in the lease. Shortly after this conversation the defendants entered upon the premises and affixed thereto a "To Let" sign.

[1] An express agreement to surrender and accept leased premises need not be shown. Such an agreement may be implied from the circumstances and the acts of the parties. 2 Taylor on Landlord and Tenant, § 515.

[2] While no one of the things said and done by the parties to the lease prior to and upon the vacation and abandonment of the premises would be in and of itself sufficient evidence of the surrender of the term and its acceptance by the defendants, nevertheless all of the circumstances narrated warrant the inference that the surrender of the leased premises was made and accepted by operation of law, and sufficiently support the finding that the relation of landlord and tenant previously existing between plaintiff's assignor and defendants was terminated by mutual consent. Jones on Landlord and Tenant, §§ 540, 548, 549; 2 Taylor on Landlord and Tenant, § 507; Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

[3] There is some slight conflict in the evidence on the whole case as to what was said and done by the parties to the lease at the time of the abandonment of the premises. The trial court, however, accepted the plaintiff's evidence, and apparently gave but little, if any, credence to the evidence produced on behalf of the defendants. This it had the right to do, and its decision of the question of fact, rendered upon conflicting evidence, cannot be disturbed by this court.

The judgment appealed from and the order denying a new trial are affirmed.

We concur: HALL, J.; MURPHEY, J., pro tem.

ALLEN v. CENTRAL COUNTIES LAND CO.

SAME v. VANDERCOOK. (Civ. No. 1,141.) (District Court of Appeal, First District, California. Feb. 11, 1913.)

1. CORPORATIONS (§ 456*)—CONTRACTS OF EMPLOYMENT—RESOLUTIONS BY DIRECTORS.

It is not necessary that a resolution should be passed by the board of directors in order to bind a corporation in the matter of the employment of its servants.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1806; Dec. Dig. § 456.*]

2. CORPORATIONS (§ 426*)—CONTRACTS OF EMPLOYMENT—ESTOPPEL.

The regular payment of a monthly salary by a corporation at a certain rate, with the full knowledge of the directors, for upwards of three years, without objection on the part of any director or other officer, precludes the corporation from contending in an action for several months' salary that there was no agreement to pay such an amount, or that the services were not reasonably worth such amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.*]

3. CORPORATIONS (§ 177*)—ACTION BY STOCKHOLDER FOR SERVICES—IMPLIED CONTRACT.

The fact that one suing for services rendered a corporation was a stockholder does not preclude his recovery either upon an express or implied contract, being merely evidentiary as to whether any promise ever existed to pay for such services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 653; Dec. Dig. § 177.*]

4. MASTER AND SERVANT (§ 71*)—RECOVERY OF SALARY—EXPRESS CONTRACT—INTEREST.

In an action for services under an express contract to pay a certain monthly salary, interest should be allowed on each payment as it fell due.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 89; Dec. Dig. § 71.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Edward O. Allen against the Central Counties Land Company and by the same plaintiff against E. P. Vandercook. Actions consolidated. Judgment for plaintiff, and defendants appeal. Affirmed.

Harding & Monroe and F. W. Nightingill, for appellants. W. H. Payson, of San Francisco, for respondent.

HALL, J. The two above-entitled actions were consolidated and tried together, and the appeals from the judgment rendered in the consolidated action come to this court upon one record.

The action against the corporation was brought by plaintiff to recover from the corporation defendant a stated amount for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

salary of plaintiff as the secretary of said corporation, and another amount as salary of one Dick as bookkeeper for the corporation, whose claim was before suit brought assigned to plaintiff. The action against Vandercook was predicated upon the same claims, and was brought against him upon his liability as a stockholder of said corporation. In his complaint as originally filed plaintiff sued to recover of defendant upon an express contract for salary as secretary of said corporation from the 1st day of April, 1909, to the 31st day of January, 1910, at an agreed compensation of \$150 per month; and also salary from February 1, 1910, to May 25, 1910, at an agreed compensation of \$50 per month. There was no controversy about this latter part of the claim. In his second count he sought to recover upon an express contract for the salary of one A. G. Dick as bookkeeper of said corporation from April 1, 1909, to August 17, 1909, at an agreed compensation of \$100 per month. At the close of the trial plaintiff amended his complaint so as also to state a cause of action to recover the \$150 per month as the reasonable value of the services rendered, and made a similar amendment as to the \$100 per month sought to be recovered as the salary of Dick, as bookkeeper of said corporation. The court made its findings in such a way as to cover either theory of the case. It found that defendant agreed to pay plaintiff for his services from April 1, 1909, to January 31, 1910, at the rate of \$150 per month, and also found that said sum was the reasonable value of such services. The court made similar findings covering the claim for salary of Dick.

[1] Upon these appeals it is claimed by appellants that the evidence does not show any express contract upon the part of the corporation to pay either \$150 per month to plaintiff or \$100 per month to Dick, and that no evidence was introduced to prove the reasonable value of the services which plaintiff and Dick did render to the corporation. We find in the record ample evidence to support the findings to the effect that the corporation did promise to pay to plaintiff \$150 per month for his services as secretary of the corporation, and \$100 per month to Dick for his services as bookkeeper of the corporation. No formal resolution expressly fixing the compensation of either the secretary or the bookkeeper was ever passed by the board of directors covering the period for which the salaries are in dispute. The corporation was organized in 1906. Plaintiff was duly elected secretary. Mr. Vandercook in fact acted as the general manager of the corporation from its organization, and some time later was formally elected to such position. By agreement with plaintiff Vandercook fixed plaintiff's salary for the first few months at \$100 per month, but in the latter part of

1906 this was increased by Mr. Vandercook to \$150 per month. During all the time that plaintiff remained in the employ of the corporation, he and Dick made out monthly pay rolls, showing the salary of each of them. As to the salary of plaintiff each pay roll would have an item as follows: "To Edw. O. Allen, Secretary. Time one month, rate per month \$150. Amount earned \$150. Balance payable \$150." A similar item would appear as to the salary of Dick, showing the rate for his salary to be \$100 per month. These pay rolls were regularly presented to the president of the corporation, with checks for the amounts called for, and such checks were signed by the president and by the secretary. Upon many occasions these pay rolls were presented to the board of directors and were by the board approved.

Upon the 14th day of January, 1908, many months after both plaintiff and Dick had been employed and their respective compensations fixed by Vandercook, the board passed a resolution whereby it "sanctioned, ratified, approved, and confirmed" all transactions, payments, and agreements made and entered into upon behalf of the company by the officers and agents of the company. At this time the directors had full knowledge of the salaries being regularly paid to both plaintiff and Dick, and never made any objection thereto. For three years and upwards these salaries were regularly paid, and the payments entered upon the books of the corporation. The general manager, Mr. Vandercook, had at all times full knowledge thereof. All the directors had the same knowledge.

It is true that Dick was employed by one J. Dalzell Brown, who seems to have been in some way interested in the corporation. But he was employed for the corporation and with the full knowledge of Vandercook and the directors. The services he rendered were rendered to the corporation and regularly paid for by it at the rate of \$100 per month, with the full knowledge of the general manager and the board of directors. Under these circumstances we think the corporation was bound to pay plaintiff and Dick the salaries that they had been thus regularly receiving from the corporation month by month, and that such corporation was bound to pay such stated salaries as upon an express contract to pay such sums. It is well settled that it is not necessary that a resolution should be passed by the board of directors in order to bind the corporation in the matter of the employment of its servants. *Brown v. Crown Milling Co.*, 150 Cal. 376, 89 Pac. 86; *Crowley v. Genesee Mining Co.*, 55 Cal. 273.

[2] The regular payment of the monthly salaries at the rates of \$150 and \$100 per month, with the full knowledge of the directors of the corporation, for upwards of three years, without objection on the part

of any director or other officer of the corporation, is ample to preclude the corporation from now contending either that there was no agreement to pay such amounts, or that the services were not reasonably worth such amounts. *Shade v. Sisson M. & L. Co.*, 115 Cal. 357, 47 Pac. 135. These circumstances support the findings as made by the court both as to the agreements to pay the amounts sued for as well as to the reasonable value thereof.

[3] The fact that the plaintiff was a nominal stockholder of the corporation does not affect the case. It does not preclude him from recovering either upon an express contract or upon an implied contract. The fact that a plaintiff is a stockholder, or is otherwise interested in a corporation, may be shown as evidentiary matter upon the question as to whether or not any promise, either express or implied, ever existed to pay for his services. This is as far as the cases cited by the appellant under this head go.

[4] As the finding as to an express contract to pay an agreed sum monthly is supported by the evidence, the court did not err in allowing interest at the legal rate upon each month's salary as it became due.

For the reasons above stated, the judgment appealed from is affirmed as to both appellants.

We concur: LENNON, P. J.; MURPHEY, J., pro tem.

CAMPBELL v. SOUTHERN PAC. RY. CO.
(Civ. 1,006.)

(District Court of Appeal, Second District,
California. Feb. 11, 1913.)

1. TRIAL (§ 251*)—INSTRUCTION—ISSUES.

Where, in an employé's action for injuries, no issue of assumed risk is raised by the pleading or evidence, instructions on assumed risk are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF—NEGLIGENCE.

In an employé's action for injuries, the burden is on plaintiff to affirmatively prove his employer's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—NEGLIGENCE—PRESUMPTION.

That an employé is injured in the course of his employment raises no presumption of negligence on the part of his employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

4. MASTER AND SERVANT (§ 113*)—INJURY TO SERVANT—LIABILITY OF MASTER.

A railroad company is not liable for injuries to an employé due to being struck by a roof under which the car upon which he is employed is passing, where the roof is so constructed as to permit passage thereunder with-

out injury to those upon passing cars, and the company has discharged all duties devolving upon it in its relation with the employé.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 218, 224-227; Dec. Dig. § 113.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTION—EVIDENCE.

Where, in an employé's action for injuries, the evidence did not show negligence on defendant's part, error in an instruction on contributory negligence could not be prejudicial to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

6. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTION—ISSUES.

Where no issue of assumed risk was raised by the pleadings or evidence in an employé's action for injuries, an inaccurate instruction on assumed risk could not be prejudicial to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by E. J. Campbell against the Southern Pacific Railway Company. From a judgment for defendant and the denial of new trial, plaintiff appeals. Affirmed.

Crouch & Crouch, of Los Angeles, for appellant. J. W. McKinley, of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for respondent.

ALLEN, P. J. The action was one by an employé against his employer to recover damages on account of personal injuries. The complaint alleges that these injuries were occasioned through the negligent act of defendant in maintaining a roof so constructed that there was not a sufficient passageway between such roof and the car upon which plaintiff was employed, the result of which was that plaintiff, while in the performance of his duties, was struck by such roof and injured. The answer denied the allegations of the complaint, and, in addition, alleged that the injuries so sustained were occasioned on account of plaintiff's negligence which proximately contributed to such injuries. The action was tried by a jury, which returned a verdict for defendant. From the judgment rendered thereon, and from an order denying a new trial, plaintiff appeals upon a bill of exceptions.

The only evidence contained in the bill of exceptions on behalf of plaintiff is to the effect that plaintiff, having knowledge that the roof was beside the track, always supposed that the same was far enough away to clear a man coming down the side of a passing car; that while descending from a passing car in the discharge of his duty he was struck by such roof and injured. The evidence set out as being received on behalf of defendant was that, while it did maintain the roof in question, there was provided a sufficient passageway between such track and

said roof, and that the accident could not have happened to plaintiff in the manner claimed by him.

[1] The errors assigned relate solely to the matter of instructions given and refused. The instructions refused were with reference to assumed risks. The record does not disclose any defense based upon a claim that the injuries were due to the ordinary risks of employment. This defense to be available must be pleaded. *Lucid v. E. I. DuPont Powder Co.* (C. C. A.) 199 Fed. 377, citing *Magee v. North Pac. C. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69. There being no issue in reference to assumed risks, and nothing appearing in the bill of exceptions to the contrary, it must be assumed that no evidence was admitted touching a matter not at issue. This being true, plaintiff was not entitled to instructions inapplicable to the case presented. The only evidence before us establishes a conflict as to defendant's negligence in the premises.

[2] In actions by an employé against an employer for damages on account of negligence, it is incumbent upon the plaintiff to affirmatively prove negligence on the part of the employer.

[3] The mere proof of injuries received in the course of employment raises no presumption of negligence, as is the case where a passenger for hire is injured in the operation of the instrumentalities employed in his transportation.

[4] In so far as the evidence is presented by the bill of exceptions, there is to be found sufficient to warrant the jury in determining that no negligence of defendant was shown. If no negligence was established by a fair preponderance of the evidence, and the jury believed that the roof was so constructed as to permit a passageway thereunder and thereby without injury to those upon passing cars, and that no obligation or duty devolving upon defendant in its relation with plaintiff had been undischarged or unfulfilled, a verdict for the defendant was proper.

[5] It is claimed, however, that certain instructions with reference to contributory negligence were erroneous. If no negligence upon defendant's part was shown, the matter of contributory negligence became unimportant, and charges with reference thereto could not be prejudicial. An examination of the instructions given upon the trial indicates a condition similar to that referred to in *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 Pac. 976, wherein the Supreme Court, speaking through Mr. Justice Lorigan, has quoted with approval this rule: "Where numerous instructions are given (as in this case), it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If, however, when the entire charge is examined, the omissions or inaccuracies in a par-

ticular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions."

[6] Appellant contends that certain instructions with reference to the assumption of risk were not entirely accurate; but, as we have before said, no issue with reference to assumed risks was made, and no evidence is shown to have been received which would make applicable a charge in that regard, and we are unable to see how such a charge could have prejudiced plaintiff's rights.

We are satisfied that, considering all of the instructions given, the record as presented contains no prejudicial error warranting a reversal of the judgment or order.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

JOHNSTON v. JOHNSTON. (Civ. 1,034.)
(District Court of Appeal, Second District,
California. Feb. 11, 1913.)

1. DIVORCE (§ 184*)—LACHES — FINDING BY COURT.

Whether a delay of about six years in bringing an action for divorce on the ground of extreme cruelty was reasonable, within Civ. Code, § 124, providing that a divorce must be denied when there is an unreasonable lapse of time before commencement of the action, was a question for determination in the trial court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. § 184.*]

2. APPEAL AND ERROR (§ 201*)—OBJECTION BELOW—NECESSITY.

Where, in an action for divorce, plaintiff's counsel made no effort to insist upon their rights to be heard in the case, but without objection permitted the court to practically try the case without their aid, they could not be heard to say on appeal that plaintiff was denied his right to have the aid of counsel at every stage of the proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1251-1256; Dec. Dig. § 201.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by James A. Johnston against Elizabeth Johnston. From judgment for defendant and denial of new trial, plaintiff appeals. Affirmed.

F. W. Allender, of Los Angeles, for appellant. Gray, Barker & Bowen, of Los Angeles, for respondent.

ALLEN, P. J. The action was one for divorce upon the ground of extreme cruelty. The court finds from the undisputed evidence that the defendant was guilty of extreme cruelty through acts committed in the years 1900, 1901, and 1902. The action for divorce was not commenced until the year 1908, although the plaintiff seems to have been a resident of this state since some time

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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in 1904. Upon the trial the court, of its own motion, called the plaintiff as a witness and developed the fact that the only reason he could urge for not bringing the action sooner was that he had not thought of bringing it until he had lived in California quite a while and had become disgusted at her actions. The court found that an unreasonable time had elapsed, and under section 125 of the Civil Code denied the divorce on account of laches.

[1] Section 124 of our Civil Code provides that a divorce must be denied in all cases, other than where the ground of divorce is adultery or conviction of a felony, when there is an unreasonable lapse of time before the commencement of the action. The question whether this lapse of time is reasonable or not is one which the trial court must determine. Considering the long lapse of time between the occurrences complained of and the bringing of this suit, the court might well say that a presumption would arise either of condonation of the offense or acquiescence in the same. Plaintiff made no effort to introduce any testimony tending to show a reasonable excuse for his delay in bringing the action.

[2] Counsel for appellant insists that the court took charge of the examination of the witness and afforded him no opportunity to show the facts tending to disclose a reasonable cause for the delay. It is true, as appears from the record, that the court practically tried the case without the aid or assistance of counsel; but, notwithstanding this peculiar conduct of the case, plaintiff's counsel, if he so desired, might have offered to show in a proper way a reasonable excuse, and if the court had refused to permit him to make such showing there would be much force in his contention. But when counsel sit by and make no effort to insist upon their rights as counsel to be heard in the case, they cannot very well say that appellant's right to try his case according to the law and the evidence, and to have the aid of counsel at every stage of the proceedings, has been ignored.

We are of opinion that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: JAMES, J.; SAW, J.

CHAPPELL v. THOMPSON. (Civ. 1,230.)

(District Court of Appeal, Second District, California. Feb. 10, 1913.)

LIMITATION OF ACTIONS (§ 87*)—ACTION ON JUDGMENT—COMPETITION OF PERIOD.

Under Code Civ. Proc. § 836, subd. 1, prescribing a five-year limitation for actions upon foreign judgments, and section 351, providing that, if when the cause of action against a person accrues he is out of the state, it may

be commenced within such period after his return, and that his absence from the state after the cause of action accrues is no part of the limitation period, the bar does not commence to run in favor of defendant until he comes into this state and does not run during his absence, so that where action has accrued on a foreign judgment, and is not barred in the jurisdiction where rendered, action thereon against defendant who has resided in the state not more than 2½ years is not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 456-462; Dec. Dig. § 87.*]

Appeal from Superior Court, Los Angeles County; F. E. Denamore, Judge.

Action by A. B. Chappell against J. D. Thompson. Judgment for plaintiff, and defendant appeals. Affirmed.

Miller & Miller, of Los Angeles, for appellant. Daniel M. Hunsaker and Lacey & Hunsaker, both of Los Angeles, for respondent.

SHAW, J. Plaintiff sued upon a judgment rendered in his favor on June 30, 1905, by the district court of Black Hawk county, state of Iowa. As a defense to recovery thereon, defendant pleaded subdivision 1 of section 336 of the Code of Civil Procedure. The court gave judgment for plaintiff, from which defendant appeals upon the judgment roll.

The statute pleaded prescribes a period of five years within which an action upon a judgment of a sister state may be brought. The complaint herein was filed October 19, 1911, being 6 years, 3 months, and 19 days after the rendition of the judgment sued upon. Section 351 of the Code of Civil Procedure, however, provides that: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." An action upon the judgment was not barred by the laws of Iowa which, as found by the court, prescribe a period of 15 years within which to sue thereon; and the court found that since the rendition of the judgment defendant had not been a resident of or within the state of California for a period exceeding 2½ years. This latter finding, we think, brings the case directly within the exception contained in section 351 above quoted. The statute did not commence to run in favor of defendant until he came to this state, where he was subject to the process of its courts, and, if subsequent to coming he left the state, the statute did not run during the period of his absence. We regard *Dougall v. Schulenberg*, 101 Cal. 154, 35 Pac. 635, and *McKee v. Dodd*, 152 Cal. 637, 93 Pac. 854, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82, as decisive of the point

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

raised. These cases differ from the one at bar, in that they were appeals in actions involving promissory notes executed and payable out of the state by nonresident payors who subsequently removed to the state. The rule, however, applies with equal force to actions upon judgments. *Kennard v. Alston*, 62 Miss. 763; *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820. Omitting all reference to the provision contained in section 351, "the weight of authority is that the statute of the forum does not begin to run until the defendant comes within the jurisdiction in which suit is brought, and that the time elapsing between the accrual of the right of action in the foreign state and the acquiring of domestic residence forms no part of the statutory period of the forum." Annotator's note to *Rutledge v. U. S. Savings & Loan Co.*, 5 Ann. Cas. 542.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J

BURKE v. SAN FRANCISCO BREWERIES, Limited. (Civ. 1,139.)

(District Court of Appeal, First District, California. Feb. 13, 1913. Rehearing Denied by Supreme Court April 11, 1913.)

LANDLORD AND TENANT (§ 190½*)—RENT—EFFECT OF INABILITY TO PROCURE SALOON LICENSE.

Where a lease for years contained a stipulation that the lessee would not directly or indirectly use or allow the premises to be used, except for a saloon and lodging house, without the consent of the lessor, the fact that subsequent to the date of the lease defendant was refused a license to conduct a saloon therein is no defense to an action for rent, for the lease did not require the violation of an existing law, and the fact that the performance of the contract became impossible subsequent to the making of the contract did not discharge the lessee; it not appearing that the lessor had refused to permit some other use of the premises, or that it could not be used as a lodging house.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 190½.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Frank H. Burke against the San Francisco Breweries, Limited, revived in the name of Mary A. Burke as executrix. From a judgment for plaintiff, defendant appeals. Affirmed.

Hoefler, Cook, Harwood & Morris, of San Francisco, for appellant. Charles A. Shurtleff and J. G. De Forest, both of San Francisco, for respondent.

LENNON, P. J. Frank H. Burke was the original plaintiff in this action. After the action was commenced he died, and his wife, Mary A. Burke, as the executrix of his last will and testament, was substituted in his place and stood as plaintiff in the action.

In discussing this case our references to the plaintiff will be understood as applying to the original plaintiff. The action was brought for the recovery of the sum of \$1,250, alleged to be due plaintiff from the defendant as rental under the terms of a written lease executed and dated January 3, 1908, whereby the defendant was granted the use and occupation of certain premises in the city and county of San Francisco for the term of five years at the total rental of \$7,500, which it was stipulated in the lease was to be paid in monthly installments of \$125. Pursuant to the lease the defendant, upon the day and date of its execution, entered into possession of the demised premises, and paid the rent therefor as it became due save and except for the period commencing with the 1st day of August, 1909, and ending with the 1st day of June, 1910. The lease, among other things, provided, and the parties thereto expressly agreed, that the defendant would not "directly or indirectly use or allow to be used the said premises for any other purpose than that of a saloon and lodging house, without the written consent of the lessor, or Madison & Burke, agents." The execution of the lease was not denied, but the answer of the defendant pleaded as a separate defense to the action a failure of consideration for the lease and the impossibility of complying with the terms thereof. In this behalf the answer of the defendant alleged in substance that the defendant was, at the time of the execution of the lease and at all times thereafter, exclusively engaged in the business of manufacturing and selling beer; that the sole and only consideration for defendant's entering into the lease in question was to secure the leased premises for the purpose of conducting a saloon and selling beer manufactured by the defendant; that the charter and ordinance of the city and county of San Francisco, at the time of making the lease and at the time of the commencement of the action, provided that no person should engage in the sale of liquor as a retail liquor dealer without first procuring a license therefor; that plaintiff and defendant at the time of entering into the lease knew of and contemplated the existing requirements of the charter and ordinance referred to; that on the 30th day of July, 1909, the board of police commissioners of the city and county of San Francisco refused and ever since has refused to grant a license to the defendant for the purpose of selling beer or liquor of any description on the leased premises; and that by reason thereof the consideration for the execution of the lease failed and the lease itself became impossible of performance. The lower court granted plaintiff's motion to strike from the defendant's answer the special defense pleaded therein, upon the ground that it was sham and irrelevant, and that the facts stated therein did not constitute a de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fense to the action. Upon the issues raised by the pleadings as they stood after the motion to strike out was granted the case was tried, and a judgment rendered and entered for the plaintiff, from which the defendant has appealed upon the judgment roll alone.

Although counsel for the defendant have devoted considerable space to a discussion of the law relating generally to contracts made in contravention of public policy, the particular thing complained of and upon which they rely for a reversal of the judgment is not stated in their briefs. We apprehend, however, that the defendant is dissatisfied with the ruling of the lower court striking out parts of the answer, and that the only point involved upon the appeal is the correctness of that ruling.

This brings us to a consideration of the question as to whether or not the defendant was relieved from liability for the rent reserved in the lease for the remainder of the term granted merely because of the refusal of the municipal authorities to renew the license of the defendant to sell liquor in the demised premises. It is one of the contentions of the defendant that because the demised premises could not without violating the law be used by the defendant from and after the 30th day of July, 1909, for all of the purposes to which their use was limited by the terms of the lease, the lease from that date became impossible of performance by operation of law, and was no longer enforceable. It is further contended by defendant that the contract of lease was against public policy, and therefore void from its very inception. This latter contention is based upon the assumption that by the terms of the lease the defendant was obligated to continue for the period of five years in a business which might at any time after the execution of the lease be declared unlawful.

These contentions cannot be sustained. They are founded upon the rule of law that no recovery can be had by either party to a contract the performance of which involves the violation of an existing law. This rule of law has no application to the facts of the present case. The lease in question does not purport to require the performance of an act in contravention of an existing law. Nor can it be said that the parties to the lease, either expressly or impliedly, contracted for the termination of the lease in the event of a change in the law which would render further performance of the lease impossible without violating the law. On the contrary, it affirmatively appears from the allegations of the special defense relied upon that the defendant was compelled to discontinue the business of selling liquor not because of a change in the law, but rather because of its application to the business of the defendant subsequent to the execution of the lease. The defendant did not deny the allegation of the complaint that it had entered into the possession of the demised

premises under the lease on the 30th day of July, 1908; and in this connection it will be noted that the special defense of the defendant as pleaded is evasive to the extent that it is silent as to whether or not the defendant occupied the premises as a saloon under a license from the municipality prior to July 30, 1909, the date upon which it is alleged a renewal of the defendant's license was refused. That such was the fact, however, may be fairly inferred from the answer as a whole. No provision was made by the parties to the lease for its termination in the event of the failure of the defendant to secure a renewal of its license to sell liquor in the demised premises, and it cannot be fairly said that the terms of the lease can be construed to cover such a contingency. The renewal of the defendant's license was not a matter within the control of the plaintiff. That was a privilege which could be granted or withheld only by the municipality; and although a license had been granted to the defendant at or shortly after the execution of the lease, the defendant had no assurance that such license would be renewed from time to time during the life of the lease. This being so, the inference is irresistible that if the plaintiff and defendant had intended that the life of the lease should depend upon the renewal from time to time of the defendant's license to sell liquor in the demised premises, a clause to that effect would have been inserted in the lease; and if it be conceded, as counsel for the defendant contend, that the plaintiff and defendant, when executing the lease, had in contemplation the possibility of the unfavorable application of the existing laws of the municipality, the conclusion must follow that the defendant, when it accepted the lease, assumed the risk that a renewal of the license to sell liquor might at any time be refused.

It has been repeatedly held that under such circumstances the refusal of the municipal authorities to renew a liquor license cannot be availed of as a defense to an action for the rent reserved and due under a lease. The rule in this behalf was succinctly stated in the case of *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346. In that case the action was for rent due under a lease which provided that the demised premises should be used during the term only for the purpose of conducting a saloon business. There the lessee, as a defense to the action, pleaded his inability to use the premises for the purpose designated in the lease because of the rejection of his application for a license to sell liquor. In passing upon a demurrer which assailed the sufficiency of this defense, the court said: "It is the general rule that where the performance of a contract becomes impossible subsequent to the making of the contract, the promisor is not thereby discharged. To this rule there is a well-established exception, namely, where the performance becomes impossible by a

change in the laws the promisor is discharged. The facts here presented do not bring the case at bar within the exception. The appellant did not discontinue his business because of a change in the law, but because of its application. At the time of entering into the contract, that he might subsequently by the proper authorities be denied a license was a probability well known to him. *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *San Antonio Brewing Ass'n v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *White v. Stuart*, 76 Va. 546. With this knowledge appellant made his terms unconditionally. He took the risk of being held liable for the rents even though performance became impossible by reason of circumstances beyond his control."

The general current of authority dealing with the subject under discussion is in substantial accord with the rule enunciated in the case last cited and quoted. The cases dealing with the subject, either directly or upon principle, are many, among which may be cited the following: *Gaston v. Gordon*, 208 Mass. 265, 94 N. E. 307; *Teller v. Boyle*, 132 Pa. 56, 18 Atl. 1069; *Forster v. Eberle*, 7 Misc. Rep. 490, 27 N. Y. Supp. 986; *Goodrum Tobacco Co. v. Potts, etc.*, 133 Ga. 776, 66 S. E. 1081, 28 L. R. A. (N. S.) 498; *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 Pac. 788, 117 Pac. 132, 34 L. R. A. (N. S.) 773, 777; *Kerley v. Mayer*, 10 Misc. Rep. 718, 31 N. Y. Supp. 818; *McLarren v. Spalding*, 2 Cal. 510. The case of *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25, so strongly relied upon by the defendant, is not applicable to the facts of the case at bar. In that case the parties had knowingly entered into a contract for the letting of certain premises within 150 feet of a church to be used as a saloon. A city ordinance provided that no saloon should be permitted or licensed within said 150 feet; indeed, the sale of liquor upon the demised premises would have been illegal with or without a license; and the court held that inasmuch as the parties to the lease had knowingly entered into a contract which had for its object a violation of the law, such contract was void from its very inception and unenforceable by either party. No such question confronts us in the present case.

Aside from the questions already discussed, the special defense relied upon was deficient in failing to show that the defendant had ever requested permission, as provided in the lease, to use the premises for other than saloon purposes, or that the plaintiff had ever refused to allow the premises to be so used. Such defense was also deficient in failing to show that the refusal to renew the defendant's license in conjunction with the restriction of the lease had operated to

deprive the defendant of the beneficial use of the demised premises. The refusal to renew the liquor license did not preclude the defendant from using the premises as a lodging house, and this was one of the purposes for which the lease provided the premises might be used. The case of *Teller v. Boyle*, supra, involved a similar situation. There the lease contained a provision that the demised premises should not be occupied save as a saloon and dwelling without the lessor's written consent; and the court, in holding that the lease was not terminated by the lessee's failure to obtain a liquor license, said: "If the lessor were insisting that his lessee should sell intoxicating liquors, and claiming the right to forfeit the lease because he refused to comply, it would doubtless be a good defense to say that he was forbidden by law to sell; but that is not this case."

For the reasons stated we are of the opinion that the order striking out parts of the defendant's answer was rightfully made, and it is therefore ordered that the judgment appealed from be affirmed.

We concur: HALL, J.; MURPHEY, J., pro tem.

GERNON v. SISSON. (Civ. 1,040.)

(District Court of Appeal, Third District, California. Feb. 7, 1913. Rehearing Denied by Supreme Court April 8, 1913.)

1. DEEDS (§ 207*) — GENUINENESS — SUFFICIENCY OF EVIDENCE.

Evidence held to show that a deed to land in controversy was genuine.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 614-624; Dec. Dig. § 207.*]

2. EVIDENCE (§ 353*)—DEED—ADMISSIBILITY.

Under the direct provisions of Code Civ. Proc. § 1951, a deed of conveyance was competent evidence of a grant from grantor to grantee.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1404-1423, 1430, 1431; Dec. Dig. § 353.*]

3. PLEADING (§ 304*)—DENIAL OF GENUINENESS—EFFECT OF AFFIDAVIT.

An affidavit filed under Code Civ. Proc. § 448, providing that, when the defense to an action is founded on a written instrument, its genuineness and execution are deemed admitted unless plaintiff filed an affidavit denying same, is not evidence; its only effect being to relieve the party filing it from having admitted its genuineness and due execution.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 908, 909; Dec. Dig. § 304.*]

4. WITNESSES (§ 133*) — COMPETENCY — ACTIONS AGAINST EXECUTORS.

In an action by an executor to quiet title to realty claimed by defendant under a deed from testator, defendant was not rendered incompetent to testify as to conversations with testator in his lifetime, by Code Civ. Proc. § 1880, subd. 3, prohibiting parties to an action against executors or administrators on a claim against the state from being witnesses.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 566-569; Dec. Dig. § 133.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. DEEDS (§ 194*)—DELIVERY—PRESUMPTION. It is presumed that a deed was delivered as of its date.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. § 194.*]

6. ADVERSE POSSESSION (§ 63*)—POSSESSION BY GRANTEE.

A grantor's possession after delivery of his deed will be considered either as tenant or trustee for the grantee, in the absence of an express disclaimer of such relation and a notorious assertion of an adverse claim.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333-357; Dec. Dig. § 63.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Richard Gernon, Executor of Charles R. Wood, deceased, against Elmer L. Sisson. From a judgment for defendant, plaintiff appeals. Affirmed.

J. N. True, of Goldbeach, Or., for appellant. W. P. Johnson and McCoy & Gans, all of Red Bluff, for respondent.

CHIPMAN, P. J. Plaintiff brings the action as executor of the last will of Charles R. Wood, deceased, to quiet the title in the estate to certain land in Tehama county. Defendant claims title by deed executed by said Wood on January 20, 1903. Wood died June 1, 1911, and in his last will executed September 11, 1907, he specifically devised the land in question to certain named heirs of his deceased sister, and nominated plaintiff as the executor of said will. The conveyance to defendant is conceded to be a deed of gift and contains the following provision: "This grant, however, is with the express understanding and agreement that the party of the second part (the grantee) is to pay to the party of the first part (the grantor) one-fourth of all crops raised on said lands, during the lifetime of the party of the first part, and it is expressly understood and agreed that this reservation is intended between the parties hereto to be a reservation of a life interest in the property conveyed to the extent of such rental, but is in no way to interfere with the possession of said party of the second part to the said property, and this interest shall die with the party of the first part, and from and after his death, the party of the second part and his heirs and assigns will be relieved from such obligation."

The cause was tried by the court and findings and judgment went for defendant. Plaintiff appeals from the judgment and brings the record here under the provisions of sections 941a to 941c and 953a to 953c of the Code of Civil Procedure. Some other points are presented by the appellant which will be noticed; but the question of primary importance advanced by appellant is whether the deed from Wood to the defendant is genuine or a fabrication. On its face it conveys the fee absolute, subject to the reserva-

tion above quoted, and, if genuine, the finding of the court that by it the title passed to defendant is supported.

It was in evidence that Wood and defendant were intimate friends at the time the deed was executed and that Wood had often expressed an intention to leave this property to defendant; that he had no known relatives in whom he felt any interest. H. P. Andrews, a practicing attorney of Red Bluff, who had attended to Wood's legal business, testified: That Wood came to him the day before the date of the deed and explained to Andrews that he wanted an instrument drawn which would convey the property to defendant, but wanted to reserve the use of the land or its rentals in himself during his life. Andrews prepared the deed as directed by Wood, who signed and acknowledged it before Andrews as notary public. Andrews testified: "I wrote the deed, and I think it was the next day that he came in and signed and acknowledged it, after having carefully gone over the matter again after it was written out. * * * I asked him what I must do with the deed. He says, 'You can either give it to Elmer (Elmer Sisson was the grantee) or you can keep it for him; I want him to have it; I want him to have the property.' I then took the deed and put it in the secret drawer of my safe, and I kept it there until last spring." He testified that shortly after the deed was signed, a few days later, he informed defendant of the deed. He was asked what arrangements, if any, were made with defendant in regard to the deed and answered: "He told me to just let it stay there in the safe. Q. Then for whom were you keeping the deed? A. Elmer L. Sisson." This witness testified that for several years thereafter, and until the latter part of the summer of 1907, Wood received the rentals or income of the place through the witness, to whom defendant or the tenants paid the money for Wood, and that Wood frequently referred to the matter of his interest in the property as being only that provided for in the deed. There was evidence that defendant attended to renting the property and to some extent had the care of it, although Wood came and went to and from the property at his will and spent some time on the place at intervals. Defendant testified: "I arranged with Mr. A. B. Miller to rent the property and instructed him to pay the money to the Bank of Tehama County to the credit of Mr. Wood. Q. Did you rent the property as your own property? A. I did, for Mr. Wood's interest. I rented it for Mr. Wood to have the rental, under the terms of the deed." Defendant also testified that, a few days after the deed was executed, Andrews told him of it and handed the deed to him, and defendant gave it back to Andrews with directions to keep it for him. Miller had the place one

year and, after him, the tenants were the Sisson Bros., cousins of defendant, to whom defendant rented the farm. They remained until the fall of 1907, paying the rentals to Andrews for Wood, as directed by defendant. Other tenants followed in succeeding years; sometimes Wood making the arrangement after consultation with defendant, and sometimes defendant attending to the renting. Defendant also testified that it was agreed between him and Wood that the latter would pay the taxes inasmuch as he received all the rentals.

The principal, and practically the only, act of Wood indicating claim of ownership of the land in himself was the will executed by him September 11, 1907, in which he attempted to devise the land to certain named relatives. Defendant had no knowledge of the execution of this will until after Wood was adjudged insane, when he was told of it by the executor, Gernon. But the evidence was that, after the will was executed, defendant's relation to the property and to Wood remained the same as before. It appeared that, a short time before his death, Wood was adjudged insane and sent to the Napa state hospital, and while there the deed was delivered to defendant by Andrews. The day following his death defendant had the deed recorded. There was no attempt to impeach either Andrews or defendant, except by some expert testimony to the effect that the signature to the deed was not made by the same hand as signed certain admitted examples of Wood's handwriting. Other experts were very positive that the will and these other signatures were in the genuine handwriting of Wood.

[1] Upon the question of the genuineness of the deed, the evidence is ample to support the finding.

[2] Defendant's deed was admissible under section 1951 of the Code of Civil Procedure and was competent evidence of a grant to the grantee from the grantor. *McDougall v. McDougall*, 135 Cal. 316, 319, 67 Pac. 778.

[3] Appellant seems to hold, under section 448 of the Code of Civil Procedure, that, having filed what he terms an affidavit of non est factum, the burden was thereby cast upon defendant to first establish "the genuineness and due execution" of the deed before it was admissible, and took from defendant the right given him by section 1951 of the Code of Civil Procedure. As we understand section 448, the affidavit relieves the party from the effect which his failure to make the affidavit would entail, namely, the genuineness and due execution of the instrument would be deemed admitted. Having filed the affidavit, he was in a position to

controvert the genuineness of the deed. The affidavit is not evidence and is but a part of the pleadings. In *Moore v. Copp*, 119 Cal. 429, 432, 51 Pac. 630, 631, this section was construed and the cases cited, and it was there pointed out that the plaintiff may controvert the instrument on various grounds where there is no affidavit, "except that he cannot controvert its due execution nor its genuineness." However, the issue was fully gone into by both parties, and the genuineness and due execution of the deed, as we have seen, were amply established.

[4] It is also contended that defendant was not a competent witness to testify to conversations he had with Wood in his lifetime, citing subdivision 3, § 1880, of the Code of Civil Procedure. The proceeding here is not against the executor, nor is it upon any claim or demand against the estate of the deceased person. The point is not well taken. *Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73; *Bollinger v. Wright*, 143 Cal. 296, 76 Pac. 1108; *Calmon v. Sarraille*, 142 Cal. 642, 76 Pac. 486.

[5] Some question is raised as to the delivery of the deed. There is a presumption that a deed was delivered at its date. This presumption was strengthened by the testimony of Andrews, which showed an actual delivery to him for the benefit of the grantee, and the grantee's assent is shown both by the testimony of the grantee and by Andrews. See subdivision 2, § 1059, Civ. Code. Appellant's claim that Wood acquired title as against this deed by adverse possession finds no support in the evidence.

[6] "By the execution and delivery of a deed of land, the entire legal interest in the premises vests in the grantee, and, if the grantor continues in possession, afterward his possession will be either of tenant or trustee of the grantee. He will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee." Cyc. vol. 1, p. 1039; section 321, Code Civ. Proc. There is no evidence of hostility to defendant's title or his control of the property. All the evidence shows that Wood was entirely satisfied with the disposition of the property made by him. His attempt to devise it by will is unexplained, and standing alone, whether explained or not, it is wholly insufficient to show adverse possession or hostility to defendant's title.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

GREAT WESTERN POWER CO. v. BOARD OF SUPRS OF PLUMAS COUNTY. (Civ. 1,029.)

(District Court of Appeal, Third District, California. Feb. 10, 1918.)

1. INTOXICATING LIQUORS (§ 76*)—GRANT OF LIQUOR LICENSE—REVIEW BY CERTIORARI.

The action of county commissioners in granting a liquor license is a judicial act, reviewable on certiorari.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 80; Dec. Dig. § 76.*]

2. INTOXICATING LIQUORS (§ 59*)—LICENSE—SUFFICIENCY OF APPLICATION.

Act March 25, 1909 (St. 1909, p. 722), made it unlawful to sell liquor at any place more than one mile out of the limits of any city or town and within four miles of any camp of men working upon public improvements, except at a licensed saloon maintained at the time the act takes effect, and which was established at least six months before the establishment of such a camp. *Held*, that an application for a license at a place more than one mile outside the limits of an incorporated city or town, and within four miles of a camp of men engaged in constructing a quasi public work, was improperly granted.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 59; Dec. Dig. § 59.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Certiorari by the Great Western Power Company against the Board of Supervisors of Plumas County. Judgment for plaintiff, and defendant appeals. Affirmed.

L. H. Hughes, of Beckwith, for appellant.
L. N. Peter, of Quincy, for respondent.

BURNETT, J. The court below on certiorari annulled an order of said board of supervisors granting to one H. O. Jacobs a license to engage in the business of selling liquors at Prattville, in said Plumas county.

The application for the writ was made upon the ground that the action of said board was void by reason of the law approved March 25, 1909 (St. 1909, p. 722), and providing that "it shall be unlawful for any person to sell, keep for sale, or give away, any spirituous, vinous, malt or mixed intoxicating liquors at any place situated more than one mile outside the limits of an incorporated city or town, and within four miles of any camp or assembly of men, numbering twenty-five or more, engaged upon, or in connection with the construction, repair or operation of any public or quasi public work, improvement or utility; provided, however, that nothing in this section contained shall be deemed to apply to the sale, keeping for sale, or disposal of any such liquor at a licensed saloon or liquor store which shall have been established, or at a licensed saloon or liquor store which shall be maintained, at the time this act takes effect, upon the same premises where a licensed saloon or liquor store shall have been established, at least six months prior to the es-

tablishment of such camp or assembly of men or to the sale, keeping for sale, or disposal of any such liquors at any winery, licensed brewery or distillery, where the same is manufactured." Preliminarily, three undisputed propositions may be stated. One is that said statute is valid; another, that the board of supervisors has no authority to license any one to violate the law; and the third, that the present case is not within any of the exceptions provided for by said statute.

[1] There are only two controverted questions presented for consideration. One is whether the action of a board of supervisors in granting a liquor license is open to revision on certiorari and the other, upon the assumption that it may thus be reviewed, whether the case upon its facts is a proper one for the exercise of this extraordinary writ.

Nothing needs to be added to the discussion of the general scope and purpose of the writ of certiorari. It is sufficient to refer to the following decisions of our Supreme Court: *Whitney v. Board of Delegates*, 14 Cal. 479; *Levee District No. 9 v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; *Borchard v. Supervisors*, 144 Cal. 14, 77 Pac. 708. That within the principles therein announced the action of a board of supervisors in discharging certain statutory duties involves the exercise of the judicial function and legally invites an application for a writ of review is well settled in this and other jurisdictions.

Some of our own cases treat the subject as follows:

In *People v. Supervisors of Marin County*, 10 Cal. 344, it was held that: "In determining upon the sufficiency of the bond of an officer, and whether the officer, by his failure to comply with the requisition of the supervisors to file a new bond, has vacated his office, the supervisors exercise power of a judicial character," and that the order made would be annulled through certiorari proceedings.

In *Robinson v. Supervisors of Sacramento*, 16 Cal. 208, it was determined that: "Under the consolidation act of 1858, the board of supervisors of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act and their action in creating such office and raising such salaries may be reviewed in certiorari."

In *Murray v. Supervisors of Mariposa County*, 23 Cal. 493, it was held that "the district courts have power to grant writs of certiorari, to review the action of a board of supervisors in granting a ferry license."

In *Levee District No. 9 v. Farmer*, *supra*, it was decided that, in passing upon the sufficiency of a petition for the establishment of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a road, the board of supervisors exercised judicial power, and, while its judgment could not be attacked collaterally, it could be reviewed upon certiorari where the jurisdiction of the board had been exceeded.

In *Stumpf v. Board of Supervisors*, supra, it was held that: "An order of a board of supervisors purporting to create a sanitary district must be annulled upon writ of review where the return to the writ does not show that any evidence was taken or heard to prove the jurisdictional facts that the signatures to the petition were genuine, that 25 of them were resident freeholders within the proposed boundaries, and that the order calling the election was posted in three public places in the proposed district for four weeks, as required by law."

While our attention has been directed to no case in this state in which an order of a board of supervisors granting a liquor license was annulled on certiorari, it is clear that the foregoing decisions involve an analogous principle to that confronting us here.

Indeed it is declared in the case of *In re Bickerstaff*, 70 Cal. 35, 11 Pac. 393, that jurisdiction to issue a license to sell liquor "is put in motion by the petition and certificate; and upon the petition, fortified by the required certificate and report as evidence, the city council acts judicially in making the order." Manifestly, this is equivalent to saying that the order granting the license is subject to review in a proceeding of this nature.

In other states it has been directly held that certiorari is the proper remedy where the board has exceeded its authority in granting a liquor license. *State v. Heege*, 37 Mo. App. 338; *Rhode Island Soc. v. Budlong* (R. I.) 25 Atl. 657.

The rule is stated in *Black on Intoxicating Liquors*, § 175, as follows: "If the power to grant or refuse licenses is vested in a board of commissioners and the matter is placed exclusively within their jurisdiction, their action in granting a license is quasi-judicial, and if the grant would be improper the remedy is by appeal, writ of error, or certiorari, according to the nature of the error complained of."

We conclude that the first point made by appellant is entirely without merit.

[2] To determine whether the board had jurisdiction to grant the license, it is, of course, necessary to look into the evidence upon which the order was based. Whether it exceeded its authority can be ascertained in no other way. As stated in the *Stumpf Case*, supra: "It is only the evidence heard by the board of supervisors upon questions essential to their jurisdiction that can be considered by a court in determining whether the board acquired jurisdiction to make the order creating the sanitary district; and the sufficiency of the evidence to establish the

jurisdictional facts is reviewable upon the writ."

If there were substantial evidence in support of facts authorizing the board to grant the license, then, manifestly, the order could not be reviewed in this proceeding. Looking at the record, however, we find that the only rational inference that can be drawn from the testimony of the witnesses before the board is that the place where the said Jacobs was licensed to engage in the liquor business was situated "more than one mile outside the limits of an incorporated city or town and within four miles of a camp or assembly of men numbering twenty-five or more engaged upon and in connection with the construction of a quasi-public work, improvement or utility," and that the applicant had not brought himself within the exception to said statute.

It follows, therefore, that the board acted in excess of its authority, in violation of the express provisions of the law, and the court below properly annulled its order.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

KENISON v. CAMPBELL (Civ. 1,125.)

(District Court of Appeal, First District, California. Feb. 13, 1913. Rehearing Denied by Supreme Court April 9, 1913.)

1. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR.

In an action for wages, where the complaint averred that plaintiff rendered services at defendant's request for an agreed compensation of \$2.50 a day, upon an open current book account, the overruling of a demurrer for uncertainty was harmless, where the court disregarded the ambiguous expression "upon an open current book account," and made findings responsive to the issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4106; Dec. Dig. § 1040.*]

2. BILLS AND NOTES (§ 465*) — ACTIONS — PLEADING.

In an action upon a negotiable instrument, it is unnecessary to allege a consideration in the complaint, as a consideration is presumed.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1447, 1477-1479; Dec. Dig. § 465.*]

3. APPEAL AND ERROR (§ 1039*)—REVIEW—HARMLESS ERROR.

Where, in an action for compensation for services and money due, no interest was allowed prior to the filing of the complaint, the ambiguity in plaintiff's demand for interest was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

4. WORK AND LABOR (§ 28*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for compensation for work and labor and money due, evidence held sufficient to support a finding for plaintiff and to warrant the denial of defendant's counterclaim.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 17, 55; Dec. Dig. § 28.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Hiram Kenison against A. C. Campbell. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant. Frank V. Cornish, of San Francisco, for respondent.

HALL, J. This is an appeal taken by defendant within 60 days from the entry of a judgment against defendant and in favor of plaintiff for the sum of \$325 and legal interest thereon from the filing of the complaint to the entry of judgment. The complaint is in three counts. The first count states a cause of action for a balance of \$290.25 unpaid for services rendered defendant by plaintiff at defendant's request as clerk, salesman and laborer at the agreed compensation of \$2.50 per day. In the second count plaintiff sues upon a check for the sum of \$424.85, drawn upon the First National Bank of San Francisco, payable to plaintiff or order, signed and delivered by defendant to plaintiff. The third count sets up a claim for compensation for services rendered by the wife of plaintiff to defendant; but, as the court found that such services were rendered gratuitously and allowed plaintiff nothing therefor, it is eliminated from the case. Appellant demurred generally and specially to each of the counts, and now urges that the court erred in overruling said demurrer.

[1] There can be no question but that the first count alleges a good cause of action for services rendered at an agreed compensation. The only complaint now urged is that the count is uncertain in that it is alleged that the services were rendered "upon an open current book account." But the phrase "upon an open, current book account" may be disregarded, and the count is without fault as an action to recover a balance unpaid for services rendered plaintiff by defendant at his special instance and request at an agreed compensation of \$2.50 per day. Whatever uncertainty or ambiguity may exist from the use of the words criticized, it is clear that appellant was not injured by the ruling of the court thereon, for the court in its findings ignored these words and made findings responding to the issues as made by the pleadings, omitting the criticized words.

[2] It is claimed that no cause of action is stated as to the check, because no consideration for the giving of the check is alleged. In counting upon a negotiable instrument, it is not necessary to allege the consideration, as a consideration is presumed. 1 Chitty on Pleading, 293; Moore v. Waddle, 34 Cal. 145.

[3] No injury was done appellant because of any uncertainty as to plaintiff's demand for interest, as the court allowed no interest prior to the filing of the complaint. No error to the possible injury of appellant was

committed by the court in overruling appellant's demurrer.

[4] Appellant in his answer set up that both the claim of plaintiff for services rendered and the check had been fully paid, and also pleaded various matters by way of counterclaim. Among other things pleaded by way of counterclaim is a demand for rent against plaintiff for certain premises occupied by him and his wife while working for appellant.

The court found that plaintiff had rendered services for defendant, at his special instance and request within two years prior to the filing of the complaint, for 113.1 days at the agreed compensation of \$2.50 per day, and that the same was unpaid. This would amount to \$282.75. The court also found that appellant had not repaid to plaintiff the \$424.85 represented by the check, which check appellant in his answer claimed had been given as a receipt for that amount of money, or its equivalent, deposited with appellant by plaintiff, and which the proof clearly showed was a valid demand for that amount against defendant by plaintiff. The court found various sums to be owing to appellant upon several of his counterclaims, and as a result found that on the 23d day of December, 1910 (the date of filing the complaint), defendant was indebted to plaintiff, on account of services and money delivered by him to defendant, in the sum of \$325, after deducting the set-offs to which defendant was entitled. Appellant attacks the sufficiency of the evidence to support the findings made in favor of plaintiff.

The evidence shows that from November 1, 1907, to the 18th day of March, 1910, plaintiff was employed by defendant to run a coal yard for defendant for a compensation of \$2.50 per day. There is no dispute but that the check for \$424.85 represented money in effect loaned by plaintiff to defendant. Plaintiff, in running the coal yard, made collections and payments, for which he made accountings to defendant from time to time. Defendant kept an account of all these transactions and produced at the trial his account as kept by himself with plaintiff. In this account he had credited plaintiff with his wages month by month, and also with the \$424.85 represented by the check. He had charged plaintiff with all that he (defendant) claimed should be charged against plaintiff, including the charge of \$220 for rent, and as a result his account, as kept by himself, showed that he (defendant) owed plaintiff a balance of \$145.

At the conclusion of his testimony, after he had gone through his account in much detail, in answer to a question by the court, he stated that he owed plaintiff a balance of \$145. His counsel, for him, made the same admission in open court. In arriving at this balance, however, appellant charged against plaintiff \$200 for rents. But the court found that the premises for which

these rents were claimed were not let by defendant to plaintiff, but that the occupation thereof by plaintiff was for the convenience and benefit of defendant, and accordingly allowed defendant nothing therefor. If this finding is supported by the evidence, it is perfectly manifest that the substance of the findings in favor of plaintiff is amply supported by the evidence. For, adding to the balance of \$145, admitted by defendant to be owing plaintiff, the item of \$220 for rents, which defendant had charged against plaintiff in order to bring the balance to \$145 in favor of plaintiff, we have a balance owing to plaintiff of \$365, which is more than the court allowed him. It only remains to determine whether or not the action of the court in disallowing the claim of defendant for rents can be supported.

The evidence as to the circumstances concerning the occupation of the premises by plaintiff, for which defendant sought to charge him with rent, is not as full and complete as it might be. This may be accounted for because the court early in the trial announced that he would not allow any offset for rent. From the record it does appear, however, that, after plaintiff had worked for some time for defendant in running his coal yard, the defendant made some repairs to a house upon the premises used for a coal yard, which house had been at one time used for a dairy. Plaintiff and his wife thereafter lived in this house, but defendant never said anything to them about paying rent therefor, and at none of the monthly settlements made with plaintiff was anything said about rent nor any charge made therefor upon the account kept by defendant with plaintiff, until the last of September, 1909, when the entire charge for 14 months was entered as one item. The occupation of the house had terminated with the month of June, 1909, and had commenced in May, 1908. During all this time the coal yard had been run by plaintiff, without other help than such as was rendered him by his wife, who, during his absence from the yard in delivering coal or the like, attended to such matters as required attention, and especially in the matter of taking orders from customers. This she could readily do because of residing at the yard. From all these circumstances it is probable that it was never intended by defendant that plaintiff should pay for the occupation of the house, but that it was furnished him in order that plaintiff could the better, with the help of his wife, attend to the business of defendant. This is evidently the view that the learned trial judge took of the situation, and we cannot say that it was not supported by the circumstances in evidence. For this reason the action of the court in finding against defendant's claim for rent in the sum of \$220 finds support in the evidence.

As a result of this finding and the admission of defendant that he owed a balance to plaintiff of \$145 after charging plaintiff with \$220 for rent, it is clear that plaintiff was entitled to recover of defendant at least \$325, which is what the court found to be due and unpaid him from defendant after deducting all set-offs, and for which judgment was rendered. The findings attacked by appellant are thus supported by the evidence. No other point is relied upon for a reversal.

The judgment appealed from is affirmed.

We concur: LENNON, P. J.; MURPHEY, Judge pro tem.

In re GREEN. (Civ. 1,028.)

(District Court of Appeal, Third District, California. Feb. 10, 1913.)

1. NEWSPAPERS (§ 3*)—DESIGNATION—"GENERAL CIRCULATION."

A newspaper within Pol. Code, § 4460, defining a newspaper of general circulation as one published for the dissemination of local or telegraphic news of a general character having a bona fide subscription list, etc., need not publish both local and telegraphic news, and whether a newspaper is within the section depends on the diversity of its subscribers rather than on mere numbers.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 16-19; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 4, p. 3053.]

2. NEWSPAPERS (§ 3*)—DESIGNATION—"GENERAL CIRCULATION."

A newspaper which is published daily except Mondays and legal holidays, which has a circulation in almost every town in the county among bankers, merchants, lawyers, real estate agents, insurance agents, and physicians, and which, in addition to items of local news, publishes a list of the real estate transfers of each day, real and chattel mortgages, and appointments of agents filed in the register's office, marriage licenses, building permits, news of general interest, and court proceedings, is a newspaper of general circulation within Pol. Code, § 4460.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 16-19; Dec. Dig. § 3.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Application by Harry H. Green for the ascertainment and establishment of a newspaper as a newspaper of general circulation within Political Code, § 4460. From an order denying the petition, the applicant appeals. Reversed and remanded for new trial.

A. L. Hart, of San Francisco (R. L. Shinn, of counsel), for appellant.

PLUMMER, J. This is an appeal from an order of the superior court denying the petition of the appellant that the Daily Recorder, a paper published in the city of Sacramento, state of California, be ascertained and established as a newspaper of general circulation, as that term is defined in section 4460 of the Political Code.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The petition sets forth, in substance, that the Daily Recorder is a newspaper published for the dissemination of local and telegraphic news and intelligence of a general character; that said paper has been established, published, printed, and circulated at regular intervals, to wit, every day except Mondays and legal holidays in the city and county of Sacramento, state of California, for more than one year preceding the filing of the petition; that said newspaper is not devoted to the interests or published for the entertainment or instruction of any particular class, profession, trade, calling, race or denomination, or for any number of such classes, professions, trades, or callings, etc.; and, further, that such newspaper has a bona fide subscription list of paying subscribers.

The testimony set forth in the bill of exceptions is without conflict, and is to the effect that the Daily Recorder has been published daily, except Mondays as hereinbefore stated, in the city of Sacramento for a period exceeding one year preceding the filing of the petition; that said paper publishes local and telegraphic news and intelligence of a general character; that its telegraphic news is obtained from other Sacramento evening papers; that the greater part of the local news published by the "Recorder" consists of the daily report of documents recorded in the offices of the recorder of Sacramento county, the proceedings of the superior court of said county, also other general news of a local nature; that the subscription list of paying subscribers to said paper somewhat exceeds the number of 200; that its subscribers consist of bankers, wholesale liquor houses, brokers, furniture dealers, saloons, fire insurance companies, retail grocers, wholesale glass and paint companies, carpenters, wholesale cement and lime companies, builders and contractors, millmen, automobile dealers, manufacturers, real estate dealers, private residents, barbers, attorneys at law, doctors, title companies, mercantile agencies, fruit exchanges, architects, collection companies, plumbers, dealers in hops, and bond and mortgage companies, the largest classes represented among the bona fide paying subscribers being lawyers and real estate firms; and that it is not the avowed purpose of said Recorder to entertain or instruct any particular trade, calling, race or denomination, or any number of such classes.

A copy of the paper issued under date of March 17, 1912, is attached to the transcript and made a part thereof. In this copy there appears a list of the documents recorded on the preceding day in the office of the county recorder of Sacramento; a statement of the collections made by the city collector of Sacramento for the preceding week; an account of a doctor's banquet; a notice that a realty firm has taken new quarters; a list of the building permits issued on the previous day; a requisition issued by the Governor; an ac-

count of the erection of a second-class hotel; an item relating to the action of the grand jury of said county; a statement of bank clearances; a few personal notices; the trial calendar of the various departments of the superior court of Sacramento county for the following day; also the superior court proceedings for the preceding day; a short item as to the action of the chamber of commerce; an account of the annual meeting of the Sacramento Valley Development Association; an item in relation to an understanding reached by the Retail Merchants' Association providing for the installation of electroliners; a report from the county clerk's office of the marriage licenses issued; two items as to new buildings; a résumé of seven decisions reported in the National Reporter system relating to real estate and matters affecting the title thereto; a report of the action of the Sacramento center of the California Civic League, of interest to women voters; an account of the activity of the members of Congress from California and what they are doing in Washington; a list of real estate dealers, attorneys at law, contractors and builders, plumbers and gas-fitters, garages and machine works and the members of the Master Painters' Association, together with several other items not necessary to further specify, as well as a small number of general advertisements.

Upon this testimony the trial court found that said Daily Recorder is not a newspaper published for the dissemination of local or telegraphic news or intelligence of a general character, and, further, that said newspaper is devoted to the interests of and is published for the instruction of particular classes, to wit, members of the legal profession and real estate agents; that it is the avowed purpose of said newspaper to entertain and instruct said classes. These findings of the court are attacked as being contrary to the evidence.

[1] Section 4460 of the Political Code defines a newspaper of general circulation to be a newspaper "published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying members, and which shall have been established, printed and published at regular intervals in the state, county, city, city and county, or town where such publication, etc., * * * is had; a newspaper devoted to the interests or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes is not a newspaper of general circulation." This section does not provide that in order for a newspaper to be established as a newspaper of general circulation it shall publish both local and telegraphic news. The language of the Code is, "local

or telegraphic news and intelligence of a general character."

Does the Daily Recorder properly come within the definition of the Code and is it a newspaper of general circulation? As to whether it is such a newspaper is manifestly a matter of substance and not merely of size; and that it is of general circulation must largely depend upon the diversity of its subscribers rather than upon mere numbers. There are doubtless many strictly literary, scientific, religious, medical, and legal journals which have a large number of subscribers, but are not of general circulation, being published for the information, respectively, of such particular classes. And, as said in *Hanscom v. Meyer*, 60 Neb. 72, 82 N. W. 115, 48 L. R. A. 411, 83 Am. St. Rep. 509: "It would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices—the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published." The same case holds that the fact that a newspaper makes a specialty of some particular class of business and conveys intelligence of particular interest to those engaged in such business will not thereby deprive it of its general classification as a newspaper within the meaning of the statute. The definition of a newspaper there given is as follows: "A printed publication issued in numbers at stated intervals conveying intelligence of passing events," etc.

The paper before the court in that case contained legal notices, information regarding courts, a legal directory of the Douglas County bar, some advertisements of a miscellaneous character, literature of a general kind commonly designated "plate matter," and what purported to be information of the action of Congress, two addresses by lawyers, and a limited amount of general news of current events, although, as the court says, there was quite a dearth of the latter. The court held that such a paper came within the terms of the statute.

In the case of *Lynn v. Allen*, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223, the question arose as to the sufficiency of a publication in the Daily Reporter, a paper published in the city of Indianapolis in the state of Indiana. Its circulation, as stated by the court, was among judges, lawyers, bankers, collection, and commercial agencies, real estate dealers, merchants, manufacturers, and other professional and business men to the extent of about 550 copies in the city of Indianapolis, and outside of said city and throughout the state of about 2,500 copies. Its news consisted primarily of legal matters, including proceedings of the Supreme Court and Appellate Courts of the state, the various federal, state, county, and city courts sitting in Indianapolis, the trial calendars of the various

courts, an account of new suits filed, proceedings of the board of public works and other matters relating to street improvements, a list of deeds filed in the recorder's office of the county, mortgages, liens, etc. Such a paper was held to be one publishing intelligence of a general character. In its opinion the Supreme Court of Indiana further says: "By a newspaper of general circulation the Legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is, in greater or less degree, devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party and especially devoted to the interests of such party it would not therefore be a newspaper of general circulation. Yet such a newspaper is to a large extent read only by the members of the political party whose doctrines are advocated or expounded in its columns."

A similar case was before the Supreme Court of Michigan in *Lynch v. Judge of Probate*, 101 Mich. 171, 59 N. W. 409, 24 L. R. A. 793, 45 Am. St. Rep. 404. It was there held that the Wayne County Legal News, a newspaper published weekly in the city of Detroit, while devoted primarily to the interests of the legal profession and the dissemination of legal news, containing an account of the proceedings of the Supreme Court of the state of Michigan, Wayne county circuit court and other courts of the city of Detroit, notices of future proceedings in said courts, opinions of the courts of the United States and other states, also of other counties in Michigan where the same were of interest to the legal profession or to the general public; also personal items of general interest and notices of passing events, records of real estate transfers and mortgages, chattel mortgages, bills of sale and general advertisements, circulating among judges, lawyers, bankers, brokers, real estate agents, merchants, and business men and containing items of interest to all of them, constituted a newspaper of general circulation within the meaning of the revised statutes of that state.

In the late case of *Hesler v. Coldron*, 29 Okl. 216, 116 Pac. 787, the Supreme Court of Oklahoma had before it for adjudication questions almost identical with those presented by the case at bar. Section 4006 of the Statutes of Oklahoma reads: "No legal notice, advertisement or publication of any kind required or provided by any of the laws of the territory of Oklahoma to be published in a newspaper shall have any force or effect as such unless the same be published in a newspaper of the county having general circulation therein and which newspaper has been continuously and uninterruptedly published in said county during the period of fifty-two consecutive weeks prior to the first publication of the notice or advertisement."

[2] The court in that case says that the testimony is undisputed, and proves that the Daily Legal News has been published since 1903 and more than 52 weeks prior to the publication referred to; that at the time the publication in question was running and for one year prior thereto it had a circulation of from 205 to 215 among bankers, merchants, lawyers, real estate agents, insurance agents, wholesale merchants, hardware merchants, physicians, and almost every class of business in the county; that it circulated in almost every town in the county; that it was so circulating for one year prior to the 1st of October, 1908; that in addition to items of legal news it carries a list of the real estate transfers of each day, the mortgages, both real and chattel, appointments of agents, powers of attorney filed in the registrar's office, marriage licenses, building permits, charters from the secretary's office at Guthrie, also news items of general interest. It carries besides court proceedings short telegraphic dispatches of general interest; that of the four copies of the paper introduced in evidence one contained a telegraphic dispatch concerning the Cooper trial at Nashville; one concerning President Castro of Venezuela, and one concerning the illness of Gov. Lillie; and then held that such evidence discloses that the publication in question was one of general circulation in the county and fell squarely within the terms of the statute, reversing the judgment of the lower court and remanding the case for a new trial.

We think that the news items referred to in this opinion as having been published in the Daily Recorder are matters of local interest to the people of Sacramento and also constitute intelligence of a general character within the meaning of the language used in the section of the Code defining newspapers. Practically all classes of people are more or less interested in court proceedings and in the instruments which are filed from day to day in the county recorder's office, building permits and proceedings of bodies constituting a city's government. The paper in question contains such news items without any unnecessary verblage, and is of that character of paper to which one would naturally look for information concerning affairs of local intelligence of a general character affecting the business and welfare of Sacramento county.

Being of the opinion that the Daily Recorder is a paper of general circulation as defined by section 4460 of the Political Code, and that the findings of the trial court are contrary to the evidence as contended for by appellant, the judgment of the lower court is hereby reversed, and the cause remanded for a new trial.

We concur: CHIPMAN, P. J.; BURNETT, J.

BLACKWELL v. RENWICK. (Civ. 1,266.) (District Court of Appeal, Second District, California. Feb. 8, 1913. Rehearing Denied by Supreme Court April 9, 1913.)

1. MUNICIPAL CORPORATIONS (§ 706*)—INJURIES ON STREETS—ACTIONS—JURY QUESTION.

Whether walking upon a street, instead of the sidewalk, was negligent, even if there was a sidewalk at the place where plaintiff was struck by an automobile, held a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—USE BY PEDESTRIANS.

The mere fact that there was a sidewalk, customarily used by pedestrians, would not make one guilty of contributory negligence as a matter of law for using the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—INJURIES ON STREETS—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for injuries by being struck by an automobile while walking in the street, whether plaintiff was guilty of contributory negligence in not looking back up the street for vehicles held a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

4. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

5. NEGLIGENCE (§ 72*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

That one acting in an emergency does not act the way that a reasonably prudent man having time for deliberation would act does not make him guilty of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 99, 100; Dec. Dig. § 72.*]

6. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—NEGLECT.

In an action for injuries by being struck by an automobile while walking in the street, whether defendant was negligent held a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by John D. Blackwell against George Renwick. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Bert Campbell, of Los Angeles, for appellant. Amend & Amend, of Los Angeles, for respondent.

JAMES, J. Plaintiff sued to recover damages for injuries alleged to have been suffered through the negligence of defendant. The cause was tried before the court sitting without a jury, and the findings and judgment were in favor of plaintiff. The alleged

negligence acts of defendant consisted in so driving an automobile on a public street at the outskirts of the city of Los Angeles that it collided with plaintiff, who was a pedestrian upon the street. At the outset it may be observed that there was a conflict in the evidence as to the manner in which the accident occurred. Plaintiff testified that at about 5:30 o'clock p. m. on the 10th day of November, 1910, he and his wife alighted from a car which was traveling southerly on Santa Fé avenue and at the junction of, the latter street with Vernon avenue; that Vernon and Santa Fé avenues intersect at that point at right angles; that plaintiff's home was located a short distance southerly from Vernon avenue on Santa Fé avenue, toward, which place he and his wife were then traveling; that Santa Fé avenue at that location was in the condition of an ordinary county road, having a very rough surface and without cement or other sidewalks on either side of it; that according to their custom plaintiff and his wife started to walk southerly in the direction of their home down Santa Fé avenue and a little to the right of the center of it, the wife walking between the rails of a car track laid on the right side of said avenue and the husband at the left of the inner rail of said track; that, after having progressed a distance of about 100 feet an automobile suddenly came upon them from the rear without warning of any kind, either by the sounding of a horn or other alarm; and that before plaintiff could move to a place of safety he was run over by the machine and seriously injured. The plaintiff further testified that up to the moment that the automobile came upon them he had heard no noise, and had not seen the approaching vehicle. He further testified that on the side of the street where he and his wife were walking there was only a distance of nine or ten feet from that side of the street to the west rail of the car track along which they were walking, and that the distance from the east rail of said track to the opposite or easterly side of the street was about 34 feet. He denied that, as asserted by defendant, there was a path answering for a sidewalk on the west side of the street along which pedestrians customarily traveled; on the contrary, his testimony was that because of the lack of a sidewalk pedestrians habitually used the street in traveling to and from points along its course. The defendant in his testimony gave his version of the events leading up to the accident. He testified that he was traveling along Santa Fé avenue in the same direction in which plaintiff and his wife were moving, and that up to the time he reached the intersection of Santa Fé avenue with Vernon avenue he was traveling at the left of the car track running down Santa Fé avenue, and that, when he reached Vernon avenue, he turned toward the right and proceed-

ed southerly with the westerly rail of the car track, upon which plaintiff and his wife were walking, between the wheels of his automobile. He admitted that he observed plaintiff and his wife in ample time to have stopped the automobile, but his statement was that he was traveling at a moderate rate of speed, not to exceed 15 miles per hour, and that when he was about 100 feet away from plaintiff both plaintiff and his wife turned and faced the automobile and there stood; that he, defendant, observing that there was ample room to drive his automobile to the right of plaintiff and his wife and between them and the westerly line of the street, started as he approached them to guide his machine in that manner around them, when plaintiff's wife suddenly jumped toward the westerly side of the street; that, in order to avoid injuring her, he turned his machine to the left, and that he would have escaped injuring either of the pedestrians had not the plaintiff suddenly moved in front of the machine, and was then struck by it. He testified that his machine was equipped with gas and oil lights, all of which were burning at the time, and that he did not give alarm by blowing the horn because he noticed that, when he was about a hundred feet away from plaintiff and his wife, they had turned and observed the automobile. The findings of the court, as has been noted, determined the facts in favor of plaintiff. This appeal was taken from the judgment as entered, and also from an order made denying defendant a new trial.

It is contended that the facts as shown by the evidence did not establish the charge of negligence against the defendant, and, further, that plaintiff's injuries were caused through his own contributory negligence. As pertinent to the latter contention, it is insisted, first, that plaintiff was negligent in walking in the roadway when there was provided a sidewalk for pedestrians; and, second, that, conceding his act in being upon the roadway to be without negligence, nevertheless, his failure to look for the approach of vehicles before starting to travel along the street, and his conduct immediately before and at the time of the collision showed a lack of the exercise of reasonable care on his part.

[1, 2] As to the contention that the act of walking upon the street was negligent because a sidewalk had been provided for pedestrians, it is sufficient to say that the matters as to whether a sidewalk in fact existed, or whether its condition, if one did exist, was such as to warrant pedestrians in the exercise of ordinary care in using the street, instead of such walk, were matters of fact which, upon the conflicting evidence submitted, were for the trial court sitting as a jury to determine, and, even though it had appeared that there was a sidewalk custom-

arily used by pedestrians, that fact alone would not warrant the deduction that as a matter of law plaintiff was guilty of contributory negligence in using the street, instead of such sidewalk. In the case of *Schierhold v. N. B. & M. R. R. Co.*, 40 Cal. 455, it is said: "There is nothing in the point that the deceased was wrongfully in the street at the time of the accident, because he went there to play. If he had the necessary discretion and physical ability to be allowed to be in the streets at all, unattended, the purpose for which he went there is entirely immaterial. * * * The streets were made for travelers, it is true, but the fact that a person is there for other purposes does not justify a trespass committed upon his person. * * * If the deceased was playing in the street at the time of the injury, he may thereby have increased the danger or the difficulty of the defendant to avoid the injury. This would be material, but still the inquiry would be, what happened and what was done in the street, and not for what reason the deceased was there."

[3] Neither can it be said as a matter of law that plaintiff was negligent in not looking back up the street to observe whether there were vehicles approaching before proceeding southerly. It cannot be said that, had he observed the approach of the automobile before he and his wife started to move in a southerly direction, they could not have reasonably and prudently started on their course along the very portion of the street traversed by them up to the time of the collision. It certainly was not their duty to turn about constantly and repeatedly to observe the approach of possible vehicles from the rear where the drivers of such vehicles could plainly observe them in time to give warning, or turn out and avoid a collision. The defendant admitted that he could have stopped his machine within a distance of about twenty feet, but he relied upon his belief that he could pass the pedestrians at their right without running any risk of injuring them.

[4] If we take the statement of plaintiff to be true, as we must, in view of the conflicting state of the evidence, then it might reasonably appear that, had defendant given warning by sounding his horn at the time he first observed plaintiff, plaintiff might have been able to move out of the way and avoid the collision. In effect, plaintiff's testimony was that the automobile came upon him so suddenly that he was startled and acted with some precipitation, pushing his wife as he thought out of the way of injury, and attempted to save himself.

[5] Where the circumstances are such that a person acts in a way that a reasonably prudent man would not act had he time for deliberation, and so perhaps increases the danger of injury being inflicted upon him,

it cannot necessarily be said that he was guilty of contributory negligence, but under all the circumstances of the case that question must be resolved by the jury. We quote from the case of *Davis v. Pacific Power Co.*, 107 Cal. 575, 40 Pac. 952, 48 Am. St. Rep. 156: "It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury. It is not enough that the evidence be without conflict. If, upon the facts disclosed, there is room for a reasonable deduction of proper care on the part of the person injured, the case is one for the jury." And in the case of *Schierhold v. N. B. & M. R. R. Co.*, supra, it is said: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff." See, also, *Fox v. Oakland Consolidated St. Ry.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693.

[6] In this case, under the state of the evidence, as we have briefly summarized it, it became the duty of the court to determine the question as to the negligence of the defendant and as to whether plaintiff was, under all of the circumstances shown, guilty of contributory negligence, and with the conclusions thereon made, under the authorities, an appellate court cannot interfere.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

In re ANTHONY'S ESTATE
SPEED v. RATZBACH.
(Civ. 1,159.)

(District Court of Appeal, First District, California. Feb. 11, 1913.)

1. WILLS (§ 130*)—OLOGRAPHIC WILL—STATUTORY PROVISIONS.

Under Civ. Code, § 1277, defining an "olographic will" as one entirely written, dated, and signed by the hand of the testator himself, the date must contain the year, month, and day, and hence the omission of the month was fatal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338-340; Dec. Dig. § 130.*

For other definitions, see Words and Phrases, vol. 4, pp. 3321, 3322.]

2. WILLS (§ 130*)—OLOGRAPHIC WILL—REQUISITES.

Where a decedent, just prior to his death, wrote a letter relative to the disposition of his property which was not dated and hence was not sufficient as an olographic will, it and another letter properly dated could not be taken together as constituting decedent's will unless the second letter was testamentary in character

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and so referred to the first letter as to incorporate it therein.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338-340; Dec. Dig. § 130.*]

3. WILLS (§ 448*)—PRESUMPTIONS IN FAVOR OF TESTACY—APPLICATION.

The rule of law that favors testacy as against intestacy only applies where the existence of the testamentary intent is ascertained and the subject-matter of the doubt is one of construction, and when there is a doubt as to the existence of the testamentary intent the rule does not apply.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 904; Dec. Dig. § 448.*]

4. WILLS (§ 130*)—OLOGRAPHIC WILLS—REQUISITES.

A decedent just prior to his death wrote a letter to S. not dated so as to constitute an olographic will, stating that he desired his real estate sold and the proceeds given to a labor organization, that he imposed the duty of attending to this matter on S. and gave him power of attorney, that the local union would bury him, and that all moneys left over from the benefits due him should remain in the local. He also inclosed a power of attorney to sell the real estate. In another letter written at the same time, he stated: "I have given S. the power of attorney to sell my property. * * * I direct that the money left over from the benefits due me shall belong to my local." *Held*, that the second letter appeared to be a narration of the things accomplished through the instrumentality of S. and by means of the power of attorney, the direction as to the disposition of benefits being at most confirmatory of the intention indicated in the letter to S., and hence, this second letter not being testamentary in character, the two letters could not be taken together as constituting an olographic will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338-340; Dec. Dig. § 130.*]

5. WILLS (§ 130*)—OLOGRAPHIC WILL—REQUISITES.

Assuming that the second letter was testamentary in character, there was not a sufficient reference to the letter to S. to incorporate it therein, since to incorporate one instrument in another by reference the reference must be clear, certain, and unambiguous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338-340; Dec. Dig. § 130.*]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Petition by George Speed for the probate of an alleged will of J. A. Anthony (also known as Jacob Anthony), deceased. From an order admitting the alleged will to probate, Barbara Ratzbach appeals. Reversed with directions.

I. F. Chapman, of San Francisco, for appellant. John W. Gwilt, of Oakland (Goodfellow, Eells & Orrick, of San Francisco, of counsel), for respondent.

MURPHEY, Judge pro tem. This is an appeal from an order of the superior court of the county of Alameda, admitting to probate as the last will and testament of deceased two letters written entirely in the handwriting of the deceased a short period of time before his death and addressed to the respondent and another friend Lavin. These letters are quite long, and contain a large amount

of immaterial matter relative to the writer's dissatisfaction with social, religious, and industrial conditions generally, and informing his friends that he has concluded to end it all in death, which he states to them will have resulted before the letters reach them. These letters, in so far as they relate to anything material to this discussion, are as follows:

"San Francisco, 27, 1911. To George Speed—Dear Comrade: I have made up my mind that there is one slave too many in this world and that I am that one. Accordingly when you read these lines I shall be dead. * * * I send my last greetings to those nearest to me by the ties of blood. I love them now as I have always. I am leaving some little property behind. * * * Enough said. There remains then the I. W. W., and it is my last will and desire that my little real holdings be sold as speedily as may be and the money sent to general headquarters, No. 518 Cambridge Building, Chicago, Illinois, to be used for the purpose of organization and propaganda. I do not specify. They know best. I name the I. W. W. as beneficiaries because I firmly believe in the coming struggle, etc. * * * It is upon you, my friend, that I impose the duty of attending to this matter. I give you the power of attorney. The necessary papers you will find at my safe deposit box. * * * My union, Local No. 127, will bury me. All moneys left over from the benefits due me shall remain in the local, to be used as they see fit. You will notify C. D. Lavin, Builders' Trade headquarters, Oakland. * * * Farewell, and keep in kindly remembrance your comrade, J. A. Anthony."

"San Francisco, June 27, 1911. Charles D. Lavin—Dear Comrade: When we parted on Monday you said that you would see me on Thursday. So you will, but you must come to me, to my place, where you will find me dead. * * * For this and other reasons I find my satisfaction in being able to render the I. W. W. a slight service after I am dead. I have given George Speed the power of attorney to sell my property and sent the proceeds to headquarters in Chicago. * * * Local 127 will bury me of course, and I direct that the money left over from the benefits due me shall belong to my local. * * * J. A. Anthony."

It is not disputed that everything contained in these two letters is in the handwriting of the deceased; and it may be inferred from the record that the power of attorney mentioned in the letters was received by Speed in the same envelope that conveyed to him the letter. The power of attorney, being designated, "Power of Attorney Special," was dated June 26, 1911, and signed by Jacob Anthony (whose identity with the J. A. Anthony who signed the two letters above set out is conceded), and provided that: "Said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—7

George Speed is hereby authorized as my attorney to sell" certain real estate described in said power and constituting all the real estate owned by the deceased. This power of attorney was not acknowledged, but was signed and sealed in the presence of a notary public.

The first of these letters, the Speed letter, was offered for and admitted to probate on July 29, 1911. The appellant herein immediately filed an application for the revocation of the probate of the letter upon the ground that it was not dated, and therefore could not be admitted as an olographic will. Subsequently and before action had been taken on this petition for revocation the respondent herein filed a petition for probate of both letters above set out upon the ground that the two letters constituted the will of the deceased, and that the omission of the date in one was supplied by the date in the other. The appellant herein filed a contest to the admission to probate of these letters as the will of the deceased; and upon the trial of the issues thus raised the order appealed from herein resulted.

[1] It is practically conceded that the Speed letter is not sufficient as an olographic will, it failing to measure up as such to the statutory requirements (Civ. Code, § 1277) as interpreted by the decisions of the court of last resort in this state (*Estate of Martin*, 58 Cal. 531; *Estate of Price*, 14 Cal. App. 462, 112 Pac. 482); the essential requirement that in the dating the "year, the month and the day" must be given not being fulfilled.

We now come to the Lavin letter, held by the trial court to have incorporated the Speed letter by reference in such a way as to constitute the two letters the will of the deceased.

[2] The first question suggested is as to whether the Lavin letter in itself is testamentary in character, and whether it discloses on its face any intimation or intention on the part of the deceased to constitute it his last will; and finally, if it can be said to possess either of these characteristics to a satisfactory or convincing extent, then is there such a reference in the Lavin letter to the Speed letter as would incorporate the latter into the former within the meaning and intent of the law applicable to such a contingency?

In order to effectuate these two letters as a testamentary disposition of property the latter must have testamentary character. In *Re Noyes' Estate*, 40 Mont. 231, 106 Pac. 355, the Supreme Court of Montana says: "A paper not of a testamentary character is to be construed with one having that character whenever the latter has by proper reference to the former incorporated it within itself, thus giving it also a testamentary character."

[3] The rule of law that favors testacy as against intestacy only operates where the existence of the testamentary intent is ascer-

tained and the subject-matter of the doubt is one of construction. Where there is a doubt as to the existence of the animus testandi, the rule in favor of testacy is not applicable. In *Estate of Meade*, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244, the Supreme Court says: "The intention of the deceased that the paper should stand for a last will and testament must be plainly apparent. The heirs at law are not to be disinherited unless such intention be clearly manifested."

"Effect must be given to the intention of the testator if that can be discovered and is consistent with the rules of law; but the intention must be expressed with legal certainty; otherwise the title of the heirs at law must prevail." *Sutherland v. Sydnor*, 84 Va. 880, 6 S. E. 480.

Carrying this idea a little further, we find this language in the case of *McBride v. McBride*, 87 Va. 476: "It must satisfactorily appear that he intended the very paper to be his will. Unless it so appear the paper must be rejected."

In *Re Richardson*, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635, the Supreme Court says: "It is not for courts to declare that to be a testamentary disposition of his estate where it does not clearly appear that such was the intention of the individual executing it."

[4, 5] With these principles of law in mind, can it be said that the deceased, at the time of writing the Lavin letter, entertained the slightest suggestion that he was writing a will? The very idea, as it appears to us, is inconsistent with anything contained in the letter, and certainly inconsistent with the previous conduct and acts of the deceased as well as inconsistent with the theory of respondent. The letter upon its face appears to be a narration to his friend of things accomplished through the instrumentality of his friend Speed and by means of the power of attorney executed to him. The only language hinting at testamentary disposition is in the direction that the money left over from the benefits due shall belong to his local. This was a repetition of the thought expressed in the Speed letter, and at most was confirmatory of the intention there indicated. There can be no doubt but that the atmosphere created by these letters and the power of attorney to Speed indicates an intention on the part of the decedent to dispose of his property. This intention is not, however, made manifest by the Lavin letter. On the contrary, that letter assumes the effectuation of his purposes through the instrumentality of the power of attorney and directions given to Speed. No person we apprehend would have been more surprised than the deceased had the suggestion been made to him that he was at the time of writing the Lavin letter making his will.

It is true that the means he adopted for disposing of his property were ineffectual and abortive; but this is no justification for

a court to substitute a method of its own to give life and force to what it may determine to be the general intent of the party. To incorporate into a paper an intent entirely foreign to anything suggested by the circumstances surrounding its making and not manifested by anything appearing upon its face, and inconsistent with the previous conduct and expressions of the author, would be to make the court and not the deceased the testator.

Assuming the Lavin letter to have testamentary character (and we are entirely satisfied that it has not), we are next met with the proposition that there is nothing upon the face of the letter that indicates an intention or design to incorporate in it the Speed letter. The conclusion of the trial court in that respect is purely speculative and, as we see it, in the nature of a flat-determination. There is no evidence in the record supporting this theory; and the circumstances indicate that in referring to the "power of attorney" given to Speed the deceased meant just what he said. In the power of attorney he gives Speed, as he supposes, power to "sell" his real estate. In the letter to Speed he informs him that it is his "will and desire" that his real holdings "be sold," and in the letter to Lavin he says that he has given "Speed the power of attorney to sell." These constitute clear evidence and expression of his belief that the power of attorney is a sufficient method to effectuate his purposes, and there is no doubt but that when he wrote to Lavin such was his understanding.

The law requires that before an instrument may be incorporated in another by reference the reference must be clear, certain, and unambiguous. In *Estate of Young*, 123 Cal. 337, 55 Pac. 1011, the Supreme Court says: "An existing writing may by reference be incorporated into and made a part of a will; but before such an extrinsic document may be so incorporated the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt." Again in *Re Shillaber*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433, the court says: "All the authorities to which our attention has been called agree that any paper may be referred to and made part of the will. * * * If the will be duly executed and attested, the paper referred to, whether attested or not, will become a part of the will if it be already in existence and is clearly described and identified." Authorities to this effect might be multiplied almost without limit. See *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. 345; *Brown v. Clark*, 77 N. Y. 369; *Dyer v. Erving*, 2 Dem. Sur. (N. Y.) 160. *Allen v. Maddock*, 11 Moore, P. C. C. 427, 6 Week. Rep. 825, is the leading English authority on the subject of what will serve to incorporate

an unattested paper in an attested will. From these authorities it must be apparent that the purported reference in the Lavin letter to the Speed letter wholly fails to measure up to the requirements of the law.

The order appealed from is reversed, and the trial court directed to deny the petition.

We concur: LENNON, P. J.; HALL, J.

SIMPSON v. SIMPSON. (Civ. 1,060.)

(District Court of Appeal, Third District, California. Feb. 10, 1913.)

1. DIVORCE (§§ 199, 209*) — ACTION FOR DIVORCE AND "ALIMONY"—JUDGMENTS.

Where an action is for divorce and for alimony, the application for alimony, though not a separate suit, is a proceeding for a separate judgment which, when granted, has nothing to do with the final judgment; "alimony" in the strict legal sense being a provision which the court may make for the support of the wife pending a suit for divorce, and alimony, strictly speaking, proceeds only from husband to wife.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 585, 586, 721, 605-609; Dec. Dig. §§ 199, 209.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 307-311; vol. 8, pp. 7571, 7572.]

2. HUSBAND AND WIFE (§ 285½*) — ACTION FOR SEPARATE MAINTENANCE.

Where a wife has a cause for divorce, she may, under Civ. Code, § 137, sue for support and maintenance without applying for a divorce, but the right rests upon the existence of the marriage relation.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1074; Dec. Dig. § 285½.*]

3. DIVORCE (§ 219*) — ACTION FOR DIVORCE AND ALIMONY—DECREE FOR ALIMONY—DECREE FOR DIVORCE—EFFECT.

Where a wife, suing for divorce and alimony, obtained a judgment for alimony, and thereafter the court rendered a judgment that she take nothing by her action and granting a divorce to the husband, the judgment for maintenance terminated on the granting of the divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 640, 735-737; Dec. Dig. § 219.*]

4. JUDGMENT (§ 910*) — ACTIONS — LIMITATIONS.

An action on a judgment for maintenance rendered in favor of a wife is barred by the five-year statute of limitations (Code Civ. Proc. § 336, subd. 1), and limitations will begin to run against the judgment on the date thereof.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1732-1737; Dec. Dig. § 910.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Annie Simpson against John Simpson. From a judgment for defendant, plaintiff appeals. Reversed.

Frank Schilling, of San Francisco, for appellant. T. J. Crowley, of San Francisco, for respondent.

CHIPMAN, P. J. On September 24, 1910, plaintiff filed her complaint to enforce pay-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment of a judgment entered, on February 12, 1903, in an action as above entitled, which, it is alleged and admitted, was never appealed from, and that no part of the judgment has been paid.

This judgment reads as follows: "In the Superior Court of the City and County of San Francisco, State of California. Annie Simpson, Plaintiff, v. John Simpson, Defendant. Decree of Maintenance. This cause coming on regularly to be heard on the 12th day of February, 1903, upon the complaint on file herein, defendant having failed to appear and answer in said action, and the default of the defendant for not answering having been duly entered and upon proofs taken orally in open court, from which it appears that all of the allegations of the complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency; and it also appearing to the said court that said defendant was duly and regularly served with summons and complaint herein, and all and singular the law and the premises being by the court here understood and considered. Wherefore, it is ordered, adjudged, and decreed and the court does order, adjudge, and decree, that John Simpson, the defendant herein, pay to Annie Simpson, plaintiff herein, the sum of twenty-five (\$25.00) dollars per month, beginning from the rendition of this judgment until the further order of this court; the further sum of fifty (\$50.00) dollars counsel fees and costs of suit in the amount of \$44.75. J. C. B. Hebbard, Judge of the Superior Court. Dated this 12th day of February, 1903."

Indorsed: "Filed February 12, 1903. Albert B. Mahony, Clerk, by F. J. Dugan, Deputy Clerk. Co. Clerk F. No. 15. I, Albert B. Mahony, county clerk of the city and county of San Francisco, state of California, and ex officio clerk of the superior court, in and for said city and county, hereby certify the foregoing to be a full, true and correct copy of the original decree of maintenance in the above-entitled cause, filed in my office on the 12th day of February, A. D. 1903. Attest my hand and seal of said court, this 12th day of February, 1903. Albert B. Mahony, Clerk, by A. S. Levy, Deputy Clerk."

Indorsed on back: "No. 82,991. Department 4. Superior Court, State of California, City and County of San Francisco. Annie Simpson, Plaintiff, v. John Simpson, Defendant. Certified Copy Decree of Maintenance."

Defendant answered and, by way of defense, pleaded the following judgment which, it is alleged and is admitted, was never appealed from: "In the Superior Court in and for the City and County of San Francisco, State of California. Annie Simpson, Plaintiff, v. John Simpson, Defendant. This cause having been brought on to be heard this 20th day of April, 1903, upon the complaint of plaintiff, and the answer and cross-complaint of defendant and answer thereto

and the cause having been submitted to the court upon the evidence taken, and the court having made and filed its decision in writing therein: Now, therefore, in accordance with said decision, upon motion of Messrs. Garoutte & Goodwin, counsel for defendant, it is ordered, adjudged, and decreed that the plaintiff take nothing by her said action. It is further ordered, adjudged, and decreed that the marriage between the said plaintiff, Annie Simpson, and the said defendant, John Simpson, be dissolved, and the same is duly dissolved accordingly, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony and all the obligations thereof. Dated this 25th day of April, 1903. J. C. B. Hebbard, Judge.

"Co. Clerk F. No. 15. I, Albert B. Mahony, county clerk of the city and county of San Francisco, state of California, and ex officio clerk of the superior court, in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original decree of divorce in the above-entitled cause, filed in my office on the 25th day of April, A. D. 1903. Attest my hand and seal of said court, this 20th day of May, 1903. Albert B. Mahony, Clerk, by F. J. Dugan, Deputy Clerk."

Indorsed on back: "82,991. In the Superior Court of the City and County of San Francisco, State of California. Annie Simpson, Plt., v. John Simpson, Deft. Certified copy of Decree of Divorce. Garoutte & Goodwin, Attorneys at Law. Mutual Savings Bank Building, 708 Market St., San Francisco. Telephone Bush 762."

These judgments were admitted in evidence and constitute all the evidence in the case except as above stated. The court made the following findings: "(1) That on the 12th day of February, 1903, this court, department No. 4 thereof, in that certain action then pending therein and numbered 82,991, wherein this plaintiff was the plaintiff, and the defendant here was defendant therein, made a decree of maintenance, requiring the defendant to pay to plaintiff the sum of \$25 per month beginning on said date, and until the further order of this court, and the further sum of \$50 counsel fees, and \$44.75 costs of suit. (2) That thereafter, and on the 25th day of April, 1903, this court, department No. 4 thereof, in that certain action then pending therein, and numbered 82,991, wherein this plaintiff was the plaintiff, and the defendant here was the defendant therein, made a decree adjudging that the plaintiff take nothing by her said action, and ordering, adjudging, and decreeing that the marriage between the said plaintiff and the said defendant be dissolved, and the said parties there and each of them was released from the bonds of matrimony and all the obligations thereof."

As conclusions of law the court found that plaintiff's prayer for relief should be denied

and that defendant is entitled to judgment in his favor, and judgment was accordingly entered, from which plaintiff appeals.

It will be observed that the title of the cause in both decrees of 1903 is the same; the court and number of the department and number of the action are the same and the same judge entered the decrees. The decree of divorce followed the decree for maintenance two months and was entered on an answer to plaintiff's complaint and defendant's cross-complaint and answer to the cross-complaint. We think it sufficiently appeared that both decrees were entered in the same action. Appellant claims that the final decree of divorce had no effect upon the decree for maintenance, and that the liability thereby created is a valid subsisting indebtedness of defendant, and plaintiff should have had judgment for the full amount mentioned in the decree. Defendant pleaded the statute of limitation, subdivision 1, § 336, Code of Civil Procedure. No finding was made on this issue, and respondent makes no reference to it in his brief. Respondent contends that "there can be no doubt but that the default decree of maintenance was set aside and defendant permitted to file his answer and cross-complaint, to which cross-complaint plaintiff made answer, and the case tried, resulting in a decree denying plaintiff relief, and granting a decree of divorce upon the cross-complaint."

We cannot doubt that defendant's default was set aside and leave given him to answer. The subsequent decree, two months later, on his cross-complaint and the answer thereto, cannot be construed as meaning anything less. But it does not follow that the decree for support or alimony pendente lite or, as the counsel claims it was, "for maintenance," was set aside. We do not know whether plaintiff's action was for maintenance without divorce, under section 137, Civil Code, or was for a divorce under the same section, and support pendente lite. We have nothing to guide us but the two decrees.

[1] If the action was for divorce and for support the allowance, strictly speaking, was for alimony and, though the application for alimony cannot be considered a separate suit, it "is a proceeding for a separate judgment which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it." *Hite v. Hite*, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345. It was held, in *Ex parte Spencer*, 83 Cal. 400, 23 Pac. 395, 17 Am. St. Rep. 266, that the Legislature used the term "alimony" in the statute in its strict legal sense when prescribing the provision which the court might make for the support of the wife pendente lite. And alimony in that sense proceeds only from husband to wife without which relation there can be no alimony. In the same case it was pointed out that allowance made to the wife after decree of divorce should be called "al-

lowance" or "permanent allowance" and not alimony.

[2] When the wife has a cause for divorce, she may, without applying for divorce, have an action for "support and maintenance" (Civ. Code, § 137); but this right also rests on the fact that the relation of husband and wife exists, and a decree awarding such maintenance contemplates the existence of the marital relation not only when the decree is made but during its life. If the wife or husband should thereafter bring an action for divorce, the decree in that action would be conclusive of the rights of the parties, and "if it contained no provision for support it would necessarily terminate the allowance theretofore made in the action." In the case here the decree of divorce expressly declares "that the plaintiff take nothing by her said action * * * and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony and all the obligations thereof."

[3] Inasmuch as the decree of maintenance was made in the same action and was dependent upon the existence of the marriage relation, it must follow that, upon the termination of that relation, the allowance would cease especially as the divorce decree expressly declared that plaintiff should take nothing by her action. In *Smith v. Superior Court*, 136 Cal. 17, 68 Pac. 100, the court said: "It is conceded that a complete divorce will relieve petitioner from the judgment for alimony, because the plaintiff in the first suit would no longer be his wife." In that case, however, the principle did not apply because an appeal was pending from the divorce decree, the effect of which was, as declared by the court, that "these parties are not divorced." No appeal having been taken in the present case from the divorce decree, its effect was to relieve defendant from the judgment for future support. "After the judgment granting the divorce the plaintiff was no longer the wife of defendant, and he owed her no longer any marital duty." *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, and see *Harlan v. Harlan*, 154 Cal. 341, 98 Pac. 32, for review of the cases.

But when the decree of divorce was entered in the present case there was a judgment for maintenance, counsel fees, and costs from which no appeal had then been taken nor was at any time taken. The final decree had no effect upon that judgment (cases supra) except to put an end to its future operation. Had the divorce decree recited that the maintenance judgment was set aside, or if such was the necessary effect of the language used in the divorce decree, we think respondent's contention might be sustained. But the application for maintenance being a separate proceeding in the case and the judgment appealable (*Sharon v. Sharon*; *Hite v. Hite*, supra), we cannot give to the divorce decree the force contended for, to wit, that the maintenance decree was set

aside, since it is entirely consistent with the language of the divorce decree that the maintenance decree remained undisturbed. In adjudging "that plaintiff take nothing by her said action," we think is meant that plaintiff was to have no relief in the future. Plaintiff would therefore be entitled to judgment for the allowance given up to the date of the decree of divorce and counsel fees and costs in her judgment mentioned. If we could say, with certainty that plaintiff's action was for maintenance alone, we might with some safety assume that the default judgment as well as the default for nonappearance was set aside and that the issue of maintenance was again heard. But her action may have been for divorce, and judgment for maintenance or alimony may have been given pendente lite, in which case defendant's answer may have been to her alleged grounds for divorce. In that case the divorce decree would not be inconsistent with the maintenance judgment and should not be given the effect of setting aside that judgment. No explanation is given for not bringing up the pleadings in that action or the order of the court in setting aside defendant's default, except it was stated at the argument that all the court records were destroyed in 1906; each party happening to preserve the copies of the several decrees. Before defendant in the present action should be permitted to evade the effectiveness of plaintiff's judgment pleaded, there should be something more than vague and uncertain implications drawn from his decree of divorce.

[4] We conclude that plaintiff's judgment for maintenance had vitality undisturbed up to the date of the divorce decree, but had no operative effect for maintenance beyond that date. The statute of limitations began to run against that judgment on February 12, 1903, certainly no later than April 20, 1903, and any action brought upon it was barred in five years by subdivision 1, § 336, Code of Civil Procedure. This action was commenced September 24, 1910, and is barred by that section.

But as there is no finding on that issue the judgment must be reversed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

PEOPLE v. SIMON. (Cr. 424.)

(District Court of Appeal, First District, California. Feb. 4, 1913. Rehearing Denied by Supreme Court April 5, 1913.)

1. CRIMINAL LAW (§ 678*)—TRIAL—ELECTION BETWEEN ACTS.

Where the evidence on a trial for abortion showed that defendant agreed for a specified sum to procure a miscarriage, that she thereafter performed an operation which was ineffectual, that she later delivered medicine to be used for the same purpose, and subsequently performed a second operation, which accomplished its purpose, the prosecution was not required

to elect on which operation it would rely for a conviction, since while under Pen. Code, § 274, relative to administering drugs or using instruments with intent to procure a miscarriage, it is not necessary that a miscarriage be produced, yet a series of criminal acts in the effort to produce a miscarriage may be treated as done in the commission of one and the same crime; the unity of the transaction not necessarily depending upon the immediate connection in point of time of such acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.*]

2. CRIMINAL LAW (§ 678*)—TRIAL—ELECTION BETWEEN ACTS.

While if on a trial under an indictment charging only one offense evidence is introduced sufficient to prove two or more separate offenses, either of which would support the charge in the indictment, an election should be required if requested, the rule does not apply where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

E. Sattler Simon was convicted of crime, and she appeals. Affirmed.

A. L. Frick and H. C. Morrison, both of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant, a woman, was convicted under an information which charged that she "on the 15th day of June, A. D. 1912, at the said county of Alameda, state of California, did willfully, unlawfully, and feloniously use and employ certain means, to wit, instruments and drugs, in, about, and upon and within the body of Helen Neuman, the said Helen Neuman being then and there a woman pregnant with child, as the said E. Sattler Simon then and there well knew, with intent thereby then and there to procure the miscarriage of her, the said Helen Neuman."

[1] The evidence tends to show that Helen Neuman early in June, 1912, called upon defendant, and sought her services to procure a miscarriage of Helen Neuman. Defendant at this interview offered to perform the abortion for \$20, but on account of the price no agreement was reached. On the next day defendant called on Mrs. Neuman at her house, and offered to perform the abortion for her for \$15, provided that she, Mrs. Neuman, would come the afternoon of that day. Accordingly Mrs. Neuman visited the residence of defendant, and upon the statement of the defendant "that she wanted her money first before she would perform the abortion" Mrs. Neuman paid her \$15. Thereupon, as the evidence amply tends to prove, defendant proceeded to use an instrument in and upon the uterus of Mrs. Neuman for the manifest purpose of procuring a miscarriage or abortion. As a result Mrs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Neuman was for a time ill, and blood flowed from her vagina, but no miscarriage followed. This operation occurred upon Saturday, the 8th or 15th day of June, 1912. In about a week from the first operation Mrs. Neuman telephoned to defendant that no miscarriage had resulted, and was told by defendant to come to her house and she (defendant) would give her some pills. Accordingly Mrs. Neuman on the same day called at the home of defendant, and obtained some pills to take, and was told by defendant that if the pills were not effective to come again in a few days. Altogether defendant gave Mrs. Neuman pills on four occasions but without any results so far as producing an abortion or miscarriage. Finally defendant informed Mrs. Neuman that she would have to perform a second "operation," but would like to have Mrs. Neuman wait a little longer. Later defendant called on Mrs. Neuman and told her to come to her (defendant's) home and she would again perform the abortion. Accordingly on the following Saturday, July 21, 1912, Mrs. Neuman went to the residence of defendant, where defendant again used instruments in and upon the uterus of Mrs. Neuman with the manifest purpose of procuring a miscarriage. This operation accomplished its purpose, and a miscarriage followed.

At the close of the testimony given by Mrs. Neuman, and again at the close of the entire case for the people, defendant's counsel asked the district attorney to elect as to which operation he would rely upon for a conviction; and upon the refusal of the district attorney to so elect counsel for defendant requested the court to compel an election, which request the court in each instance denied. It is this action of the court which is solely relied upon for a reversal of the judgment and the verdict.

[2] It may not be disputed that where, in a trial under an indictment charging but one offense, evidence is introduced sufficient to prove two or more separate and distinct offenses, either one of which would support the charge in the indictment, an election should be required if requested. *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *People v. Williams*, 133 Cal. 165, 65 Pac. 323; and *People v. Hatch*, 13 Cal. App. 521, 100 Pac. 1097. This rule, however, has no application where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense. "Where the doings on different days may be regarded as parts of the one transaction, the combined acts on all the days may be shown, and there will be no cause for election." *Bishop's New Cr. Proc.* § 460, subd. 3. "The right of demanding an election and the limitation of the prosecution to one offense is confined to charges which are actually distinct from each other and do not form parts of one and the same

transaction." *Goodhue v. People*, 94 Ill. 37.

In the case at bar the two operations and the use of the drugs were manifestly in pursuance of the agreement of defendant to procure the miscarriage or abortion, which was eventually produced. Although the various things done by defendant were done upon different days, they were all done in pursuance of the one agreement and to accomplish one particular purpose. They were all parts of one transaction. While it is not essential or important to the completion of the offense denounced by section 274 of the Penal Code that a miscarriage be produced, yet, where under one agreement to procure a miscarriage a defendant does a series of criminal acts in the effort to produce such a miscarriage, all the acts may be and justly should be treated as done in the commission of one and the same crime. They certainly are parts of one and the same transaction. The unity of the transaction does not necessarily depend upon the immediate connection in point of time of the acts done in the commission of the crime.

This is well illustrated by the case of *People v. Frank*, 28 Cal. 507, where, intermediate the forgery of an indorsement on a draft and its uttering, by defendant, the draft had been accepted by the drawee and indorsed by another party. It was claimed that the act of forging and the act of uttering constituted two different offenses. To this the court said: "To this proposition we cannot assent. The mere adding of other parties did not destroy the identity of the instrument *nor the unity of the transaction*, under the rule in *Shotwell's Case* [27 Cal. 394], and the act of forging and the act of uttering were therefore both committed with reference to the same instrument. And we may add that so long as the various acts mentioned in the statute are committed with reference to the same instrument they must be regarded as constituting one continuous transaction within the meaning of the *Shotwell Case*, notwithstanding the lapse of time or the intervention of acts which do not destroy the identity of the instrument." (Italics are ours.) We think the reasoning of the *Frank Case* is applicable to the facts of this case. The various criminal acts having been committed in pursuance of one agreement to produce a miscarriage must be regarded as constituting one continuous transaction, and for that reason may be considered as but parts of one and the same offense.

For this reason the court did not err in denying defendant's request that the district attorney be required to elect upon which occasion he would rely in support of the charge.

The judgment and order are affirmed.

We concur: LENNON, P. J., and MURPHEY, J., pro tem.

PEOPLE v. LOPEZ. (Cr. 271.)

(District Court of Appeal, Second District, California. Feb. 18, 1913.)

1. HOMICIDE (§ 254*)—SUFFICIENCY OF EVIDENCE—MURDER IN SECOND DEGREE.

Evidence upon a trial for murder held to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.*]

2. HOMICIDE (§ 342*)—APPEAL—HARMLESS ERROR.

Where the evidence in a trial for murder justified a verdict of murder in the second degree, defendant could not claim that, if testimony of a certain witness was true, defendant was guilty of murder, since a defendant cannot complain because the verdict is more favorable to him than the evidence warrants.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 342.*]

3. CRIMINAL LAW (§ 874*)—TRIAL—POLLING JURORS.

Where the clerk upon defendant's request for a poll of the jury again read the verdict, and asked each member of the jury the question, "Is this your verdict?" to which each replied in the affirmative, there was a sufficient compliance with Pen. Code, § 1163, providing that the jury may be polled at the request of either party by being severally asked whether it is their verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2085-2088; Dec. Dig. § 874.*]

4. CRIMINAL LAW (§ 1040*)—APPEAL—NECESSITY OF OBJECTION.

On the assumption that upon a poll of the jury each juror should have been required to state his verdict in his own language, and without reference to the form of the verdict returned, or that the verdict should have been read to each of the jurors separately, when asked if it was his verdict, defendant, who did not request a poll in such manner nor object to the manner of polling the jury, could not complain on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2649; Dec. Dig. § 1040.*]

5. CRIMINAL LAW (§§ 642, 1119*)—TRIAL—REQUEST FOR INTERPRETER.

Under Code Civ. Proc. § 1894, requiring the court to appoint an interpreter in cases where the witness does not understand or speak the English language, the matter of appointment is within the discretion of the court; and, where the record fails to show that defendant was unable to speak or understand English its ruling thereon will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1455, 1598, 2927-2930; Dec. Dig. §§ 642, 1119.*]

6. CRIMINAL LAW (§ 720*)—TRIAL—CONDUCT OF PROSECUTING ATTORNEY.

In a trial for murder, the statement of the district attorney that he believed upon his oath as an attorney that the defendant had not told what happened at the time, based upon the evidence, was not misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

7. CRIMINAL LAW (§ 730*)—APPEAL—HARMLESS ERROR—CONDUCT OF PROSECUTING ATTORNEY.

Where the court upon a statement by the district attorney alleged to constitute misconduct instructed that the jury should consider it as an argument, and not as a statement of

fact, defendant was not prejudiced by such statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

8. WITNESSES (§ 388*)—IMPEACHMENT—PREDICATE.

Under Code Civ. Proc. § 2052, providing that a witness may be impeached by proof of inconsistent statements when a predicate is made by relation of such statement, which, if in writing, must be shown to the witness, a witness cannot be impeached by showing that he testified differently at the preliminary examination, without showing him the transcript of his testimony then taken, though the witness then testified through an interpreter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.*]

9. CRIMINAL LAW (§§ 338, 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—RACE OF DECEASED.

The admission in a trial for murder of evidence as to whether deceased was an Anglo-Saxon was erroneous, but harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753-756, 787, 788, 801, 855, 3088, 3130, 3137-3143; Dec. Dig. §§ 338, 1169.*]

10. CRIMINAL LAW (§ 829*)—REQUESTS—INSTRUCTIONS.

Requested instructions which in so far as they state the law applicable to the case are included in instructions given are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 1038*)—TRIAL—NECESSITY OF REQUEST FOR INSTRUCTION.

Under Pen. Code, § 1093, requiring the court to charge on any points pertinent to the issue, if requested by either party, a defendant cannot complain of the court's failure to instruct upon his good character, even though it was pertinent to the issue, where no request for such an instruction was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Appeal from Superior Court, Los Angeles County; Wm. M. Finch, Judge.

Juan C. Lopez was convicted of murder in the second degree, and he appeals. Affirmed.

Edward J. Dennison, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Appellant was charged by information with the crime of murder. Upon trial he was convicted of murder in the second degree. He appeals from the judgment and an order denying his motion for a new trial.

[1] Defendant was an employé of one Lat-tour, who was engaged in the growing of cattle in one of the mountainous regions of Los Angeles county. It appears that he and his employer were the only occupants of the place. On July 1, 1912, at about noon, the deceased, Frank S. Randolph, came to Lat-tour's house, where he spent the afternoon and had supper with Lattour and defendant, on which occasion they drank more or less

wine. So far as appears, no trouble had existed between any of the parties, and up to the time of the shooting which resulted in the death of Randolph the relations between all of the parties were of a friendly character. On the morning of the 2d of July defendant surrendered himself to an officer at Newhall, some distance from the place where the homicide was committed, stating that he had the night before shot and killed Randolph in self-defense, claiming that Randolph had first shot Lattour, his employer, and then attempted to shoot him. The testimony of defendant, if believed by the jury, would have justified a verdict of justifiable homicide. Not only were there circumstances established which were inconsistent with the story as told by defendant, but the testimony of Lattour was to the effect that defendant, and not Randolph, shot him, and that defendant shot and killed deceased. It thus appears there was evidence to justify the jury in the verdict rendered.

[2] Indeed, we do not understand counsel for defendant to question the sufficiency of the evidence, other than to claim that, if the testimony given by Lattour was true, then defendant was guilty of the crime of murder, rather than the lesser crime of which he was found guilty. *People v. Coulter*, 145 Cal. 66, 78 Pac. 348, and *People v. Cyty*, 11 Cal. App. 702, 106 Pac. 257, are authorities in support of the proposition that defendant cannot complain because the verdict is more favorable to him than the evidence warrants.

[3] When the verdict was returned, defendant's counsel asked that the jury be polled; whereupon, as appears from the record, "the clerk again read the verdict and asked each member of the jury the question, 'Is this your verdict?' to which each replied in the affirmative." This was a sufficient compliance with section 1163 of the Penal Code, which provides that "the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict."

[4] Conceding, however, that, as claimed by counsel, each juror should have been called upon and required to state his verdict in his own language and without reference to the form of the verdict returned by the jury, or, in lieu thereof, that the verdict should have been read to each of the jurors separately when asked, "Is this your verdict?" no such request was made, nor was there any objection interposed to the manner of polling the jury. Under such circumstances appellant is in no position to complain, even if the point had merit.

[5] Defendant, when called to the witness stand to testify in his own behalf, requested the court to appoint an interpreter for him, which request was by the court denied. Under section 1884, Code of Civil Procedure, the court is required to appoint an interpreter in those cases only where the witness does

not understand or speak the English language. The question is one for the judicial determination of the court, and its ruling thereon will not be disturbed unless the record clearly discloses an abuse of discretion by the court. *People v. Young*, 108 Cal. 8, 41 Pac. 281; *People v. Morine*, 138 Cal. 626, 72 Pac. 166. The record fails to show that defendant was unable to speak or understand the language; indeed, its tendency is strongly to the contrary. In reply to a question put to him by the court, defendant stated: "Some words I cannot understand. That is the reason I would rather have an interpreter."

[6] Another point equally without merit is the alleged misconduct of the district attorney. In arguing the case to the jury the district attorney, in referring to the testimony given in his own behalf by defendant, stated: "I believe, gentlemen, upon my oath as an attorney at this bar, that the defendant has not told what happened there that night." The belief of the prosecuting officer was based upon the evidence, and certainly he had a right to express his doubts as to the truth of defendant's testimony. *People v. Glaze*, 139 Cal. 159, 72 Pac. 965.

[7] Moreover, since the court at the time took the precaution to instruct the jury that they should "consider the statement as the argument of counsel, and not as a statement of fact," it is difficult to see how, in any event, defendant could have been prejudiced by reason thereof.

[8] At the preliminary examination Lattour, a witness for the people, gave his testimony through an interpreter, a transcript thereof as then interpreted being made by the recorder. At the trial this witness testified without the aid of an interpreter. For the purpose of impeaching his testimony, defendant, without showing the witness the transcript of his former testimony, asked him if he had not testified differently at the preliminary hearing. An objection to this question was sustained, and the ruling is assigned as error. Appellant not only insists that he was entitled, without reading or referring to the deposition, as required by section 2052, Code of Civil Procedure (*People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201; *People v. Lambert*, 120 Cal. 170, 52 Pac. 307), to question the witness as to his testimony given before the magistrate, but also insists, upon the authority of *People v. Jan John*, 137 Cal. 220, 69 Pac. 1063, that the deposition could not be used to impeach the witness, and hence he was entitled to question the witness in the manner proposed. The proposition finds no support in the *John Case*. In an opinion by Justice Angellotti in *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467, he clearly distinguishes the former case from the facts involved in the one at bar, and holds that for the purpose of impeachment, where the proper foundation has been laid for the admission of the deposition, the fact

that it was taken through an interpreter in a foreign language does not affect its admissibility, if it is properly transcribed in long-hand and certified by the reporter as provided by the statute. There was no error in the court's ruling.

[9] We are unable to perceive any theory of the case upon which the question as to whether or not deceased was an Anglo-Saxon was material or competent, and the action of the court in overruling defendant's objection thereto was error. Nevertheless, it is impossible to conceive how appellant could have been prejudiced thereby.

[10] Defendant assigns as error the refusal of the court to give an instruction touching defendant's right of self-defense. As a whole the instruction was erroneous, and should not have been given in the form tendered. In so far as it stated the law applicable to the case, the subject thereof was included in the instructions given, which fact the court assigned as a reason for its refusal.

[11] Evidence was introduced tending to prove that defendant was a man of good character and peaceably disposed. He insists, although he did not request it, that it was the duty of the court of its own motion to have instructed the jury in relation thereto. Section 1003, Penal Code, makes it the duty of the court to charge the jury on any points pertinent to the issue, "if requested by either party." A defendant is in no position to complain of the court's failure to instruct upon a point, even though it be pertinent to an issue, where no request was made that it instruct thereon.

We find no prejudicial error, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

BEAUMONT v. MIDWAY PROVIDENT OIL CO. (Civ. 1,213.)

(District Court of Appeal, Second District, California. Feb. 8, 1913. Rehearing Denied March 10, 1913.)

1. APPEAL AND ERROR (§ 934*) — PRESUMPTION—REGULARITY OF PROCEEDINGS.

Where the clerk certified that a judgment was entered in the action, it must be presumed that it was regularly entered, in absence of a contrary recitation therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 984.*]

2. MOTIONS (§ 44*)—RENEWAL — DENIAL OF APPLICATION.

Where an application to renew a motion to vacate a judgment, made about a month after the original motion was denied, did not show why the same proofs then offered could not have been offered at the hearing of the first motion, the application to renew was properly denied.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 57; Dec. Dig. § 44.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Charles Beaumont against the Midway Provident Oil Company. From orders denying defendant's motion to vacate a judgment for plaintiff and denying an application to renew the motion to vacate, defendant appeals. Appeal from first order dismissed, and second order affirmed.

H. M. Barstow and William Ellis Lady, both of Los Angeles, for appellant. James W. Bell, of Los Angeles, and Bell & Ingalls, of Bakersville, for respondent.

JAMES, J. This action was brought by plaintiff to recover the sum of \$473.25 alleged to be due for services performed for the defendant, and the additional sum of \$100 alleged in plaintiff's complaint to be a reasonable amount to be allowed as an attorney's fee in the action. The complaint contained no allegation showing that defendant had contracted to pay any attorney's fee in the action. An answer was filed which admitted the principal indebtedness of \$473.25 alleged to be due, but denied that any sum was a reasonable fee or should be allowed as attorney's fee. Thereafter judgment was entered for the amount admitted to be due, no allowance being included in the judgment on account of the attorney's fee claimed. It was recited in the judgment that the plaintiff had directed the judgment to be entered for the admitted amount, and the formal judgment, as shown by the printed roll bore the signatures of attorneys for plaintiff. The clerk, however, certified that the judgment set forth was a true copy of that entered in the action. About 30 days after the judgment was entered the defendant moved to set it aside on the ground that it was void upon its face, and on the ground that the county clerk was not authorized to enter the same. This motion was heard by the court and denied. More than a month later defendant again appeared and asked leave to renew the motion made to vacate the judgment and offered in support of the application an affidavit of the clerk in which it was recited that the judgment as entered was entered upon the direction of attorneys for plaintiff and without an order of court being first had and obtained. The court denied defendant's application to present a second time the motion to vacate the judgment. This appeal was then taken, the notice of appeal reciting that both the order denying the motion to vacate the judgment and the order denying the application of defendant to renew the same were appealed from.

[1] The judgment as entered was not void upon its face. The clerk certified that it was entered in the action, and we must presume that it was regularly entered; no recitation therein appearing to the contrary. If judgment for the amount admitted to be due could only be entered upon order of the court, then we must presume that it was so

entered in the regular way. The first order, that denying the motion to vacate the judgment, was made on the 28th of February, 1912, and the notice of appeal was served on the 25th day of May, 1912. The appeal from this order, if regular otherwise, was taken too late, as more than 60 days had elapsed from the date of the ruling complained of. Section 939, Code Civ. Proc. Defendant in support of the first motion relied wholly on its assumption that the judgment was shown to be void on its face and offered no proof showing that it was entered by the clerk without the order of the judge.

[2] In its application made a month later, in support of which it for the first time offered the affidavit of the clerk, there was shown no good reason why the motion should be permitted to be renewed, or why the same proof then offered could not have been offered at the time of the hearing of the first motion. For this reason alone the court properly denied the application to renew the motion. There is a further and conclusive answer to be made to the argument of counsel for defendant, and that is that the record of all of the proceedings had upon the hearing of the motions referred to is not authenticated in such a way as to entitle such record to be used at the hearing of this appeal. There was no appeal from the judgment and there was no bill of exceptions settled in the manner prescribed by the Code in which might have been incorporated the record which is attempted to be presented in the printed transcript. We have shown, however, that even though such record did regularly and properly present for our notice the proceedings had in the superior court, defendant's appeal would lack a showing of merit.

The appeal from the order made on the 28th of February, 1912, denying defendant's motion to vacate the judgment, is dismissed. The order of the court as made on the 26th day of March, 1912, denying the application of defendant to renew the motion to vacate the judgment, is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

ATKINSON v. GOLDEN GATE TILE CO.
(Civ. 1,127.)

(District Court of Appeal, First District, California. Feb. 11, 1913. Rehearing Denied by Supreme Court April 9, 1913.)

1. ACCOUNT STATED (§ 19*)—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to warrant a finding that there was an account stated between the parties.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.*]

2. ACCOUNT STATED (§ 6*)—RETENTION OF ACCOUNT RENDERED—REASONABLE TIME.

An account rendered and retained for 25 days without objection is deemed accepted, con-

ceded to be correct, and constitutes an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30-39; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 1, pp. 93-98; vol. 8, p. 7561.]

3. ACCOUNT STATED (§ 19*)—AGREEMENT TO PAY INTEREST—EVIDENCE.

In an action on an account stated, evidence held to warrant a finding that defendant had impliedly agreed to pay interest on unpaid balances at 10 per cent.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.*]

4. INTEREST (§ 34*) — IN EXCESS OF LEGAL RATE—ACCOUNT STATED.

Civ. Code, § 1917, providing that an express contract in writing is necessary to fix interest in excess of 7 per cent., does not apply to interest included in and agreed to upon an account.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 71-74; Dec. Dig. § 34.*]

5. INTEREST (§ 17*)—COMPOUNDING INTEREST—ACCOUNT STATED.

Civ. Code, § 1919, providing that parties may in a writing whereby a debt is secured agree that, if interest is not punctually paid, it shall become a part of the principal and bear interest, does not prevent interest included in an account stated being compounded without an agreement in writing.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 30, 31; Dec. Dig. § 17.*]

6. COURTS (§ 91*) — DECISIONS OF SUPERIOR COURT—STARE DECISIS.

Although a point decided in the Supreme Court is in conflict with the weight of authority, and was rendered by a divided court, where it has not been criticised or modified by that court, the appellate court has no option but to follow its reasoning in disposing of the same point in other cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.*]

Appeal from Superior Court, City and County of San Francisco; Clarence A. Rakker, Judge.

Action by H. L. Atkinson against the Golden Gate Tile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ames & Manning, of San Francisco, for appellant. Page, McCutchen, Knight & Olney, of San Francisco, for respondent.

LENNON, P. J. This is an action brought to recover the sum of \$802.42 upon an account stated. The same cause of action was variously pleaded in eight separate and distinct counts of the plaintiff's complaint, but upon the trial of the action the plaintiff elected to rely solely upon the sixth count, which, by way of inducement to the allegation of an account stated, averred that plaintiff's assignor, Baker & Hamilton (a corporation), had sold and delivered goods, wares, and merchandise to the defendant at the agreed price of \$1,725.67; that the defendant agreed with said Baker & Hamilton to pay interest on said sum at the rate of 10 per cent. per annum to be computed upon monthly unpaid balances; that the interest so agreed to be paid upon said monthly

unpaid balances amounted to the sum of \$276.75; that prior to the commencement of the action the defendant paid on account of said indebtedness the sum of \$1,200, which left a balance due and unpaid for principal and interest in the sum of \$802.42.

Plaintiff's complaint then proceeded to allege the existence of an account stated as follows: "On or about the 1st day of March, 1910, defendant and said Baker & Hamilton (a corporation) stated an account of the goods, wares, and merchandise so sold and delivered and the payments on account thereof, as hereinbefore set forth, together with the interest thereon, and there was found due from said defendant to said Baker & Hamilton upon such statement of account the sum of \$802.42; that the defendant accepted the said accounting and the balance so found due as aforesaid, and agreed to pay to said Baker & Hamilton the said sum of \$802.42."

The defendant by its answer denied this and every other allegation of the plaintiff's complaint; and upon the issues thus raised the case was tried, and judgment rendered and entered for the plaintiff, from which and from the order denying a new trial the defendant has appealed upon the judgment roll and a bill of exceptions.

The trial court found the facts of the case to be in substantial accord with the allegations of the plaintiff's complaint. The defendant assails the sufficiency of the evidence to support the trial court's findings of fact to the effect that an account was stated between plaintiff's assignor and the defendant.

[1] The evidence offered and received in support of this phase of the plaintiff's case was in substance as follows: It was the custom of plaintiff's assignor upon the last day of every month to make up a written and printed statement of its account with each of its customers, including the defendant. These statements were prepared and formulated so as to show (1) the balance brought forward from the previous month; (2) goods purchased during the current month; (3) a notice that "accounts not paid promptly when due will be subject to interest charge and sight draft without notice"; (4) a statement of the interest charged to date upon accounts "past due"; and (5) the balance due. Such statements were mailed monthly and regularly to every customer of the plaintiff's assignor, including the defendant. It was the fixed and uniform custom of plaintiff's assignor to charge each of its customers, including the defendant, with interest upon unpaid monthly balances at the rate of 10 per cent. per annum; and, if the account was not paid when due, the interest charged thereon was invariably added to the total for the next month. Such interest was regularly and specifically charged upon and added to unpaid balances, appear-

ing in every monthly account rendered to the defendant. This was the uniform custom pursued by plaintiff's assignor in its dealings with the defendant extending throughout a series of years.

Thus far the evidence offered and received in support of the plaintiff's case stands uncontradicted in the record before us; but upon the question of the acceptance of the account as stated the evidence upon the whole case is to some extent in substantial conflict. In that connection the evidence of the plaintiff was to the effect that the statement of the defendant's account with Baker & Hamilton as rendered upon the 31st day of March, 1910, constituted the account stated and sued upon. The action was commenced upon the account thus stated on April 25, 1910; and the evidence of the plaintiff was to the further effect that at no time prior thereto was any objection made by the defendant to the statement of the account as rendered for the month mentioned, or to the statements as rendered for any previous month, either generally or as to any item of merchandise or interest charged therein.

[2] These facts bring the plaintiff's case squarely within the settled rule that an account rendered and retained beyond a reasonable time without objection is deemed accepted, conceded to be correct, and thereby constituted an account stated. *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Mayberry v. Cook*, 121 Cal. 588, 54 Pac. 95.

True there is some testimony to be found in the record given upon behalf of the defendant which tends to show that objection was made to several items of the account other than the charges made for interest as rendered from time to time prior to the rendition of the account sued upon; but the trial court upon the whole evidence found that the account in suit was stated and accepted, as alleged in the plaintiff's complaint, and in the presence of a substantial conflict in the evidence the finding must be sustained.

[3] The defendant complains of the charge made for interest at the rate of 10 per cent. per annum upon unpaid monthly balances, and which were merged in the sum total of the account as finally stated and sued upon. It is the defendant's contention that there is no evidence to support the finding of the trial court that the defendant agreed to pay interest upon unpaid monthly balances at the rate of 10 per cent. per annum or at any other rate, and that in any event interest could not be charged upon the monthly balances as stated from time to time in excess of the legal rate, except upon a contract in writing.

We have already shown the undisputed evidence of the plaintiff to be that the statements of account regularly rendered to defendant from month to month throughout a

series of years contained a notice that interest would be charged upon unpaid monthly balances, and that in each instance interest was charged upon and added to the monthly unpaid balance at the rate of 10 per cent. per annum. The plaintiff's evidence further shows that it was the custom of plaintiff's assignor in its dealings with the defendant, as with all of its customers, to balance this account and render a statement thereof at the end of each month, in which was included a charge for interest upon unpaid balances at the rate of 10 per cent. per annum, which interest, in turn, was added to the balance stated for the succeeding month. While the charge for interest was not in any instance stated to be at the rate of 10 per cent. per annum, nevertheless every statement of account rendered to the defendant contained a charge for interest at that rate. No objection was ever made by the defendant to the interest charged and computed upon the unpaid monthly balances shown on the accounts rendered from time to time and finally included in the sum total of the account stated. It was not necessary that the defendant should have expressly agreed to the rate of interest charged. His assent thereto could have been rightfully inferred by the trial court from all of the circumstances of the transaction as herein enumerated, and therefore it must be held that the evidence supports the finding that the defendant agreed to pay interest upon unpaid monthly balances at the rate indicated. *Marye v. Strouse* (C. C.) 6 Sawy. 204, 5 Fed. 483.

[4] The precise point that interest in excess of the rate provided in section 1917 of the Civil Code could not be included in an account stated except upon the written agreement of the parties was made upon practically the same state of facts as appear here, and disapproved in the case of *Auzerais v. Naglee*, supra. In that case interest at the rate of 1 per cent. per month had been charged and included in an account stated. Then, as now, section 1917 of the Civil Code provided that: "Unless there is an express contract in writing fixing a different rate interest is payable on all moneys at the rate of 7 per cent. per annum after they became due * * * or due on any settlement of account from the day on which the balance is ascertained. * * *" This section of the Civil Code was construed in the case last cited, and in effect held to have no application to the rate of interest which might be included in and agreed to upon an account stated. That this question was directly involved and decided is expressly declared in the opinion of the court, which, after reviewing numerous authorities, proceeds to say that: "The deduction is that, there being no positive law to the contrary, the payment of interest may be the subject of contract, express or implied, in cases where, but for such contract, no interest could be recovered. In this state

we are of the opinion that when, as in the present case, it is shown to be the universal custom of a merchant to charge interest after 30 days upon monthly balances due upon open account, and where such account showing the interest charged up regularly is received by the debtor and fully understood by him, and where such account becomes stated either by the prolonged failure of the debtor to object thereto, or by a settlement and adjustment thereof between the parties, a new contract arises between such parties, and the debtor is bound to pay the balance due, and no inquiry is permissible as to the items beyond the defense of the statute of limitations and that of fraud, error, or mistake."

[5] Finally upon the subject of interest the defendant insists that the account stated and sued upon could not legally contain charges for interest upon interest; in other words, it is the defendant's contention that interest was computed and charged against him in contravention of section 1919 of the Civil Code, which provides that "parties may in any contract in writing whereby any debt is secured to be paid agree that if the interest on such debt is not punctually paid it shall become a part of the principal and thereafter bear the same rate of interest as the principal debt."

This latter contention, it seems to us, is fully answered by the reasoning in the case of *Auzerais v. Naglee*, supra. True, the question of the right to compound interest upon an account stated was not involved nor decided in that case; but we apprehend that if such question had been involved the opinion, to be consistent, must have held that the rule relating to compound interest as declared in section 1919 of the Civil Code had no more application to an account stated than did the rule relating to interest declared in section 1917 of the same Code. The conclusion arrived at in the case was founded upon "the theory that the interest as charged being known and assented to by the debtor, and, not being in violation of any positive law, affords a sufficient consideration for the new promise involved in an account stated."

The reasoning which permits a rate of interest upon an account stated in excess of the rate ordinarily fixed by statute must likewise, in order to be consistent and logical, permit such interest to be compounded without the necessity of an agreement in writing.

[6] It is said that the opinion in the case of *Auzerais v. Naglee*, supra, is weakened by the fact that it was rendered by a divided court, and is apparently in conflict with the weight of authority in other jurisdictions. Conceding all this to be so, the decision in the case has never thus far been criticized or modified by the Supreme Court of this state, and therefore we have no option but to follow and apply the reasoning thereof in disposing of the points made here.

Finally appellant contends that there was no proof of the delivery of the account nor of the assignment of the cause of action to plaintiff. We have examined the record, but do not find that it supports this contention. In each case there is some evidence of the fact sufficient for the court to base its finding upon.

The judgment and order are affirmed.

We concur: HALL, J.; MURPHEY, J., pro tem.

MULHOLLAND v. WESTERN GAS CONST. CO. et al. (Civ. 1,164.)

(District Court of Appeal, Second District, California. Jan. 28, 1913. Rehearing Denied by Supreme Court March 29, 1913.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

A verdict sustained by some evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. MASTER AND SERVANT (§ 205*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An inexperienced employé in the generating department of a gas factory may, while working in that department, rely on the employer's assurances of safety, unless by observation he learns of dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

3. MASTER AND SERVANT (§§ 288, 289*)—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Whether an employé in a gas factory, injured by an explosion of a gas tank caused by sparks from a generator, assumed the risk or was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088, 1089, 1090, 1092-1132; Dec. Dig. §§ 288, 289.*]

4. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé in a gas factory, caused by an explosion of a gas tank by sparks from a generator falling into it, evidence *held* to support a finding of actionable negligence by the employer in causing the opening into which the sparks fell to be left uncovered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

5. EVIDENCE (§ 539*)—EXPERTS—COMPETENCY.

One who has had seven years' experience in the manufacture of gas, and who has made a study of the process by means of text-books, treatises, and actual experience, is competent to testify on the subject of what is necessary to make a gas factory reasonably safe for employés.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where a witness testifying as an expert on the subject of what is necessary to make a gas factory reasonably safe for employés gave

his reasons for his conclusion, the error, if any, in permitting him to state what is a safe way to equip a scrubber is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

7. MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT—PROXIMATE CAUSE.

Where an employé was injured in a gas factory by being struck by an iron plate, moved by an explosion of a gas tank, and the explosion and the moving of the plate happened simultaneously, the jury could find that the explosion was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 956, 970, 976; Dec. Dig. § 276.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by J. J. Mulholland against the Western Gas Construction Company and another. From a judgment for plaintiff against defendant named, it appeals. Affirmed.

See, also, 131 Pac. 113.

Oscar A. Trippet and Haas & Dunnigan, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

JAMES, J. This action was brought by the plaintiff to recover damages for personal injuries alleged to have been suffered through the negligence of appellant. As to the second defendant named, judgment of nonsuit was granted, and as to which no complaint is made upon this appeal. The jury sitting at the trial of the action returned a verdict in favor of plaintiff for the principal sum of \$10,875, upon which verdict judgment was entered. This appeal is taken from the judgment, and from an order denying the motion of appellant for a new trial.

Prior to the 25th day of January, 1910, appellant was engaged, under contract, as an independent contractor in erecting a certain apparatus for the manufacture of gas. At the date above mentioned the apparatus had been practically completed, but had not yet been accepted by the gas company for which it was being built, and there remained some work of finishing and adjusting to be done upon it. This was the condition of the work when plaintiff applied to one White, who was in full charge of the construction work, for employment. Plaintiff, a young man, 20 years of age, was a competent plumber and pipe fitter, and had worked for about two weeks in a gas manufactory, but not in the generating department. White, after asking him some questions as to his efficiency as a pipe fitter, employed him, and he went to work immediately. Plaintiff testified that White took him around the apparatus, which consisted mainly of several cylinders of metal standing upright, about 10 feet in diameter and 25 feet long. The cylinders were all capped,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so as to make complete receptacles for the gas and material used in generating the same, except one which had an opening for the introduction of fuel, and another which had an opening at the top for the escape of flames and fumes. The use served by the various cylinders in the process of the manufacture of gas was fully explained by the evidence, but that narrative need not here be repeated, as the conditions which surrounded the plaintiff and the manner in which he received his injuries can be briefly explained.

[1] Of course, any inconsistency in the plaintiff's testimony, or contradiction of his statements by other witnesses, cannot be considered in argument against the verdict of the jury, because it was for the jury to determine the facts, and with their determination we can raise no question so long as some evidence in support thereof is shown in the record. Plaintiff testified: That after looking about the apparatus he was shown, at the top of one of the tanks called a "scrubber," a pipe connection, the pipe being attached to the tank by the use of a bushing, which was a fitting used to screw into a threaded aperture in the tank, and to which bushing in turn the pipe fixture was screwed. That White told him that the bushing was loose and leaked, and asked him if he could fix it. That he said "Yes," that he would see what he could do with it, and was told to get a helper to assist him. That he had asked White if the machine was shut down, and White had replied: "Yes; shut down; ain't no danger here." The next day he returned with his helper, and they took out the bushing and tried to make it tight with some cord and white lead, but failed; that he reported to White and told him that he could not fix the bushing without a lock nut, and that there were no such nuts at the storeroom, and White replied: "Leave it out, or leave it alone, and I will get you a lock nut when I go up town." The bushing was left out, and consequently there was left open an aperture in the top of the scrubber tank of about 2½ inches in diameter. Pending the securing of a lock nut, plaintiff was instructed by White to bring in a certain gas meter and attach it to a tank, and he was at work at this when he received the injuries complained of. Thirty or 40 feet away from the apparatus upon which plaintiff was at work was a gas generator in active operation. As was usual with such machines, at regular intervals there would be a burst of flame from the top of the generator, which would last for a few moments, and oftentimes following this discharge sparks would fall about in the vicinity of the apparatus. The top of the scrubber from which plaintiff had removed the bushing was not protected so as to prevent sparks falling upon it, and it does not appear that it was usual to provide such

protection. Near to and below the top of the scrubber referred to was laid a floor made of sheets of iron, which were not fastened, but fitted upon iron beams which supported them. While plaintiff was at work with the meter on the ground near the scrubber, an explosion occurred from within the scrubber, which the evidence tended to show was caused by a spark or sparks from the neighboring generator falling into the aperture of the scrubber from which the bushing had been removed. This explosion caused several of the iron plates of the floor referred to to be dislodged, and one of these plates in falling struck plaintiff on the head, crushing a portion of his skull and inflicting serious and permanent injuries.

[2, 3] It is argued on behalf of appellant that under the facts shown plaintiff was not entitled to recover, because, first, the risk of the injury which was caused to him was one assumed by him as a risk ordinary to this employment; and, second, that the injuries were caused through his own contributory negligence. It was not shown by any testimony that plaintiff was familiar with the method of manufacturing gas, or that he knew just how the apparatus upon which he was employed to work was operated. He did know that, as was a fact, the scrubber contained water, or that water was made to percolate through it, but he had no knowledge that the receptacle contained gas, or was in a condition which made it dangerous to leave open the hole from which he detached the bushing. He testified that there was an odor of gas all about the place, but that odor, of course, was common about the premises of a gas-manufacturing establishment. Moreover, he did take the precaution, according to his sworn statement, to inquire of White whether the machine was in operation or not, and was told by White that it was shut down, and that there was no danger there. White was the representative of his employer and a man experienced in the handling of gas-making apparatus. Plaintiff was entitled to rely upon the assurances of his employer as to the absence of danger, unless by observation something was brought to his attention which would give him knowledge of a contrary state of things. But not only was there evidence to show the statement of White as narrated above, but there was evidence of the further direction of White, given to plaintiff when the latter informed White that he could not fix the bushing without a lock nut, to "leave it out, or leave it alone." White told the plaintiff that the machine was shut down, and that there was no danger; then when informed of what the plaintiff had done with respect to the bushing, told him to leave it out; in other words, to leave the aperture open, for it could not be closed without the use of a bushing. Plaintiff followed these instructions, left the bushing out while waiting for

White to obtain the lock nut, and went about the other work that was assigned to him to do by his employer. Considering all of these facts, it cannot be said either that there was any assumption of the risk by plaintiff, or any negligence on his part concurring to produce his injuries.

[4] On the other hand, plaintiff's employer was presumed to know that it would be dangerous to leave the aperture open in the scrubber and it was negligent either in not causing the opening to be closed, or informing plaintiff of the risk attendant upon his working about the machine in that condition. There was no evidence showing that after the opening had been made by the removal of the bushing any flow of gas could be detected at the aperture, and there was testimony showing that when such an opening had been made the tendency would be for air to be drawn in rather than for gas to be forced out; this due to the fact that the pressure inside the scrubber was customarily below that of the atmosphere. Some argument is made to give point to the contention that plaintiff's testimony should be disregarded as being too improbable to warrant credence. As we have before suggested, it was the province of the jury to pass upon the credibility of the witnesses, the truthfulness of their testimony, and with their conclusion as to those things we have no right to interfere. It may be said, however, that the testimony of plaintiff as to the material facts was not inherently improbable, and this testimony did find some corroboration, at least in the evidence furnished by other witnesses. A careful examination of the record convinces us that there was evidence sufficient to sustain the verdict of the jury.

Two witnesses gave testimony on behalf of the plaintiff touching the use of steam in gas scrubbers. It was sought to show that, in order to expel the gas from such a receptacle and make it safe from danger of explosion, such as that which occurred at the time plaintiff was injured, the use of steam was reasonably necessary and customarily employed for that purpose. One witness (Gillingham) testified that he was foreman of the Western Boiler Works, and had worked for a considerable length of time on the gas machine which exploded; that he was familiar with the machinery used in this part of the state for making gas, and proceeded to describe the process. Without objection, he was allowed to testify that there was no steam pipe attached to the scrubber, and he further said, in explanation of the purpose for which such a steam pipe might be used: "That is all to kill the gas by turning the steam on. The steam dissolves it. If there was a steam pipe on it, you turn it on to kill the gas." As noted, no objection appears to have been made to these answers, but error is assigned because of the ruling of the court

permitting the witness Millard to make answer to a similar line of interrogatories.

[5, 6] Millard testified that he was 38 years old, had had 7 years' experience in the manufacture of gas, and had made a study of the process by the perusal of text-books, treatises, etc., and by actual experience. At the time the accident happened which resulted in the injuries being inflicted to plaintiff, this witness was superintendent of the Los Angeles Gas & Electric Company, and was in his office close by the scene of the explosion. He testified, without objection, as to the use to which the various machines were put in the manufacture of gas. He further testified that he had had experience with gas plants at Santa Monica, Long Beach, and other localities, and had been superintendent of the Los Angeles company for about 7 years. He was then asked the question as to whether, considering the safety of the employes, it was proper to equip a scrubber with or without steam pipes. This question was objected to, the objection overruled, and the witness answered as follows: "I can't say what the Western Gas sets—how they are equipped. I can speak of the machines that I have built, that have been built under my jurisdiction." The court then asked him this question: "The question is, What is necessary to make a plant reasonably safe for the protection of the plant? A. In its scrubber I would put a steam pipe for the purpose of purging the cylinder." All of this testimony was objected to, and appropriate motions to strike out were made, and the ruling of the court was adverse to appellant. The witness, in further explanation, testified that when a machine was out of commission for any purpose steam would be injected to drive out any foreign matter, such as gas, and also for the purpose of removing tar and other residuum that might have collected therein. He then was asked this question: "Do you mean to say that you consider it, the steam pipe, what you call the purging process, necessary for the safety of the men in and about the plant? A. Yes. That is my opinion that was asked for." It is objected that this witness had not shown sufficient knowledge to entitle him to testify as an expert; also that, conceding his qualifications to so testify, he should not have been permitted to say what would be a safe way to equip a scrubber in order to protect the men employed upon it. The cases of *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, and *Luman v. Golden Ancient Channel M. Co.*, 140 Cal. 700, 74 Pac. 307, are cited in support of the argument on this point. As to the general qualification of the witness, we think there was sufficient shown to entitle him to testify upon the subject adverted to, and if his answer as to what would be a safe way to equip a scrubber stood alone, without explanation, we would be inclined to hold that

the overruling of objection thereto was prejudicial error. However, the witness quite fully gave the reasons for his conclusion, and, even though he was not shown to be a skilled chemist, he had had a great deal of practical experience in the manufacture of gas and as to the use and operation of appliances connected therewith. In the case of *Giraudi v. Electric Improvement Co.*, the court said: "The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. . . . The answer of the witness gave the facts in full, explaining what methods would have been safe." It was there held that the error, if any had been committed, was not prejudicial, and we feel constrained to so view the ruling of the court as made in this case. In *Luman v. Golden Ancient Channel M. Co.*, the court merely held that it was not error to sustain an objection to a question which required a witness to state as to whether a certain machine and appliance was a safe one. It is not said in that case that it would have been error, under the facts, to have overruled the objection. And so here, if the court had sustained the objection to a question which brought forth from the witness an opinion as to what equipment was necessary to make a scrubber safe, that ruling would not be held to be error. Under all of the testimony it was for the jury to say whether ordinary and customary practice in this locality required the use of steam attachment on the gas machine to render it safe when not in use and being worked upon by employes. The jury was fully instructed as to the law in this regard.

There seems to us to be nothing in the point made that plaintiff was not acting within the scope of his employment in leaving the scrubber aperture open. He was specifically instructed to attempt to fix the bushing which was fitted into the aperture, and when he told White, the foreman, as we must assume from his testimony he did tell him, that he could not fix it without having a lock nut, White instructed him to leave the bushing out, or leave it alone until a lock nut could be procured with which to make it tight.

[7] The point is made that, as plaintiff was injured by the falling of the floor plate, and as no negligence was shown in the installation of such plates or the manner in which they were secured, no recovery could be had, because the falling of the plate was the secondary cause of the accident, and that it could not be directly attributed to the explosion of the scrubber. To our minds, there is no merit in this contention. The explosion of the scrubber and the falling of the floor plate happened simultaneously, and without

any question whatever it must be said that the explosion was the direct and proximate cause of the injury sustained by plaintiff.

We have examined the instructions given by the court, and are satisfied that they contain a full and fair statement of the law as applied to the facts of this case.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

MULHOLLAND v. WESTERN GAS CONST. CO. (L. A. 2,926 [Civ. 1,164].)

(Supreme Court of California. March 31, 1913.)

In Bank. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by J. J. Mulholland against the Western Gas Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed by the Court of Appeal. Application for rehearing in bank denied.

See, also, 131 Pac. 110.

Oscar A. Trippet and Haas & Dunnigan, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. Aside from any of the matters discussed in the opinion of the District Court of Appeal, there is a question presented by the record which we are bound to notice, notwithstanding the omission of that court to do so; and this for the reason that the amount involved brought the cause within our jurisdiction by direct appeal, and its assignment to the District Court for hearing and decision does not absolve us from the obligation to consider every substantial assignment of error relied upon by the appellant.

The trial judge gave to the jury the following instruction: "Defendant's claim of contributory negligence on the part of the plaintiff, as set out in the verified answer of the defendant, presupposes the existence of negligence on the part of the defendant; for if there was no negligence on the part of the defendant, Western Gas Construction Company, there could be no contributory negligence on the part of the plaintiff, J. J. Mulholland. Contributory negligence, as used in these instructions, means such negligence, if any, on the part of the plaintiff contributing directly or approximately to the accident, and except for such negligence said accident would not have occurred." It was quite proper for the District Court of Appeal to omit any discussion of this particular instruction, for the reason that one substantially like it was approved by this court in *Linforth v. S. F. Gas & El. Co.*, 156 Cal. 66, 103 Pac. 320, 19 Ann. Cas. 1230, and that decision is a binding precedent in cases of this character for the District Courts of Appeal and the superior courts. Here, however, it may be, and in my opinion it ought to be, reconsidered. It plainly tells the jury that a plea of contributory negligence of the plaintiff is an admission of culpable negligence on the part of defendant. This is not the law. A defendant may deny that he was guilty of any negligence, and at the same time may consistently claim that, even if the jury should find that he has been negligent, the plaintiff would not have sustained any injury if it had not been for his own negligence as a proximate cause. And it cannot be said that

an error of this character in a distinct and completed instruction is cured by a more correct statement of the law in the general and discursive charge of the court. The result in such case is, at best, a direct conflict in the instructions, leaving the jury without a guide in their deliberations.

TAYLOR et al. v. JONES et al. (L. A. 2,971.)
(Supreme Court of California. March 10, 1913.)

1. MORTGAGES (§ 258*) — ASSIGNMENT—NOTE SECURED BY MORTGAGE — NONNEGOTIABLE INSTRUMENTS.

Since a note secured by a real estate mortgage is not negotiable, a transferee thereof from the mortgagee takes subject to equities available between the original parties.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 689-691; Dec. Dig. § 258.*]

2. MORTGAGES (§ 258*)—ASSIGNMENT — DEFENSES—FAILURE OF CONSIDERATION.

Plaintiffs, who owned two city lots, each subject to a mortgage, executed two notes each for \$2,000, each secured by a second mortgage on one of the lots, and reciting that it was a first lien, the proceeds to be used in paying the first mortgage and other liens. The mortgagee, without making such payments, transferred the mortgages for full value, and absconded. Plaintiffs resided in a house situated on one of the lots, and any inquiry by the transferee would have disclosed the fraud. *Held*, that the fraudulent mortgagee was not the mortgagor's agent, and that the defense of failure of consideration was available against the transferee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 689-691; Dec. Dig. § 258.*]

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by John H. Taylor and another against L. E. Jones and another. Judgment in favor of defendant Bridget Donnelly, and plaintiffs appeal. Reversed.

Frank Herald, W. W. Wideman, and Chas. N. Salisbury, all of Los Angeles, for appellants. Smith, Miller & Phelps and John C. Stick, all of Los Angeles, for respondent.

MELVIN, J. Plaintiffs sued to quiet title to two parcels of land in Los Angeles county, and to cancel and release of record two mortgages upon said property, given by plaintiffs to one L. E. Jones, who assigned the said mortgages for their face value to Bridget Donnelly, the defendant. It was alleged in the complaint that plaintiffs, who are husband and wife, were the owners of the two lots in question; that two mortgages, aggregating about \$1,900, were of record, and constituted liens against each of the said lots; that about January 1, 1909, plaintiffs applied to L. E. Jones for a loan of \$4,000 to pay off the said mortgages; that Jones expressed his ability and willingness to loan \$4,000 to plaintiffs; that he promised to pay the existing incumbrances, the cost of having the title certified to date and other expenses including insurance, if plaintiffs would ex-

ecute in his favor two notes each for \$2,000 and each supported by a mortgage upon one of the two lots; and that the difference, if any, between said payments and \$4,000 should be paid by Jones to plaintiffs. The complaint further avers that, relying upon the promises and representations of Jones, plaintiffs on or about January 4, 1909, made and executed the notes and mortgages in accordance with the suggestions of Jones, naming him therein as mortgagee; that these mortgages were recorded; that subsequently the notes and mortgages were assigned by Jones to Bridget Donnelly, the defendant; that the representations and promises of Jones with reference to the payment of the debts of plaintiffs and the removal of the liens of the earlier mortgages from their lots were false and fraudulent; and that plaintiffs received no consideration whatever for the notes and mortgages given by them to Jones and by him assigned to Bridget Donnelly.

Defendant answered, admitting that she had received assignments of the notes and mortgages, and alleging that she had paid the full sum of \$4,000 for them. She asserted that plaintiffs had received full consideration for the notes and mortgages executed by them in favor of Jones. Two separate affirmative defenses were pleaded, in one of which it was alleged that Jones had acted throughout the transaction as the agent of plaintiffs; and in the other that the defendant had purchased without notice of any equities in favor of the plaintiffs and in full belief that Jones was the owner of the notes and mortgages.

The cause was tried, and the court found, among other things, that Jones had not represented to plaintiffs that he was loaning the money to them. Other findings were that Jones had acted as the agent of plaintiffs, and that the money was paid to Jones by Donnelly for and on behalf of plaintiffs. The allegations of the special defenses were also found to be true. Findings and judgment followed to the effect that the mortgages were valid and subsisting liens against the property in question.

This is one of the numerous cases arising as a result of the rascality of L. E. Jones. Each of them involves great hardship upon one of the parties who trusted him. Defendant insists, and the court evidently had the same theory, that the fraud on the part of Jones could not have operated to injure plaintiffs until he embezzled the money which he held as agent for them, and that up to the moment of said embezzlement Jones had acted entirely within the scope of his agency. She also invokes the rule that, where one of two innocent parties must suffer, the hardship should be visited upon that one by whose negligence the fraud was made possible. Neither of these positions is tenable in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the present case. The matter of agency is a false quantity. It makes no difference whether plaintiffs expected Jones to loan them the money or to negotiate the notes and mortgages for their benefit.

[1] Defendant was dealing with him as a mortgagee, and she purchased from him nonnegotiable instruments. This placed her upon her inquiry, and, if she failed to make a reasonable investigation, she took the assignments subject to all defenses which might have been urged in favor of the Taylors in an action by Jones to foreclose the mortgages.

[2] One of these defenses was failure of consideration. If defendant had made inquiry of the mortgagors, and they had told her that Jones was acting for them as their agent, the matter would appear in an entirely different light. But she did not take the trouble to consult them, although, as shown by the evidence, they resided in a house situated upon one of the lots subject to one of the mortgages to Jones. Another thing which should have put her upon her inquiry was the recital in each mortgage that it was a first lien upon the property, when at the time of the purchase each lot was incumbered by the lien of recorded mortgages senior to that in which Jones appeared as mortgagee. The evidence shows that each party to this action placed full confidence in the rascally Jones, who absconded with the money paid to him by Mrs. Donnelly. A decision either way will, as we have said, doubtless work great hardship upon an innocent party; but we cannot escape the conclusion that the facts of the case bring it within the principles announced in such cases as *Meyer v. Weber*, 133 Cal. 682, 85 Pac. 1110, *Briggs v. Crawford*, 162 Cal. 125, 121 Pac. 381, and *Helmer v. Parsons*, 18 Cal. App. 451, 123 Pac. 356.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

DUNSTON v. LOS ANGELES VAN & STORAGE CO. et al. (L. A. 2988.)

(Supreme Court of California. March 7, 1918.)

1. TRADE-MARKS AND TRADE-NAMES (§§ 3, 9*)—SUBJECT OF RIGHT—STATUTE.

Under Civ. Code § 991, declaring that one who conducts a particular business cannot exclusively appropriate any designation or part of a designation which relates only to the name or description of the business, or the place where it is carried on, the name "Los Angeles Van, Truck & Storage Company," since it refers both to the place of business and to the description of the business, cannot be the subject of exclusive trade-mark.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 4-7, 13; Dec. Dig. §§ 3, 9.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—INJUNCTION—UNFAIR TRADE DEALING.

In the interest of fair trade dealing, courts of equity will protect one who has been the first

in the field, doing business under a given name, to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon his business and on the public; but where there is nothing more than mere similarity of names, or no misuse of the first used name by such advertising or soliciting as amounts to fraud, and nothing more than confusion to the first established business by acts not in themselves wrongful, no relief can be granted.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 81; Dec. Dig. § 70.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 92*)—UNFAIR COMPETITION—EQUITABLE GROUND OF RELIEF—FRAUD.

In an action to enjoin alleged unfair trade dealing with respect to a business name, fraud will not be presumed, but must be pleaded and shown.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by R. H. Dunston, doing business as the Los Angeles Van, Truck & Storage Company, against the Los Angeles Van & Storage Company, L. Lichtenberger, and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

E. W. Freeman, of Willow, for appellants. Trusten P. Dyer, of Los Angeles, and H. Cleveland Schultz, for respondent.

HENSHAW, J. Plaintiff alleged that in the year 1896, in the city of Los Angeles, he established the business of moving, hauling, trucking, and storage. To this business he gave the name of "Los Angeles Van, Truck & Storage Company." In 1902 he made application to the state of California to have that name registered and trade-marked, and on the 13th day of August, 1902, there was issued to plaintiff a certificate by the Secretary of the State of California "granting said R. H. Dunston the sole and exclusive right to use and appropriate said name of Los Angeles Van, Truck & Storage Company to his said business." Ever since the year 1896 to and including the present time plaintiff has been and is conducting his business under this name. By reason of the competent and efficient manner in which he has so conducted it, he has gained for his business known as the Los Angeles Van, Truck & Storage Company a widespread and valuable reputation, and he commanded and still commands an extensive patronage throughout the county of Los Angeles which is, and for many years last past has been, a source of great profit to him. In 1910 the defendants "willfully, wrongfully, and unlawfully disregarding the rights of this plaintiff, willfully, wrongfully, unlawfully, and fraudulently used and appropriated the name of Los Angeles Van & Storage Company for conducting a similar business to that of the plaintiff herein in the city of Los Angeles," and on or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

about the 8th day of April, 1910, the defendants, and each of them, formed and organized a corporation by the said name of Los Angeles Van & Storage Company under the laws of the state of California, and ever since said time have carried on their said business under said name of Los Angeles Van & Storage Company with intent to deceive and defraud the public and patrons of the plaintiff herein, and to injure and defraud this plaintiff, and deprive him of his profits and of the business acquired by his valuable reputation as aforesaid." The defendants at all times have been advised and informed "that the said imitation name of Los Angeles Van & Storage Company has been pirated and simulated, and is an infringement and fraudulent counterfeit of the name used, issued to, and adopted by this plaintiff." "The name used by the defendants herein was calculated and intended to deceive the patrons of this plaintiff and the public in general, and said name of Los Angeles Van & Storage Company has actually misled and does still mislead many of them to patronize the defendants herein, in the belief that they, the said public, are placing said orders and patronage with this plaintiff, greatly to the diminution and damage of the business and profits of this plaintiff." Plaintiff further alleges that the business carried on by defendants "under the name of Los Angeles Van & Storage Company, in imitation of the said name of this plaintiff, is greatly inferior, and that by reason of the premises the esteem and reputation of plaintiff's said business has been injured, greatly to the diminution and damage of the business and profits of this plaintiff." Defendants "have caused, and do still cause, an advertisement of their said business, Los Angeles Van & Storage Company, to appear in extra large letters directly ahead of the telephone numbers and address of this plaintiff, in the directory of the Home Telephone Company of Los Angeles, which act and advertising on the part of the defendants herein are contrary to equity, and greatly injure and damage the business of said plaintiff." Defendants "have advertised their said business under said name of Los Angeles Van & Storage Company in various ways and places, and by said acts have secured orders intended to be given to this plaintiff, all to the great diminution and damage of the business and profits of this plaintiff." That, after request and demand by plaintiff, defendants have refused to desist from the use of the name in the telephone directories and elsewhere. The prayer of this complaint, besides the prayer for general relief, is that a perpetual injunction be issued enjoining the defendants "from using said name of Los Angeles Van & Storage Company, to the injury and damage of plaintiff, and that the defendants herein, and each of them, be enjoined and restrained from publishing or

advertising their said business under said name of Los Angeles Van & Storage Company."

The quotations from the complaint have been made thus full for the reason that the appellants argue that the complaint charges simply a violation of a property right in a registered trade-mark, whereas respondent insists that it not only so charges, but that, aside from the property right in the registered trade-mark, the complaint also charges unfair dealing. This appeal is from the judgment granting the injunction. The findings therefore become of especial importance in considering upon what facts the court actually based its decree.

The court found in accordance with the allegations of the complaint as to the character of the business of the plaintiff, its conduct under the name of Los Angeles Van, Truck & Storage Company, and that there was issued a certificate by the Secretary of State of the state of California granting plaintiff "the sole and exclusive right to use and appropriate said name of Los Angeles Van, Truck & Storage Company." The court further found in accordance with the allegations of the complaint that defendants did "willfully, wrongfully, unlawfully, and fraudulently use and appropriate the name of Los Angeles Van & Storage Company for conducting a similar business to that of the plaintiff," and found, as alleged in the complaint, that defendants organized the corporation under this name and ever since have carried on their business under this name, "thereby causing loss and damage to the said business of said plaintiff herein and creating much confusion in the conducting of said business." It found that the defendants caused and cause "an advertisement of their said business, Los Angeles Van & Storage Company, to appear in extra large letters directly ahead of the telephone and address of this plaintiff, and have advertised their said business under said name in various other ways and places." Finally, it found "that, the plaintiff having had the prior and exclusive use of said name Los Angeles Van, Truck & Storage Company, the defendants herein, or neither of them, have any right to use said name Los Angeles Van & Storage Company, for the reason that the use of said name Los Angeles Van & Storage Company, by the defendants herein, is of damage to the plaintiff herein, and is calculated to deceive the customers of the said plaintiff."

It would appear from a reading of these findings that the judgment of the court was based upon the protection which the law gives to a trade-mark. This is made manifest from the court's finding that the certificate by the Secretary of State was issued granting to plaintiff "the sole and exclusive right to use and appropriate said name of Los Angeles Van, Truck & Storage Company." If this were so, no question of

unfair dealing would arise. The question to be resolved would be simply whether the similar name adopted by defendants and used by them was an infringement upon plaintiff's property rights in the trade-mark name.

[1] But the finding of the court to this effect cannot be supported for two reasons: The first, that the Secretary of State did not pretend to issue or certify to the issuance of an exclusive right to plaintiff to use the indicated name. The Secretary of State by his certificate merely declared that plaintiff had filed "a claim to a trade-mark to be used in connection with van, truck and storage business. Said trade-mark consists of the words 'Los Angeles Van, Truck & Storage Company,' a description of which is more fully set forth in the specification attached to and made a part of the claim to trade-mark above referred to." Such a certificate of a claim to a trade-mark is obviously a very different thing from a certificate awarding an exclusive trade-mark. But, second, and more important, is the fact that the trade-name used by plaintiff is not susceptible under our law of exclusive use, and therefore of protection as an exclusive trade-mark or name. This proposition is completely covered by section 991 of our Civil Code, which declares: "One who * * * conducts a particular business * * * cannot exclusively appropriate any designation, or part of a designation, which relates only (a) to the name * * * or (b) the description of the * * * business, or (c) the place where the * * * business is carried on." It is too apparent to need discussion that the name here employed by plaintiff has reference in its first words to the place of business; in the remaining words to a description of the business. Such names, titles, or designations are not the subject of exclusive copyright or trade-mark. *Eggers v. Hink*, 63 Cal. 445, 49 Am. Rep. 96; *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; *Castle v. Siegfried*, 103 Cal. 71, 37 Pac. 210; *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014; *American Wine Co. v. Kohlman* (C. C.) 158 Fed. 830.

It follows, therefore, since the plaintiff cannot acquire an exclusive property right in the associated words "Los Angeles Van, Truck & Storage Company," any relief based upon an asserted invasion of this exclusive trade-mark is without warrant. *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 252, 110 Pac. 913, 32 L. R. A. (N. S.) 439.

[2, 3] As the judgment cannot thus be supported upon the theory of an invasion of an exclusive right to property in a trade-mark, the only ground for the support of

the judgment is that which has come to be known as "unfair trade dealing." This is but a succinct statement of the principle, that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field. *Spleker v. Lash*, 102 Cal. 38, 36 Pac. 362; *Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263; *Shaver v. Shaver*, 54 Iowa, 208, 6 N. W. 188, 37 Am. Rep. 194; *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588. But, as has been intimated, relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. Like all other kinds of fraud and deceit, this is not presumed but must be pleaded and shown. Since plaintiff had no exclusive property right by way of trade-mark in the use of the name, it follows that the mere similarity of names does not establish the fraud. It must be such a misuse of the name by advertising and soliciting as amounts to fraud, and without this proof no relief may be granted, for, as is said by the Supreme Court of the United States in *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581: "True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." The findings absolutely fail to show such fraud, imposition, or deceit. Since the use by the defendants of the similar name which they have selected is not forbidden by law, the use of it even for conspicuous advertising so long as the advertisements are true is not a violation of any of plaintiff's rights. The fact that confusion to the business of the plaintiff has resulted from acts not in themselves illegitimate of itself affords no ground for relief.

It follows herefrom that the judgment must be reversed and the cause remanded, and it is so ordered accordingly.

We concur: MELVIN, J.; LORIGAN, J.

LEVIN v. PABST BREWING CO.

(S. F. 5,907.)

(Supreme Court of California. March 21, 1913.)

LANDLORD AND TENANT (§ 199½*)—LIABILITY FOR RENT—REMOVAL OF BUILDING.

A lease of premises, with a building thereon, for five years from November, 1906, provided that if the building should be ordered to be taken down by the municipal authorities then the lease should thereupon terminate. In January, 1908, an ordinance directed the removal of certain buildings on or before May 1, 1910, and prior to February 10, 1909, the lessor was notified that he must remove the building, at which date the tenant tendered possession of and vacated the premises. *Held*, in an action for rent due for the months beginning February 10 and March 10, 1909, declaring upon the lease, that the provision terminated the lease when the order for removal was made, and was a good defense to the action.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 199½.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Louis Levin against the Pabst Brewing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Heller, Powers & Ehrman, of San Francisco (Sydney Schlesinger, of San Francisco, of counsel), for appellant. A. A. Sanderson, of San Francisco (Harold L. Levin, of San Francisco, of counsel), for respondent.

SHAW, J. This is an appeal from a judgment against the defendant, and from an order denying its motion for a new trial.

On August 9, 1906, the plaintiff, in writing, leased to the defendant a parcel of land in San Francisco, "together with a certain building or structure to be erected on said property" by the plaintiff, at the monthly rental of \$325, for the term of five years from the date of the completion of the building. The contemplated building was completed on November 10, 1906, the defendant took and held possession thereof from that date until February 10, 1909, when it tendered possession of the premises to plaintiff, vacated the same, and refused to pay any rent therefor. The present action was begun on March 20, 1909, to recover the rent for the two months beginning February 10 and March 10, 1909.

The lease contained the following condition: "It is further agreed that if said building to be erected on said premises by said first party shall be ordered to be taken down or razed by the municipal authorities of said city and county, then this lease shall thereupon terminate, and that neither party thereto shall be held liable or responsible to the other thereunder."

There was nothing in the lease particularly specified as to whether the building to be erected was to be of wood, stone, brick, or

iron. It was admitted, however, that the building erected by Levin was of a character not permitted in the district in which it was situated by the fire ordinance of the city then in force. In January, 1908, the board of supervisors of San Francisco enacted an ordinance declaring that all such buildings erected in the city after April, 1906, "are hereby ordered demolished or removed on or before May 1, 1910," and directing the board of public works forthwith to serve notice on all owners and lessees of property having such buildings thereon, and making it the duty of said board to remove or demolish such buildings if the owner failed to do so, as provided in the ordinance. Prior to February 10, 1909, the board, pursuant to this ordinance, gave notice to Levin that he must comply therewith, and requiring the removal of the building.

We are of the opinion that the above-quoted clause of the lease, taken in connection with the facts we have stated, establishes a good defense to the action. It provided that if the building erected "shall be ordered to be taken down or razed" by the city authorities "then this lease shall thereupon terminate." The plaintiff contends that the true meaning of this language, as applied to the ordinance in question, is that the lease did not terminate until the last day of the period allowed the owner or lessee to remove or demolish the building. The argument is that an order made on January 9, 1908, to remove or demolish a building "on or before" May 1, 1910, does not become an effectual order until the latter date, and hence that it is not until that date that the clause became operative to end the lease. The language, however, is clear that if the building is "ordered" to be taken down "then this lease shall thereupon terminate." This literally means that it terminates when the order is made, and necessarily implies that it does not continue to the expiration of the time allowed in which to obey the order.

Under the circumstances existing when the lease was made, this is the most reasonable interpretation to be placed upon it. The great fire destroying all the buildings in the central part of San Francisco occurred in April, 1906. This lease was made in August, 1906. At that time it had been unofficially given out by the city authorities, and it was generally understood by the people, that the erection of temporary wooden buildings in the burned district, but within the prohibited limits, would be allowed for the immediate necessities of the inhabitants, but that they would be subject to removal at any time, if the board of supervisors so directed. The period of this indulgence was undetermined, and it was obvious that it would be uncertain. It was not to be expected that when such direction was given it would be for the immediate removal of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such buildings. Good policy would dictate that a reasonable time would be allowed for such removal after the order therefor was made. It would not be fair to bind the tenant to pay rent up to the last day for the removal of the building, where such removal was to be made by the lessor, as would be the case here. The tenant could not know when his landlord would decide to remove the building, and he might be put to great harm and loss by a sudden notice to that effect by the lessor. To avoid these contingencies the clause was advisedly so drawn as to end the lease with the making of a municipal order directing the removal of the buildings. If the tenant should then hold over, another clause of the lease provided that such holding should be a tenancy from month to month only. If he vacated the premises, the owner could thereupon remove the buildings, occupy them himself, or lease them temporarily until it was convenient for him to remove them, and thus no injustice would be done to him. The defendant did not vacate the premises, but continued to occupy them for 13 months after the termination of the lease and paid the rent monthly. This was a holding over after the termination of the lease, and under the clause referred to it became a tenancy from month to month.

There might be some doubt whether the defendant had the right to terminate this tenancy from month to month on February 10, 1909, except upon a notice to that effect, given one month in advance. Civ. Code, § 1946. No such previous notice appears to have been given. A notice given on February 10, 1909, would not terminate the lease until March 10th, and the tenant would be liable for the rent for that month, if a proper suit had been begun therefor. But the plaintiff does not sue upon such liability, and the question is not involved in this action. The complaint was filed on March 20, 1909. It declares upon the lease, stating that the rent was thereby made payable in advance, and that the rental payable on February 10th for the ensuing month, and that payable on March 10th for the month ending April 10th, were due and unpaid. It does not allege a holding over, or a tenancy from month to month, or an occupancy or possession for either of these months. It assumes that the lease had not terminated, and the action is to recover the advance rent due by the express covenants of the lease. No claim for recovery is made, except upon the theory that the lease was still in force when the suit was begun. The lease, as we have heretofore stated, terminated when the order for the removal of the buildings was made, and the clause relating to such order declares that upon such termination neither party shall be liable to the other under the lease. The defendant therefore is not liable

upon the obligation set forth in the complaint. We therefore find it unnecessary to determine the question whether, under a proper pleading, in any event, it would be liable for the month ending March 10, 1909.

There is a suggestion that the lease is invalid, because it is a contract to erect a building of a character forbidden by the fire ordinance, and therefore contrary to the policy of express law. Civ. Code, §§ 1608, 1667. Our conclusion that the defendant is not liable for the rent under the lease, even if it is valid, makes it unnecessary to decide about its legality.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

COPELAND et al. v. FAIRVIEW LAND & WATER CO. et al. (L. A. 3,133.)
(Supreme Court of California. March 20, 1913.)

1. PROPERTY (§ 4*)—"REAL PROPERTY"—"WATER."

Water stored by an irrigation company in its reservoir was real property, the right to use which could become appurtenant to land.

[Ed. Note.—For other cases, see Property, Cent. Dig. §§ 4-6; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951; vol. 8, pp. 7409, 7410.]

2. WATERS AND WATER COURSES (§ 249*)—IRRIGATION COMPANY—CONTRACT—CONSTRUCTION.

A controversy having arisen between the F. Water Company, which was obligated to supply plaintiffs with water for irrigation, and the H. Water Company, relative to their respective interests in the waters of a river, they made a compromise agreement for the division of such waters, which agreement contained a clause providing that the H. Company should sell water to the F. Company if at any time the latter should have insufficient water to supply and irrigate its lands. Held, that this was at most a mere executory agreement for sales of water to be effective at the option of the F. Company, and did not transfer to it any right in the water supply of the H. Company, and hence plaintiffs had no right in the water belonging to the H. Company.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

3. WATERS AND WATER COURSES (§ 247*)—IRRIGATION—ENFORCEMENT OF CONTRACT—LACHES.

Where, until recently, no water was ever demanded under a contract executed between two water companies in 1887, which contract provided that, if the water supply of one proved insufficient at any time, it should be supplied with water by the other, the right to enforce the contract in equity was barred by laches; the supply having always been insufficient.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. § 247.*]

4. WATERS AND WATER COURSES (§ 249*)—PUBLIC SERVICE CORPORATION—DUTY TO SUPPLY WATER—MANDATORY INJUNCTION.

A public service corporation, engaged in distributing water to the public for irrigation purposes, will not be required to furnish water

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to lands, where it is not shown that they are within the area to which the water has been dedicated, or are entitled to such water, or that the company had any surplus to supply to lands not within the original dedication.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 249.*]

5. WATERS AND WATER COURSES (§ 252*)—IRRIGATION—TRANSFER OF RIPARIAN WATER RIGHT.

Where a land company owned a tract of land abutting on a river, and, having acquired as a riparian right a water right which extended to every part of the tract, organized another corporation as a mere holding company of which it retained control, and to which it transferred the water right, and where it then sold the land in small parcels, giving with each parcel a certificate of stock in water corporation, which certificate declared that the holder was "entitled" to a certain part of the water "belonging to" the corporation, the purchaser of each parcel became vested with a proportionate part of the riparian right originally held by the land company.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 252.*]

6. WATERS AND WATER COURSES (§ 153*)—IRRIGATION—TRANSFER OF WATER RIGHT—VALIDITY.

The transfer of a water right to an irrigation district, which had no legal existence, was void and the title remained in the transferor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158-160; Dec. Dig. § 153.*]

7. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—WATER RIGHTS.

Where a land company and the purchasers of parcels of land from it were tenants in common of a water right, and the company occupied, as to the purchasers, the relation of trustee of the water right, the mere fact that the company took possession of waterworks owned by another corporation and acquired title to same by adverse possession as against the corporation did not divest the purchasers of their title in the water right; it being essential to any possession adverse to the purchasers, that the company distinctly informed them that it repudiated their claim to a share of the water and that it claimed adverse title to all the water.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

8. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—WATER RIGHTS.

That a company, which was a tenant in common of a water right, with purchasers of land from it, and occupied toward them the position of trustee, imposed a charge upon them for water did not make its possession of the water right adverse, where the original sale agreement imposed upon the purchasers a duty to pay a part of the expenses of repair and distribution, and the circumstances under which the charge was made were such that they could reasonably presume that it represented merely their share of the expense.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

9. WATERS AND WATER COURSES (§ 156*)—WATER RIGHT—FORFEITURE.

Where a company, having directed water and thereby acquired a water right, sold an interest in it to another, and thereafter continued to divert the water for the vendee, the mere failure of the vendee to demand or use the wa-

ter did not forfeit his right thereto to the vendor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

10. WATERS AND WATER COURSES (§ 156*)—WATER RIGHT—FORFEITURE.

The doctrine that an easement acquired by use is lost by mere disuse under the express provisions of Civ. Code, §§ 811, 1411, does not, so far as the company is concerned, apply to a water right acquired from a company by conveyance.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by William F. Copeland and others against the Fairview Land & Water Company and another. From a judgment for defendants, and denial of new trial, plaintiffs appeal. Affirmed in part, and reversed and remanded in part.

Purington & Adair, of Riverside, P. N. Myers, of Los Angeles, and Wm. F. Copeland, of Riverside, for appellants. Collier, Carnahan & Craig, of Riverside, for respondents.

SHAW, J. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The object of the plaintiffs' action was to obtain a decree declaring that they were each entitled to receive from the Fairview Land & Water Company sufficient water upon their respective tracts of land for irrigation and domestic use thereon, upon payment of charges sufficient to defray the expenses of keeping up the water system and distributing the water, and to enjoin the Fairview Company from demanding or collecting charges for the delivery of such water in excess of the sum reasonably necessary for the purposes stated, not exceeding 10 cents per inch per day of 24 hours. As to the Lake Hemet Water Company, they asked a decree declaring that they were entitled to share in the water of that company whenever the water of the Fairview Company was insufficient to supply and irrigate their said lands.

The court adjudged that the plaintiffs McCunn, Bradshaw, Hart, Elise Beck, Catherine Beck, and Emily Compton, as to certain lands specifically described, had no right to demand or receive water from either defendant. With regard to the other lands described in the complaint, the judgment was that the plaintiffs are each entitled to the continuous use of water for irrigation and domestic purposes upon their respective tracts of land, to be delivered to them by the Fairview Land & Water Company, upon the payment of such legal rates and tolls as shall be charged for furnishing the said water, but that none of the plaintiffs had any right or interest in water belonging to the Lake Hemet Water Company. The right of the plaintiffs, except as above stated, to receive

water from the water supply in control of the Fairview Company, on payment of lawfully fixed tolls, was conceded by that company in its answer. Thus it will be observed that, except as to the lands first mentioned, the only dispute between the plaintiffs and the defendant the Fairview Land & Water Company is whether the charges which the company may impose are limited to the amount necessary to cover the cost of keeping up the waterworks and distributing the water, not to exceed 10 cents for each inch per day, or whether the company may charge a greater sum, including reasonable annual interest upon its investment. And the main question on this branch of the case is whether or not the Fairview Company is the owner of the water itself and may consequently include the value of the water supply as part of the investment upon which it is entitled to a reasonable return as part of its charges for delivering water to the plaintiffs.

1. We think the claim of right to receive water from the supply belonging to the Lake Hemet Water Company is not well founded.

[1] We cannot agree with the argument on behalf of that company that, as its water supply consists of water stored in a reservoir, such stored water is personal property which cannot be appurtenant to land, in support of which *Heyneman v. Blake*, 19 Cal. 594, is cited. There is a statement in the opinion in that case that water, when collected in reservoirs and pipes and thus separated from its original source, is personal property. But this declaration cannot be accepted as sound. The question involved in that case was the question whether or not a corporation which stores water, conducts it through the earth in pipes, and sells and delivers it by that means to the inhabitants of a city on their premises is engaged in trade and commerce. Unquestionably it is, but not, as is there erroneously said, because the water becomes personal property when thus stored, but, as is further said, because it is then sold for a price to the inhabitants. Upon delivery for household use, it undoubtedly becomes personal property, being then completely severed from the realty. The question of the character of water as property was fully considered in *Stanislaus, etc., Co. v. Bachman*, 152 Cal. 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359. *Heyneman v. Blake* was distinguished, and the remark therein, above referred to, was declared not to be the law. Water, in its natural state, is part of the land. Like any other part thereof, it may become personal property by being severed from the realty, but not until then. When it is sold for domestic use and delivered by means of pipes to the premises in the usual manner, the pipes themselves are fixtures and part of the realty, and this severance takes place when the water is taken from the pipes by the consumer. In the case of water for irrigation, delivered in ditches or pipes, the severance does not take place at all. The water,

by that use of it, permeates the soil and remains a part of the realty. The water of the Hemet Company, stored in its reservoir, is therefore real property, the right to the use of which may become appurtenant to land.]

[2] There are other reasons, however, advanced by that company, which fully support its position. Plaintiff's claim is based wholly on a contract dated February 12, 1887, between the Fairview Land & Water Company and the Lake Hemet Water Company. The theory of the plaintiffs is that this contract vested in the Fairview Company a right or interest in the waters belonging to the Hemet Company, and that by mesne conveyances, which, for the present, it is not necessary to state in detail, a proportional share of this right in the Hemet water became vested in the plaintiffs. We think the said contract did not vest in the Fairview Company any interest whatever in the water belonging to the Hemet Company, and consequently that, whatever may have been the effect of the mesne conveyances above mentioned as to other waters, the plaintiffs obtained no interest in the Hemet water which can now be enforced. At the time that agreement was made, the Fairview Company and the Hemet Company each had or claimed interests in the waters of the San Jacinto river, and there was some conflict as to their respective rights. The main purpose and effect of the agreement was to segregate and define the parts of the stream which should thereafter be deemed to belong to each company respectively, so that neither should thereafter have any right or claim in the part therein set apart to the other. The Hemet Company therein quitclaimed and released to the Fairview Company all right, title, or interest in the waters of two tributaries of the river known as Strawberry creek and the North fork and all of the waters of the South fork below a certain diversion dam to be constructed therein a short distance above the junction of the South fork and Strawberry creek. The Fairview Company, in turn, quitclaimed to the Hemet Company all right, title, or interest in the waters of the South fork above the said diversion dam. The clause under which the plaintiffs claim was as follows—the Hemet Company being the first party and the Fairview Company the second party: "And said party of the first part hereby agrees to and with the said party of the second part that, if at any time the water hereinbefore mentioned of said last-named party shall be insufficient to supply and irrigate its lands, the said party of the first part will furnish water to said party of the second part upon the same terms and price it furnishes water to other persons by the day or by the run, and will deliver such water into the pipes of said parties of the second part on their said lands at such points on the line of its pipe or pipes to which said parties of the second part may lay their pipes." This clause does not operate to

transfer to the Fairview Company any property right or interest in the supply of the Hemet Company. At most, it is a mere executory agreement for sales of water, to be effective at the option of the Fairview Company. As an agreement to sell an interest in property, it lacks the essential element of certainty as to the property which is to be delivered. It does not state the quantity of water to be furnished, nor give any means of determining that quantity. The precise act to be done in its performance is not clearly ascertainable. It is therefore incapable of enforcement against any specific property. *Berry v. Woodburn*, 107 Cal. 508, 40 Pac. 802; *Magee v. McManus*, 70 Cal. 556, 12 Pac. 451; *Stanton v. Singleton*, 126 Cal. 664, 59 Pac. 146, 47 L. R. A. 334; *Meyer v. Quigle*, 140 Cal. 498, 74 Pac. 40; Civ. Code, § 3390, subd. 6; 2 Devlin on Deeds, § 1010.

[3] Furthermore, all right of action to enforce the contract in equity is clearly barred by laches. The water quitclaimed to the Fairview Company was always insufficient to irrigate the Fairview tract, yet, for the entire period from the making of the contract in 1887 until a few months before this action was begun, no water was ever demanded under the contract either by the Fairview Company or its successors in interest or by any of the plaintiffs, and the validity of the contract as a conveyance or agreement to convey an interest in the waters of the Hemet Company was never at any time recognized by that company. The action was begun on October 29, 1908. The statutory period of limitation had run over and over again. For these reasons we conclude that the plaintiffs have established no right or specific interest in the water belonging to the Lake Hemet Water Company.

[4] There is some discussion of the proposition that the Hemet Company is a public service corporation and that the plaintiffs, as beneficiaries of the public use, are entitled to take water from its system. There is no direct evidence that the Hemet Company is distributing its water to the public, or for general use, or that its water is, or has been dedicated to the use of the public or any part thereof. But, if it is conceded that its water is devoted to the public use, there is no evidence to show that the lands of the plaintiffs are within the area to which such water has been dedicated, or that they are entitled to water from that system, or that the company has any surplus to apply to lands not within the original dedication. See *Hildreth v. Montecito, etc., Co.*, 139 Cal. 29, 72 Pac. 395; *Thayer v. California Dev. Co.*, 164 Cal. —, 128 Pac. 21. It follows, from these considerations, that the judgment and order appealed from, so far as the Lake Hemet Water Company is concerned, are correct and should be affirmed.

[5] 2. For a proper understanding of the differences between the plaintiffs and the Fairview Land & Water Company, a more

elaborate statement of facts is necessary. There is no substantial conflict in the evidence as to the facts about to be stated. In the early part of the year 1887, that company, which we will hereafter designate the Fairview Company, was the owner of a tract of land containing 2,897 acres of land known as the Fairview tract, abutting upon the San Jacinto river and being a part of a larger tract comprising a Mexican grant known as the Rancho San Jacinto Viejo. This tract being riparian to the stream, the company had the right to use the water upon the land and to that extent it owned an interest in the waters of the river. Its right was limited to the portions of the stream quitclaimed to it by the contract hereinbefore mentioned between it and the Hemet Company, but it was obviously a riparian right. The land and the water together were very valuable; separately, the land, at least, was comparatively worthless. The Fairview Company adopted the plan of selling the land in parcels together with a share of the water, charging a lump sum for each parcel of land combined with a proportionate share of the water. For this purpose it had the land surveyed and subdivided partly into town lots and partly into parcels of 20 acres each. Thereupon it announced that it had a water supply for the use of such land; that it would pipe such water to each parcel thereof so surveyed; and that it would sell the land with the right to receive a proportionate share of the water for use thereon at the prices fixed. In order to carry out this plan respecting the water, the Fairview Company, through its board of directors, organized a subsidiary company, called the Florida Water Company, with a capital stock of 20,000 shares of the nominal par value of \$5 each. To the Florida Company it conveyed all of its rights in the water of the San Jacinto river and its tributaries aforesaid, receiving in exchange therefor all the said stock of the Florida Water Company, except 50 shares which were retained to be used to qualify persons to act as directors and which were accordingly issued to persons designated by the Fairview Company, who thereupon became directors of the Florida Company. The certificates issued by the Florida Company, as evidence of its shares of stock, each declared, in substance, that for each share of such stock the holder thereof was entitled to one twenty-thousandth part of the water belonging to the Florida Company. Thus, in effect, the water right attached to this land became the property of such stockholders. The purpose of the Fairview Company in organizing this auxiliary company was to facilitate the sale of a proportional part of the water right with each sale of the parcel of land. Accordingly each agreement of sale provided that five shares of said stock would be sold with each acre of land and one share with each town lot, and that the Fairview Company would pipe

the water to each parcel. As the parcels were conveyed to the respective purchasers, the stock was transferred in accordance with the agreement. The agreement also provided that the stockholders of the Florida Company must thereafter bear the expense of keeping up the water system. The Fairview Company still remained the holder of a majority of the stock. Each purchaser of land in this manner bought and paid for his due proportion of the water right. The money for the construction of dams and conduits necessary for the diversion and distribution of the water to the several parcels was furnished by the Fairview Company, partly before and partly after it deeded its water rights to the Florida Company. That deed was dated May 20, 1887, but it was not acknowledged until August 3, 1887.

Until the year 1892, the directors of the Florida Company distributed the water to the parcels of land which had thus been sold by the Fairview Company. These directors were elected by the Fairview Company through its ownership of a majority of the stock of the Florida Company, and they acted at all times in harmony with the wishes of the directors and managers of the Fairview Company. Up to this time no specific charge appears to have been made for the distribution of water, but there were occasional assessments upon the stock of the Florida Company to pay expenses, and they were paid by the respective stockholders without objection. The expense of keeping up the repairs of the water system was, for the most part, paid by the Fairview Company, whether out of these assessments or not does not appear. In 1892 there was an attempt made under the state law to organize an irrigation district in that vicinity. In November of that year the Fairview Company made a formal transfer of all the stock which it then owned in the Florida Company, being some 14,800 shares, to the irrigation district, taking in exchange therefor bonds purporting to have been issued by said district. At that time it was supposed that the irrigation district had a legal existence. Thereafter the directors of the Florida Company were elected by persons claiming to act as directors of the irrigation district, so called; they being in control of a majority of the shares of the stock of the Florida Company, and these Florida Company directors continued to distribute the waters of the system to the respective owners in proportion to their interest. This method continued until July, 1899. During this period it was found necessary to make charges against the water users for the expense of repairs and service, and such charges were made and paid without objection by the plaintiffs. Some time after the supposed organization of the district, its legality was attacked by an action for that purpose, and on July 11, 1899, the superior court of Riverside county adjudged

that it had not been legally organized, and never had a legal existence. Its bonds were therefore utterly void. At the same time the Florida Company practically ceased to act as a corporation and abandoned all right or claim to the waterworks known as the Florida system and to the water rights previously conveyed to it by the Fairview Company. The Fairview Company thereupon took charge of the water system and thenceforward managed and controlled the same, diverting and distributing the waters to the parcels of land which it had previously sold with water stock. Upon taking charge thereof, it gave notice to each of such landowners that it had taken control of the system and would distribute the water to them in such quantities as they might desire, upon payment of charges to be imposed. It continued to do so from that time until shortly before this action was begun, without any objection or dispute arising between it and the plaintiffs. Concerning the amount of the charges to be imposed, there is no evidence that it gave notice to the plaintiffs that it claimed the right to charge for any other purposes than to cover the cost of repairs and a reasonable charge for the expense of distribution. Nor did it at any time deny that the several plaintiffs had the right, under the sales of land with the Florida Water Company stock, by which their lands were originally acquired, to participate in the use of the water belonging to the system. It did, however, fix its charges according to the quantity of water delivered, and made no attempt to apportion the water between the several landowners in proportion to their respective shares of Florida stock. But it never announced or notified the landowners that this was done in repudiation or denial of their title to a share of the water.

Upon these evidentiary facts the court declared in its findings that the Fairview Company did not sell the lands in question together with water for irrigation and domestic use thereon; that the Florida Company was not formed to hold and control the water for the convenience of the Fairview Company; that there was no intention that the Florida Company, in taking title to the water, should act as agent of the Fairview Company to distribute said water to the purchasers of land from said Fairview Company; that the Fairview Company did not control the appointment of officers and agents of the Florida Company or the election of its directors or direct its policy and business up to the year 1892; that the certificates of stock in the Florida Company declared that each owner of a share was entitled to one twenty-thousandth part of the water owned by that company, but that, in fact, such holder did not thereby become entitled to said share of said water; and that from the time the Fairview Company took possession of the water supply and water system on July 11, 1899,

until the beginning of this action, its possession was adverse, not only to the Florida Company, but also adverse to all claim of the plaintiffs or either of them to a right or share in said water supply, and that its said possession was under a claim by the Fairview Company that it was the absolute owner of the water and had the right to impose charges for the sale or delivery thereof to the plaintiffs in excess of the amount required for the expenses of keeping up the system and a fair remuneration for the service, and, in effect, that the Fairview Company was the absolute owner of the water and water supply, so far as the charges therefor were concerned. We think that these findings are contrary to the legal effect of the facts we have stated.

The water right in question was a riparian right arising from the fact that the lands abutted upon the river. It originally extended and attached to every part of the Fairview tract. The device of organizing the Florida Water Company, transferring to it the water right, receiving immediately from it certificates of stock declaring the holder of each share entitled to a proportional part of the water right, and thereupon selling the land in parcels together with a proportional number of the shares of stock, was a scheme for the apportionment of the water right to the several parcels of land so that each could thereafter be conveniently sold with its proper share of the water right. In effect it preserved the riparian right to the several parcels of land, regardless of their proximity to the stream, and vested in the owner of each parcel, as soon as it was sold to him, a proportional part of the riparian right originally held by the Fairview Company in the waters of the stream. [That such riparian right can be thus preserved in parcels which do not border upon the stream when, by the conveyance, they are severed from the original riparian tract is fully settled by the decisions in this state. *Strong v. Baldwin*, 154 Cal. 157, 97 Pac. 173, 129 Am. St. Rep. 149; *Rose v. Mesmer*, 142 Cal. 328, 75 Pac. 905; *Anaheim, etc., Co. v. Fuller*, 150 Cal. 331, 88 Pac. 978, 11 L. R. A. (N. S.) 1062; *Verdugo, etc., Co. v. Verdugo*, 152 Cal. 683, 93 Pac. 1021; *Hudson v. Dailey*, 156 Cal. 624, 105 Pac. 748. How far such an apportionment or transfer is good against owners of other riparian lands upon the same stream, not part of the tract from which such parcels are conveyed, we need not consider, since none of such other owners are parties to or concerned in this suit.]

The certificates of stock declared that the holder thereof was "entitled" to a certain part of the water "belonging to" the Florida Water Company. The clear intent of this language and its legal effect was to transfer to the holder the title to that part of the water, the same title which the Florida Company held at the time. The Florida Com-

pany paid no consideration for the water, except by the issuance of this stock to its vendor. Its holding of the title during the infinitesimal point of time between its receipt of the conveyance of the water and the delivery of these certificates in exchange was a holding as a naked trustee for the benefit of its vendor, the Fairview Company. That holding did not change the nature of the right nor divest the beneficial interest therein from the Fairview Company, which still remained the owner of the land. When thereafter the Fairview Company sold parcels of the tract to the plaintiffs and others with the accompanying certificates of stock, the right to a share of the water passed to the purchaser and it remained, as before, a riparian right growing out of the situation of the Fairview tract as land abutting the stream. When such parcels were sold in this manner, with the certificates of stock carrying the water right, the Fairview Company immediately became a tenant in common of the water right with the purchaser; each being entitled to his proportional share therein. As the Fairview Company had actual control of the operations of the Florida Company, by reason of the fact that it held a majority of the stock and did in fact select its directors, and as by that means it was in practical control of the waterworks and the distribution of the water for the benefit of all the owners thereof, it stood in the relation of trustee for the owners of the several parcels of land so conveyed. During the time the persons in control of the irrigation district selected the directors of the Florida Company, they occupied a similar trust relation to the several landowners.

[8] It is proper to consider in this connection the effect of the purported transfer of the stock to the irrigation district. The authorities are apparently unanimous to the effect that a contract purporting to transfer property to a fictitious person, or to one who is dead at the time, or to a corporation having no legal existence, passes no title at all, but that the title to the property attempted to be transferred remains in the transferor. *Muskingum Co. v. Ward*, 13 Ohio, 127, 42 Am. Dec. 191; *Hunter v. Watson*, 12 Cal. 376, 78 Am. Dec. 543; *Phelan v. San Francisco*, 6 Cal. 541; *Jackson v. Cory*, 8 Johns. (N. Y.) 388; *Douthitt v. Stinson*, 63 Mo. 278; *Harriman v. Southam*, 16 Ind. 190. There are cases holding that if the corporation has a legal existence, but is merely incapable of holding the particular property, the transfer is good as to all persons except the state which created the corporation. But this exception has no relation to this case, for here the irrigation district never had a legal existence. The result is that the transfer to the irrigation district was wholly void, and the legal title to the stock, notwithstanding that transfer, remained in the Fairview Company, and it is now the owner thereof, with the

corresponding shares of the water right which they carry. When, therefore, in July, 1899, the Fairview Company took possession of the waterworks of the Florida water system, it still remained a tenant in common of the water right with the other landowners in the Fairview tract, and it still stood in the relation of a trustee to them with regard to the control of the waterworks and the distribution of the common supply of water.

[7] It may be conceded that the act of the Fairview Company in taking possession of the waterworks in 1899 and thereafter holding the same and continuing the operation thereof was adverse to the right and title of the Florida Company thereto, and that, after such possession had continued for five years without interruption, whatever right, title, or interest the Florida Company had to the waterworks or to the water supply thereupon passed to and became vested in the Fairview Company. This fact, however, does not, itself, divest the title and right of the plaintiffs. The Florida Company had the title to the waterworks and pipes, whether as trustees or otherwise, it is not important to determine. But it did not hold the title to the water right or to the water. That title, as we have seen, had passed to the holders of the certificates of stock, and the plaintiffs and the Fairview Company were tenants in common thereof. In order to make the possession of the Fairview Company adverse to the plaintiffs and to their right and title to the water thus acquired by them, it was necessary for the Fairview Company, occupying, as it did, the position of trustee towards plaintiffs, and tenant in common of the water supply with them, to distinctly inform them that it repudiated their claim and right to a share of the water, under their water stock, and that it claimed the ownership of all the water adversely to their title. If it claimed the right to impose charges to cover more than the cost of upkeep and a fair charge for the service of administering the system, it was necessary, under these circumstances, that it should make such claim clearly known to the plaintiffs and give them notice that its charges were for other purposes; otherwise its conduct in taking possession of the works and distributing the water for all concerned would not be adverse to the title of the plaintiffs and their right to receive a proportion thereof.

[8] The mere fact that charges were imposed did not make its possession adverse. Similar charges had been imposed before and were to be expected. The original understanding was, and the original plan and the said agreements of sale of the parcels plainly imply it, that charges would be imposed from time to time as they became necessary to repair the works and pay the expense of distribution. During the time the irrigation district officers controlled the system, such

charges were made; but it does not appear that plaintiffs were informed or believed that by paying such charges they were yielding the ownership of the water which they had bought and paid for. The imposition of charges by the Fairview Company, when it began distributing the water, did not give the plaintiffs notice that their right or title to their proportional share of water was disputed or invaded. They would reasonably suppose that the charges were imposed because of the necessity of raising money to defray the expense of repairs and the cost of the service. The evidence indicates that this was the sole purpose of imposing such charges as were made. The evidence also shows that the information given to the plaintiffs was that the charges were made because of the necessity of raising money for that purpose. There is no evidence that any other purpose was stated to any of the plaintiffs. We cannot perceive that the fact that the water was delivered as called for, and that the charges were fixed by the quantity and without regard to the proportional share of each person, is of any weight as proof of an adverse claim by the Fairview Company. There was no declaration or notice that such method was followed in pursuance of any adverse claim against the right of the plaintiffs. The natural inference would be that it was done in that manner because it was the fairest method of apportioning the common expense. The plaintiffs were given no information that it was done for any other reason. It was not, in itself, incompatible or inconsistent with the ownership of a share of the water supply by the respective landowners. We think, therefore, that the finding of adverse possession, so far as it is intended to declare that the plaintiffs lost their right to their proportional share of the water because of such adverse possession, is contrary to the evidence.

Since it does not appear that the charges imposed by the Fairview Company exceeded the amount necessary to pay the cost of the service and expense of upkeep, it might be plausibly claimed that the judgment is not injurious to the plaintiffs. But the difficulty with this suggestion is that the findings declare that the entire water supply now belongs to the Fairview Company, and the judgment goes upon the theory that it may fix its charges as absolute owner thereof, and that the plaintiffs have no right whatever therein, except the right to buy water at such rates as may be legally fixed or imposed. If this be true, it may fix the charges at a rate which will give it a revenue upon the actual value of the water supply itself, a proportional part of which, as we have seen, belongs to the plaintiffs and not to the said company. Thus it would be able to make the plaintiffs pay again for the water right which they had previously bought and paid for in connection with the purchase of

their lands. It appears that the Fairview Company, since it took charge, has expended a considerable sum of money in renewing and repairing the pipes and conduits of the system. No doubt it has a just right, as a part of its charge for the delivery of water, to include a sum sufficient to cover plaintiffs' proportionate shares of the interest on this investment, and perhaps to enforce contribution of the principal. But it would have no right to base its charge upon the theory that it is the owner of the water delivered to plaintiffs, and that it is consequently entitled to a reasonable return upon the value of that water considered as an investment. If it does not intend to charge rates on this basis, the suit should be capable of a quick settlement, by a judgment containing a provision that it shall not do so.

[9] For somewhat similar reasons we are of the opinion that the decision that the lands of McCunn and others, above mentioned, had no right to the water is erroneous. This conclusion seems to be based on one or the other of two theories: first, that their right to the use of the water is that of an appropriator under the provisions of the Civil Code, and that under section 1411 the right ceased when they ceased to make a beneficial use of the water; second, that their holding is, as of a title by prescription, in the nature of a servitude or easement acquired by enjoyment, which, under section 811 of the Civil Code, is extinguished by a disuse thereof for five years. There is evidence to the effect that these lands, or some of them, were not irrigated or served with the water for periods of at least five years. The fact that a new trial must be ordered makes it proper to consider these questions.

Assuming that the right is of a nature which would place it in one or the other of these classes, the conclusion that the right has ceased or has become extinguished, under the circumstances here existing, by no means follows. It might be so if a third person were claiming the water in opposition to all the parties to this action. But this is not such a case. Here the right was originally gained by the Fairview Company. If it was by diversion or appropriation, that company made it for use on these particular lands, and the diversion or appropriation has ever since that time been made by that company or its intermediaries, for the benefit of all the parties. The plaintiffs all derived their titles from and are holding under that company. Where one thus diverting the water and thereby acquiring a water right, whether by prescription or statutory appropriation, sells an interest in it to another and thereafter continues to divert the water himself for the vendee, the fact that the vendee does not demand or use the water he has bought may, if it is not otherwise beneficially used by some one receiving it from the appropriator, enable some third person

to take such unused water and defeat the right of the first appropriator, upon the theory that such part has not been by him applied to a beneficial use. But we do not understand the law to be that such failure to receive or use the water by the vendee will forfeit his right thereto to the vendor, who has in the meantime continued the diversion, unless such vendor in some manner informs the vendee that such forfeiture will be claimed because of nonuse or asserts it against him by some hostile act. Mere failure to take and use the water for which he has, at the time, no need will not forfeit the right to the vendor in such a case.

[10] With respect to the theory that it is an easement or servitude originally acquired by enjoyment, it may be said further that, so far as the Fairview Company is concerned, it having acquired the right and thereupon transferred it by contract to the plaintiffs, it is not, as between them and the company, a right acquired by prescription, but it is a right which they have acquired from the company by conveyance, and the doctrine that an easement acquired by use is lost by mere disuse does not apply to a right gained in that manner. *Smith v. Worn*, 98 Cal. 212, 28 Pac. 944; *Currier v. Howes*, 103 Cal. 437, 37 Pac. 521; *Walker v. Lillingston*, 137 Cal. 403, 70 Pac. 282.

But there is no evidence of such appropriation or right by prescription. The right, as we have stated, is a riparian right, and its nature has not been changed. The purpose of the original plan was to preserve to each parcel of land its proportional right to the water. It does not appear that there was any intention to sever or destroy the riparian right or to convert it into a right of a different character. The fact that the transfer was made through the agency and by means of the stock of the Florida Water Company does not substantially change the nature of the transaction of the nature of the right transferred. The transfer of the water right to that company was simultaneous with the retransfer thereof to the Fairview Company by virtue of the issuance to it of the entire capital stock. It was form without substance. It may be conceded that the result of this arrangement would be that by transferring his stock alone, without selling the land, the owner of a parcel would enable the vendee of the stock to have the water delivered to other land, and thus the water and the land would be effectually separated. But none of these plaintiffs have done this, and the right of each of them has preserved its riparian character. Such a right is not lost by mere disuse. The evidence does not show that the Fairview Company in any way manifested its intention to take and hold adversely to them the water to which these lands were entitled. Until it did manifest such intention to them, its title against them by prescription would

not begin to run. The case, it appears, was not tried upon the theory that this was necessary.

The judgment and order are affirmed as to the Lake Hemet Water Company. As to the Fairview Land & Water Company, the judgment and order are reversed, and the cause is remanded for a new trial of the issues so far as they affect the rights of plaintiffs against that company and in accordance with the views herein expressed.

We concur: HENSHAW, J.; MELVIN, J.; ANGELLLOTTI, J.; SLOSS, J.

PEOPLE v. FREY. (Cr. 1,753.)

(Supreme Court of California. March 20, 1913.)

1. BANKS AND BANKING (§ 21*)—CRIMINAL OFFENSES—PASSING WORTHLESS CHECKS.

Under Pen. Code, § 476a, providing that every person who willfully, with intent to defraud, makes or delivers any check on a bank, banker, or depository for the payment of money, knowing that he has not sufficient funds in or credit with such bank to meet such check in full, is punishable as therein provided, the want of funds in or credit with the bank is an essential element of the crime.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

2. CRIMINAL LAW (§ 409*)—CRIMINAL OFFENSES—PASSING WORTHLESS CHECKS.

On a trial for making and delivering a check with knowledge that the drawer had no funds in or credit with the drawee with which to meet it, evidence that the check was forwarded to the drawee by another bank and returned with the words "no account" written thereon, that it was handled in the customary manner and usual course of business, and that it was customary to so indorse checks where the drawer has no funds to meet it, without any evidence that the indorsement was made by a person connected with the drawee bank, or by one who knew or could know the facts, was insufficient proof of the corpus delicti to justify the admission of extrajudicial confessions by accused; since, while very slight proof of the corpus delicti will justify the admission of such confessions, purely hearsay testimony is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972; Dec. Dig. § 409.*]

3. CRIMINAL LAW (§§ 419, 420*)—LEGISLATIVE AND JUDICIAL POWERS.

Courts cannot in a prosecution for making and delivering a check with knowledge that the drawer had no funds in or credit with the drawee bank with which to meet it authorize hearsay evidence of the nonexistence of funds or credit merely because of the inconvenience of obtaining any other evidence of such fact; that being a matter for legislative adjustment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

4. CRIMINAL LAW (§ 409*)—CONFESSIONS—NECESSITY OF CORROBORATION.

A conviction cannot be had upon the extrajudicial confessions of a defendant, unless cor-

roborated by independent proof of the corpus delicti.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972; Dec. Dig. § 409.*]

5. BANKS AND BANKING (§ 21*)—MATTERS WITHIN KNOWLEDGE OF DEFENDANT.

In a prosecution for making and delivering a check, with knowledge that the drawer had no funds in or credit with the drawee with which to meet it, the allegation of the nonexistence of funds or credit was not a negative allegation regarding matters peculiarly within the knowledge of defendant within the rule that such allegations need not be proved.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

6. CRIMINAL LAW (§ 800*)—INSTRUCTIONS—CORPUS DELICTI—DEFINITION OF TERM.

In a prosecution for making and delivering a check with knowledge that the drawer had no funds or credit with which to meet it, an instruction that, before the jury could find accused guilty, they must be satisfied that the corpus delicti had been proved; that this term meant exactly what it said, and involved the element of crime; that it was not sufficient to show that accused drew a check or draft upon a bank where he had no funds or credit, in order to establish the corpus delicti; that this would simply establish the corpus, and that proof thereof joined with a confession would not be sufficient to convict, was properly refused; since overlooking the improper dissection of the term "corpus delicti" it failed to define that term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.*]

7. BANKS AND BANKING (§ 21*)—CRIMINAL OFFENSES—PASSING WORTHLESS CHECKS.

In a prosecution for making and delivering a check with knowledge that the drawer had no funds or credit with which to meet it, an instruction that if the only evidence showed that accused drew a check upon a bank in which he had no deposit or credit, and that he knew this to be true at the time of drawing the check or draft, the jury must acquit, was properly denied, since the proof outlined would have amounted to a prima facie case.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

8. CRIMINAL LAW (§§ 781, 1173*)—INSTRUCTIONS—CONFESSIONS—PREJUDICIAL ERROR.

In a prosecution for making and delivering a check with knowledge that the drawer had no funds or credit with which to meet it, in which the only evidence to show lack of funds or credit, independent of accused's confessions, was hearsay testimony, accused was entitled to an instruction that, unless there was some other evidence tending to show the commission of the crime, the confession was not competent, and a failure to give it was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864-1871, 1898, 3164-3168; Dec. Dig. §§ 781, 1173.*]

9. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a prosecution for making and delivering a check drawn on the D. county bank, with knowledge that the drawer had no funds in or credit with such bank with which to meet it, a letter received by another bank stating that the D. County Farmers' Bank had succeeded to the rights and business of the D. County Bank was hearsay and improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

10. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

In a prosecution for making and delivering a check with knowledge that the drawer had no funds or credit with the drawee with which to meet it, where there was no competent evidence of want of funds, a judgment of conviction could not be affirmed under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted in a criminal case for misdirection of the jury, or the improper admission or rejection of evidence, or for errors as to any matter of pleading or procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice; since that section does not authorize an affirmance, notwithstanding a failure to prove one of the essential elements of the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

F. Frey was convicted of crime, and he appealed to the District Court of Appeal, which reversed the judgment and order denying a new trial. On rehearing by the Supreme Court the judgment of the Court of Appeal was affirmed, and the judgment of conviction reversed.

True Van Sickle, of Oakland, and T. J. Weldon and W. D. L. Held, both of Ukiah, for appellant. U. S. Webb, of San Francisco, and J. Charles Jones, of Sacramento, for the People.

MELVIN, J. This case was reheard, on motion, after decision by the District Court of Appeal, principally because the opinion of that court contained certain inconsistent statements. In fairness to Mr. Justice Hart, the author of said opinion, we wish to state the reason for the presence of the conflicting expressions. At first he concluded that the corpus delicti had been sufficiently proven, but that the cause should be reversed on account of the court's failure to instruct upon that subject, in connection with defendant's confession. An opinion embodying these views was prepared, but upon further study the learned author became convinced that there had been no sufficient proof of the corpus delicti independently of the confession. His written opinion was accordingly modified, but by inadvertence some of the language of the original draft, applicable only to the theory upon which it had been prepared, was copied into the final opinion and went to print without correction during a brief absence of Mr. Justice Hart from Sacramento.

The appeal is from the judgment of conviction and from an order denying defendant's motion for a new trial. The defendant was convicted of the offense defined by section 476a of the Penal Code. The information charged, in substance, that defendant, with intent to defraud one Frank Sandelin, did unlawfully, feloniously, fraudulently and

knowingly draw and deliver to Sandelin a certain check and draft for the payment of money upon a certain banking corporation, the Douglas County Bank of Gardnerville, Nev., and that defendant had not at the time sufficient funds in or credit with said bank to meet said check in full or at all on its presentation.

[1] The section upon which this prosecution is based is as follows: "Every person who, willfully, with intent to defraud, makes or draws, or utters, or delivers to another person any check or draft on a bank, banker or depository for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in or credit with such bank, banker or depository to meet such check or draft in full upon its presentation, is punishable by imprisonment in the state prison for not less than one nor more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depository for the payment of such draft." It will be seen that want of funds in or credit with the bank upon which the draft or check is drawn constitutes one of the essential elements of the crime denounced by this statute.

[2] Appellant contends that there was no proof of the corpus delicti made independently of the defendant's confession, and we are convinced that the point is well taken. The detective who arrested Frey testified that while in custody the latter admitted that he had no funds in or credit with the bank mentioned in the information. The independent proof of the dishonor of the check was that it had been deposited by the drawee in a bank at Ukiah for collection; that it was then sent by that bank to the First National Bank of San Francisco; that it was by the last-mentioned bank forwarded to the bank at Gardnerville; and that it was returned to the First National Bank of San Francisco with the words "No account" written across its face. By the testimony of bankers it was shown that the check had been handled in the customary manner and in the usual course of business. They also testified that whenever a check is presented, and the drawer has no funds in the bank to meet it, it is customary for an officer of the bank to write on the said check the words "No funds" or "No account," and then return it to the sender. There was no testimony on the part of any one connected with the bank that the words "no account" on the face of the check were written by any person connected with the banking corporation in Nevada, or by any one who knew or could know the facts. The learned Attorney General insists that such proof as was here adduced is sufficient establishment of the corpus delicti, and that, unless this court so

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

declares, it will be impossible to convict any one of the crime defined by section 476a of the Penal Code.

[3] We are fully mindful of the importance of the argument *ab inconvenienti*, but since the Legislature has seen fit to make proof of a negative proposition, namely, the nonexistence of funds or credit, an essential element of a crime, we cannot see our way to a conclusion authorizing hearsay evidence to establish that constituent part of the offense. If practical difficulties are involved, that is a matter for legislative adjustment.

[4] "The rule is well established that a conviction cannot be had upon the extrajudicial confession of the defendant, unless corroborated by proof *alunde* of the *corpus delicti*." *People v. Jones*, 123 Cal. 68, 55 Pac. 700. We are aware of the fact that many cases properly hold very slight proof of the *corpus delicti* to be sufficient basis for the admission of a defendant's confession, but we know of none which sustains proof of the *corpus delicti* upon purely hearsay testimony. *People v. Spencer*, 16 Cal. App. 759, 117 Pac. 1040, is cited with apparent confidence by the Attorney General, but that was a case in which the appellant contended that his want of credit with the bank was not sufficiently shown. The court held that such a fact might be proved by circumstantial as well as by direct evidence, saying: "But here the testimony showed that the defendant represented that he had on deposit in the Seattle Bank \$20,000; that within a few days he expected \$75,000 more; yet when his draft was presented for payment a few days later he had on deposit approximately only \$200. These facts, together with the circumstance that the check was dishonored, were quite sufficient to warrant the jury in drawing the inference that the defendant did not have sufficient credit with the bank to meet the draft, and consequently justified the court in admitting proof of the extrajudicial statements of the defendant without further evidence to establish the *corpus delicti*. The authorities support this view." In that case there was no question that the lack of funds on deposit to defendant's credit was shown by competent evidence. The chief clerk of the Seattle Bank testified upon that subject.

[5] Nor does this case come within the rule that negative allegations regarding matters peculiarly within the knowledge of the defendant need not be proven. That is a special rule applicable to such prosecutions as those for practicing some profession or following some calling without the license provided therefor by law. *People v. Boo Doo Hong*, 122 Cal. 607, 55 Pac. 402; *People v. Fortch*, 13 Cal. App. 775, 110 Pac. 823. It cannot be said of a person that he has such peculiar knowledge of the state of his bank account or credit that mere allegations of their nonexistence places upon him the burden of proving them. If that were true, it

would only be necessary in a case like this to prove the drawing of the check, the refusal of the depositary to cash it, and then, unless the defendant could prove that he had cash or credit with such depositary, his fraudulent intent would be inevitably inferred. If the argument of inconvenience is to be indulged, it seems to us it may be more logically applied to exempt a defendant charged with this offense from the purview of the rule in license cases and the like, than to justify the prosecution in sustaining proof of the *corpus delicti* by hearsay. The ruling of the court in permitting proof of the confession before proper proof of the *corpus delicti* was error for which a reversal must be ordered.

[8-8] Appellant complains of the court's refusal to give two instructions upon the subject of the admission of the confession. One of these was in part as follows: "I charge you, gentlemen of the jury, that before you can find the defendant guilty you must be satisfied that the *corpus delicti* has been proven. This term means exactly what it says. It involves the element of crime. It is not sufficient that it is shown that the defendant drew a check or draft upon a bank, banker, or depositary where he had no funds or credit, in order to establish the *corpus delicti*. This would simply establish the *corpus*, and proof thereof joined with a confession by the defendant of his guilt would not be sufficient to convict." The proposed instruction was erroneous and calculated to mislead the jury, and was therefore properly refused by the court. From the lawyer's standpoint the language employed is subject to just criticism because of the ruthless dissection of the term "*corpus delicti*." It is true that there is some excuse for this error to be found in a decision of this court, because in *People v. Simonsen*, 107 Cal. 346, 40 Pac. 440, the following language is used: "The term '*corpus delicti*' means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the *corpus delicti*. It would simply establish the *corpus*; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict. For there must be some evidence tending to show the commission of a homicide, before a defendant's confession would be admissible for any purpose." Whatever may be said of the reasoning contained in the above quotation, we cannot approve its Latin. Doubtless the learned author had in mind the two elements of the *corpus delicti* which are recognized by all of the authorities: (1) The facts forming its basis; and (2) the criminal agency causing them to exist. But to separate the two words of the term itself was ruthlessly to put asunder that which the usage of ages has kept in firmest wedlock. But the principal trouble with the instruction

was that it did not contain any definition of the legal term used. The giving of it without such definition would have been about as sensible as it would have been to tell the jurors that the defendant was accused of a violation of section 476a of the Penal Code without reading that statute to them or substantially stating its contents. The latter part of the proposed instruction contained a correct statement of the law. By it the jurors were told, in effect, that, unless there was some evidence tending to show the commission of a crime, the confession of the defendant was not admissible for any purpose. The first part of another proposed instruction which the court refused to give was of a similar purport, but the latter part was as follows: "And in this case, if the only evidence before you shows that the defendant drew a check or draft upon a bank in which he had no deposit or credit and that he knew this to be true at the time of drawing the check or draft, then you must find the defendant not guilty." This was properly refused. The proof outlined would have amounted to the establishment of a prima facie case against the defendant. But, while these instructions as proposed were improper, the court should have told the jury the true rule with reference to the admission of confessions and the necessity for independent proof of the corpus delicti. In such a case as this the defendant was entitled to the benefit of such a charge. The court utterly failed to instruct upon this matter, and thereby committed error.

[9] No other alleged errors require comment except that relating to the attempted proof by a letter, said to have been sent from Gardnerville to the First National Bank of San Francisco, that the Douglas County Farmers' Bank had succeeded to the corporate rights and business of the Douglas County Bank. This was, of course, hearsay testimony, and its admission was improper.

[10] The attorney General invokes the aid of section 4½ of article 6 of the Constitution, but that section can have no application here. Whatever may have been the purpose of that constitutional provision, it could not excuse failure to prove by competent evidence one of the essential elements of a crime, or, as Mr. Justice Hart phrased it, that section "will never be so construed as that it may be made to apply to and rescue from reversal any criminal case in which, as here, there is no proof of one of the essential elements of an offense with which the accused may be charged, or, in other words, that it will not stand as a shield against reversal if, as here, there is absolutely no proof of a crime having been committed at all."

The judgment and order are reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.

HOWELL v. CITY OF HAMBURG CO.

(S. F. 6,374.)

(Supreme Court of California. March 21, 1913.)

1. MUNICIPAL CORPORATIONS (§ 117*)—FIRE LIMITS—ORDINANCE—SUSPENSION.

The board of supervisors of San Francisco having established fire limits and provided against the erection of wooden buildings within such limits, under San Francisco Charter, c. 2, § 5, authorizing the board to fix the limits within which wooden buildings and structures shall not be erected or maintained, and providing that such limits, when once established, shall not be changed except by extension, the ordinance was not affected by an unofficial announcement of the board, immediately after the conflagration of April 18 to 20, 1906, that temporary wooden buildings within the fire limits would be permitted, subject to removal at the pleasure of the authorities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 272; Dec. Dig. § 117.*]

2. LANDLORD AND TENANT (§ 29*)—LEASE—VALIDITY—ILLEGAL CONSIDERATION.

A lease, providing for the erection and letting of a frame and corrugated iron building on a lot in the city of San Francisco within the fire limits, where such buildings were prohibited by ordinance, was founded on an illegal consideration, and the entire contract was void and unenforceable.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 86; Dec. Dig. § 29.*]

3. CONTRACTS (§ 138*)—ILLEGALITY.

Where defendant continued to occupy premises after the expiration of a lease based on an illegal consideration, plaintiff could not recover subsequent rent if he was required to rely on the lease to establish his cause of action.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

4. LANDLORD AND TENANT (§§ 83, 86*)—COVENANT TO RENEW—EFFECT.

A covenant for renewal of a lease at the option of a lessee imports the giving of a new lease; but if the lessee is only given the option to retain possession for a specified additional term the covenant is one for extension of the original lease only, and the contract becomes a lease for both the original and the extended terms.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 263, 264, 266, 267, 269, 270-275, 278, 295; Dec. Dig. §§ 83, 86.*]

5. LANDLORD AND TENANT (§ 194*)—INVALID LEASE—OPTION TO RENEW—EFFECT.

A lease of real property, based on an illegal consideration, provided for a term of two years, with the privilege to the tenant to renew the lease for three years from June 1, 1908. In conformity with such privilege the lessee gave plaintiff notice of his intention to renew, and continued in possession for a part of the renewal term without the execution of a new lease. *Held*, that such provision was a mere option for an extension and not a covenant to renew, so that the tenant continued to hold under the original lease, which was void; and hence no recovery of rent for part of the unexpired term, after the tenant attempted to surrender, could be had.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 783, 789; Dec. Dig. § 194.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. R. Howell against the City of Hamburg Company. Judgment for plaintiff, and defendant appeals. Reversed.

Harding & Monroe, of San Francisco (Robert H. Borland, of San Francisco, of counsel), for appellant. Charles F. Hanlon, of San Francisco, for respondent.

ANGELLOTTI, J. This is an action commenced April 4, 1910, to obtain judgment for \$360 rent alleged to be due under the terms of a lease for the months of January, February, March, and April, 1910. The case was submitted to the trial court for decision upon an agreed statement of facts. Plaintiff had judgment as prayed, and this is an appeal by defendant from such judgment.

The material facts are as follows: On May 17, 1906, plaintiff was the owner of a lot of land 40 by 60 feet fronting on Oregon street, near Davis street, in San Francisco. This lot was within the territory in which the erection of wooden buildings or structures was then prohibited by ordinance enacted prior to April 18, 1906—in other words, within what is generally styled “the fire limits”—and has ever since been within said fire limits. On May 17, 1906, the parties to this action entered into a written agreement of lease, by which plaintiff let to defendant that certain one-story frame and corrugated iron building “to be constructed” on said lot, “and to be erected as soon as possible,” for the term of two years from June 1, 1906, to June 1, 1908, for \$80 per month, payable monthly in advance. The plaintiff expressly agreed therein “to use every effort to have said premises completed as near to June 1, 1906, as possible.” The privilege was thereby given to defendant “to renew this lease for a period of three years from June 1, 1908,” at \$85 monthly rental for the first year, \$90 for the second year, and \$95 for the third year, provided that notice of the intention to exercise the privilege be given the lessor in writing 90 days prior to June 1, 1908. In conformity with the terms of the lease, plaintiff constructed the building on the lot, and defendant took possession under the lease, and paid the stipulated rent for the first two years. On February 26, 1908, defendant gave plaintiff notice in writing of its intention to renew the lease for three years from June 1, 1908, at the rental specified in the so-called renewal clause. It continued in possession until the latter part of December, 1909, paying the stipulated rent to December 31, 1909. Prior to December 31, 1909, defendant tendered the keys and possession of the premises to plaintiff, but plaintiff refused to accept the same. Defendant vacated the building, and has not been in the occupancy of the premises at any time since December 31, 1909. The premises were vacant to the time of the commencement of the action.

At the time of the execution of the lease, ordinances in force made it unlawful to erect or construct on said lot such a building as was provided for in said lease and in fact constructed. Among the things admitted by the stipulation of facts is that “the consideration for said lease was the erection upon said lot of land of the said wood frame and corrugated iron building.” It is clear, of course, that such erection, was at least a most material part of the consideration. At no time since the execution of said lease has there been any ordinance in terms purporting to authorize the erection within said limits of such building as was agreed to be constructed on said lot, and as was actually constructed thereon.

In the face of the great necessity for temporary buildings in San Francisco immediately following the conflagration of April 18, 19, and 20, 1906, the municipal authorities of the city and county unofficially announced that the construction of temporary wooden frame buildings within said fire limits would be permitted until July 1, 1906, but that all said buildings would be subject to removal at the pleasure of the authorities. On January 6, 1908, an ordinance was adopted providing for the removal, not later than May 1, 1910, of all buildings erected “in violation of and contrary to the laws and ordinances of said city and county of San Francisco,” and directing notice thereof to be served on all owners. On April 11, 1910, an ordinance was adopted providing for said removal not later than May 1, 1911. Defendant occupied the building in question from June 1, 1906, to the latter part of December, 1909, and was never interfered with by the authorities of the city in the use and enjoyment thereof.

[1] The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that “such limits when once established shall not be changed except by extension.” Section 5, c. 2, Charter. So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits; the charter provision limiting their powers in this behalf. But they did not even purport to so do by ordinance, which, even if there were no charter provisions, would be essential to any change in existing ordinances on the subject. All that there was in this case, in effect, was the unofficial announcement of the municipal authorities that they would regard the law on the subject suspended for the time being, and would not attempt to enforce it, which was followed by the actual failure on the part of such authorities to enforce the same. The good faith, both of the authorities and those erecting

wooden buildings under the assurance thus given, is not to be questioned in the slightest degree. It may freely be conceded that the emergency was such as to morally justify the authorities and those acting upon their assurances in doing as they did. But, of course, the law could not be changed in any such way. The ordinances on the subject continued in force unaffected by the unofficial announcement in the slightest degree, with the result that the construction of this building on this lot, which was expressly provided for in the lease, was "contrary to an express provision of law," and therefore "not lawful (section 1667, Civ. Code), on May 17, 1906, and at all times thenceforth. We regard this proposition as so elementary in its nature as to require no citation of authority to uphold it. Certainly no case cited by learned counsel for plaintiff tends to support a contrary law.

[2] It necessarily follows that the contract of lease was founded upon an unlawful consideration, and that the entire contract was therefore void and unenforceable. Civ. Code, §§ 1607, 1608; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *Swanger v. Mayberry*, 59 Cal. 91.

[3] It is claimed that, even if the original lease was void and unenforceable for the reasons stated, plaintiff is not required to rely upon the same for a recovery in this case; reliance being placed upon the rule that the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case. Admittedly, if he does so require the aid of the unlawful transaction, he cannot enforce his claim. *Berka v. Woodward*, supra. The theory of plaintiff in this connection is that the old lease terminated on June 1, 1908, and that defendant then entered upon a new three years' lease, which involved no unlawful feature, in that it cannot be held to have contained any undertaking for the erection of a forbidden structure; such structure having already been erected, and the stipulated facts not showing that the ordinances in force in terms prohibited the mere maintenance of such a building already constructed within the fire limits. For the purposes of this decision, it may be assumed that a prohibition of the construction of such a building within the fire limits was not also a prohibition of the maintenance of the same after its construction. Plaintiff's theory that defendant after June 1, 1908, was occupying the premises under a new lease, rather than under an extension of the old lease, is based on the fact that the privilege given by the old lease was one "to renew this lease for a period of three years," etc., and not a privilege to extend the old lease at all, and that defendant in fact gave notice of his intention "to renew the lease" for such period.

[4] The authorities fully support the claim of learned counsel for plaintiff that a covenant for renewal of a lease at the option of the lessee "imports the giving of a new lease" (2 Wood's Landlord and Tenant, § 1413), "contemplates the execution of some further instrument by the lessor" (*Delashman v. Berry*, 20 Mich. 297, 298, 4 Am. Rep. 392), gives the lessee the right "to have another lease" (*Hunter v. Silvers*, 15 Ill. 176), "requires the making of a new lease" (*Taylor's Landlord and Tenant*, § 332), "involves the making of a new lease" (*Wood's Landlord and Tenant*, § 413), and "would require the making of a new lease" (*Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886). On the other hand, if the lessee is simply given by the original lease the option to retain the premises for a specified additional term, without the execution of any new lease, the covenant is merely one for an extension of the original lease, and when the lessee gives the notice of exercise of his option, if notice be required by the terms of his lease, he is "entitled to hold for the additional term under the original lease," which then becomes a lease "for both the original and extended terms." *Wiener v. Graff*, 7 Cal. App. 580, 583, 95 Pac. 167.

[5] Although the word "renew" is used in the eighth subdivision of the lease before us, we do not think that the giving of any new lease was within the contemplation of the parties. The lessor did not covenant to renew the lease; the language being that "the privilege is hereby given the lessee to renew this lease," etc., which implies that the notice subsequently provided to be given by the lessee of his intention to exercise the privilege was the only thing essential to give the right to the additional term. This was the practical construction given to the provision by the parties; for the defendant did not demand a new lease, and the plaintiff did not give one. The notice of intention to exercise the privilege being given by defendant, it remained in possession, and the plaintiff, without giving any new lease, accepted rent from it in accordance with the provisions of the original lease as to the possible additional term prescribed for therein. And in his complaint in this action plaintiff in terms alleges that "defendant has continued in possession * * * pursuant thereto [the original lease] and to the extension thereof," and the trial court found this allegation to be true. We therefore concur in what was said by the District Court of Appeal of the First District in this connection in deciding this case, namely, that the so-called renewal of the lease was not the creation of a new lease after the building was constructed, but was merely an extension of the original lease, with the result that the important question in the case is the legality of the original lease contract. The action is based solely on that contract, and plaintiff is required to

rely upon that alone for a recovery. It certainly is clear that if the provision was one for a new lease, rather than one for an extension of the original lease, plaintiff would be without any right of recovery for rent for any period of time after defendant had vacated the premises; for no new lease was given, and the original lease, on that theory, ended on June 1, 1908, with the result that defendant was under no obligation to continue as plaintiff's tenant. It is only on the theory that the original lease was extended that plaintiff could have any right of action at all. There is no force whatever in the suggestion that defendant's notice of intention to exercise its privilege can be regarded as a new lease.

We find nothing else in the briefs of counsel that requires discussion here. We are satisfied that the District Court of Appeal was correct in its conclusion that plaintiff has no right of recovery in view of the stipulated facts. In view of the circumstances appearing, the contract upon which recovery is sought was founded upon an unlawful consideration, in that the construction of the building provided for therein was contrary to an express provision of the law. The agreement, under the circumstances, was one of a kind sometimes styled "a gentleman's agreement," one which the parties thereto are considered in honor bound to abide by, but which the courts cannot enforce on account of considerations of public policy. And this is so, although, as in this case, the undertaking of the plaintiff was in no way *malum in se* or contrary to good morals, except in so far as the mere violation of any law is contrary to good morals.

The District Court of Appeal clearly showed the distinction between its decision in this case and its decision in *Wayman Investment Co. v. Wessinger et al.*, 13 Cal. App. 108, 108 Pac. 1022. It said in that regard: "Our conclusion is this case is not in conflict with the case of *Wayman Investment Co. v. Wessinger et al.*, 13 Cal. App. 108 [108 Pac. 1022]. There the contract of lease did not require the erection of a building in violation of an ordinance, but the lease was of a building which had already been constructed, and what was said by the court in that case was that 'the leasing and giving possession of a building originally illegally constructed, for an agreed rental,' involved no violation of law; that 'the ordinance did not in terms prohibit the leasing of such a building.' Moreover, in that case it appeared that the tenants were in possession, enjoying the use of the illegal structure, and apparently claimed the right to do so without the payment of any rent."

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

Ex parte STODDARD. (Nos. 2,036, 2,037.)
(Supreme Court of Nevada. April 8, 1913.)

1. COMMERCE (§ 64*)—INTERSTATE COMMERCE—STATE REGULATIONS—"ITINERANT MERCHANT."

Rev. Laws, § 8890-8894, inclusive (Act approved March 24, 1905 [St. 1905, c. 153] § 1), makes it unlawful for any itinerant merchant or peddler to offer goods for sale without first obtaining a license. Section 2 defines an itinerant merchant, etc., as one having no permanent place of business within the state, which is not regularly located and taxed. Section 3 fixes the amount of the license required. Section 4 provides that the act shall not apply to drummers representing wholesale houses; and section 5 provides that it shall not apply to the sale of farm products. *Held*, that the act violated Const. U. S. art. 1, § 8, relating to interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 104-106; Dec. Dig. § 64.*]

For other definitions, see Words and Phrases, vol. 4, p. 3799.]

2. CONSTITUTIONAL LAW (§ 230*)—LICENSES (§ 7*)—EQUAL PROTECTION OF LAW.

The act violates Const. U. S. Amend. 14, and article 4, § 2, relating to equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230;* Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

In the matter of the application of R. C. Stoddard in behalf of Z. M. Taylor and another for writs of habeas corpus. Writs granted, and petitioners discharged.

R. C. Stoddard, of Reno (Arthur C. Lyon, of Grinnell, Iowa, of counsel), for petitioners. Cleveland H. Baker, Atty. Gen., for respondent.

NORCROSS, J. Original proceedings in habeas corpus in behalf of Z. M. Taylor and L. P. Rounds were instituted to obtain their release from the custody of the sheriff of Churchill county. The cases are identical and will be considered together. Taylor and Rounds were held under arrest, charged with the violation of that certain act of the Legislature entitled, "An act to provide for licensing itinerant and unsettled merchants, traders, peddlers and auctioneers," approved March 24, 1905 (St. 1905, c. 153).

From the agreed statement of facts it appears that Taylor and Rounds were authorized soliciting agents and salesmen for the Spalding Manufacturing Company of Grinnell, Iowa, a manufacturer and wholesale and retail dealer in buggies, motor cars, and other vehicles; said company having no store or other place of business in the state of Nevada, permanently located or regularly taxed therein, and said agents soliciting sales and selling the products of said company without license, as provided in said act of 1905.

The act under consideration provides:

"Section 1. It shall be unlawful for any itinerant or unsettled merchant, trader, ped-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dler or auctioneer to sell or offer for sale any goods, wares or merchandise at any place in the state of Nevada, without first obtaining and paying for a license, as hereinafter provided; and all sales or contracts of sale made without such license shall be null and void.

"Sec. 2. An itinerant or unsettled merchant, trader, peddler or auctioneer within the meaning of this act, shall include every person, firm, or corporation, selling or offering for sale any goods, wares or merchandise, which has no permanent store or other place of business at some point or points within this state, and which is not permanently located and regularly taxed therein.

"Sec. 3. Each and every itinerant and unsettled merchant, trader, auctioneer or peddler shall, before selling or offering for sale any goods, wares or merchandise within this state, procure a license for each and every county in which such person shall attempt to sell or offer for sale any goods, wares or merchandise, which license shall not be granted for more than one month and shall cost the applicant three hundred dollars (\$300).

"Sec. 4. This act shall not apply to drummers and commercial travelers representing and acting for wholesale houses in this and other states so long as they do not attempt the sale of goods, wares and merchandise at retail in competition with established retail dealers, nor shall it in any sense alter or change the present existing laws governing merchants, traders, peddlers and auctioneers permanently established and doing business in this state; Provided, however, that its provisions shall apply to and be enforced against any peddler or auctioneer acting for or on behalf of any itinerant merchant or trader.

"Sec. 5. * * * The provisions of this act shall not apply to the sale, or offering for sale, of the products of any farm, ranch or range situated within this state."

Section 6 fixes the penalty for the violation of the act. Rev. Laws, §§ 3890-3895.

It is contended by counsel for petitioners, and so conceded to be by the Attorney General, that the act in question is unconstitutional. The question of the constitutionality of this act was submitted to the office of the Attorney General, and that official, the Hon. R. C. Stoddard, counsel for petitioner herein, by opinion rendered September 1, 1907, gave it as his conclusion that the act was unconstitutional. Biennial Report of Attorney General 1907-08, p. 83. The Attorney General in his brief says: "A careful examination of the authorities cited in such brief, and of a great many other authorities not therein cited, convinces him that the points advanced by the petitioners in these cases are founded upon true principles of law, and that the statute brought into court for review by petitioners, upon which this action

is founded, is unconstitutional and void. * * * The general trend of judicial decision, since the decision of the case of *Robbins v. Shelby Taxing District*, 120 U. S. 489 [7 Sup. Ct. 592, 30 L. Ed. 694], by the Supreme Court of the United States, has been to declare void any statute imposing an occupation tax which in any way interferes with interstate commerce, and there can be no question but that the statute here in consideration does and was intended to so interfere. The statute also discriminates between residents and nonresidents of this state, and is therefore opposed to 'equal rights' clause of the fourteenth amendment to the United States Constitution."

[1, 2] The contention of counsel for petitioner that the act of 1905 in question is violative of section 8 of article 1 of the Constitution of the United States, relative to interstate commerce, and denies to certain citizens of the United States the equal protection of the laws in violation of section 2 of article 4 and of the fourteenth amendment of the federal Constitution, is well taken.

In view of the fact that the law applicable to this case is so well settled and that the unconstitutionality of the act in question is conceded by the Attorney General, we deem it unnecessary to enter into an extended discussion of the questions controlling, and which are so fully covered in opinions of this and other courts. Suffice it to say that the following authorities and other authorities therein cited fully support the conclusion reached. *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Norfolk, etc., Ry. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Spaulding v. Evenson* (C. C.) 149 Fed. 913; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; *In re Kinyon*, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699; *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A. (N. S.) 297.

The petitioners are discharged from arrest and their bondsmen released.

GORDON v. DISTRICT COURT OF FIFTH JUDICIAL DIST. et al.

(No. 2,011.)

(Supreme Court of Nevada. April 10, 1913.)

1. FALSE IMPRISONMENT (§ 7*)—LIABILITY OF JUDICIAL OFFICER.

Where a justice of the peace had jurisdiction, a party prejudiced by his decision or acts in committing him to jail has no recourse in a civil action for damages against the justice and his sureties, even though the latter acted with malice.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

2. FALSE IMPRISONMENT (§ 7*)—LIABILITY—JUSTICE OF THE PEACE—JURISDICTION.

Under Comp. Laws, § 4780, providing that every one who shall willfully and unlawfully injure any property belonging to another shall be punished, a complaint sufficiently avers ownership by another than accused, as against collateral attack in false imprisonment against a justice of the peace, where it charges the severance and removal of the property from the possession of the complaining witness; possession being prima facie evidence of ownership.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

3. FALSE IMPRISONMENT (§ 8*)—COMMITMENT OF OFFENDERS.

Where a justice of the peace fixed the bond of one charged with a misdemeanor at \$1,000 cash, the erroneous requirement of cash bail did not deprive the justice of jurisdiction so as to render him liable for the improper order; it appearing that the accused made no offer of any sort of bail.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68-73; Dec. Dig. § 8.*]

4. PROHIBITION (§ 19*)—PARTIES.

Where prohibition is sought to restrain enforcement of a judgment, a sheriff seeking to levy execution is a proper party; for, if the judgment be void for want of jurisdiction, then the sheriff, who draws all of his authority from the court, has no right to enforce the execution.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 68; Dec. Dig. § 19.*]

5. PROHIBITION (§ 3*)—RIGHT TO.

Where it is sought to prevent enforcement of a void judgment upon which execution is about to be levied, prohibition is the proper remedy, for an appeal from an order denying a motion to quash the summons and set aside the judgment does not afford sufficient relief; there being no provision for a stay pending the appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Original petition by Louis D. Gordon for prohibition against the District Court of the Fifth Judicial District, Mark R. Averill, Judge, and W. A. Ingalls. Writ issued.

Key Pittman and F. K. Pittman, both of Tonopah, for petitioner. H. R. Cooke and C. H. McIntosh, both of Tonopah, for respondents.

NORCROSS, J. This is an original proceeding in prohibition. The petitioner was a defendant in a case determined in the lower court, entitled John F. Davidson, Plaintiff, v. George H. Keyes, John Tabor, W. M. Doyle, and Louis D. Gordon, Defendants. The default of the defendant Louis D. Gordon, petitioner herein, for failing to appear and answer was entered in the case, and subsequently judgment against him for \$1,500 damages and costs was entered. Petitioner was a resident of the state of Utah, and an order for service of summons by publication upon petitioner was granted by the lower court. Subsequently and in pursuance of such order personal service was obtained upon petitioner in Salt Lake City,

state of Utah, in lieu of publication. After judgment was entered against petitioner, execution was issued to the respondent W. A. Ingalls, sheriff of Esmeralda county, who was proceeding to sell certain corporate stock of petitioner which had been attached at the time the suit was instituted. Subsequently the petitioner, Gordon, appeared specially in the action and moved for an order to set aside and vacate judgment and to annul the writ of execution thereon, upon the ground that at the time the judgment was entered the court below had not obtained jurisdiction over the defendant Gordon. The motion was denied, and this proceeding was instituted to prohibit the lower court from further proceedings under the alleged void judgment upon the same grounds—want of jurisdiction—urged upon the trial court. Want of jurisdiction in the trial court to enter an order of service of summons by publication is based upon the alleged fact that the complaint fails to state a cause of action. *Victor Mining Co. v. Justice Court*, 18 Nev. 22, 1 Pac. 831; *Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 53 Am. St. Rep. 733.

[1] The defendants above named were bondsmen upon the official bond of one P. J. Gallagher, justice of the peace in and for Gordon township, Nye county. The complaint alleges the fact that judgment had been obtained by the plaintiff, Davidson, in a prior action against the said P. J. Gallagher and one W. T. Mattly for damages for unlawful imprisonment in the sum of \$2,500, and that the said Gallagher and Mattly were impecunious and insolvent. The complaint under consideration in this proceeding was to obtain judgment against the bondsmen of said Gallagher, justice of the peace, as aforesaid, for the same alleged unlawful imprisonment. The official bond of said Gallagher was in the penal sum of \$2,000 and upon which the petitioner, Gordon, became surety in the sum of \$1,500.

The complaint alleged substantially that one W. T. Mattly wrongfully, maliciously, and without any reasonable or probable cause, appeared before the said P. J. Gallagher as justice of the peace and swore falsely to a pretended criminal complaint against the said John F. Davidson; that the said P. J. Gallagher, as such justice, with knowledge of the falsity of said alleged criminal charge, and at the malicious instigation, solicitation, and procurement of the said Mattly, did issue a warrant of arrest upon said complaint for said Davidson; that thereafter said Davidson was arrested and brought before the said justice, who then and there wrongfully, maliciously, and with intent unlawfully to deprive him of his liberty, did fix the amount of bail for said Davidson's appearance to said criminal complaint in a grossly excessive amount, to wit, the sum of \$1,000, and did wrongfully and maliciously order that said Davidson

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

furnish such bail in cash, well knowing that he would be unable to furnish the same in cash; that such justice of the peace committed the said Davidson to jail pending trial upon the complaint, and was by the constable lodged in the town jail and therein incarcerated for two days and two nights; that said jail was poorly constructed and defectively heated, and said Davidson suffered severely from cold and contracted a severe cold, which caused him to become and remain sick and sore, and that owing to the loathsome condition of the beds in the jail and the extreme coldness he was unable to sleep, etc.; that two days after such commitment said criminal proceeding was wholly terminated and said Davidson discharged from custody.

It is the contention of counsel for petitioner that the complaint fails to state a cause of action, for the reason that Gallagher, the justice of the peace, was acting judicially, and when so acting the motives which prompted his acts cannot be a subject of inquiry in a civil action. It is contended that the criminal complaint upon which Davidson was arrested charged the commission of a misdemeanor; that the arrest thereupon was lawful and gave the justice jurisdiction of the person of the defendant and the subject-matter of the offense charged; that such justice had jurisdiction to determine that defendant should furnish bail as a condition of his release pending the trial of the charge against him, and that the amount of such bail was a matter in the discretion of the justice, and whether the amount was excessive or not cannot be questioned in a civil action for damages, and that, in any event, there are no facts alleged in the complaint that would justify the conclusion that the amount of bail fixed was excessive; that a bare allegation that the judge demanded cash bail will not be considered, for if plaintiff failed to present personal bail properly justified the court had no other alternative than to demand cash bail, and upon failure of plaintiff to give it to incarcerate plaintiff.

In *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652, Shaw, C. J., speaking for the Supreme Court of Massachusetts in a case of first impression in that court, said: "It is a principle lying at the foundation of all well-ordered jurisprudence that every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences. * * * He is not bound, at the peril of an action for damages, or of a personal controversy, to decide right in matter either of law or of fact, but to decide according to his own convictions of right, of which his recorded judgment is the best, and must be taken to be conclusive,

evidence. * * * If it be said that it may be conceded that the action will not lie, unless in a case where a judge has acted partially or corruptly, the answer is that the losing party may always aver that the judge acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend, not upon his own original conviction—the conclusion of his own mind in the decision of the original case—as, by the theory of jurisprudence, it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations. The general principle, which excepts judges from answering in a private action, as for a tort, for any judgment given in the due course of the administration of justice seems to be too well settled to require discussion; and, as was said by Mr. Chief Justice Kent in the case of *Yates v. Lansing*, [5 Johns. (N. Y.) 282], 'has a deep root in the common law.' * * * The only remaining question is whether the case set forth in the plaintiff's declaration was within the jurisdiction of the defendant as a justice of the peace. Leaving out the epithets 'maliciously,' 'willfully,' 'falsely,' with which the declaration is so thickly sprinkled, and which cannot change or qualify the material facts, it is stated that the defendant, being a justice of the peace, issued a warrant against the plaintiff, on the complaint of one Burley, charging the plaintiff with a malicious trespass on his land. It is alleged that the complaint is false, feigned, and groundless, and that the defendant knew it; but this was the very question to be tried, and the defendant could not judicially know it till a trial. His private knowledge could not prevent the complainant from having it tried. It is further alleged that the defendant willfully and maliciously tried and convicted the plaintiff, and sentenced him to pay a fine of \$2 and costs. The plaintiff alleges that he was not guilty, and that the defendant knew he was not guilty. These are facts which the defendant is not bound to contest with the plaintiff."

In the case of *Cooke v. Bangs* (C. C.) 31 Fed. 640, cited by counsel for petitioner, Justice Brewer, considering the question of the liability of a justice of the peace for damages in a civil action for acts done in his official capacity, said: "Under what circumstances can a justice of the peace be held liable for a civil action for damages for an act done by him in his capacity as justice of the peace? Nothing is more important in any country than an independent judiciary, and nowhere is it so important, so absolutely essential, as under a popular government. No man can be a good judge who does not feel perfectly free to follow the dictates of his own judgment, wheresoever they may

lead him. And in a country where the people rule, and where popular clamor is apt to sway the multitude, nothing is more important than that the judges should be kept as independent as possible. And it is universal experience, and the single voice of the law books, that one thing essential to their independence is that they should not be exposed to a private action for damages for anything they may do as judges. * * * With respect to all judicial officers, justices of the peace as well as judges of higher courts, the settled law of the Supreme Court of the United States, and I think the plain intimation of the Supreme Court of this state [Minnesota], is that, where they act within their jurisdiction, they are not amenable to civil action for damages. No matter what their motives may be, they cannot be inquired into."

Other cases of the same general import cited by counsel for petitioner are *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 133; *Wilson v. Mayor of New York*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *State ex rel. Egan v. Wolaver*, 127 Ind. 306, 26 N. E. 763; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 95; *Scott v. Fishbale*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 632, 71 Am. St. Rep. 254.

Cyc., in treating of the question of the civil liability of justices of the peace, says: "When a justice of the peace has jurisdiction, he is not personally liable for any error in its exercise, and this immunity from civil liability extends even to cases in which a justice upholds and enforces unconstitutional law. In England a justice of the peace is civilly liable for acts done maliciously and without probable cause, but in the United States the authorities are divided; it having been both asserted and denied that the justice may be liable, where it is shown that he has acted corruptly or maliciously. The general rule is that a justice of the peace who acts in a case of which he has no jurisdiction, or who exceeds his jurisdiction, is liable in damages to any party injured. A distinction has, however, been drawn in some cases between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter; and it has been held that, where jurisdiction of the subject-matter has been invested by law in the justice, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, and he is not liable for error in determining the facts necessary to his jurisdiction. So, too, it has been held that if the want of jurisdiction over a particular case is caused by matters of fact it must be made to appear that they were known, or ought to have been known, to the justice, in order to hold him liable for acts done without jurisdiction." 24 Cyc. 421.

We think the prevailing rule in the Amer-

ican courts is concisely stated in *Curnow v. Kessler*, 110 Mich. 10, 67 N. W. 982, as follows: "The justice having obtained jurisdiction of the subject-matter, the rule is well settled that no action can be sustained against him for the recovery of damages by one claiming to have been injuriously affected by his judicial action. It is indispensable to the administration of justice that a judge or other judicial officer, who acts within the scope of his jurisdiction, may act freely, without any fear of being held responsible in a civil action, or having his motives brought in question by one injuriously affected by his judgment. This immunity is uniformly held not to be affected by the motives with which it is alleged that the judicial officer has performed his duty. If the officer be in fact corrupt, the public has its remedy; but the defeated suitor cannot be permitted to obtain redress against the judge by alleging that the judgment against him was the result of corrupt or malicious motives. See *Bradley v. Fisher*, 13 Wall. 335 [20 L. Ed. 646]; *Mechem*, Pub. Off. 619-621."

In the recent case of *Lacey v. Hendricks*, 164 Ala. 280, 51 South. 157, 137 Am. St. Rep. 45, Evans, J., speaking for the court, said: "It is settled law in this jurisdiction that no action can be supported against a justice of the peace acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive."

[2] The criminal complaint upon which Davidson was arrested in its charging portion reads as follows: "That said John F. Davidson did then and there unlawfully, maliciously, and willfully sever and carry away a detonator from a 15 h. p. F. & M. hoist, which is located on leasing block No. 1 of the Round Mountain Red Top Mining Company's Black Hawk claim, without the permission and consent of the aforesaid plaintiff, W. T. Mattly, who holds possession of said lease and hoist."

We think this complaint sufficiently charges a public offense to give the justice jurisdiction of the person arrested upon warrant based thereon, and the subject-matter of the charge. It is admitted that this charge was based on the provisions of section 4780 of the Compiled Laws (Cutting) which reads: "Every person who shall willfully, unlawfully and maliciously destroy, burn, cut, or otherwise injure any goods, chattels or other property of any description whatever, belonging to another, shall upon conviction be punished by fine of not more than \$500 or by imprisonment in the county jail not more than six months, or both such fine and imprisonment."

It is the contention of counsel for respondent that this complaint fails to charge an offense, for the reason that it fails to allege that the article charged to have been taken by Davidson "belonged to another." The complaint alleged possession in another of

the hoist from which the defendant was charged with unlawfully, willfully, and maliciously severing and carrying away a detonator. It is well settled that possession is prima facie evidence of ownership. *State v. Rising*, 10 Nev. 104; *State v. Parker*, 16 Nev. 79. Property in the lawful possession of another is property "belonging to another," within the meaning of the statute. Possession of property is presumed to be a lawful possession until the contrary is shown. Upon direct attack the complaint in question might be required to be made more specific, a point we do not decide; but considering it as upon collateral attack, as in the present case, it cannot be said, we think, to be fatally defective as not charging the property removed as belonging to the complainant, in whose possession it was alleged to be at the time of the alleged unlawful removal.

[3] The complaint having charged a public offense, upon the defendant being brought before the justice, the latter had jurisdiction to commit him until the time set for trial. It may be conceded that the justice was without power to refuse personal bail or to order that bail be furnished in cash. The making of such erroneous orders, however, did not divest the justice of power to commit, certainly not in the absence of an offer of a sufficient bail bond. It is not alleged in the complaint that the defendant could have furnished any sort of a bond, either by sureties or by deposit in lieu of bond. We need not determine the question whether the offer of a sufficient bond would, of itself, divest the justice of jurisdiction to commit; but it is clear, we think, that in the absence of such an offer the power to commit exists, however erroneous the order may be. We can conceive of nothing more reprehensible in a justice than to refuse to give one charged with a misdemeanor every opportunity to furnish a bail bond. Upon the other hand, before the sureties upon an official bond should be held liable in damages, the complainant should show that he has exhausted the remedies open to him, and that, notwithstanding he has done everything within his power under the circumstances, he has suffered injury. In the case of *State v. Davis*, 14 Nev. 439, 33 Am. Rep. 563, the defendant, who was charged with the crime of escaping from jail, sought to introduce evidence to the effect that the jail "was absolutely intolerable and injurious to the health of the defendant." Considering error assigned in refusing to admit the offered evidence, this court said: "We consider it unnecessary to decide whether or not the proposed testimony would have been admissible in justification had a proper foundation been laid therefor; that is to say, had appellant shown or offered to show that he exhausted the lawful means of relief in his power before attempting the course pursued. It was not shown or claimed that he had even com-

plained to the sheriff or the board of county commissioners, or that he had endeavored to obtain relief by any lawful means. The plea of necessity in justification of acts which, without such necessity, constituted the crime charged was unavailable without also showing that lawful measures had first been adopted to accomplish the desired result. A person confined by the law should be delivered by the law; and no other means can be justified in any case until the officers in charge, and the law, refuse him relief; and then the evidence of the necessity must be clear and conclusive, and the act must proceed no further than the emergency absolutely requires. *Bishop on C. L.* vol. 1, § 352."

If evidence of the character of the jail is not admissible to show justification or mitigation of the charge of escaping from jail, in the absence of a showing that the defendant had exhausted the appropriate and lawful means for relief therefrom, is there not a greater reason for requiring a similar showing before damages in a civil action can be collected for injuries alleged to have occurred by reason of unlawful confinement in a jail that is not suitable for the purpose? We think there is.

The facts alleged in the complaint for damages may constitute malfeasance in office, and might have supported a proceeding for removal from office; but, as the justice acted within his jurisdiction in causing the arrest and commitment of the defendant, the justice and his bondsmen cannot be held liable in damages in a civil action for the acts complained of, under the well-established rule heretofore stated. This rule is for the protection of courts for the benefit of the public, and the fact that the application of the rule in individual instances may work a hardship, as possibly it does in this case, does not detract from the force of the rule. The rule, to be of any benefit, must be inflexible to the extent that when it appears that a justice of the peace is acting within his jurisdiction he cannot be held liable in a civil action for damages for his acts committed within such jurisdiction. While the state may proceed against a justice and punish him for acts committed within his jurisdiction, which are shown to have been done maliciously, for reasons of public policy, the individual is required to seek relief by the various methods which the law affords him. A defendant charged with a misdemeanor may demand an immediate trial. If for any reason this is not granted, he may demand release on bail. If bail, in his judgment, is fixed too high, he may apply for reduction. If the justice refuses to reduce his bail, the remedy of habeas corpus is open to him. If he is confined in a jail that is not a suitable place for the confinement of persons charged with offenses against the law, he may apply to the lawful authorities to remedy the condition of the jail. In extreme cases the remedy by habeas corpus might relieve one held

in such confinement. Doubtless there are individual cases such that these and other remedies cannot afford full relief, but it is practically impossible for laws to be devised that will afford full relief under every possible circumstance. An innocent person always suffers a great injury when he is prosecuted for a crime he did not commit, but society thus far has not been able to devise a suitable remedy for the injury done in such cases. The public welfare requires the prosecution of persons for offenses committed against society. In the administration of the penal laws, of necessity, it occasionally occurs that the innocent suffer injury. Such injury is usually done when the officers of the law are proceeding in strict accordance with the letter and spirit of the law, and with due regard for the rights of the accused. The wisdom of centuries has crystallized into law the rule that courts whose duty it is to administer the law shall not be obliged to proceed in the performance of their judicial acts with the knowledge that they are subject to civil actions for damages for wrongs, real or imaginary, which may be by any litigant deemed to have been committed by the judge within the exercise of his jurisdiction.

However unjust may have been the arrest and imprisonment of Davidson, such arrest and imprisonment, according to the allegations of the complaint, do not appear to have been occasioned by an order or orders in excess of the jurisdiction of the justice of the peace to make, and the complaint therefore fails to state a cause of action, and the district court did not acquire jurisdiction in the action over petitioner.

[4] Counsel for respondent in this proceeding raised two preliminary objections to the issuance of a writ of prohibition in this case. It is contended that there is a misjoinder of parties respondent; that the sheriff was not a necessary or proper party to the proceedings with the court. We think a liberal rule should prevail in proceedings of this character, in so far as parties are concerned. The sheriff is an officer of the court, and derives his powers therefrom. If the judgment is void for want of jurisdiction to enter it, the writ which the sheriff is proceeding to execute, and which is based on the judgment, is likewise void. The objection that there is a misjoinder of parties is not well taken.

[5] It is contended that the writ should not issue because petitioner had a plain, speedy, and adequate remedy by appeal. Had a motion been made to quash the service of summons prior to the entry of judgment, doubtless an appeal would have been an adequate remedy; but where the writ is sought to prohibit the enforcement of a void judgment, upon which execution has issued and is about to be levied and property sold thereunder, an appeal from an order deny-

ing a motion to quash the summons and set aside the judgment does not seem to us to afford an adequate remedy, as there is no provision that we are aware of for a stay pending an appeal from such orders.

The writ will issue as prayed for.

TALBOT, C. J., concurs.

NOTE.—McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

STATE v. ALEXANDER et al.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 321*)—IMPEACHMENT.

The rule that a party is not allowed to impeach his own witness is subject to exceptions. Where a witness for the state had testified on direct examination to a commotion and to the appearance of a wounded man, and on cross-examination had testified to exclamations made by the wounded man, testimony of another witness for the state that the witness first referred to was drunk at the time is considered admissible in the discretion of the court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100; Dec. Dig. § 321.*]

2. CRIMINAL LAW (§ 366*)—EVIDENCE—RES GESTÆ.

Where a wounded man coming out of a stairway from an upper room exclaimed, "I'm shot!" and then said, "Take me home," and being asked "Who shot you?" gave the name of one of three persons who were with him in the room immediately before the shooting, and the wounded man died in about 10 minutes afterwards, his exclamation and answer are admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.*]

3. WITNESSES (§ 383*)—IMPEACHMENT ON COLLATERAL MATTER.

Evidence should not be admitted to contradict a statement of a witness elicited upon cross-examination upon a purely collateral matter, which does not tend to prove or disprove an issue in the case; the contradictory evidence being offered by the party eliciting the statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

4. WITNESSES (§ 240*)—EXAMINATION OF WITNESS—LEADING QUESTIONS.

A witness for the state testified to an encounter between several persons in which one was shot. A defendant who was present at the affray testified that another, also present, fired the shot. He was then asked whether there was a scuffle before the shooting. In the circumstances shown the evidence was admissible, and an objection on the ground that the question was leading was not well taken, although the objection might have been avoided by relating the entire occurrence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

5. CRIMINAL LAW (§ 719*) — ARGUMENT OF COUNSEL—INSTRUCTION.

A remark in the closing argument for the state in a criminal action about turning the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendants loose to get into trouble in other communities for carrying razors is improper, where the evidence does not show that they have been in trouble caused in that way. Upon timely objection an instruction should have been given to prevent misapprehension by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

6. HOMICIDE (§ 288*)—INSTRUCTIONS.

An instruction that the jury have nothing to do with the charge against a person not on trial but against whom there is evidence of guilt may be understood to refer not only to the information, but to the evidence imputing guilt, and if so understood is misleading. A clause should have been added to make the meaning clear.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 593; Dec. Dig. § 288.*]

Appeal from District Court, Edwards County.

Charles Alexander and Floyd Alexander were convicted of manslaughter in the fourth degree, and they appeal. Reversed and remanded.

Chas. E. Lobdell, of Great Bend, and Chas. A. Baker, of Kinsley, for appellants. Jno. S. Dawson, Atty. Gen., and M. A. Merten, of Kinsley, for appellee.

BENSON, J. The defendants appeal from a conviction for manslaughter in the fourth degree in killing H. C. Bussenbark at Belpre, in Edwards county.

Chas. Alexander and H. W. Bennett met in a poolroom and engaged in wrestling and in drinking whisky. For further wrestling and to procure more whisky, Bennett, who was a barber and had his chair in the poolroom, obtained a key from the proprietor, and the two men went upstairs to a hall above, where they continued drinking and wrestling. Bussenbark was a bystander in the poolroom who had not joined in the drinking, but accompanied the others to the hall. A few minutes after the men left the poolroom, the proprietor heard a noise as of chairs being overturned above, and going to the street door saw Bussenbark coming down the stairs from the hall, and heard him exclaim, "I'm shot!" and also heard him say, "Take me home." Asked who shot him, he answered "Bennett." He was taken into a restaurant near by, and died in about 10 minutes. Floyd Alexander followed the wounded man down the front stairs, and the evidence tends to show that he assisted him in leaving the hall. Chas. Alexander came down the back stairs, also in a wounded condition. Bennett, badly intoxicated, sat down in a chair in the hall, and fired a shot down through the floor.

A witness who had gone into the hall by the back stairway for a drink of whisky and stopped in a dressing room testified that through a partially opened door he "saw the two Alexanders, Bussenbark, and Bennett at the head of the stairs. * * * Heard con-

versation among party as to wrestling. Heard Bennett say, 'Here, Curley, you take these things while I go on the mat.' Did not know what was referred to. In about 10 minutes after that heard some one say in tone of surprise rather than anger, 'Why, you son of a bitch!' Didn't know who said this. Opened door then and looked out. Saw 'Red' (Chas.) Alexander hit Bennett a blow on the top of the head, and knock him down. Heard Red say, 'Give me that gun,' and turn, facing Curley (Floyd). The latter started towards his brother. Bussenbark stepped forward, and said, 'No, you don't.' At this time Bennett rose and got into the mêlée. They mixed up for a minute and the gun was discharged. Bussenbark cried out that he was shot. Curley and Bussenbark left the opera house by the front door, the former assisting Bussenbark. Bennett and Red were grappled. Bennett had a 'hammerlock' hold on Alexander. As they turned around in the scuffle witness saw the gun 'in both their hands, but rather in Alexander's hand than in Bennett's and Bennett had a hold of Alexander's hand.' This was the first time witness had seen the gun. While in this position the gun was fired again. Then Alexander said, 'If you'll let me go, I'll get out of here.' Bennett said, 'Go, damn you.' As Alexander ran for the back stair, Bennett fired at him, but seemed to miss. Then Bennett sat down on a chair like a man exhausted. * * * Did not see the gun at any time till after Bussenbark and Curley had left the opera house. Did not know 'Red' Alexander's voice, but saw his lips move when he said, 'Give me that gun.' Didn't know to whom this was addressed."

Floyd Alexander testified that he did not go up the front stairs with the others, but went later up the back stairway.

The pistol used in the affray belonged to Bennett, and was found in the chair in which he sat down after the affray. This weapon was a Colts automatic with barrel two inches in length. Four shells were found in the hall, also a bullet hole through the floor, and one in the wall. A bullet was found in the wound in Chas. Alexander's back. The defendants are brothers. Floyd is 21 years of age and Charles is older. Their home is in Attica. They have been engaged as laborers at Hutchinson, Macks-ville, and in the country about for several years. Both have been arrested for disturbing the peace and for assault, and one of them for selling intoxicating liquor. Each of them testified that they saw Bennett fire the shot that wounded Bussenbark, and that neither of them ever held the pistol. Chas. Alexander in his direct examination was asked if there had been a scuffle between himself and Bennett before the shooting, but upon an objection that the question was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

leading he was not allowed to answer. Bennett was not called as a witness.

In producing its evidence the prosecution called the proprietor of the poolroom, who testified to the scuffling or wrestling in that room, the departure of Bennett, Chas. Alexander, and Bussenbark for the hall above, and the noise of the chairs and disturbance there, but was examined no further. On cross-examination by the prosecution he testified that he assisted the wounded man from the stairway, and heard his exclamations before referred to. The county attorney objected to the evidence of what Bussenbark said, but it was received. Afterwards the prosecution produced testimony, to which an objection was made, tending to prove that this witness was greatly intoxicated at the time to which his testimony related. Chas. Alexander testified that while in the hall above the poolroom Bussenbark drank about three-fourths of a pint of whisky, after Bennett had taken a small drink from the bottle. This testimony was elicited on cross-examination. In rebuttal the state was allowed to prove over the defendant's objection that upon a post mortem examination of the body of the deceased no smell of whisky was perceived.

The prosecuting attorney in his closing argument said: "We might have turned the Alexanders loose to go into other communities to raise disturbances there, to get into trouble for selling liquor, and for carrying razors." There was no evidence that either of the defendants had been in trouble for carrying razors. When asked whether he had attempted to kill a man with a razor, Floyd Alexander testified that he had not, but admitted that he had a razor at the time of making an assault for which he had been tried. This remark of the county attorney was objected to, and a request was made for an instruction to the jury to disregard it. The request was denied. At the close of the argument the defendant requested an instruction to the effect that evidence of previous troubles elicited upon cross-examination was competent as bearing on their credibility as witnesses, but should not be considered as tending to create a probability that they were guilty of the crime with which they were now charged. This request was refused. Among the instructions given was the following: "The defendants, Charles Alexander and Floyd Alexander, are charged in the information jointly with one H. W. Bennett, but are not being tried jointly with the said H. W. Bennett, and in this case you have nothing to do with the charge against H. W. Bennett, and should not consider that charge in arriving at your verdict in this case."

[1] Assignments of error are based upon the rulings referred to. Complaint is made because the prosecution after calling a witness to prove the events that led up to the affray was allowed to impeach this witness

by testimony that he was drunk at the time. An answer is made to this objection by the suggestion that the only material testimony which could be affected by the impeachment was the repetition of the alleged statement of the wounded man that Bennett had shot him, and that statement, it is contended, was incompetent. The general rule forbids an attempted impeachment by one who has first called the witness. *Johnston v. Marriage*, 74 Kan. 208, 86 Pac. 461, 87 Pac. 74. The rule is subject to exceptions, but the discussion of this principle in the case cited makes it unnecessary to examine it at any length here. The state here went no further in the line of impeachment than to show the mental condition of the witness. While the testimony of drunkenness tended to weaken the force of the witness' testimony elicited on cross-examination, it had a similar effect upon his evidence in chief, and we cannot say that it was not within the discretion of the district court to admit it. Besides, another witness testified to the exclamations of the wounded man, and no contradictory evidence appears. The testimony that this witness was drunk even if erroneously admitted was probably not prejudicial.

[2] In this connection it is deemed proper to say that the evidence of the exclamation referred to, and to which the state objected, is deemed admissible. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *Campbell v. Brown*, 81 Kan. 480, 106 Pac. 37, 28 L. R. A. (N. S.) 1142.

[3] The testimony that the post mortem examination gave no evidence of intoxicating liquor in the stomach was produced, it seems, to contradict the testimony of one of the defendants that Bussenbark partook freely of whisky just before his death. The rule that a party is not allowed to contradict testimony of purely collateral facts elicited on cross-examination appears to have been violated. Whether the victim participated in the drinking was an inquiry that did not tend to show who bore a guilty part in the tragedy. The collateral inquiry was of no consequence except to give an opportunity to contradict the witness, and for that purpose it was not admissible.

[4] The examination of the defendant Chas. Alexander as a witness was unduly restricted by sustaining the objection to the question whether a scuffle had preceded the shooting. It is true the objection was that it was leading, and the objection might have been avoided by calling upon the witness to relate the occurrences, still no good reason is apparent why the question in the form asked should not have been allowed. The principal witness for the state had testified to an encounter which might be called a scuffle, and the defendant should have been allowed to testify whether a scuffle preceded the shot without reciting the occurrences in detail in his examination in chief.

[5] The implication in the closing argu-

ment of the prosecutor that the defendants had been in trouble by carrying razors is conceded in the brief of the state to have been improper, but with the suggestion that it was not prejudicial. It must be remembered that several persons were participating in a drunken bout. One was killed; there was no certain evidence on the part of the state to prove who fired the shot. The vicious character of any one taking part in the affray would naturally be considered of moment. The question and answer both referring to a razor may have been confused in the minds of the jury by the objectionable remark in the argument. Attention being at once called to it, the situation merited such an instruction as would have prevented any misapprehension.

[8] The instruction quoted above was objected to. It may be variously interpreted. To one trained in court procedure the statement that the jury had nothing to do with the charge against Bennett would not be misapprehended. Others might understand that the charge meant, not only the information, but the evidence imputing guilt. If understood in the latter sense, it was misleading. It was a question for the jury whether Bennett or one of the Alexanders fired the shot that killed Bussenbark. While it is true that the defendants may have been guilty participants, even if Bennett was the principal, still the jury ought not to have been precluded from considering the evidence that charged him with the shooting. The word "charge" sometimes means to make liable, and the jury may have so understood it. A clause should have been added to make the meaning clear.

The testimony relied on to support the verdict does not show who fired the fatal shot, and seems inconclusive as to the part taken by the defendants in the tragedy. A careful examination of the record has been made to determine whether the errors referred to probably led to a result which otherwise would not have been reached, although in other circumstances they might perhaps be disregarded. The district court, it appears, approved the verdict with hesitancy. This court is not satisfied that justice has been done, and it is concluded that the errors referred to should not be disregarded.

The judgment is reversed and the cause remanded for a new trial. All the Justices concurring.

LOWE v. WEAVER.

(Supreme Court of Kansas. April 12, 1913.)

1. WORK AND LABOR (§ 6*)—RIGHT TO COMPENSATION—RELATIONSHIP.

Where plaintiff, a minor, lived with defendant as a member of his family and received the same treatment as would be accorded to a son, he is not entitled to compensation for serv-

ices rendered without any agreement or understanding that he was to be paid.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 11; Dec. Dig. § 6.*]

2. WORK AND LABOR (§ 30*)—VERDICT—FINDINGS—CONFLICT.

In an action by a minor for compensation for services rendered, where the question in issue was whether he occupied the relation of the son toward defendant, three special findings of the jury that defendant did not always treat plaintiff as a father would treat a son, that he did not always treat him as a son after plaintiff came to live with him, but that after plaintiff came to the home of defendant the second time he provided him with such necessities, schooling, and spending money as an ordinary farmer would extend to his son, are so inconsistent that a verdict for plaintiff cannot stand.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.*]

Appeal from District Court, Miami County.

Action by Charles E. Lowe, a minor, by his next friend, William Tator, against John S. Weaver. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Sheridan, Meuser & Sheridan, of Paola, for appellant. Lane & Lane, of Paola, for appellee.

PER CURIAM. [1] The rights and obligations of the parties depend upon the relations that existed between them. If the appellee was living in the family as a member thereof as a son and received home comforts, clothing, food, schooling, and attention in sickness, and, on the other hand, labored and rendered services for the appellant without any agreement or understanding that either was to receive compensation from the other, no cause of action exists in favor of either against the other. *Sawyer v. Sauer*, 10 Kan. 519; *Wiley v. Bull*, 41 Kan. 206, 20 Pac. 855.

[2] The relation existing between the parties was properly submitted to the jury as a question of fact, and they made three special findings relating thereto, as follows:

"I. Is it true that the defendant always treated the plaintiff, during the times mentioned in the plaintiff's petition, substantially as a father would treat a son? Ans. No."

"III. Is it true that the defendant took the plaintiff into his home from the time the plaintiff last came to his home to live, and thereafter treated him as if he were a son or substantially the same? Ans. No."

"VII. State if it is true that the defendant, from the time the plaintiff came to the home of the defendant the second time, furnished him with a good home, provided him with raiment, lodging, schooling, and some spending money, along from time to time, and substantially all the necessities of life, such as an ordinary farmer would extend to his son? Ans. Yes."

There seems to be a conflict in these findings. Also, the finding that appellant agreed to give appellee a horse and buggy for his

services during the time mentioned in the petition is very indefinite, and the evidence in support thereof is indefinite as to whether the horse and buggy was promised as a gift or as compensation for services rendered or to be rendered.

For these reasons the judgment is reversed and the case is remanded for a new trial.

KANSAS POSTAL TELEGRAPH CABLE CO. v. LEAVENWORTH TERMINAL RY. & BRIDGE CO.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 93*)—COMPENSATION—PROPERTY NOT TAKEN.

In condemnation proceedings damages to property not taken should be confined to those which from the evidence may reasonably be expected to result.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 237, 238; Dec. Dig. § 93.*]

2. EMINENT DOMAIN (§ 200*) — COMPENSATION—AWARD OF DAMAGES.

An item allowed by the jury without reasonable evidential basis should be set aside.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540; Dec. Dig. § 200.*]

Appeal from District Court, Leavenworth County.

Action by the Kansas Postal Telegraph Cable Company against the Leavenworth Terminal Railway & Bridge Company. From an award of damages in condemnation proceedings, plaintiff appeals. Modified.

Gage, Ladd & Small, of Kansas City, Mo., and A. E. Dempsey, of Leavenworth, for appellant. W. W. Hooper, of Leavenworth, and Jno. Barton Payne, of Chicago, Ill., for appellee.

WEST, J. The plaintiff appeals from an award of damages. Condemnation proceedings were begun to condemn the right to string its wires over the Kansas portion of the defendant's bridge. It was agreed that the telegraph company had a right to institute and maintain the proceeding and that the only question for the jury was the amount of damages to be awarded. The jury fixed the sum at \$2,000 and answered certain special questions showing the items making up the total. Complaint is made that some of these items were not supported by any testimony, that the court erred in its instructions, and that the award was excessive and speculative.

The measure of damages adopted in the examination of witnesses without objection, and used by the court in the instructions, was the difference between the value of the structure before and after the appropriation. The jury allowed \$1,000 for additional trouble in turning the draw, and \$200 for the wearing off or scraping off of paint by the plaintiff's employes. It is insisted that the

first was unwarranted by the evidence and the second imaginary. But evidence was introduced which justified these allowances, and the fairness of the jury was shown by disallowing various items claimed and more or less supported. The total damage was by the defendant's witnesses fixed at \$8,000 to \$10,000; $\frac{600}{1100}$ being the Kansas portion—or about 60 per cent. The only witness for plaintiff who attempted to fix the damage estimated it at \$722. The jury were instructed that they might consider, among other things, "the future damages that might accrue to said bridge by reason of personal property being injured thereon by reason of said wires falling by storm or other causes." It is insisted that this left the jury to conjecture causes including the negligence of the bridge company. The plaintiff requested an instruction that they should not consider the mere possibility that some of the employes of the plaintiff might at some time be injured by trains moving across the bridge, the mere possibility that the wires or cable of the telegraph company might at some future time come in contact with high tension electric wires and damage the bridge, or that at some remote time in the future the defendant might wish to reconstruct its bridge, and that the plaintiff's cable or apparatus might interfere therewith.

"That all mere possibilities were too remote and improbable to be considered and such only should be considered as were shown by the testimony as reasonably sure to occur." This was refused. The jury, however, allowed nothing for damages because of the possibility of the plaintiff's employes meeting with accidents by the operation of trains over the bridge for which the bridge company might be liable and allowed nothing on account of possible contact between the plaintiff's wires and electrical currents that might pass along their wires and injure persons and property. Neither did they allow anything for possible interference of the telegraph cable with the work of rebuilding or reconstructing the bridge. Hence the refusal to give this instruction could have worked no harm to the plaintiff except as to the admonition to regard only such damages as were shown to be reasonably sure to occur.

[1] We think, however, the defendant was entitled to be compensated for such damages as the jury believed from the evidence might reasonably be expected to result, and not merely those which were reasonably sure to occur. *Missouri, K. & T. Ry. Co. v. Haines*, 10 Kan. 439; *Atchison & D. R. Co. v. Lyon*, 24 Kan. 745; *K. O. & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15. The use of the words "other causes" by the court in its instruction should have been limited or explained, but we do not think their use misled the jury to the prejudice of the plaintiff.

[2] The principal contention is that the al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lowance of \$545 for damages to personal property on the bridge was unwarranted. It is insisted that there was not the slightest evidence showing or tending to show that there was or would be any personal property on the bridge liable to be damaged. The defendant replies to this by asking why, if there was no evidence, the plaintiff submitted question 22 to the jury for answer, to which the plaintiff replies that, the court having given an instruction covering this matter at the request of the defendant to which the plaintiff excepted, it took the very natural means of self-defense of asking the jury to state what they allowed in this respect in order to show that such allowance, if any, would be without evidential support. We do not find anything in the evidence showing or tending to show the presence of any personal property on the bridge likely to be damaged by reason of the plaintiff's wires, and we are at a loss to know what the jury had in mind as a basis for this item of allowance. *Postal Telegraph Co. v. Peyton*, 124 Ga. 746, 52 S. E. 803, 3 L. R. A. (N. S.) 333, and note. Finding no basis for it, we think it should be set aside.

The judgment is therefore modified by deducting the item of \$545 therefrom. In other respects it is affirmed. All the Justices concurring.

FERGUSON v. CLOON.

(Supreme Court of Kansas. April 12, 1913.)

(*Syllabus by the Court.*)

1. MORTGAGES (§ 534*)—FORECLOSURE SALE—TITLE ACQUIRED.

It is a general rule that at a foreclosure sale the purchaser takes the title of all the parties to the action.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1555; Dec. Dig. § 534.*]

2. MORTGAGES (§ 534*) — FORECLOSURE — ESTOPPEL.

When one having a reversionary interest in real estate prosecutes a foreclosure action against mortgagors whose interest is subject to that right, without claiming the reversion or referring to it in any manner, and causes the property to be sold, he is estopped from asserting title afterwards under the reversion. The general rule referred to in the first paragraph above applies.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1555; Dec. Dig. § 534.*]

Appeal from District Court, Franklin County.

Action by Robert M. Ferguson against Sylvia C. Cloon. Judgment for defendant, and plaintiff appeals. Affirmed.

F. M. Harris, of Ottawa, for appellant. W. J. Costigan, of Ottawa, for appellee.

BENSON, J. This is an action in ejectment for the recovery of town lots. The plaintiff conveyed the lots to the trustees of a church as a site for a house of worship.

The conveyance was upon a condition expressed in the deed that the lots were to be used for church purposes and in case that use should cease the lots without improvements should revert to the grantor. The deed was recorded. The proposed building was erected and used for church purposes. The trustees borrowed a sum of money from the plaintiff and gave him a mortgage upon the property as security. The plaintiff was one of the trustees signing the mortgage which contained no reservation or reference to the reversion referred to but did contain covenants of general warranty. This mortgage was foreclosed in a suit by the plaintiff for default in payment, and in pursuance to the judgment the property was purchased at the sheriff's sale by the defendant to whom a certificate was issued. Before the period of redemption had expired, the trustees caused a quitclaim deed to the property to be made to the defendant who then applied to the court for an order requiring the sheriff to make a deed in lieu of the certificate. At that time the plaintiff had ceased to be a trustee and a son of the defendant had become one of the board. The plaintiff appeared and contested this motion; but the court, treating the conveyance from the trustees as a waiver of the right of redemption, directed the sheriff to execute a deed, which order was complied with. The consideration paid by the defendant was sufficient to pay the judgment and left a surplus to the trustees. The deed made by the plaintiff was on record when the foreclosure proceedings were begun. The plaintiff was present at the sale and bid upon the property. No notice was given nor suggestion made that anything less than the fee-simple title was being sold, and nothing in the pleadings or record indicated that the plaintiff claimed any interest in the property other than as a mortgagee. No other claim was asserted until the application for a sheriff's deed, when the plaintiff objected and set out his interest in the property under the clause in the conveyance to the trustees providing for a reversion. The use of the property for church purposes had ceased before the commencement of this action to enforce the reversion.

[1] The court, after finding the facts of which the foregoing is a summary, held that the plaintiff was estopped from asserting a reversion and that the defendant had acquired all the title and interest of all the parties to the foreclosure. This conclusion is approved. The general rule is that in judicial sales such as the one in question the purchaser obtains the title of all the parties to the suit, that is, of mortgagee and mortgagor, both being parties. 2 *Jones on Mortgages*, § 1654; 2 *Freeman on Executions*, § 335, p. 1127; *Wiltale on Mortgage Foreclosures*, § 577; *Young v. Brand*, 15 Neb. 601, 19 N. W.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

494; Hart v. Beardsley, 67 Neb. 145, 93 N. W. 423; Watson v. Dundee M. & T. I. Co., 12 Or. 474, 482, 8 Pac. 548; 17 Am. & Eng. Encyc. of L. (2d Ed.) 1010.

[2] It is stated in the case last cited that the effect of foreclosure is to transfer to the purchaser the rights of the mortgagee so far as he has any claim or interest in the premises as security for his debt. In this case the mortgagee proceeded precisely as though the mortgagors had the complete title, referring in no way to his own reserved interest. He invoked the aid of the court in collecting his debt by a sale of the property without reservation, and it was so sold in his presence and by his co-operation. Although the purchaser had the constructive notice of the right of reversion afforded by the record of the deed, she also had notice of the foreclosure proceeding indicating a sale without reservation. The right to the reverter did not compel an exercise of that right, and the attempt to exercise it after the sale and payment of full value was too late. It is held that in the situation shown the plaintiff is estopped from asserting the reversion, and that the general rule that the title of all the parties passes by a foreclosure sale was rightfully applied.

The judgment is affirmed. All the Justices concurring.

JONES v. HEDSTROM.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 148*) — CONTRACT — PERFORMANCE — NECESSITY OF TENDER.

Where a written contract is made between the owner and a proposed purchaser of a tract of land, in which contract the terms of the transaction are specified in full, and where the purchaser thereafter requests that the deed be made to recite a different consideration than is recited in the contract and the name of the grantee be left blank, the seller is not bound to comply with the request, nor is he justified by reason thereof in repudiating the whole transaction, but it is his duty to grant the request or to tender performance in accordance with the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 290-295; Dec. Dig. § 148.*]

2. BROKERS (§ 71*)—COMMISSION—DAMAGES.

Where a real estate agent has a contract with the owner of certain lands that if the agent secures a purchaser for the land at a specified price per acre net to the owner, the implied agreement being that any excess obtained should go to the agent as his commission, and the agent secures a buyer who executes a contract to buy the land upon the terms prescribed to the agent, but at the price of \$1 more per acre than the net price stated, and such purchaser is able and willing to buy the land pursuant to his contract, but the owner refuses without just cause to convey the land, held, that the agent is entitled to recover of the

owner as damages a judgment equal to \$1 per acre of the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56; Dec. Dig. § 71.*]

3. ATTACHMENT (§ 241*)—ORDER OF SALE.

Where, in an action for the recovery of money, an attachment is issued and levied upon real estate, and the action proceeds to judgment in favor of the plaintiff, no question as to the validity of the attachment having been raised, an order for the sale of the attached property in case of the nonpayment of the judgment is properly made.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 829-838; Dec. Dig. § 241.*]

Appeal from District Court, Butler County.

Action by H. A. Jones against A. A. Hedstrom. From a judgment for plaintiff, defendant appeals. Affirmed.

J. T. Pringle, of Burlingame, C. L. Harris, of Eldorado, and W. S. Kretzinger, of Escondido, Cal., for appellant. T. A. Kramer and Geo. J. Benson, both of Eldorado, for appellee.

SMITH, J. The appellee solicited from the appellant, by letter, the agency to sell 640 acres of land owned by appellant in Butler county, and informed appellant that he had a buyer offering \$12,500 therefor. In the reply the appellant informed appellee as follows: "Just at present I do not care to sell it. Probably later on it will be on the market." Without further word from the appellee, 10 days later the appellant wrote to appellee as follows: "Was going to hold off for a while on that land but if I can get \$12,800 net to me I'll sell." He also gave a statement of the incumbrances on the land and the cash necessary to make the deal, assuming that the purchaser would assume the incumbrance. Several letters followed from appellant to appellee in which appellant urged the selling of the land, and giving details as to the incumbrances, etc. On October 25, 1909, attorneys for appellee sent to appellant a copy of a contract which appellee had made with John C. Hoyt. The contract was dated October 22, 1909. November 8, 1909, appellant wrote to appellee the following letter: "I have your letters and telegrams saying you have sold the land. Have given the same to Mr. J. T. Pringle, Burlingame, Ks., to look after as you probably know. Want to get everything straightened up as early as possible. Yes, I should have gotten more, but wanted to sell it now so of course it's alright. Glad that you sold it. I know you have been making quite an effort and you are entitled to something. Hurry things up." Afterwards Mr. Pringle, the attorney referred to in the above letter, wrote to Kramer and Benson, appellee's attorneys, the following letter: "I am sending the Hedstrom abstract. Please note carefully the letter of Davis, Welcome & Co. Make no changes in this abstract as it is to go back to the Insurance Co. in New York. If title is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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satisfactory prepare a deed for Mr. Hedstrom to sign and send it to me." November 30, 1900, the appellant wrote to the appellee making objections to some requests made as to the terms of the deed, which had been sent to his attorneys to be executed by him, and in closing said: "I feel that under the circumstances, I would rather declare the whole matter of selling my land off until I see or write you further. You need not further offer the land for sale until I see or write you." On December 29, 1900, the appellant definitely informed appellee that he called the deal off. As shown by the contract and letters, the appellee had negotiated a sale of the land for \$21 per acre, and the price at which he was to account to appellant was \$20 per acre. Thereafter the appellee commenced this action to recover \$640 commission, which by the terms of the letter he claims he was entitled to receive.

It is true that in the negotiations the purchaser through the appellee requested that the consideration for the deed be stated as "One (\$1.00) and other valuable consideration and 00/100 dollars," and that the name of the grantee be left blank, but by the terms of the contract appellant had a right to deed the land to Mr. Hoyt or to any party whom Hoyt might designate. A deed stating the true consideration and conveying the land to James C. Hoyt would have met the conditions of the contract on appellant's part. Neither the appellee nor the purchaser had at any time made the requests a condition for closing the deal, and the requests were made after the execution of the contract by Hoyt. The contract was approved by appellant in his letter of November 9th, more than two weeks after it had been executed by Hoyt and forwarded to him. In this letter appellant urged the closing of the transaction as early as possible. By the contract the appellant was advised that the purchaser had deposited \$350 in a bank at Eldorado to secure the performance of the contract on his part, and there is evidence that this was the fact. Exceptions are taken to the overruling of appellant's objection to the evidence of Hoyt that he had made arrangements to raise the money to comply with the contract; also, that the court erred in overruling the demurrer to appellee's evidence, in rendering judgment for appellee, and in overruling the motion for new trial. It is urged that, as Hoyt admitted that he did not have sufficient money to comply with his contract, the appellant was not, by reason thereof, bound to forward his deed. The objections are untenable. Hoyt had the amount of money deposited in the bank which was required by the contract to protect appellant from any damages preliminary to the production of the deed and abstract, and also had assurance of procuring the additional sum necessary to complete the purchase. Moreover, the supposed uncertainty of Hoyt's ability to comply

with his contract was not the ground of appellant's refusal to complete the transaction. There was ample evidence to support the claim of the appellee and to justify the judgment.

[1] While a deed was requested which did not in every respect conform to the contract which had been approved by the appellant, the appellant was not obliged to comply with such request, nor, on the other hand, was he justified in repudiating the whole transaction because of such request. If he was not willing to allow the request, it was his duty to tender performance in accordance with the contract. This he failed to do.

[3] At the beginning of the action the appellee had caused an attachment to be levied upon the appellant's land, and in rendering the judgment the court ordered the sale of the land to satisfy the judgment. The abstract of appellant does not indicate that any effort was made to dissolve the attachment before the trial, and therefore, if the judgment was proper, the order of sale, conditioned on the nonpayment of the judgment, followed as a matter of course.

[2] There was evidence to sustain a finding that the appellee secured a purchaser who was able and willing to buy and pay for the land in accordance with the contract, and such finding is implied in the decision of the court in favor of the appellee.

The judgment is affirmed. All the justices concurring.

GRAVES v. NEOSHO FALLS BANK et al.†
(Supreme Court of Kansas. April 12, 1913.)

1. BANKS AND BANKING (§ 77*)—INSOLVENCY—ACTION AGAINST RECEIVER.

An action to recover money which a bank, subsequently placed in the hands of a receiver, had received in payment of a note, but which it had failed to apply thereon, thereby compelling plaintiff to pay the debt again to the purchaser of the note, is properly brought against the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

2. BANKRUPTCY (§ 341*)—PRESENTATION OF CLAIMS—STRIKING OUT CLAIMS—EFFECT.

The presentation of a claim against a bankrupt to the trustee in bankruptcy does not prevent an action thereon against the bankrupt, where the claim was stricken out and neither allowed nor paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528; Dec. Dig. § 341.*]

3. JUDGMENT (§ 565*)—RES JUDICATA—DISMISSAL—EFFECT.

The dismissal, without prejudice, of a motion for the allowance of a claim of a creditor of a firm seeking to intervene in a suit for an accounting between the partners does not bar an independent action on the claim.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1018; Dec. Dig. § 565.*]

Appeal from District Court, Woodson County.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied May 16, 1913.

Action by John Graves against the Neosho Falls Bank and J. G. Wilson, as receiver. From a judgment for plaintiff, defendants appeal. Affirmed.

Baxter D. McClain, of Iola, for appellants. S. C. Holmes, of Yates Center, and J. W. Dickson, of Neosho Falls, for appellee.

PER CURIAM. It was not necessary to set out or attach a copy of the note spoken of, as the action was not brought upon the note, but rather to recover money which appellant had received in payment of the note and had failed to apply it to that purpose, with the result that appellee was compelled to pay the debt again to the purchaser of the note.

[1-3] The action was properly brought against the receiver of the bank, and the judgment against appellants is supported by the testimony. Although the claim was once presented to the referee in a bankruptcy proceeding, it was subsequently stricken out, and was neither allowed nor paid. There was an attempt, too, by appellee to intervene in the action for an accounting between the partners of the Neosho Falls Bank. His motion for the allowance of the claim, however, was dismissed. There is a dispute as to whether it was dismissed with or without prejudice. The proof offered tended to show, as the trial court must have held, that it was dismissed without prejudice, and hence its presentation did not bar a recovery herein; nor was appellee concluded by the presentation of the claim in the bankruptcy court.

Other assignments of error were made, but are found to be immaterial.

The judgment is affirmed.

NELSON v. SCHOONOVER et al.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. JURY (§ 14*)—RIGHT TO JURY TRIAL—ACTION TO ACQUIRE TITLE.

An action against heirs or devisees to acquire title to real property, because the decedent, under whom they claim, had agreed to leave it by will to the plaintiff, is in the nature of one for specific performance of a contract to convey land, and in the trial thereof a jury cannot be demanded as a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

2. SPECIFIC PERFORMANCE (§ 41*) — ORAL AGREEMENT RELATING TO LAND—HUSBAND AND WIFE.

An oral agreement between husband and wife that she will make a will leaving to him all the property owned by her at the time of her death, both real and personal, in consideration of real estate owned by him being conveyed to her, is rendered enforceable, notwithstanding the statute of frauds, where, in accordance with its provisions, the title to land paid for by the husband is taken in the wife's name, and she makes such a will, and thereafter, in reliance

thereon, he expends labor and money in improving the property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-123; Dec. Dig. § 41.*]

3. WILLS (§ 79*)—RIGHT TO REVOKE.

A will executed under an agreement founded upon a valuable consideration is contractual as well as testamentary. In the latter aspect it may be revoked without the consent of the beneficiary, but not in the former. Its revocation as an instrument capable of probate is effected by the execution of a new will, and this may be enforced so far as the provisions of the earlier will, which are based on contract, are not violated, but no further.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 199; Dec. Dig. § 79.*]

4. EXECUTORS AND ADMINISTRATORS (§ 327*)—DEBTS AND EXPENSES—SALE OF PROPERTY—CONTRACTUAL WILL.

Notwithstanding an agreement by a wife, founded upon a valuable consideration, to leave to her husband by will the property owned by her at the time of her death, such property will be subject to sale by the executor where that is necessary for the payment of valid demands against the estate or of the costs of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1844; Dec. Dig. § 327.*]

5. WILLS (§ 79*) — SUBSEQUENT WILL—EFFECT.

Where a testatrix, in pursuance of a contract with her husband, executes a will leaving to him all her property, with a proviso that, at such time as he could without inconvenience, he should pay a stated amount to her son, a subsequent will, undertaking to give half her property to a trustee for the benefit of her son, may be enforced to the extent of requiring the payment of such amount to the trustee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 199; Dec. Dig. § 79.*]

(Additional Syllabus by Editorial Staff.)

6. EXECUTORS AND ADMINISTRATORS (§ 261*)—"FUNERAL EXPENSES."

The expense of erecting a suitable monument over the grave of deceased is to be classed among "funeral expenses" within Gen. St. 1909, § 3515, which gives funeral expenses priority over all other demands against decedent's estate (citing 4 Words and Phrases, p. 3008).

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 944-974; Dec. Dig. § 261.*]

Appeal from District Court, Butler County.

Action by Walter V. Nelson against Clarence Schoonover and others. From a decree for plaintiff, defendants appeal. Modified and affirmed.

T. A. Kramer, of Eldorado, J. K. Coddling, of Lansing, and Kramer & Benson, of Eldorado, for appellants. Hamilton & Leydig and H. W. Schumacher, all of Eldorado, for appellee.

MASON, J. Nancy G. Nelson died, leaving a will executed shortly before her death, which was admitted to probate. By it she undertook to give one half of her property to her husband, Walter V. Nelson, and the other half to her executor in trust for Clarence Schoonover, her son by a former mar-

riage. Her husband brought action against her son and the executor, claiming to be entitled to all the real estate standing in the name of his wife at the time of her death. The petition alleged, in substance, that Nelson and his wife some years before had orally agreed that all real estate acquired by either of them should be deeded to her, and that she would make a will leaving to him all property, both real and personal, of which she died possessed; that thereafter, in pursuance of this arrangement, the real estate in question was purchased with means furnished by him, the title being taken in her name, and she executed such a will and delivered it to him; that, in reliance on the agreement, he had expended money and labor improving the real estate; that, in some way unknown to the plaintiff, this will had disappeared and could not be found. These allegations were denied by the defendants. Upon the trial the court found for the plaintiff upon all the issues thus raised. Judgment was rendered setting aside the will, decreeing the plaintiff to be the owner of the real estate in controversy, requiring the defendants to convey it to him, and providing that, upon their failure to do so, the decree should operate as a conveyance. The defendants appeal.

A number of special findings were made. Some of them are attacked by the defendants; but we think there was sufficient evidence to support at least such of them as are of present importance, and they will be treated as the established facts of the case. The plaintiff testified in detail as to the contents of the first will. The court afterwards struck out this testimony. Apart from it, however, there was sufficient evidence that Mrs. Nelson had made a will at the time indicated; that it was made in pursuance of an agreement with her husband; and that this agreement was substantially as claimed by him. The finding as to the execution of the will, and as to its contents so far as here important, is therefore supported by evidence outside of the plaintiff's own testimony.

[1] Some features of the case—some phases of the pleadings, evidence, findings, and judgment—tend to suggest that the action is one to enforce a trust with respect to real estate, growing out of an oral agreement. If it were to be regarded in that light, there might be some difficulty in determining whether, under all the circumstances, it could be enforced, in view of the statute requiring express trusts concerning lands to be in writing. Gen. St. 1909, § 9694. In somewhat similar situations an implied trust had been held to arise out of the confidential relations existing between husband and wife (note, 39 L. R. A. [N. S.] 925); and a part performance has been held to take such a case out of the statute. Same note, 39 L. R. A. (N. S.) 928. Taking the pleadings, evidence, and findings as a whole, however, the

plaintiff's right of action does not appear to be grounded upon the creation of an express trust. Under the agreement between him and his wife, her title to the real estate was not one thing in law and another in equity. She did not have merely a life estate. Her title was just what it appeared to be. She was the actual owner of the property. She did not even undertake to keep it during her lifetime and see that the title passed to her husband at her death. She merely contracted that whatever property she might own at her death should go to him by her will. The action, therefore, must be regarded as essentially one for the specific performance of a contract to make a will in the plaintiff's favor. "An agreement in writing, made upon sufficient consideration, to devise real estate is enforceable by specific performance against the heirs of the testator." *Newton v. Lyon*, 62 Kan. 306, 310, 62 Pac. 1000; *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351; *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878; 30 A. & E. Encycl. of L. 621. Whether or not the relief sought is described with technical accuracy as specific performance, it is of that nature.

"An agreement to make a certain disposition of property by will is one which, strictly speaking, is not capable of a specific execution, yet it is within the jurisdiction of a court of equity to do what is equivalent to a specific performance of such an agreement. Such a contract is enforced after the death of the promisor by fastening a trust on the property in the hands of the heirs, devisees, and personal representatives and others holding the property with notice of the contract or as volunteers." 36 Cyc. 735. An action of this character is clearly equitable, and the defendant's demand for a jury was properly denied. 36 Cyc. 788. See, also, *Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194.

[2] The original agreement between the husband and wife, as it included a contract to devise real estate, was within the statute of frauds. Note, 14 L. R. A. 862; note, 5 Ann. Cas. 495; note, 20 Ann. Cas. 1137; note, 102 Am. St. Rep. 240. However, the conveying of the real estate to his wife, the actual making of the will, and the improvement of the property by the plaintiff in reliance upon the agreement are sufficient to take the case out of the statute, viewed as part performance, accompanied by such a change of conditions as to make the denial of enforcement inequitable. Note, 14 L. R. A. 863; note, 102 Am. St. Rep. 241. The will itself has been treated as such a memorandum of the agreement as to satisfy the statute. *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Shroyer, Appellant, v. Smith*, 204 Pa. 310, 54 Atl. 24. See, also, 29 A. & E. Encycl. of L. 854.

[3] A will duly executed, in pursuance of an agreement based upon a valuable consideration, becomes itself, in a sense, an en-

forceable contract. The testator cannot, by making a later will, escape the obligation confirmed by the first one. 40 Cyc. 1068; Schouler on Wills (3d Ed.) § 452. The delivery of the will to the beneficiary has been treated as of importance in emphasizing the contractual feature of the transaction (40 Cyc. 1068, note 2), but has been said not to be essential. Johnson et al. v. McCue et al., 34 Pa. 180. These considerations lead to the conclusion that the plaintiff was entitled to relief, but not necessarily to the full extent of that granted by the trial court. There is no suggestion of a purpose to have the first will enforced as such. By making it, Mrs. Nelson confirmed her obligation to make her husband her devisee and legatee, but she did not necessarily incapacitate herself from making a later will which should be valid except so far as it should impinge upon this obligation. 40 Cyc. 1074.

"One may bind oneself to make a bequest or devise of a certain amount or of a certain piece of property, or perhaps of what one now owns. * * * That is only saying that, the relation of debtor and creditor having been created, it may be agreed between the parties that the creditor's claim shall be paid after the debtor's death out of property of the debtor now, it may be, specifically designated for the purpose. That agreement may, in a case otherwise proper, be specifically enforced against the debtor's estate after his death. * * * Without making any such agreement at all, the debtor may become so involved as not to be able to dispose of his property by will, except to his creditors according to their rights. But he may make and revoke wills notwithstanding, and his acts may be perfectly good as testamentary acts (i. e., acts entitled to probate). Thus, having made a will in accordance with a binding agreement to devise a certain piece of land, he may revoke the will entirely, so that the instrument cannot be admitted to probate at all, or he may revoke the particular devise, so that it can be admitted to probate only as it stands after the act of revocation. * * * Nor would any court attempt to restrain him from the act. The agreement, however, would of course be binding still. Nothing more than this is in reality meant by such a statement as that in Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658, that the will, once made according to the contract, would be irrevocable in regard to the particular property to be devised; the will cannot be revoked so as to destroy the binding contract, that is all." 1 Jarman on Wills, (8th Ed.) Bigelow's note, pp. 18, 19.

"Nor would it be inconsistent with what has been said to say that one may bind himself by contract not to revoke one's will. There is no way of preventing a person from breaking such agreement. The instrument, being a will and not itself creating rights while the testator is alive, may be revoked

by him. It matters not, as regards that power of revocation, that by some other transaction the testator has bound himself not to revoke the will; such fact would avail nothing in a court of probate upon an attempt to set up a will which the testator had revoked according to law. All that the external agreement amounts to is that, if it is broken, the courts will enforce performance of the thing promised, out of the estate of the party bound, after his death." Bigelow on Wills, p. 110.

"The general rule under which the revocable character of wills is universally admitted to exist is subject to a seeming exception, where the execution of the will is a part of a contract to make a will, and the person in whose favor the devise was made has gone into possession and made expenditures upon faith in the contract. Perhaps it is hardly correct to claim that the will is irrevocable. While the testator may destroy the will or execute another revoking it, the contract itself cannot be rescinded, and will be enforced by the court in favor of the person who has acted upon it." 1 Underhill on Wills, § 289.

[4] As already pointed out Mrs. Nelson did not promise to devise specific real estate to her husband, but to leave to him such property, real and personal, as she should own at the time of her death. The plaintiff's claim is subordinate to that of creditors of the estate. If the personal property is insufficient to pay all valid demands, so much of the real estate as may be necessary for the purpose may be sold by the executor. The will contained a provision for the erection of a monument at the testator's grave, at a cost of not over \$100. This amount is obviously reasonable.

[6] The statute gives funeral expenses priority over all other demands against the estate of the decedent. Gen. Stat. 1909, § 3515. "The expense of erecting a suitable monument over the grave of the deceased is to be classed among the funeral expenses." 4 Words and Phrases Jud. Def. 3008. Therefore the executor is authorized to carry out this provision of the will, even if the sale of a part of the real estate is thereby made necessary.

[8] The plaintiff alleges in his petition that the first will, which he accepted as a compliance with the agreement, contained a provision requiring him to pay to his wife's son, Clarence Schoonover, \$500 "at such times and in such amounts as he can without inconvenience to himself." The requirement to pay the amount named was absolute, notwithstanding the qualification respecting time and manner, which should doubtless be construed as requiring payment to be made within a reasonable time. Benton v. Benton, 78 Kan. 366, 97 Pac. 378, 130 Am. St. Rep. 376, 27 L. R. A. (N. S.) 300. See, also, note. It is not a substantial impairment of the plaintiff's rights under the original will to

make this \$500 a direct charge upon the estate and to require it to be handled by a trustee for the benefit of the testator's son, instead of being paid to him outright. The new will is therefore enforceable to the extent that the executor may set apart to himself, in his capacity as trustee for Clarence Schoonover, the sum of \$500, to be derived, if necessary, from the sale of real estate.

The defendants maintain that the plaintiff is not entitled to enforce the contract with his wife, because he had violated it by causing the title to one tract of land to be taken in their joint names, instead of in the name of his wife, as the agreement required. This tract was afterwards sold, and the proceeds were invested in land, the title to which was taken in the name of the wife. We do not think the fact that for a time the title was allowed to rest in both the husband and wife is fatal to a recovery on the contract.

The judgment of the district court is modified to this extent; the provision setting the will is vacated; the provisions for vesting the title to the real estate in the plaintiff are affirmed, subject to the qualification that, in the absence of sufficient personal property, so much of it may be sold by the executor as proves to be necessary for the purposes hereinbefore indicated. All the Justices concurring.

DABNEY et al. v. COMES et al.
(Supreme Court of Kansas. April 12, 1913.)
Costs (§ 144*)—APPEAL BOND — JUDGMENT AGAINST SURETIES.

Under Gen. St. 1909, § 6205 (Code Civ. Proc. § 610), judgment may be entered against sureties on a cost bond on motion by any person having a right to any part of the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 559; Dec. Dig. § 144.*]

Appeal from District Court, Chautauqua County.

Action by W. M. Dabney and others against A. E. Comes and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. W. Mertz and J. E. Brooks, both of Sedan, for appellants. Carl Ackerman, of Sedan, for appellees.

PER CURIAM. The sureties on a cost bond appeal from a judgment entered against them for the amount of costs adjudged against the plaintiff in the action. The judgment was entered by the court upon motions filed by the former clerk of the district court and by the defendants after final judgment had been rendered in the action in favor of the defendants and against the plaintiff.

The objections which are urged against the judgment are without merit. The sureties were not entitled to a jury trial. There was no disputed question of fact. It would

be strange if a court required the aid of a jury in determining the amount of costs which have accrued in an action and of which the records of the court are the only evidence. Gen. St. 1909, § 6205 (Code Civ. Proc. § 610), authorizes the court upon motion of the defendant or any person having a right to any part of the costs to enter up judgment against the surety for the amount of costs adjudged against the plaintiff and remaining unpaid. Ten days' notice of the motion is required and the judgment is to be entered in the name of the defendant. The proceeding is a summary one. The provisions of the statute were followed in the present case, and no reason is shown why the judgment should not be affirmed.

It is affirmed.

ROGERS v. LINDSAY.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

GUARDIAN AND WARD (§ 150*)—COMPENSATION—MISTAKE IN ACCOUNTS.

Mere mistakes in keeping accounts with the estate, where no fraud is shown, do not forfeit a guardian's right to compensation for his services.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 498-500, 502, 504-507; Dec. Dig. § 150.*]

Appeal from District Court, Neosho County.

Action by Robert C. Rogers against Minnie M. Lindsay, as administratrix of George N. Lindsay. Judgment for plaintiff, and defendant appeals. Modified and remanded.

Smith & Brobst, of Chanute, for appellant. Lapham & Lapham, of Chanute, for appellee.

SMITH, J. From February, 1898, until the latter part of the year 1908, when J. C. Merritt was appointed his successor, George N. Lindsay was the guardian of the appellee, then a minor. Merritt served as such guardian until appellee attained his majority, and in due time made settlement of the estate that came into his hands. Thereafter in February, 1910, the appellee commenced this action against Minnie M. Lindsay, as administratrix of the estate of George N. Lindsay, to recover the sum of \$994.74, with interest, which he claimed Lindsay, as guardian, had received and had not accounted for or turned over to his successor, Merritt.

The action was tried on proper pleadings, and no trial error occurred, except as hereinafter referred to. Judgment was rendered in favor of the appellee for \$835 and interest and costs. Motion for new trial was overruled and appeal taken.

The errors alleged are that the court erred in rendering judgment against appellant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied May 16, 1913.

for too large an amount, in rendering judgment against the appellant for costs, and in overruling the motion for a new trial.

The amount of the judgment rendered is too large in this: That no act or conduct on the part of Lindsay, as guardian, is shown which should deprive him or his estate of reasonable compensation for his services. At most, the evidence shows that Lindsay, as guardian, made mistakes and omissions in his account and reports both adverse to himself and to his ward. No suggestion of intended fraud is made. Mere mistakes in keeping accounts do not forfeit a guardian's right to compensation for his services.

The case is remanded, with instructions to try the question and determine the value of the services rendered by Lindsay as guardian, and to deduct such amount from the judgment rendered, and the judgment so modified is affirmed. All the Justices concurring.

McINTOSH v. STANDARD OIL CO.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 132*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE OF INTOXICATION.

Upon the issue whether at a particular time a person was exercising due care for his own safety, evidence that he was intoxicated is ordinarily admissible, not as constituting or conclusively establishing negligence on his part, but as being a circumstance to be considered in determining the matter.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 257-266; Dec. Dig. § 132.*]

2. NEW TRIAL (§ 35*)—EXCLUSION OF EVIDENCE—SHOWING AS TO ANSWERS EXPECTED.

The refusal of the trial court to allow the defendant to cross-examine the plaintiff upon an important matter can be urged as a ground for a new trial without a showing as to what answers the plaintiff would have returned if the rejected inquiries had been permitted. The provision of Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), that when the ground of a motion for a new trial is error in the exclusion of evidence such evidence shall be produced at the hearing, does not apply to that situation.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

3. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—PLEADING.

The issue of negligence in an employer in failing to exercise due care to provide for his employé a safe place in which to work may be presented by allegations of specific acts or omissions, without in so many words referring to the safety of the working place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

Johnston, C. J., dissenting.

Appeal from District Court, Wyandotte County.

Action by Manuel S. McIntosh against the Standard Oil Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Hagerman, of Kansas City, Mo., and A. L. Berger and E. R. Adams, both of Kansas City, Kan., for appellant. T. P. Anderson, of Kansas City, Kan., and E. K. Robinett, of Colorado Springs, Colo., for appellee.

MASON, J. Manuel S. McIntosh, a teamster in the employ of the Standard Oil Company, was engaged in hauling oil with a wagon drawn by three mules. While he was filling the tank on his wagon from a stand-pipe in the storage yard, the team ran away. McIntosh was injured. He sued the company, alleging that the runaway was caused by an empty barrel being negligently loosened from a rick and permitted to roll toward and close to the mules. He recovered a judgment, from which the defendant appeals.

[1] The answer alleged in general terms that the plaintiff's own carelessness contributed to his injuries, without specifying the acts or omissions relied upon as constituting such contributory negligence. No motion was made to make the allegations in this regard more definite. The defendant offered evidence for the purpose of proving that at the time of the injury the plaintiff was intoxicated. The offer was refused, and complaint is made of that ruling. Upon the issue whether at a particular time a person was exercising due care for his own safety, evidence that he was under the influence of liquor is clearly admissible, not as conclusively establishing that he was negligent, but as having an obvious bearing upon the matter. 29 Cyc. 534; note, 19 Ann. Cas. 1176. The plaintiff contends, however, that if the exclusion of this evidence was error it was not prejudicial, because intoxication on his part could not constitute negligence in itself, and there was no evidence that, if he was intoxicated, his condition in that respect in any way contributed to his injury. In support of this view it is argued that the plaintiff did everything that could have been required of a reasonably prudent man, and therefore his condition as to drunkenness or sobriety was immaterial. This amounts to asserting that there was no evidence whatever that the plaintiff was guilty of contributory negligence in any respect. We think, under all the evidence, it was a fair question for the jury whether the plaintiff's own conduct was such as to preclude a recovery, and the trial court was evidently of that opinion, for the question was submitted for their determination. If it were conceded or conclusively established that the plaintiff did everything for his own protection that a sober man could have done, then doubtless evidence of his drunkenness would not be material. But it was for the jury to decide precisely what took place, and the plaintiff's condition as to sobriety might have a bearing in determining this. And whether, if he was drunk, that fact lessened

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

his effectiveness in preventing or escaping danger, was likewise a matter to be passed on by them.

[2] The statute requires that where the ground of a motion for a new trial is error in the exclusion of evidence, such evidence shall be produced at the hearing of the motion. Code Civ. Proc. § 307 (Gen. St. 1909, § 5901). The abstract does not show that at the hearing of the motion for a new trial in this case any evidence was produced that the plaintiff was in fact intoxicated when he received his injury. This omission prevents a reversal upon the ground of the exclusion of the testimony of the witness produced by the defendant at the trial, but the question of the materiality of evidence regarding the plaintiff's condition as to sobriety is presented in another aspect: One of the rulings complained of is the refusal of the trial court to allow the plaintiff to be cross-examined upon that subject. We do not think the statute referred to applies to that situation. The defendant could not be bound by the testimony of the plaintiff. It had a right to cross-examine him before the jury with reasonable fullness and freedom, asking any pertinent questions relating to the circumstances of his injury, for the purpose of testing his credibility, as well as of bringing out his version of all the details of the transaction for use in the preparation of the defense. The ruling complained of did not result merely in the exclusion of certain evidence; it in effect denied the right of cross-examination of the adverse party upon a vital matter lying peculiarly within his knowledge, by unduly restricting its scope, and was prejudicial whether or not the plaintiff would have returned such an answer to any particular question as would have been obviously against his interest. The situation in this regard is the same as that presented in *Polley v. Oil Co.*, 131 Pac. 577, decided at this sitting. The probability that the ruling affected the result seems sufficient to require a new trial.

[3] The plaintiff was permitted to rely upon evidence that the mules were frightened by the noise made by the rolling of several barrels, instead of one of them coming toward and near to them, as alleged in the petition, and an amendment to meet this situation was allowed after the verdict was returned. These rulings are complained of. They seem to have been well within the discretionary power of the court, and as the question cannot arise at a new trial it is not now important. Complaint is also made of an instruction that the defendant was bound to exercise ordinary care to provide for the

plaintiff a safe place in which to work, when the petition did not in so many words charge negligence in that regard. It was a fair question for the jury whether the place where the plaintiff was doing the work assigned him was rendered unsafe for the purpose by allowing the empty barrels to be handled in the manner testified to. The petition attributed the negligence complained of to the superintendent of the yard. The instructions spoke of the defendant's failure to exercise proper care "by its foreman, or other person having charge of said barrels." This is urged as an undue broadening of the issues, but is not subject to that criticism. The refusal of an instruction asked by the defendant seems to have been justified upon the ground that so far as it was necessary it was covered by the general charge.

Upon the ground indicated the judgment is reversed and a new trial ordered.

BURCH, SMITH, PORTER, BENSON, and WEST, JJ., concurring.

JOHNSTON, C. J. (dissenting). I do not concur in the interpretation given to section 307 of the Civil Code. To entitle a party to a new trial of a cause or to a review of a decision excluding evidence or denying a fair opportunity to produce evidence at the trial, the evidence sought to be shown must be produced on the motion for a new trial. This requirement is in plain English and applies to "all cases." No exception is made where the evidence excluded is sought to be obtained on cross-examination, nor where a party to the case is the witness whose testimony is sought. The testimony of a party to the case may be obtained, and he may be subjected to a cross-examination the same as any other witness, and the testimony proposed to be obtained from him can be shown on the motion for a new trial without difficulty. There is no exception of that kind in the statute, and, furthermore, I can see no reason why such an exception should be made. The restriction of the cross-examination of a party or other witness is only a denial of a fair opportunity to produce evidence, and the Code expressly provides that, whether it is evidence excluded or the want of a fair opportunity to produce evidence, the proposed evidence must be produced on the hearing of the motion for a new trial. If the evidence sought to be obtained from the party, either by direct or cross examination, is immaterial, a new trial should not be granted, and the theory is that its materiality must be shown on the hearing of the motion for a new trial or the motion should be denied.

McLAIN v. PARKER.

(Supreme Court of Kansas. April 12, 1913.)

On petition for rehearing. Petition denied.
For former opinion, see 129 Pac. 1140.

MASON, J. A petition for rehearing has been carefully considered, but the court remains of the opinion that the case was rightly decided. Supplementary to the original opinion, it may be said that we do not determine that the action in Kansas on the Missouri judgment could not have been revived in the name of the Missouri administrator; nor is the decision based upon the view that technically the title to that judgment was vested in the Kansas executrix, rather than in the Missouri administrator. The domiciliary representative, however, has in a sense a title to all the property of the testator, wherever situated. 18 Cyc. 1228, 1229. The executrix cannot be regarded as a stranger to the action brought by the testator in this state upon the Missouri judgment. A payment to the executrix would be a complete protection to the defendant, and under the circumstances of the case we hold that he cannot defeat the action on the ground that the revivor could only have been lawfully had in the name of the foreign representative.

The statements made in the original opinion as to the contents of the petition on which the Missouri judgment was based were derived from the recitals of the judgment—a source which we regard as sufficient for the purpose of indicating the character of the judgment. The statement as to the character of the plaintiff's cause of action was not entirely accurate. It read: "In each instance the plaintiff asked to have the court annul, on account of fraud, a contract which he had made with the defendant for the purchase of real estate." From the recitals of the judgment it in fact appears that in most instances what the plaintiff charged was, not that the defendant sold him property directly, but that he induced him to join in buying property from others, overstating the price, and defrauding him of the difference. In these instances the court annulled the contract between the plaintiff and the defendant, giving the plaintiff judgment for the amount he had paid, and requiring him to deed his interest in the property to the defendant. The correction is made for the sake of accuracy, but is not thought to affect the legal question involved.

We realize that the defendant is exposed to an apparent hardship by the Kansas court undertaking to enforce the foreign judgment, inasmuch as it has no power to compel the delivery of the deeds deposited with the clerk of the Missouri court for his bene-

fit. We remain of the opinion, however, that inasmuch as the judgment by its terms is payable without condition, the plaintiff is entitled to sue upon it in this state, where its justice or injustice is not a matter of inquiry. If collection is made here, it must be presumed that the defendant, upon showing that fact to the Missouri court, can obtain his deeds, just as he might do if the judgment had been satisfied in any other manner, and just as he might procure a discharge of any judgment against him, the amount of which had been collected by suit thereon in another state.

MONTGOMERY v. SLATER et al.

(Supreme Court of Kansas. April 12, 1913.)

On rehearing. Former judgment (87 Kan. 848, 126 Pac. 1085) adhered to.

PER CURIAM. The former judgment is adhered to.

PHILLIPS v. CARPENTER.

(Supreme Court of Kansas. April 12, 1913.)

Appeal from District Court, Sedgwick County. Action by Almira C. Phillips against L. C. Carpenter. Judgment for plaintiff, and defendant appeals. Affirmed.

David Smyth and J. W. Smyth, both of Wichita, for appellant. Blake & Ayres and C. A. McCorkle, both of Wichita, and J. W. Cavanaugh, of Paw Paw, Mich., for appellee.

PER CURIAM. The only question presented for consideration is whether or not the plaintiff established a completed gift to her from her husband of the property in controversy.

The evidence was ample to sustain the verdict, and the judgment of the district court is affirmed.

CLELLAND v. CLELLAND.

(Supreme Court of Kansas. April 12, 1913.)

Appeal from District Court, Finney County. Action by Alma Clelland against Albert Clelland. Judgment for plaintiff, and defendant appeals. Affirmed.

O. S. Bowman, H. C. Bowman, and L. C. Kelley, all of Newton, for appellant. Fred J. Evans, of Garden City, and Smith & Smith, of Hutchinson, for appellee.

PER CURIAM. The appeal is subject to dismissal because the appellant has failed to comply with an order of this court to pay the appellee a sum of money to enable her to present her side of the controversy. Some affidavits are filed for the appellant attempting to excuse his default, but he withholds any statement of his own respecting his ability to comply with the order. However, the court has investigated the merits of the appeal, and finds that none of the assignments of error is well taken.

Consequently the judgment of the district court is affirmed.

FARQUHARSON v. LIGHTNER.

(Supreme Court of Kansas. April 12, 1918.)

Appeal from District Court, Sedgwick County. Action by W. L. Farquharson against J. E. Lightner. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

McGill, Blood & McCormick, of Wichita, for appellant. Adams & Adams, of Wichita, for appellee.

PER CURIAM. The order of the district court granting a new trial is affirmed, in accordance with the well-settled rule. *Bourquin v. Railway Co.*, 88 Kan. 183, 127 Pac. 770; *Murray v. Railway Co.*, 87 Kan. 750, 125 Pac. 45; *Putnam v. King*, 87 Kan. 842, 126 Pac. 1093; and cases cited in these opinions.

RICHARDS et ux. v. WARNEKROS et ux.

(Supreme Court of Arizona. April 15, 1918.)

1. EVIDENCE (§ 418*) — PAROL EVIDENCE — NOTES—PERSONS LIABLE.

A negotiable instrument passes solely on the credit of the maker, and it is not permissible, in an action thereon, to show that the maker was agent for a third person so as to charge such third person.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1911; Dec. Dig. § 418.*]

2. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—CHATTEL MORTGAGE.

Under Civ. Code 1901, par. 8104, providing that during coverture personal property of the community shall be disposed of by the husband only, a chattel mortgage on community property securing a note, both signed only by the wife individually, is not enforceable, even though she was in fact acting as agent for her husband in giving them.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929-938; Dec. Dig. § 267.*]

3. ACTION (§ 50*)—MISJOINDER—PARTIES INVOLVED.

An action against the wife on a note signed by her individually is improperly joined with one against her husband and herself on notes and mortgages jointly given, for it is a prerequisite to the joinder of causes of action that all shall affect all of the parties defendant.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

Appeal from Superior Court, Cochise County; J. E. O'Connor, Judge.

Action by Paul B. Warnekros and wife against John R. Richards and Isabel Richards, his wife. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Pickett & Pickett, of Tombstone, for appellants. Geo. H. Neale, of Bisbee, for appellees.

ROSS, J. This is an action brought by appellees to collect three past-due promissory notes. Two of the notes, and realty mortgages to secure them, were executed jointly by appellants, who are husband

and wife, and one of the notes and a chattel mortgage to secure its payment were executed by the appellant wife alone. Three separate causes of action are set forth in the complaint, one on each note and mortgage, with prayers for judgment and foreclosure. In addition to the ordinary allegations in a suit on a promissory note and to foreclose, in the third cause of action (the one based on the note and mortgage executed by the wife alone) are the further allegations: That Isabel Richards in executing note and mortgage did so as the agent of her husband, John R. Richards, and with his knowledge and consent, and that same were given in payment for community property. The appellants interposed to the complaint a special demurrer to the effect that several causes of action were improperly united, in that the first two causes of action were against both appellants and the third cause of action showed upon its face that Isabel Richards alone was liable. Demurrer was overruled. Appellants by their answer admitted that the property covered by the chattel mortgage is community property and asserted that it could not be incumbered or disposed of during coverture, except by the husband. Judgment went against the appellants on the three causes of action, but complaint, on this appeal, is directed only to the judgment on the third cause of action.

We shall consider but one of the appellants' assignments of error, namely, that the court erred in overruling the special demurrer.

The appellees proceeded against the appellants jointly on the note and mortgage executed in the name of the wife alone, upon the theory that the wife in negotiating the loan and in the execution of those instruments acted as the agent of her husband.

[1] The instrument here sued on is a negotiable promissory note. On its face it is the individual note of Isabel Richards. There is nothing in the note or mortgage to indicate that she was acting other than as principal. The absence of a suggestion of the relation of principal and agent in negotiable paper, such as bills and notes, under all of the decisions has the effect of preventing proof of that relation.

In the note to McDonough v. Templeman, 2 Am. Dec. 518, quoting Byles on Bills 37, and Wharton on Agency, § 290, it is said: "In regard to negotiable paper, on account of its qualities, none but those appearing on its face as bound can be held liable; and hence no evidence can be admitted to charge parties whose names do not appear thereon."

In Webster v. Wray, 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754, at page 756, the decisions involving this question are collated. That court, after reviewing many of the cases, made its deduction in the following language: "But it must be confessed that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the weight of authority, if not of reason, is in favor of the rule excluding all parol evidence, even as between the immediate parties to the transaction. It is held that although the party executing the instrument describes himself as 'agent,' yet, if the name of the principal is not disclosed upon the face of it, all evidence dehors the instrument, for the purpose of holding him thereon, is to be excluded. It is wholly immaterial, therefore, that the agent had full authority to make it in behalf of his principal; that the consideration was exclusively received for his benefit; that the plaintiff knew the agent's principal, and accepted the note as the promise of the principal. *Williams v. Robbins*, 16 Gray [Mass.] 77, 77 Am. Dec. 396; *Slawson v. Loring*, 5 Allen [Mass.] 340 [81 Am. Dec. 750]. See, also, *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Brown v. Parker*, 7 Allen (Mass.) 337; *Bedford Com. Ins. Co. v. Corvill*, 8 Metc. [Mass.] 442; *Bass v. O'Brien*, 12 Gray [Mass.] 477; *Pentz v. Stanton*, 10 Wend. [N. Y.] 271, 25 Am. Dec. 558; *Thurston v. Mauro*, 1 G. Greene (Iowa) 231; *Kenyon v. Williams*, 19 Ind. 45; *Anderton v. Shoup*, 17 Ohio St. 125; *Taber v. Cannon*, 8 Metc. [Mass.] 456; *East R. Co. v. Benedict*, 5 Gray [Mass.] 561 [66 Am. Dec. 384]; *Bank of America v. Hooper*, 5 Gray [Mass.] 567 [66 Am. Dec. 390]; *De Witt v. Walton*, 5 Seld. [9 N. Y.] 571; and *Tucker Manf. Co. v. Fairbanks*, 98 Mass. 101.

In *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, the court, after stating "that a principal may be charged upon a written executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and that this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where writing is not essential to their validity," further stated that: "There is a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent."

In *Cragin v. Lovell*, 109 U. S. 194, 8 Sup. Ct. 132, 27 L. Ed. 906, it was held (quoting from syllabus): "Upon a negotiable promissory note made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal."

Daniel's Negotiable Instruments (3d Ed.) § 300, says: "It is a general principle of commercial law that a negotiable instrument

must wear no mask, but must reveal its character upon its face. And it extends to the liability of parties thereto, who must appear as distinctly as the terms of the instrument itself, in order to be bound by those terms."

The note being negotiable and signed by Isabel Richards alone, John R. Richards, under the law, is not liable therefor, and suit thereon against him, as principal, cannot be maintained.

[2, 3] There is a misjoinder of causes of actions, as in the first two causes both appellants were jointly liable and in the third cause the wife only was liable. Paragraph 1351, Revised Statutes 1901, provides that the defendant may demur where "several causes of action are improperly united." The chattel mortgage given by the wife to secure her note was upon community property and unenforceable, as "during coverture personal property may be disposed of by the husband only." Paragraph 3104, R. S. 1901. The note given by the wife was her individual obligation for which she and her separate property only were liable. In a suit on the note her husband would not be a necessary party, and should he be joined he would be only a nominal defendant without liability to pay any judgment obtained. "It is a prerequisite to the joinder of causes of action that all of the causes should affect all the parties defendant to the action." *Benson v. Battey*, 70 Kan. 288, 78 Pac. 844, 3 Ann. Cas. 283, and note.

The special demurrer of appellants should have been sustained, as there was clearly a misjoinder of causes of action. The judgment is reversed, and cause remanded, with directions that further proceedings be had not inconsistent with this opinion.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

BOYLE v. ORO PLATA MIN. & MILL. CO.
(Supreme Court of Arizona. April 15, 1913.)

1. CORPORATIONS (§ 507*)—ACTION—PROCESS.

To acquire jurisdiction in a tax suit of a domestic corporation, it not voluntarily submitting to jurisdiction, it must be served with process by some method prescribed by law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

2. CORPORATIONS (§ 507*)—DOMESTIC CORPORATION—SERVICE WITH PROCESS.

Civ. Code 1901, par. 1323, authorizes summons in a suit against a corporation to be served on an officer of it, or on the local agent representing it, in the county in which the suit is brought, or by leaving a copy at the principal office of the company during office hours. Paragraph 1324 authorizes service on a domestic corporation, not having an officer in the territory on whom service can be made, by depositing a copy of the summons in the office of the secretary of the territory, a duplicate of which shall be mailed by him to the office of the company or to an officer of it. Paragraph 1334 au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thorizes service on a nonresident defendant by mailing a copy of the summons to him at his place of residence. *Held*, that service on a domestic corporation may not be had by mailing a copy of the summons directly to an officer of it out of the territory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

3. JUDGMENT (§ 497*)—COLLATERAL ATTACK—SERVICE OF PROCESS.

A default judgment may be collaterally attacked for nonservice of defendant, though it recites "it was shown to the satisfaction of the court that defendant was duly and regularly served with process"; the return on the summons, which is part of the record, the summons and return, under Civ. Code 1901, par. 1443, being part of the judgment roll, showing service has not properly been made, controlling the recital of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

Appeal from District Court, Mohave County; Edward M. Doe, Judge.

Action by the Oro Plata Mining & Milling Company against John Boyle, Jr. Judgment for plaintiff. Defendant appeals. Affirmed conditionally.

John W. Lane, of Kingman, for appellant. Clark, Haworth & Stewart, of Prescott, for appellee.

CUNNINGHAM, J. The appellee, as plaintiff, commenced this action to quiet its title to the Todd patented mining claim situated in Mohave county. The complaint is in the form usually adopted for that purpose. The appellant, as defendant, asserts ownership and possession, and bases his title upon a sheriff's deed made as a result of a sale to satisfy a tax lien and judgment in favor of the territory of Arizona against the appellee to one Dempsey, as purchaser, and by Dempsey assigned to appellant for a valuable consideration. The sheriff's deed is made direct to appellant as the holder of the assigned certificate of sale. Appellee attacks the judgment in the tax suit as void upon the grounds that the court rendering the judgment had acquired no jurisdiction of the judgment debtor, this appellee, for the reason that appellee was not served with process in that suit. In support of the contention, the appellee offered the sheriff's return on the summons appearing in the judgment roll of the tax suit, which return shows that the summons was served upon the "defendant named in said summons by registered letter directed to the address of the president of said defendant, and by inclosing in said registered letter a copy of the summons to which was attached a true copy of the complaint mentioned in said summons, and that the registry return receipt signed by said defendant was returned to me by the post office * * * on the 20th day of August, 1908, and is hereto attached and made a part of this return." The registry receipt is addressed to H. J. Woolacott, at Los Angeles,

Cal., signed by the same name, by W. P. Eaton as his agent, and returned to the sheriff.

[1, 2] It is alleged by the plaintiff and not denied by the defendant that appellee is a corporation incorporated under the laws of the territory of Arizona, and was such corporation at the dates mentioned in the tax suit. In order that jurisdiction may be acquired of a domestic corporation in a tax suit other than by a voluntary submission to jurisdiction, the corporation must be served with process by some method prescribed by law. Par. 1323, Rev. St. Ariz. 1901, prescribes a method of constructive service by which the summons may be served on the president, secretary, or treasurer, or any director of such corporation, or upon the local agent representing such corporation, in the county in which the suit is brought, or by leaving a copy of the summons at the principal office of the company during office hours. "Whenever any corporation incorporated under the laws of this territory does not have an officer in this territory upon whom legal service of process can be made, of which return thereon shall be prima facie evidence, an action or proceeding against such corporation may be commenced in any county where the cause of action or proceeding may arise or said corporation may have property; and service may be made upon such corporation by depositing a copy of the summons, writ or other process in the office of the secretary of the territory, which shall be taken, deemed and treated as personal service on such corporation. * * *" Par. 1324, Rev. St., supra.

Process was served upon the president of the company by registered mail at the city of Los Angeles, state of California, in a manner provided for serving nonresident defendants. Par. 1334, Rev. St. Ariz. 1901. The president of a corporation is not the corporation; neither is he a defendant by reason of the suit having been commenced against the corporation of which he is the president. His place of personal residence, for the purposes of a suit against the corporation, has no bearing upon the domicile of his corporation. When he is handed the process as president of the corporation, he receives it as an agent of the corporation, and for that purpose alone. In order that service upon him may be taken, deemed, and treated as service on his corporation, if he is not served within the jurisdiction of the court, he must receive the process through the secretary's office. Paragraph 1324, supra.

The process in the tax suit was never served upon the defendant therein; the court, therefore, never acquired jurisdiction over the defendant. To permit the territory to take the defendant's property, without notice first given in some manner provided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by law, is antagonistic to the fundamental law of the land. The judgment attacked on its face is conclusive that defendant did not appear in that proceeding. The judgment was void for a total failure of the court to acquire jurisdiction of the person of the defendant therein, as appears from the sheriff's returns on the original summons in the judgment roll in that proceeding.

[3] It is contended by appellant that because the judgment recites, "It was shown to the satisfaction of the court that the defendant was duly and regularly served with process herein, had failed to appear and answer or interpose any plea to the complaint," etc., concludes an inquiry into the question of jurisdiction upon a collateral proceeding; and no evidence can be offered to contradict such recital in the judgment. This question was raised in the case of *Laney v. Garbee*, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391, in an ejectment suit. The land in question was entered by the plaintiff, which he showed and rested. The defendants introduced in support of their title a sheriff's deed made under an execution sale upon a judgment against the plaintiff for delinquent taxes on the land for certain years. The judgment, as the basis of the defendants' title, was attacked by the plaintiff for want of jurisdiction of the person of the defendant therein. The judgment contained this recital: "And the defendant, though duly served with process of summons, * * * comes not, but makes default." To overcome this recital, plaintiff offered in evidence the original summons in the case, and the return of the sheriff thereto. In considering this point after the court had considered the return, in the light of the statute, as showing no service had been made in any manner known to the law, said: "It is insisted that the manner of service cannot be shown to contradict the recitals of the judgment. If the entry of the judgment upon the books of the court constituted all the record in the case, the contention would have weight. That is not the case. The return of the sheriff is as much a part of the record as the judgment entry. The recitals of the service contained in the judgment cannot import greater verity than the return itself shows." And it is said: "The recitals of the judgment will be deemed to refer to the kind of service shown by other parts of the record"—citing a number of cases. The summons and return of service constitutes a part of the judgment roll under our statutes. Paragraph 1443, Rev. St. Ariz. 1901. It is always open to a party to contest the alleged jurisdiction by producing other parts of the record which contradict the recitals of the judgment, and particularly the recitals relating to the officer's return upon the original writ, which, in case of conflict, will control the recitals in the judgment, al-

though the endeavor is always made to reconcile apparent inconsistencies by construction, or by the aid of presumptions. 23 Cyc. 1087.

We have considered the other questions raised by the appellant, and find no reversible error presented by the record. The judgment is affirmed upon the express condition that the appellee cause to be paid to the clerk of the superior court of the state of Arizona, in and for Mohave county, for the use of appellant, the sum of \$170.27 paid out by him on account of taxes, penalties, and interest thereon to the date of the judgment in that court, viz., April 10, 1911, not later than the tenth day after the date on which the remittitur from this court is filed in said superior court. Otherwise, and upon the failure to pay said sum to said clerk as aforesaid, the judgment appealed from shall stand reversed, and the cause shall stand dismissed.

FRANKLIN, C. J., and ROSS, J., concur.

SHANNON COPPER CO. v. POTTER.

(Supreme Court of Arizona. April 15, 1913.)

1. JUDGMENT (§ 256*)—CONFORMITY TO VERDICT.

Where two causes of action, set up in the complaint, are submitted to the jury, a general verdict for plaintiff will support an adjudication as to both causes of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

2. APPEAL AND ERROR (§ 162*)—ESTOPPEL—RECEIVING PAYMENT OF JUDGMENT.

Where two causes were united in one action, and the jury rendered a general verdict for plaintiff and judgment was had thereon, a satisfaction of the judgment extinguished all matters in controversy regarding both causes of action, and, hence an appeal could not be prosecuted by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 179, 981, 982, 984-990; Dec. Dig. § 162.*]

Appeal from District Court, Graham County; E. W. Lewis, Judge.

Action by the Shannon Copper Company, a corporation, against Dell M. Potter. From a judgment for plaintiff, and an order denying its motion for new trial, plaintiff appeals. Dismissed.

The appellant, as plaintiff, commenced this action against the appellee, as defendant, to recover damages upon two causes of action arising from a failure of the defendant to perform his two contracts. The first cause of action is founded upon a contract by which defendant agreed to procure from the Arizona Copper Company a contract to haul for appellant's smelter limestone or ore to the smelter for a fixed rate of 10 cents per ton, which defendant failed to procure, to the alleged damage of appellant in the sum of \$11,500. The second cause of action is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

founded upon a contract by which defendant agreed to cause a certain flume belonging to the Arizona Copper Company to be changed to a pipe line within a specified time for appellant's benefit, which defendant failed to do as agreed, resulting in damage to plaintiff in the sum of \$1,429.10.

The defendant admits the contracts and pleads to the first cause of action a modification, and a performance by him of the modified contract. To the second cause of action he admits liability in a sum of \$148.45 in the evidence. The cause was tried on October 28, 1910, to the court with a jury. The jury returned a verdict for the plaintiff as follows: "We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths do find the issue for the plaintiff and assess it damages at the sum of one hundred forty-eight dollars and forty-five cents (\$148.45)."

A judgment was ordered and entered following the verdict. A new trial was denied plaintiff, from which order and from the judgment in its favor, plaintiff appeals. Other facts appear in the opinion.

Neale & Sutter, of Bisbee, and Ben Goodrich, of Los Angeles, Cal., for appellant. Frederick S. Nave, of Globe, and John H. Campbell, of Tucson, for appellee.

CUNNINGHAM, J. (after stating the facts as above). [1, 2] The appellant seeks by this appeal to reverse a judgment recovered by it against the appellee on account of alleged errors committed upon the trial in receiving evidence in support of the defense, and in the instructions of the court presenting the defense in charge to the jury. A number of questions are urged upon this court in the briefs of appellant, but, from the view we take of the record, we are precluded from their consideration on this appeal.

The cause was tried on the 29th of October, 1910, when the verdict was returned and the order for judgment was entered. In due time the appeal was perfected and filed in this court. On September 22, 1911, appellant filed its additional "opening brief" assigning numerous alleged errors, referring to the trial of the first cause of action, and, following the statement of the first cause of action, appears this reference to the second

cause of action: "There was another cause of action stated in the complaint for the sum of \$1,429.10, for \$148.45 of which sum plaintiff obtained a verdict, and \$1,280.65 of which sum the court took from the consideration of the jury, and refused to permit a verdict therefor on the grounds that plaintiff had not proved the same, though plaintiff claimed it was admitted by the answer. But this matter has been settled since the trial, and it is therefore not in action." What are we to understand from this statement of appellant? That the appellee has settled and satisfied the appellant's judgment of \$148.45 rendered against appellee in this action? It can have no other meaning. Appellant states that the matters settled affect the second cause of action alone. We do not think so. The whole case was submitted to the jury, and the verdict returned is responsive to the issues submitted, and in terms is broad enough to meet all the issues raised upon both causes of action. The judgment is for \$148.45 and is as broad as the verdict, and is therefore responsive to all the issues joined in the entire action. The two causes of action became merged in the judgment. It is admitted that the judgment has been settled since the trial.

The law is well settled that a party cannot receive satisfaction of a judgment in his own favor and thereafter prosecute his appeal from the same judgment in the hope of obtaining a more satisfactory one. *Cassell v. Fagin*, 11 Mo. 207, 47 Am. Dec. 151; *Robards v. Lamb*, 76 Mo. 192; *Wolfert v. Reilly*, 133 Mo. 463, 34 S. W. 847; *Watkins v. Martin*, 24 Ark. 14, 81 Am. Dec. 59; *In re Baby*, 87 Cal. 200, 25 Pac. 405, 22 Am. St. R. 239. We think the settlement of the judgment extinguished all the matters in controversy between the parties to this appeal and leaves nothing for the decision of this court. It may not be improper, however, to say that we have examined the record in the light of the assignments urged by appellant and see no prejudicial error therein.

For the reasons stated, viz., that the judgment is admitted by appellant to have been settled since the trial of the cause, the appeal is dismissed.

FRANKLIN, C. J., and ROSS, J., concur.

TOWN OF FAIRFAX v. GIRAUD. †

(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 757*)—DEFECTIVE STREETS—LIABILITY.

"A municipality is relieved of liability for the defective condition of its streets only when it has no means within its control to effect repairs. But, if it has the means within its control and fails or refuses to exercise them, it will not be excused or relieved of liability."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1591-1594; Dec. Dig. § 757.*]

2. MUNICIPAL CORPORATIONS (§ 806*)—DEFECTIVE STREETS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

A person traveling on a public street of a city, which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe condition, and is reasonably safe for ordinary travel by night, as well as by day, throughout its entire width, and is free from all dangerous holes and obstructions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.*]

3. MUNICIPAL CORPORATIONS (§ 817*)—DEFECTIVE STREETS—PERSONAL INJURIES—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and, in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part; and, when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1725; Dec. Dig. § 817.*]

4. APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE.

When there is any evidence reasonably tending to support the verdict of a jury, the same will not be reversed on appeal because of evidence which may conflict therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

5. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

On a trial of an action to recover damages for injuries sustained on account of negligence of a town in the maintenance of its street, it appeared that plaintiff was 42 years of age and was teaching music for a livelihood; that, prior to her injuries, she earned not less than from \$12 to \$15 per week, and for five or six months thereafter was totally unable to earn anything, and since then had been able to earn only \$4 or \$5 per week; that her injuries were due to the breaking of both of the bones in one of her lower limbs, just above the ankle; that the other was badly sprained, and she was seriously bruised as a result of her fall, suffering intensely for several months which continued to the date of the trial. The evidence showed that her injuries were permanent and that she would probably be a cripple for life. Verdict for \$2,000 held not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Error from District Court, Osage County; John J. Shea, Judge.

Action by Kate Giraud against the Town of Fairfax. Judgment for plaintiff, new trial denied, and defendant brings error. Affirmed.

D. L. Hubler, of Fairfax, and Grinstead, Mason & Scott, of Pawhuska, for plaintiff in error. J. M. Worten, of Pawhuska, for defendant in error.

DUNN, J. This case presents error from the district court of Osage county. On the 16th day of May, 1910, defendant in error, as plaintiff, commenced her action in the said court to recover \$8,500 for damage alleged to have been sustained by certain injuries which she suffered, due to the negligence of the town in its maintenance of one of its crossings. In her petition she alleged: "That prior to December 1, 1909, the said defendant city, under and by virtue of its corporate power, had assumed control and authority of its streets, alleys, sidewalks, curbs, and gutters; that at said time it was in full control and management of the same; that at said time the said defendant was wrongfully, willfully, wantonly, recklessly, negligently, and carelessly permitting the crossing of the gutter from the curb line or concrete sidewalk to the street crossing at the northwest corner of the intersection of Main and Elm streets in said town, going east, to be and remain in a dangerous and unsafe condition for pedestrians to pass over, and had been so permitting it for several months; that the concrete sidewalks or curb at said point was about two feet higher than the bottom of the mud gutter over which the public had to pass to the end of the stone street crossing in going east; that the end of said stone street crossing extended west to within about three feet of said concrete sidewalk or curb, and was six inches higher than the bottom of the said mud gutter; that the only means provided by the defendant for crossing said mud gutter was one small stone step on the west side of same, next to the said concrete curb, which was about three feet long, about six inches high, and about a foot wide, and which was only put there for a temporary use and was not sufficiently planted or imbedded as to be solid and not tilt or turn when the weight of an ordinary grown person was thrown upon it; that the top of said step was piled up with mud nearly to a level with the top of the curb and no light at said crossing—all of which made the crossing a very dangerous and unsafe one, and all of which was well known to the defendant, its officers, agents, and employes, or ought to have been known, and could have been known by the exercise of reasonable or ordinary care, but was wrongfully, willfully, wantonly, recklessly, negli-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied April 15, 1913.

gently, and carelessly permitted to be and remain in such condition, and had been permitted by said defendant to so exist for several months. Plaintiff states that in the month of November, 1909, she was temporarily located at the town of Fairfax, Okl., and that on the night of December 1, 1909, she had occasion to go east on the north side of Elm street from the west side of Main street over the crossing above described; that it was a rainy, dark night with no lights except from the business houses, which were only about sufficient to enable one to see the outlines of the walks and crossings; that she was unfamiliar with this crossing and did not know of its unsafe and dangerous condition, but supposed it was all right and safe, as it was one of the most public crossings in the city; that she proceeded to cross over said gutter from said sidewalk at the northwest corner of Main and Elm streets above set out and across said Main street; that, when she stepped from the top of the curb or sidewalk into the mud on the said stone step, she slipped and tottered, and, in her effort to regain her balance, the step gave away or turned with her and she fell upon said stone or some other hard substance and into the mud and water in the gutter, getting muddy and wet from head to foot, breaking both bones in her lower left limb, badly spraining her right ankle, and receiving such a bodily jar that she was caused to suffer the most excruciating pain in her head and body for several days; that she suffered severe pain from the broken and sprained limbs for weeks and months, and suffers yet from same; that she has had rheumatism in the broken limb all winter and spring as a result of said injury; that said broken limb is yet swollen and very weak and affected with numbness, which is very disagreeable and painful, and which disables her in getting around. Plaintiff states that her injuries are permanent; that the pain and suffering has been such a shock to her nervous system that the same has given away and she can never get over it."

For its answer, defendant admitted that it was a municipal corporation, incorporated on the 7th day of September, 1909, prior to which time the inhabitants of defendant town were an unincorporated community. All of the other allegations of plaintiff's petition were denied. Defendant then alleged: "Fifth. That prior to the 7th day of September, 1909, the First National Bank of Fairfax, Okl., had caused to be built a good and substantial cement sidewalk, 12 feet wide, and a curb about 15 inches high, along the east end of lot 16 in block 12 in the town of Fairfax, aforesaid; that, by subscription or otherwise, the citizens of said community had built and maintained a good and substantial stone footwalk across Main street east from a

point about four feet north from the southeast corner of the sidewalk above mentioned; that said footwalk was about 15 inches below the top of the cement sidewalk mentioned, and extended to within about 24 inches of the curb heretofore mentioned; that, by donation, subscription, or otherwise, a good and substantial stone step, to wit, a stone 3 feet long, 14 inches wide, and 6 inches thick was placed against the curb connecting with said stone footwalk; and that said stone step, street crossing, and cement sidewalk were constructed and in place and had long been used prior to the incorporation of the said town, were reasonably safe and sufficient for the purpose for which used, and that the plaintiff suffered her alleged injuries solely, purely, and exclusively by reason of her own negligence and failure to exercise ordinary care as it was her duty to do, for which reason the defendant is not liable therefor."

To the foregoing answer, plaintiff filed a reply in effect a general denial. On these issues the case was tried to a jury which returned its verdict finding in favor of plaintiff in the sum of \$2,000. On motion for new trial being filed and denied, the case has been duly lodged in this court for review.

A number of assignments of error are made and argued by defendant in the very complete brief filed in its behalf by counsel, the first of which relates to the action of the court in striking from defendant's answer the third, fourth, and sixth paragraphs thereof, which set out, in substance, that, at the time of its incorporation, it was in possession of no funds and was without authority to levy or collect general taxes for the purpose of repairing, constructing, or otherwise improving streets, sidewalks, and crossings up to and including the 1st day of December, 1909, nor had it, prior to the said date, promulgated any resolution, by-law, or ordinance for the construction or repair of street crossings, and was wholly without funds or authority within said time to do so. That the territory contained in the town was a portion of a road district and the poll tax fund had been exhausted prior to its incorporation, and that the town could not levy general revenue taxes prior to March 1, 1910, which could not be collected for five months thereafter. For a number of reasons counsels' contention on these propositions cannot be sustained. First, the defect was of such a character that no funds or money would have been required to have repaired it. The proof, while controverted, was sufficient to establish the averments of the petition as to the condition of the stepping-stone. The town marshal, who testified that he was also street commissioner, with a shovel and a few moments of time, and without the expenditure of a penny, could have made firm this stone and

rendered the same safe for passage. Or if for any reason the dangerous place in the highway could not have been made safe in this manner, it was the duty of the town to have closed the same to travel and not to have allowed it to remain open as a pit-fall for people who at least were tacitly invited to use it. This same question was involved in the case of *Carney et al. v. Village of Marselles et al.*, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328, and the court holding that while a municipal corporation cannot be required to make improvements or repairs, the cost of which would be in excess of its corporate power to raise money for such purposes, yet having exclusive control of its streets, it was required by law to maintain its bridges in a reasonably safe condition, and also that: "If for any reason, as that the cost of repair will be more than the funds at its disposal which it might, by the exercise of its corporate powers, command, the repair is impossible, the street or bridge, if known to be unsafe, should not be left open and held out to the public as safe for its use, but should be closed, and the public warned, by notice, of the danger of passage over the same."

[1] The rule seems to obtain that "a municipality is relieved of liability for the defective condition of its streets only when it has no means within its control to effect repairs. But if it has the means within its control, and fails or refuses to exercise them, it will not be excused or relieved of liability." 28 Cyc. 1343, 1344, and cases cited in notes; *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87; *Prideaux and wife v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Hutson v. City of New York*, 7 N. Y. Super. Ct. 289, afterwards affirmed in 9 N. Y. 163, 59 Am. Dec. 526.

In the case of *Erie City v. Schwingle*, supra, which was a case wherein the same question arose as in the case at bar, Chief Justice Black said: "If a mere vote of the council could have laid the tax, their disinclination to do so would hardly have been thought of as a defense. The people being their own representatives in regard to all taxation beyond a half per cent., they are bound to see to it themselves as much as the council would have been, if the matter had been intrusted to their discretion. No matter where the authority of a municipal corporation may be lodged, nor what organs may be designated to speak its will, neither the council nor the people can rid themselves of a public duty, by any vote of their own, or any refusal to vote." In our judgment the town had at its command ample means which, had it undertaken to have exercised, would have produced for it a fund ample to remedy the defect, even conceding funds were required. Section 848, Comp. Laws 1909, provides: "In addition to the powers heretofore granted by statute, the boards of

trustees of towns and villages shall have authority to levy and collect a license tax on auctioneers, contractors," etc. Here follows a list of virtually every species and line of employment which might be engaged in within a city or town. The statute then provides: "The tax so levied and collected therefrom shall be applied for the use and benefit of such towns and villages as may be directed by the councils or boards of trustees thereof." Herein was provided a ready method whereby a fund amply sufficient to have made safe the crossing where the accident herein occurred, and it was the duty of the officials to have availed themselves thereof, and neglect to do this will not relieve the town of liability.

Defendant's second assignment of error is to the point that the court erred in overruling its demurrer to the plaintiff's evidence. The basis of this complaint is that the evidence shows that plaintiff had no cause of action against the defendant; second, that the evidence showed plaintiff guilty of contributory negligence; and third, that the evidence fails to show any notice to the officers and agents of the defendant of the dangerous or imperfect condition in the walk or step at the place complained of. On the first and second of these propositions we will say that we have carefully read not only the testimony set forth in the briefs of the respective parties but also the record, and entertain no doubt whatever upon the sufficiency of the proof to show not only plaintiff's injuries and her right of action but that, in using the crossing and the step in question at this much frequented corner on these streets, she was in no wise guilty of contributory negligence. The evidence shows that the accident occurred on a cloudy night with no lights except those which shone from the business houses and which were not sufficient to disclose the dangerous condition of the step.

[2] The rule in such a case is stated in the case of *City of Stillwater v. Swisher*, 16 Okl. 585, 85 Pac. 1110, as follows: "A person traveling on a public street of a city, which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe condition and is reasonably safe for ordinary travel by night, as well as by day, throughout its entire width and is free from all dangerous holes and obstructions."

[3] And also in *City of Oklahoma City v. Reed*, 17 Okl. 518, 87 Pac. 645, that: "In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and, in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstance establishing contributory negligence on his part; and, when such facts

are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence."

Nor was it essential that actual notice be brought home to the officers of the village. The evidence showed that the step had been in the condition which caused plaintiff's injuries during all of the time of the incorporation of the town, and probably for some time prior thereto. Its public location was such that a jury had a right to assume that the officers either did or should have had notice thereof; the rule being as laid down in the case of *Town of Norman v. Teel*, 12 Okl. 69, 69 Pac. 791, that: "The sufficiency of notice to fasten liability upon a city for a defective sidewalk is a question of fact to be determined by a jury under all the circumstances surrounding the particular case. It is not essential that the corporation shall have actual notice. If the defective condition of the street or sidewalk has existed for such a period of time that, by the exercise of ordinary care and diligence, the city authorities could have repaired the defect and placed the street or sidewalk in a reasonably safe condition, and it fails to do so, then it is liable for any injuries that may be occasioned thereby by reason of such negligence, provided the injured party was in the exercise of ordinary care." See, also, *City of Guthrie v. Finch*, 13 Okl. 496, 75 Pac. 288.

[4] The fourth assignment of error raises a question on which the evidence is conflicting, to wit, the condition of the step. That of the plaintiff supports the verdict, and that of certain witnesses for the defendant disputes the facts upon which she relies. Under these circumstances the affirmative evidence being sufficient to support the verdict, the same will prevail, as the issue thereon was determined by the verdict. The court denied to defendant the right to establish the custom of the First National Bank of maintaining its light at the corner where this accident occurred. In this action, in our judgment, no error was committed.

[5] It is contended that the verdict was the result of passion and prejudice, and that the amount of recovery allowed plaintiff was excessive. In this we are not able to concur. The facts disclose that plaintiff was a widow, 42 years of age, and was teaching music for a livelihood. Prior to her injuries she earned not less than from \$12 to \$15 per week, and for five or six months thereafter was totally unable to earn any money at all, and since had not been able to earn more than \$4 or \$5 per week. That she had contracted and was required to pay heavy doctor bills, and her injuries consisted of the breaking of both bones of one of her lower limbs just above the ankle; that the other was badly sprained, and she was badly bruised as a result of the fall and suffered intensely for several months, her suffering continuing to

the time of the trial. The evidence showed that the injuries were permanent and that she would probably be a cripple for life. Under these circumstances, in our judgment a verdict for \$2,000 was not excessive, nor is there any evidence to show that the same was the result of prejudice or passion.

The instructions given by the court were unexcepted to by the defendant, and, viewing the entire record and conclusion of the trial, we are not able to say that substantial justice was not reached in the verdict.

The order of the trial court denying a motion for a new trial is accordingly affirmed.

HAYES, O. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

WOODWARD et al. v. DE GRAFFENRIED.

(Supreme Court of Oklahoma. Sept. 17, 1912.)

(Syllabus by the Court.)

1. INDIANS (§ 18*) — DESCENT OF INDIAN LANDS—WHAT LAW GOVERNS.

Where a woman enrolled as a Creek freedman selected an allotment under the provisions of section 11 of the Curtis Bill (Act June 28, 1898, c. 517, 30 Stat. 497), and died before the adoption of the original Creek treaty (Act March 1, 1901, c. 676, 31 Stat. 861), and the land so selected was allotted to her heirs after her death, the Creek law of descent and distribution governs the descent of the land, and the Arkansas law of descent and distribution does not apply.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18*]

2. INDIANS (§ 18*) — INDIAN LANDS — WHO MAY INHERIT.

A husband, not a member of the Creek Nation, may inherit land as heir to his wife under the Creek law of descent and distribution.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18*]

3. INDIANS (§ 18*)—LANDS—VESTING OF TITLE.

Where a Creek freedman, selected her allotment in accordance with section 11 of the Curtis Bill (Act June 28, 1898, c. 517, 30 Stat. 497), and died before the adoption of the original Creek treaty, the fee did not vest in her in her lifetime, but was first vested in her heirs by the provisions of sections 6 and 28 of the original Creek treaty (Act March 1, 1901, c. 676, 31 Stat. 863, 869).

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18*]

4. INDIANS (§ 15*)—LANDS—RIGHT OF ALIENATION—REMOVAL OF RESTRICTIONS.

Where a Creek freedman selected an allotment under the provisions of section 11 of the Curtis Bill (Act June 28, 1898, c. 517, 30 Stat. 497), but died before the adoption of the original Creek treaty, and the land was afterward allotted and patented to her heirs, no part of her allotment was impressed with homestead character, and all restrictions upon the alienation of such land, including the portion that would have been homestead had the allotments been made to the allottee in her lifetime, were removed by the act of Con-

gress approved April 21, 1904 (chapter 1402, 33 Stat. 204).

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

5. JUDGMENT (§ 747*) — RES ADJUDICATA — PARTITION — EJECTMENT.

A petition for partition brought on the equity side of the docket in the United States court for the Indian Territory prior to statehood showed that the defendants in the partition suit were in possession of the land of which partition was sought, holding it adversely to the plaintiff. The court sustained a demurrer to the petition and dismissed the action. *Held*, that the judgment in said partition suit was not a bar to an action in ejectment by the same plaintiff against the same defendants to establish plaintiff's title to the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1284-1296; Dec. Dig. § 747.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; John H. King, Judge.

Action by Robert P. De Graffenried against Peggie Woodward and others. From judgment for plaintiff, defendants bring error. Affirmed.

William R. Lawrence and Gibson & Thurman, all of Muskogee, for plaintiffs in error. Chas. A. Cook and J. C. Stone, both of Muskogee, for defendant in error.

ROSSER, C. This was an action brought in the district court of Muskogee county March 25, 1908, by R. P. De Graffenried against Louis and Peggie Woodward to recover an undivided half interest in certain lands in that county. The property involved in the litigation is a half interest in the allotment of Agnes Hawes. Agnes Hawes was a full-blood negro woman, enrolled on the rolls of the Creek Tribe as a Creek freedman. Louis Woodward was her father and Peggy Woodward her mother. Her husband, Ratus Hawes, was not enrolled, and was neither citizen nor freedman of the Creek Nation. Agnes Hawes selected her allotment of lands in accordance with section 11 of the act of Congress of June 28, 1898, commonly called the Curtis Bill. On the 29th of June, 1900, Ratus Hawes shot and killed his wife. He was tried upon a charge of murdering her, convicted of manslaughter, and served a term in the penitentiary for the crime. After the death of Agnes Hawes, and after the ratification of the treaty of March 1, 1901, between the United States and the Creek Tribe of Indians, sometimes known as the original Creek treaty, the Dawes Commission awarded and allotted the land to her heirs, and a patent was issued in the name of her heirs April 1, 1904. Agnes Hawes left no children or grandchildren surviving her, but left surviving her Louis Woodward, her father, Peggy Woodward, her mother, and Ratus Hawes, her husband. On the 22d day of June, 1904, Ratus Hawes ex-

cuted to plaintiff a warranty deed to an undivided one-half interest in the allotment. On the 2d day of July, 1904, the plaintiff, De Graffenried, brought an action in equity in the United States Court for the Western District of the Indian Territory at Muskogee against Louis and Peggie Woodward to partition the land. A demurrer was sustained to the original complaint in that case. The plaintiff then filed an amended complaint, in which he alleged his ownership of a half interest in the land by virtue of the conveyance from Ratus Hawes; that Louis and Peggie Woodward were in possession, refusing to recognize plaintiff's right to any portion of the land or to the rents and revenue; and that the land was capable of partition. The complaint concluded with a prayer that the land be partitioned. The court sustained a demurrer to the amended complaint, and, the plaintiff declining to plead further, dismissed the complaint. The defendants pleaded the proceedings and judgment in that suit in bar of the present suit. After the present suit was brought Louis Woodward died, and the suit was revived in the name of his heirs. The parties waived a jury and tried the case to the court. There was a judgment for plaintiff, and defendants appeal.

There are five questions presented by the defendants:

[1-3] The first is whether or not the Creek law of descent and distribution, or the Arkansas law of descent and distribution, controls the devolution of the estate. The defendants take the position that the law in force June 29, 1900, controls. Their contention is that, when Agnes Hawes selected her allotment under the provisions of the Curtis Bill, her allotment was perfected, and had become vested and absolute in her before her death, at which time the Arkansas law of descent and distribution was in force in the Creek Nation. If the selection of the land by Agnes Hawes in her lifetime, under the provision of section 11 of the Curtis Bill, had vested title in her, this contention could be sustained, but this court in the case of Barnett v. Way, 29 Okl. 780, 119 Pac. 418, held that the selection of the allotment under the provisions of section 11 of the Curtis Bill (Act June 28, 1898, c. 517, 30 Stat. 497) did not vest the allottee with any title to the fee in the land, and that no way was provided, under the provision of that act, for the allottee to obtain title, and that a method by which the allottee could obtain title was first provided by the original Creek treaty. Act March 1, 1901, c. 676, 31 Stat. L. 861. It was held that an allotment under section 11 of the Curtis Bill only carried the use and possession of the land that was allotted, and that an allotment thereunder did not carry any title or estate in the fee, and that the fee could not, and did not, de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ascend to the heirs from the allottee. It was further held in that case that as by section 6 of the original Creek treaty (Act March 1, 1901, c. 676, 31 Stat. L. 861) all allotments made to Creek citizens prior to the ratification of that agreement as to which there was no contest, and which did not include public property, were thereby ratified, and that such allotments should in all things be governed by the provisions of that treaty, the allotment did not fail, but was ratified by section 28 of said original Creek treaty. It was further held that there was vested in the heirs of such allottee all the right and title the allottee would have received if the allotment had been selected subsequent to the ratification of the treaty. It was also held that by section 28 of the original Creek treaty the law of descents and distributions of the Creek Nation governed the descent of the land, and that the heirs were to be those made such by the Creek law, and not by the Arkansas law. This decision was followed in the case of *Morley v. Fewel*, 32 Okl. 452, 122 Pac. 700; *Shellenbarger v. Fewel*, 124 Pac. 617; and *Reynolds v. Fewel*, 124 Pac. 623. No arguments are advanced, or authorities cited, which justify a different decision in this matter, even though it were a new question. It cannot be expected that the decisions above stated will be overturned without strong and cogent reasons therefor.

[2] The next question urged is that, even admitting that the Creek law of descents and distributions governs, it should be so interpreted as to exclude persons not members of the Creek Tribe from inheriting. This point, also, has been determined adversely to the contention of the defendants in the case of *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624. The decision in that case was followed in *Morley v. Fewel*, 32 Okl. 452, 122 Pac. 700; *Shellenbarger v. Fewel*, 124 Pac. 617, and in *Reynolds v. Fewel*, 124 Pac. 623. It is ably contended by counsel for defendants that this court at the time *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624, was decided, did not have before it all the Creek laws and decisions governing descents and distributions. However, it was the duty of this court to judicially know the Creek law, and the decision in that case has become a rule of property. Not only that, but in the case of *Reynolds v. Fewel*, 124 Pac. 623, the same counsel, who now appears for defendants in this case, presented the same proposition, and the same statutes of descent and distribution and the same decisions of the Creek courts were before this court as are presented in this case, and it was again held that a person not a member of a tribe could inherit lands after they were allotted. It was held, in effect, that after the property lost its tribal character noncitizens of the Creek Nation could inherit it. These decisions cannot and should not be overruled.

Descent of property after it has lost its tribal character should follow the line of natural affection, and there is no reason for presuming that a member of the Creek Tribe has not the same affection for his or her white relations as for relations of the Indian blood of the same degree of relationship.

It is next contended by the defendants that the Creek law of descent and distribution cannot be applied to the descent of the allotment in suit here, for the reason that the title had become vested by descent cast on the 29th of June, 1900, and that to change its devolution would be in violation of the fifth amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law. This contention has been answered under the first proposition advanced by the defendants. Agnes Hawes did not own the fee at the time of her death, and the heirs had no right to the land she had selected. The right of the heirs was created by section 28 of the original Creek treaty, and that section also provided by what law the heirship should be determined. The same law that created the right in the heirs, provided that the heirs should be determined according to the Creek law. This did not violate the fifth amendment to the Constitution or any other constitutional provision.

[4] The next contention is that as to the portion of the land constituting the homestead of the deceased, Agnes Hawes, the conveyance was void because the homestead was subject to restrictions at the time of the conveyance. Act Cong. April 21, 1904, c. 1402 (33 Stat. L. 204), removed the restrictions from the lands of all allottees not of Indian blood except homesteads. If it should be found that none of the land allotted to her heirs was homestead, it would not be necessary to consider this assignment further.

In the case of *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, where the question was as to the alienability of lands allotted in the name of a Choctaw Indian after his death, the court said: "In the agreement with the Creek Indians (Act March 1, 1901, c. 676, 31 Stat. L. 861, 870), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, 'and be allotted and distributed to them accordingly.' The question arose whether in such cases there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by

the statute. He said: 'After a careful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen it is necessary that a homestead be selected therefrom and conveyed to him by separate deed, but that, where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.' The court, in effect, approved this opinion of the Assistant Attorney General, and held that where a member of the Choctaw or Chickasaw Tribe died before selecting his allotment, and the land was allotted in his name after his death, none of the land was homestead, and that none of the land was subject to restrictions in the hands of the heirs. The opinion of the Assistant Attorney General was upon the exact question here, and is here followed. The land was allotted to the heirs, and not to the members who would have been entitled had she lived, and none of it was homestead. It is immaterial that a portion of it was designated as homestead in the patent. The provision with reference to the homesteads was made for the benefit of the allottee, and was not intended to affect allotments made in the name of the heirs after the death of the allottee. The matter of creating a homestead was governed by law, and the persons executing a patent could not, by designating the patented land as homestead, make it homestead, unless the law gave them authority to so designate it.

[5] The last proposition on which defendants rely is that the judgment in the partition suit is a bar to this action. It is urged that the title to the land was in issue in the partition suit, and that when the court sustained a demurrer to the petition in that suit, and rendered judgment for the defendants, there was such an adjudication of the title as prevents the plaintiff from maintaining this action. It will be observed that the partition suit was brought in equity. In so bringing the action plaintiff followed a practice almost, if not quite, universal. No case has been found where a partition suit was ever brought on the law side of the docket in the state of Arkansas. The practice in the Indian Territory was to bring such suits on the equity side of the docket. In the case of *Byers v. Danley*, 27 Ark. 77, decided in 1871, the Supreme Court of the state of Arkansas decided that equity would not take jurisdiction of a partition suit where the land was held adversely to the plaintiff in the partition suit. In *London v. Overby*,

40 Ark. 155, decided in 1882, the same rule was laid down. In *Moore v. Gordon*, 44 Ark. 334, the rule is followed. In the opinion in this case the court said: "The proceeding for partition cannot be made a substitute for ejectment to recover an interest in land held partially by others." In *Criscoe v. Hambrick*, 47 Ark. 235, 1 S. W. 150, the rule was reiterated that partition could not be maintained against a person in adverse possession. The court said: "So far as the record discloses, the lands are held adversely to him; he is excluded from any participation in the rents and profits; and his title is in dispute. He must therefore resort to ejectment to establish his title, as an action for partition is maintainable only by a party in possession, or whose title is admitted." The doctrine of these cases was adhered to in *Head v. Phillips*, 70 Ark. 432, 68 S. W. 878; *Eagle v. Franklin*, 71 Ark. 544, 75 S. W. 1093.

It was the rule in the nisi prius courts in the Indian Territory prior to statehood that a suit in equity for partition could not be maintained against persons in adverse possession. The title was not in issue, and could not be in issue in the suit for partition brought by the plaintiff, and the trial court did not err in overruling the plea of *res adjudicata*.

The judgment of the district court of Muskogee county should be affirmed.

PER CURIAM. Adopted in whole.

BRUNER et ux. v. COBB et al†

(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 70*)—VALIDITY—INADEQUACY OF CONSIDERATION.

Ordinarily mere inadequacy of consideration is not sufficient ground, in itself, to justify a court in canceling a deed, yet when the inadequacy is so gross as to amount to fraud, or in the absence of other circumstances to shock the conscience, and furnish satisfactory and decisive evidence of fraud, it will be sufficient ground for canceling a conveyance or contract, either executed or executory. The rule being based upon the theory that fraud, and not inadequacy of price, is the sole reason for the interposition of equity.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

2. DEEDS (§ 70*)—FRAUD—INADEQUACY OF CONSIDERATION—EVIDENCE.

Whenever it appears that the parties to a trade have knowingly and deliberately fixed upon any price, however great, or however small, there is no occasion nor reason for interference by courts, for owners have a right to sell property for what they please; but where there is no evidence of such knowledge, intention, or deliberation by the parties the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the fact of fraud.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 5, 1913.

3. DEEDS (§ 211*)—SUFFICIENCY OF EVIDENCE.

Milton Bruner, and Katie, his wife, were ignorant Creek freedmen. Milton owned a certain 40-acre tract which he was desirous of selling. Katie owned an allotment of 160 acres, worth from \$2,400 to \$4,000. C., desiring to purchase land, through his agent, P., entered into negotiations with Milton to purchase the 40-acre tract, agreeing to give him \$150 cash and a good note for the balance. The deed was drawn and acknowledged before P., who was a notary public, and which, after acknowledgment by Milton and his wife, proved to be a conveyance for Katie's allotment, instead of Milton's 40-acre tract. Both Milton and his wife testify positively that they sold the 40-acre tract, and never at any time sold, or intended to sell, Katie's allotment. *Held*, that the inadequacy of consideration, under the rule announced in the preceding paragraph of this syllabus, together with the other cumulative incidents and circumstances detailed in the record, amounts to such constructive fraud as to require a cancellation of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211; Cancellation of Instruments, Cent. Dig. § 102.]

4. INDIANS (§ 15*)—POWER TO ALIENATE LAND.

A Creek freedman under 18 years of age, although a married woman, cannot make a valid conveyance of her allotment, except under the direction of the county court; and a deed made without such authority is void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Seminole County; Robert M. Rainey, Judge.

Action by Milton Bruner and Katie Bruner against T. S. Cobb and another to cancel a deed. From judgment for defendants, plaintiffs bring error. Reversed and remanded.

On October 14, 1912, a motion to dismiss the appeal herein was sustained, on the ground that the alleged errors of the trial court required the examination and consideration of the evidence introduced at the trial, and that, the referee, before whom the cause was tried, not having certified the evidence to the court, and no bill of exceptions having been allowed, this court could not consider the alleged errors relied upon by plaintiff in error. This defect in the record was strenuously insisted upon by defendants in error in their brief, and was not denied in any manner by plaintiffs in error until after the order of dismissal had been entered and a petition for rehearing had been filed and oral argument had thereon, whereupon a certain agreement between counsel at the trial (which was embodied in the record) was, for the first time, called to the attention of the court by counsel for plaintiffs in error. The consideration given by the court to this agreement resulted in the granting of the petition for rehearing, and the former opinion, dismissing the appeal, is hereby recalled and set aside and the appeal reinstated, and the cause will now be considered on its merits.

Taylor, Prueitt & Sniggs, of Oklahoma City, and J. A. Baker, of Wewoka, for plaintiffs in error. Crump & Fowler, of Wewoka, for defendants in error.

ROBERTSON, C. (after stating the facts as above). This is an action by Milton Bruner and Katie Bruner, his wife, to cancel and set aside a certain warranty deed made by them on February 23, 1909, to T. S. Cobb for 80 acres of land in Seminole, and 80 acres of land in Okfuskee county. Cobb three days later sold the land to James E. Foreman, who is joined as a party defendant, but Cobb alone defends; Foreman resting his title on Cobb's deed, which is good if the deed to Cobb from the Bruners is valid. The Bruners, who are husband and wife, are Creek freedmen, and the land in controversy is the allotment of Katie Bruner. Plaintiffs in error rely for reversal of the judgment appealed from on four separate assignments of error, viz.: First. Inadequacy of price. Second. The deed was taken and acknowledged by the grantee's agent, and is therefore void. Third. Deception and fraud in obtaining the signatures of plaintiffs to said deed. Fourth. Katie Bruner, at the time of executing said deed, was under the age of 18 years, and any deed made by her while a minor was absolutely void.

It will be unnecessary to give separate consideration to the assignments above enumerated, for that the reasons advanced in behalf of each are so closely related one to the other as to be, in a measure, applicable to all; in other words, fraud and deceit being the gist of the complaint of plaintiffs, in error, we will treat the assignments of error as above enumerated merely as subdivisions of one general charge of fraud, and will give to each subdivision of such charge such consideration as it merits.

It appears from the record that these plaintiffs in error, at the time this deed was taken, were ignorant negroes, the wife, especially, being a mere girl, wholly devoid of business experience, and possessed of no judgment or knowledge of business affairs. The husband owned a certain 40-acre tract, which he was desirous of selling, and with that intention approached George B. Paine, who was a notary public and justice of the peace at Wewoka, in Seminole county, and who, from his own testimony, was acting as the agent of Cobb, who at the time was county judge of Seminole county. Milton Bruner told Paine that he wanted \$300 for his 40-acre tract. Paine, as agent for Cobb, finally agreed to give him \$300 for it, one-half cash, the balance to be secured by good note. This conversation took place in the Campbell abstract office at Wewoka on February 23, 1909. Katie Bruner was not present at the time the deal was made, but was sent for by Paine to sign the deed with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

her husband. Both Milton and Katie swear positively that they sold Milton's 40-acre tract to Paine for Cobb, and that they did not have one word of conversation with him or any one else concerning Katie's allotment; that they had no intention of selling it, but supposed always that the deed they signed was for Milton's 40-acre tract. Paine paid Milton \$150 in cash and gave him in addition a memorandum, signed by himself, to the effect that they had coming to them a deferred payment of \$150 on the land sold by them. This memorandum did not describe the land in any way, nor did it bear any interest; no payor was named therein, and it was signed by Paine alone, without any reference to his capacity as agent for Cobb. The record affirmatively shows that Katie Bruner did not receive any part of the \$150, or derive directly or indirectly, any benefit therefrom. Cobb, at the trial, offered to pay into court the balance of the purchase price, to wit, \$150. The undisputed testimony shows that the land was worth all the way from \$2,400 to \$4,000. The record also shows that the entire transaction was carried on between Milton Bruner and Paine; Katie Bruner at no time being consulted concerning the trade.

Plaintiffs allege that as soon as they discovered the deception practiced upon them they brought suit to cancel the deed; the record showing the action to have been commenced on March 26, 1909, the deed having been executed February 23, 1909. Ordinarily mere inadequacy of consideration is not sufficient cause to justify interference by a court of equity in a case of rescission of contract or annulment of deed; but where, as in the case at bar, the consideration given is so grossly inadequate as to shock the conscience and force one's mind to the immediate conclusion that the deed to the land was procured by fraud it not only is the right but the positive duty of a court to interfere and place the parties, especially the innocent and injured one, in the position he was in before the transaction occurred, and it is a matter of no moment whether the fraud was occasioned by the active, deceitful representations, connivance, and acts of him who receives the benefits of the fraudulent transaction, or whether the result was reached on account of the mental incapacity and want of business ability of the one defrauded. The result in either instance is the same; the difference in the moral turpitude involved being only of degree.

The undisputed testimony in this case shows that Cobb first sent one Coodie Johnson (who, from the record, seems to be a handy sort of a fellow and a ready witness), a few days before the deed involved herein was executed, to the Bruners to procure a deed for the land; that Cobb gave Johnson \$150 with which to purchase the same; that Johnson offered Katie \$75 for a deed, but

that she refused to take it. Three or four days later Paine, at Cobb's suggestion, put the deal through with Milton Bruner, and gave him \$150 and the purported duebill, hereinbefore mentioned, and which was worthless and of no binding effect on anybody. This is all that Cobb pretends to have given for the 160 acres, although the deed imports a consideration of \$800. None of the witnesses valued the land at less than \$2,400, and there is testimony to the effect that it was worth \$4,000; \$3,000 being the fair average value thereof.

[1, 2] When we consider all the facts and circumstances surrounding this transaction, the official position held by Cobb, and his standing in the community, his superior intelligence and official influence, the fact that he was desirous of procuring this land, and had made other attempts to secure a deed thereto, the further fact that Paine, a justice of the peace and the notary who took the acknowledgment to the deed, and who was Cobb's agent, engineered the deal and paid the money and executed the so-called duebill, which, according to the uncontradicted evidence, was to have been a good note, but which, as we have seen, was a worthless piece of paper, not binding on any one, and the further fact that the Bruners belonged to an inferior race, were ignorant and illiterate, possessed of no knowledge or experience in such matters, to say nothing of their contention that they had in mind only the sale of Milton's 40-acre tract, and not the allotment of Katie, we are forced to the conclusion that the consideration given for the land was so grossly inadequate as to amount to constructive fraud, and of such character and degree as to require the cancellation of the deed. We might content ourselves by saying, and the record would fully warrant such conclusion, that the inadequacy of the consideration, of itself, free from any other fact or circumstance, is sufficient to constitute constructive fraud of such magnitude as to require the cancellation of the conveyance; but in this case we are not required to base our judgment upon this lone conclusion, for the record is full of other inequitable facts and circumstances that, to our mind, are so cumulative in their character and corroborative of the above conclusion as to leave no room for doubt in the mind of any fair-minded man.

In volume 2, Pomeroy's Equity Jurisprudence (section 926 et seq.), this subject is treated in an able and exhaustive manner, and the general rule there laid down for cases of this sort seems to be that, while mere inadequacy of consideration is not sufficient ground, in itself, for refusing the remedy of specific performance, yet when the inadequacy is so gross as to amount to fraud, or in the absence of other circumstances to shock the conscience and furnish satisfactory and decisive evidence of fraud,

it will be a sufficient ground for canceling a conveyance or contract, either executed or executory. Section 927. This rule is based upon the theory that fraud, and not inadequacy of price, is the sole and only reason for the interposition of equity. In the note to this section in the treatise above referred to, it is said: "The rule had its origin at a time when fraud was generally inferred by presumptions of law, and often by conclusive presumptions. In the present condition of the law on the subject of fraud, this mode of formulating the rule seems to be erroneous. The principle is now almost universally adopted that fraud is a *fact* inferred, like other conclusions of fact, from the evidence; no rule of law can, therefore, be laid down as to the amount of inadequacy necessary to produce the resulting fraud. Inadequacy of consideration may be evidence of fraud, slight or powerful, according to its amount and other circumstances. When it is satisfactory and decisive evidence, when from the proof of inadequacy the court or jury are convinced that fraud as a fact did exist, then the relief is granted. Instead, therefore, of repeating the usual formula which has been handed down for generations, that the inadequacy must be conclusive evidence of fraud, I have said in the text that it must be satisfactory and decisive evidence; the former mode represented fraud as the result of a conclusive legal presumption; the latter treats it as a conclusion of fact drawn from the evidence, and is therefore in perfect harmony with the theory which now prevails in most, if not all, of the states. The following seems to be the true rationale of the doctrines concerning inadequacy of price. Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great, or however small, there is no occasion nor reason for interference by courts; for owners have a right to sell property for what they please, and buyers have a right to pay what they please. See *Harris v. Tyson*, 24 Pa. 347, 360, 64 Am. Dec. 661; *Davidson v. Little*, 22 Pa. 245, 247, 60 Am. Dec. 81. But where there is no evidence of such knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the *fact* of fraud. Such a gross inadequacy or disproportion will call for explanation, and will shift the burden of proof upon the party seeking to enforce the contract, and will require him to show affirmatively that the price was the result of a deliberate and intentional action by the parties; and if the facts do prove such action the fact of fraud will be more readily and clearly inferred."

[3] Ordinarily, if there is nothing but mere inadequacy of consideration, the case must be extreme in order to call for the interposition of equity. Volume 3, Pomeroy's Eq.

Jur. par. 928. As was said above, we would be fully justified in holding that the consideration given in this case, to wit, \$150 cash and a worthless duebill, for land worth \$3,000 would bring the case clearly within the rule hereinabove referred to; but we are not required to base our conclusion on this one item alone. The whole transaction is so intimately and completely charged with other inequitable instances, incidents, and circumstances as to absolutely preclude any other conclusion in the minds of honest men. Thus the record shows that Paine, the notary public who drew the deed, and who took the acknowledgment of the grantors, was Cobb's agent for the purpose of purchasing the land; that he opened negotiations leading up to the execution and delivery of the deed with Milton Bruner, who testifies positively that he never talked with Paine about selling Katie's allotment; that after the deed had been drawn and the trade made he (Paine) sent Milton to get Katie, who was at the company store in another part of town, in order that she might sign it; that he caused Milton to sign the deed first, and Katie to sign after him; that he paid the money to Milton, and not to Katie; that Sanders Sancho was sent to the Bruners and talked with them of and concerning the sale of Milton's land and not Katie's allotment. The fact that Milton did not know the description of the land by number, but relied upon Paine to examine the map and secure therefrom the proper description is also a circumstance worthy of note. The uncontradicted evidence that the land was worth not less than \$2,400, and from that to \$4,000; the fact that the parties were not of kin, and there was no intent on the part of the Bruners to bestow on Cobb any bounty or gift—these and many other circumstances, to our minds, bring this case clearly within the rule above referred to and require the cancellation of the deeds complained of in the petition of plaintiffs in error. Aside from all this, the evidence clearly shows that Katie, at the time she executed the deed, was under the age of 18 years, and therefore incapable of conveying her allotment. There is much positive and competent testimony in the record to the effect that she was under 18 years of age, and not a single word of competent evidence that she was over that age. Coody Johnson (Cobb's man Friday) testified that when he went to the Bruners and negotiated a sale of the land he offered them only \$75 of the \$150 which Cobb instructed him to give, for the reason that he wanted to wait a few days to get a census card from the Dawes Commission, in order to ascertain Katie's age (Record, p. 32), and yet (on page 44 of the record) he testified that he had known her for 16 years, and that she was 5 or 6 years old when he first saw and knew her. It is on testimony such as this that the referee held that she was over 18 years

of age, notwithstanding the positive testimony of Katie's mother, her stepfather, and herself that she was born on March 11, 1891. Ordinarily, where there is a conflict in the testimony on any material fact, the finding of a referee will not be disturbed, if there is any testimony reasonably tending to support the same. We do not think there is any testimony in the record reasonably tending to support the finding, and we conclude that Katie Bruner was not 18 years of age on February 23, 1909, the day the deed was signed, and that therefore the same is void on that account. This question has been settled in this state by the decision in *Jefferson v. Winkler*, 28 Okl. 653, 110 Pac. 755. See, also, to the same effect, *Gill v. Haggerty*, 32 Okl. 407, 122 Pac. 641.

[4] Katie Bruner, being a Creek freedman under 18 years of age, could not make a valid conveyance on the date the deed herein complained of was executed, and, the sale not having been made under the direction of the county court, the deed is therefore necessarily void.

This last conclusion is not only corroborative evidence of the fraudulent intent of Cobb in the premises, but, in itself, is proof conclusive of the invalidity of the deed. It therefore becomes the plain duty of this court to give to these plaintiffs in error the relief which they are clearly entitled to, but which was denied them by the referee and the trial court. It seems to be a common practice in the part of the state from which this case comes for unscrupulous and designing men to prey upon the ignorant and defenseless, and in many instances the helpless Indians and freedmen. These unfortunate classes have our undivided sympathy, for, with an intelligent and scheming white man, they have an unequal chance, even at the best; but when to this unequal chance is added the dishonesty of public officials, on whom these simple people have a right to rely implicitly for fair dealing and protection, and the duplicity and treachery of those of their own kith and kin, it is next to impossible to prevent them from being most shamefully mistreated and robbed. Ignorant freedmen (negroes), such as plaintiffs in error, have a right to rely upon honesty of purpose and fair dealing at the hands of white men, and this is doubly true as to those who hold official positions of trust and honor; they have been taught to depend upon the superior intelligence and integrity of the white race; and while the law recognizes no distinction of race or color, and is not, generally speaking, the guardian of the ignorant, yet it will at all times, especially in such cases as the one at bar, throw its protecting arms about the weak and defend their rights against the wicked designs of the strong, when the object of these designs is to take an unfair and undue advantage of

their weakness and ignorance. We feel that the facts detailed in the record in the instant case are such as to demand at our hands the relief prayed for by plaintiffs in error. We cannot think that the motive which prompted the giving of \$150 cash and the worthless duebill to Milton and Katie Bruner for 160 acres of land worth \$3,000 (even if defendants' story be true) is of such character as will appeal very strongly to honest men; and when we take into consideration the probability of the truthfulness of Bruners' story, to the effect that they sold only Milton's 40-acre tract, and not the allotment of Katie, words fail us in adequate denunciation of the acts of these persons who are responsible for the present condition. Katie, not having received any of the consideration, is not required to return the same, or any part thereof. *Gill et al. v. Haggerty*, supra, and cases therein cited.

Having reached these conclusions, it therefore necessarily follows that the judgment of the district court of Seminole county should be reversed, set aside, and held for naught, and the cause remanded to the district court of Seminole county, with instructions to enter a judgment canceling and setting aside, fully and completely, the deed executed by Milton Bruner and Katie Bruner to T. S. Cobb on February 23, 1909; also the deed executed to J. E. Foreman on February 27, 1909, by T. S. Cobb and Lillian Cobb, as set out and described in the petition of plaintiffs in error in the court below.

PER CURIAM. Adopted in whole.

CLEMENS v. ST. LOUIS & S. F. R. CO.
(Supreme Court of Oklahoma. March 15, 1913.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 119*)—PLEADING—CONTRIBUTORY NEGLIGENCE—ADMISSIONS.

In an action for personal injuries, where defendant denies generally, and alleges contributory negligence, the latter allegation is not an implied admission of negligence, rendering proof of negligence unnecessary, and limiting the issues to that of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE.

Where, in a suit for personal injuries sustained in a collision by plaintiff's intestate while an engineer on defendant's train, deceased was under orders to run from C. to L., which he did, and while running, under slow speed, on the main track to the station at L. collided, in a dense fog, with a switch engine making up another train due to leave an hour and a half before, *held*, the pleadings raising the issue, that it was error for the court to exclude testimony offered to prove a custom, in effect, that the rule requiring deceased to take the side track under said order had been abandoned by being habitually disobeyed and dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

regarded by him with knowledge of the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 918-927, 932; Dec. Dig. § 270.*]

Error from District Court, Oklahoma County; S. H. Russell, Judge.

Action by Elizabeth Clemens against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. L. McCann and A. T. Earley, both of Oklahoma City, for plaintiff in error. W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for defendant in error.

TURNER, C. J. This is an action in damages for personal injuries, brought by plaintiff in error, as the widow of James W. Clemens, against the defendant in error in the district court of Oklahoma county.

The petition substantially states that on January 14, 1907, deceased, while in the employ of defendant as an engineer on extra No. 340, started with his train, consisting of an engine and 11 cars, from Cache to Ft. Sill, by way of Lawton, where the same was due to arrive each day at 8:30 a. m., and where it was customary and in conformity to defendant's orders to approach the station on the main line, for the purpose of receiving orders to proceed; that on said morning a train, known as local No. 475, was making up at Lawton to go west through Cache to Quanah, Tex.; that when said extra No. 340 arrived at the west switch at the head of the passing track at Lawton it was defendant's duty to have the main track clear; that it failed so to do, but negligently permitted train No. 475 to operate on the main line between said switch and the station without notice to train No. 340, and as a result, while approaching under full control said station on said day, the engine attached to said extra No. 340 was struck by the engine of No. 475, which, owing to a dense fog, deceased could not see in time to avert a collision, and he was thrown from his cab and fatally injured. For answer, after a general denial, defendant alleged that deceased was guilty of contributory negligence, in that it was his duty, as a matter of reasonable precaution, and according, not only to the custom, but the rules and regulations of the company then in force, to approach the yards and terminals at that place cautiously, with his engine under full control, and to look out for other trains in the yards as he approached with his train, and not to proceed beyond the junction of the passing track until so ordered, but to side-track his train thereon; all of which, it is alleged, he did not do, but approached with his engine not under full control, and did not take the side track, but went down the main track

without orders so to do, and without keeping the proper lookout, in consequence of which the collision occurred. The answer specifically denies that deceased was obeying the orders, rules, and regulations of the company at the time of the injury, but charges that the same was occasioned by his disobedience to an order, which reads:

Form 31, St. Louis & San Francisco Railroad Company.

Train Order No. 12.

Cache, Jan. 14, 1907.

To C. & E. Eng. 340 at Cache Station.

X.....Opr.....M.

Order No. 8 is annulled.

Engine 340, Barkalow, will run extra,

Cache to Lawton, with right over No. 475.

[Signed] J. H. J.

Conductor and Engineer must both have copy of this order.

Repeated at 7:41 a. m.

Conductor: Barkalow. Train: Ex. 340. Made: Complete.

Time: 7:41. Opr.: A. M. Booker.

—and which, under the rules of the company, it says, meant that No. 340 was required to run as an extra from Cache to Lawton prior to the departure of train No. 475, and that, said No. 340 being inferior in class to the former, and its engine having the right to switch anywhere in the yards, it was the duty of deceased to side-track his train on the passing track and keep out of way of trains in the yards, and that the right of way of train No. 340 expired under said order when said passing track was reached. Defendant filed copy of said rules, regulations, and order, and alleged that the same were or could have been known to deceased by the exercise of due care, and asked to be discharged, with its cost. For reply, after a general denial, plaintiff specifically denied the existence of any custom, rule, or regulation, in force at the time of the injury, requiring deceased to approach the yards or terminals of defendant at Lawton cautiously and with his engine under control, but averred that he did so. Plaintiff further denied the existence of any custom, rule, or regulation requiring deceased to look out for trains in the yard at that point as he approached with his train, but averred that he did so, but on account of the fog could not see the colliding engine in time to avoid the injury. Plaintiff further denied the existence of any custom, rule, or regulation making it the duty of deceased not to proceed beyond the junction of the passing track until so ordered, but to side-track his train on the passing track, and averred that if defendant had any such custom, rule, or regulation it permitted the same to be, and the same had been, abandoned by being for a long time prior thereto habitually disobeyed and disregarded, with the full knowledge of defendant. Plaintiff further averred that by authority of the orders of defendant, and in keeping with its reasonable rules and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

regulations in force at the time, deceased had the right to proceed as he did on the main line to the depot at Lawton, and that such had been the custom for a long time, with defendant's knowledge. At the close of the testimony there was judgment rendered and entered for defendant pursuant to a verdict directed by the court, on the ground that no negligence was shown, and plaintiff brings the case here.

[1] Plaintiff assigns this for error, because she says the plea of contributory negligence was an admission of negligence by defendant. Not so. Such a plea following a general denial in a preceding paragraph, as here, is not, under our Code, such an admission. 29 Cyc. 582; 5 En. Pl. & Pr. 11 and 12. 6 Current Law, 768, 769, says: "While a denial of negligence and an allegation of contributory negligence are verbally inconsistent, they are not so in practice, and a defendant need not elect between the two defenses; nor does the plea of contributory negligence, when properly pleaded, admit the negligence as charged in the petition."

In *Geo. Fowler, etc., v. Brooks*, 70 Pac. 600,¹ the syllabus says: "In an action for personal injuries, where defendant denies generally, and alleges contributory negligence, the latter allegation is not an implied admission of negligence, rendering proof of negligence unnecessary, and limiting the issues to that of contributory negligence."

[2] The undisputed testimony discloses that the run of No. 340 was made from Cache to Lawton under the order set forth in defendant's answer; that under the rules of the company introduced in evidence it meant that No. 340 was required to run as an extra, with right of way on the main track from Cache to Lawton before No. 475 left that point, and there take the passing track and keep out of the way of No. 475; that said order and rules were disobeyed by deceased, who, after whistling at the whistling post for town, upon reaching the passing track, sought to continue down the main track up to the station at a speed of about six miles an hour, when the collision occurred in a fog so thick that engine No. 475 could not be seen in time to avert the accident. The testimony further discloses that No. 340 was an extra train loaded with ballast, and that it had been running under special orders for several days between those points. To avoid the force of this testimony, in effect, that the injury occurred as a result of deceased's violation of said order and the rules of the company, plaintiff, pursuant to her plea, offered to prove that the rule requiring No. 340 to take the passing track at Lawton had, with the knowledge of defendant, been so habitually violated by de-

ceased as to amount to its abrogation, and that it was customary for him to do as he did on this occasion, which was to continue on the main track up to the station and there receive his orders. To this offer the court said: "I am not going to let any custom in, even if this witness knows it, that would control this case or the admissibility of the evidence, in view of the order that has been proved and admitted to be in force." Therein the court erred, for the reason that evidence tending to prove that the rule relied on has been nullified and abandoned by being constantly violated, with the knowledge of the master, is admissible. 8 Am. & Eng. Ann. Cases, note, pp. 15, 16, and 17, and cases cited. If such were true, it was negligence on the part of defendant to dispatch this extra train to Lawton without notifying train No. 475, switching in the yards at that point, of its approach, in order that it might keep out of the way, or without notifying No. 340 that train No. 475, scheduled to leave at 7 a. m., or an hour and a half before the accident, had not yet left the yards. In *McGraw v. T. P., etc.*, R. R., 50 La. Ann. 466, 23 South. 461, 69 Am. St. Rep. 450, it is said: "It is negligence to omit to notify the employes who are dispatching an extra freight train by night that the track is obstructed at a yard which the train will reach within an hour after starting, and also negligence to omit to notify those in charge of the yard that the train is coming." See, also, 1 Labatt, 487; *Sheehan v. N. Y., etc., Ry. Co.*, 91 N. Y. 332.

The judgment of the trial court is reversed. All the Justices concur.

ST. CLAIR v. HUFNAGLE et al.

(Supreme Court of Oklahoma. Jan. 28, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 338*)—DISMISSAL OF PETITION.

A motion for a new trial being overruled on February 11, 1911, the petition in error with case-made attached was filed with the clerk of this court on February 13, 1912. *Held*, that this court has no jurisdiction to entertain same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1879-1882, 3057; Dec. Dig. § 338.*]

Error from Comanche County Court; James H. Wolverton, Judge.

Action between P. L. St. Clair and August Hufnagle and another. From the judgment, St. Clair brings error. Dismissed.

Chas. C. Black, of Lawton, for plaintiff in error. R. J. Ray, of Lawton, for defendants in error.

WILLIAMS, J. Counsel for defendant in error moves to dismiss this proceeding in error, on the ground that "more than one

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 65 Kan. 861.

year elapsed after final judgment in the trial court and before the petition in error was filed in the Supreme Court; that the motion for a new trial was overruled in the trial court on the 11th day of February, 1911, and the petition in error was filed in the Supreme Court on the 13th day of February, 1912. * * *

The record bears out the contention of the defendant in error. The motion to dismiss is sustained. *Richardson et al. v. Beidleman et al.*, 126 Pac. 816, 818. All the Justices concur.

VANSELOUS et al. v. McCLELLAN.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 758*)—DISMISSAL—BRIEFS.

When plaintiff in error in his brief fails to comply with rule 25 of this court (95 Pac. viii), his appeal may be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

Error from District Court, Kay County; *W. M. Bowles, Judge.*

Action by John F. McClellan against Thomas Vanselous and James W. Hamilton. Judgment for plaintiff, and defendants bring error. Dismissed.

John S. Burger, of Blackwell, for plaintiffs in error. D. S. Rose, of Blackwell, for defendant in error.

PER CURIAM. On December 24, 1907, defendant in error, John F. McClellan, sued Thomas Vanselous and James Hamilton, plaintiffs in error, in the district court of Kay County, in ejectment for certain lots described in his petition. There was trial and judgment for plaintiff, and when a second trial, which was granted, resulted the same way, defendants bring the case here.

But we cannot pass upon the merits of this cause, but must dismiss it. This for the reason that, owing to a failure of plaintiffs in error to comply with rule 25 of this court (95 Pac. viii), and set forth in their brief a specification of errors complained of, we can only conjecture what is relied upon to reverse the case.

Cause dismissed. All the Justices concur.

PAIN et al. v. WYLEY et al.
(Supreme Court of Oklahoma. Feb. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 511*)—DISMISSAL—CASE-MADE—SETTLEMENT.

A proceeding in error, brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant was present, either personally or by counsel, at the settlement, or that notice of the time thereof was served or waived, or what amendments

suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.*]

Error from District Court, Kingfisher County; *James W. Steen, Judge.*

Action by G. S. Pain and others against W. R. Wyley and others. From the judgment, Pain and others bring error. Dismissed.

McKeever, Walker & Church, of Enid, for plaintiffs in error. W. L. Moore, of Hennessey, for defendants in error.

HAYES, C. J. The proceeding in error in this case is prosecuted by petition in error and case-made. It does not appear from the record or otherwise that defendant in error was present, either in person or by counsel, at the settlement of the case-made, or that notice of the time and place of settlement was ever served upon or waived by defendant in error, or whether any amendments were suggested, and, if any were suggested, what amendments were allowed or disallowed.

Under this condition of the record, the case-made must be treated as a nullity, and the cause dismissed. *First Nat. Bank of Collinsville v. Daniels*, 26 Okl. 383, 108 Pac. 748; *Cobb & Co. et al. v. Hancock*, 31 Okl. 42, 119 Pac. 627; *Lister et al. v. Williams*, 28 Okl. 302, 114 Pac. 255. All the Justices concur.

DE GROAT v. FOCHT.
(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 155*)—NONNEGOTIABLE NOTE.

A clause in a note reading, "The indorsers, guarantors, and assignors severally waive presentment for payment, protest, and notice of protest thereof, for nonpayment of this note, and consent that time of payment may be extended without notice," does not render it nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407-410; Dec. Dig. § 155.*]

2. BILLS AND NOTES (§ 155*)—NEGOTIABLE NOTE—"FIXED OR DETERMINABLE TIME."

Under the uniform negotiable instrument act, an instrument, to be negotiable, must be payable on demand or at a fixed or determinable time, and a fixed or determinable time, within the meaning of that act, is when the instrument provides for a fixed period after date, on or before a fixed or determinable future time, specified therein, or on or at a fixed time after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407-410; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 3, p. 2831.]

3. PLEADING (§ 349*)—JUDGMENT ON PLEADINGS.

Where a petition alleges defects in the execution of a note, occasioned by mutual mistake of the parties, and the answer admits the defects, it is not error to render judgment on the pleadings, reforming the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. § 349.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Ferd Focht against Mrs. Frank De Groat. Judgment for plaintiff, and defendant brings error. Affirmed.

R. H. Towne, of Oklahoma City, for plaintiff in error. Everest, Smith & Campbell, of Oklahoma City, for defendant in error.

ROBERTSON, C. On May 11, 1911, Mrs. Frank De Groat, plaintiff in error, made, executed, and delivered to Mrs. M. A. Foster three promissory notes, payable, respectively, in six, seven, and eight months from date; it is alleged in the petition that by mistake the amount for which the first note was given, to wit, \$50, was omitted, and no definite sum was named, and plaintiff prays that the same be reformed and the proper sum inserted; the other notes were in the sum of \$50 each, and all, save as to the time they fall due, read as follows:

"\$50.00. May 11, 1910. 7 months after date, for value received, I, we, or either of us, jointly and severally, waiving grace and protest, promise to pay to the order of Mrs. M. A. Foster, at the Oklahoma City, fifty dollars, with interest at the rate of 8 per cent. per annum, payable annually until paid. The interest, if not paid annually, to become as principal, and bear the same rate of interest. The indorsers, guarantors, and assignors, severally waive presentment for payment, protest and notice of protest thereof, for nonpayment of this note, and consent that the time of payment may be extended without notice. Mrs. Frank De Groat.

"Indorsed: Pay to Ferd Focht. Mrs. M. A. Foster."

The petition further alleges that a chattel mortgage, on certain personal property, was given to secure the payment of the notes; that default in payment has been made; and prays for the reformation of the first, and for judgment on all three, notes, and for foreclosure of the chattel mortgage, and other proper relief.

The answer of Mrs. De Groat contains: First, a general denial, and in addition admitted, "Being indebted to said Foster in the sum of \$150 evidenced by three notes for \$50 each, due, respectively, on the 11th day of November, and December, 1910, and January, 1911;" and further alleges that she, on November 7, 1910, had been garnished in a certain cause pending in the justice of the peace court, wherein Holtzchue Bros. were plain-

tiffs, and Mrs. M. A. Foster, the payee named in said notes, was defendant, and that, in pursuance of such garnishment proceedings, she had answered to the effect that she was indebted to said payee in the sum of \$150 for the three notes hereinbefore mentioned, and that, by virtue of said answer, the justice had ordered her to pay said sum into court, to be applied to the payment of the plaintiff's judgment in the cause pending in the justice of the peace court. She further alleged that the notes were nonnegotiable; that she had no notice of their transfer from Mrs. Foster to Focht; that Holtzchue & Holtzchue were necessary parties defendant to the action; and prayed that they be brought in as such, and that she be awarded judgment for her costs. Plaintiff replied by general denial, and later filed a motion for judgment on the pleadings, which, coming on to be heard, was sustained, and the first note was reformed as prayed for, on the admissions of defendant's answer, and judgment for the full amount was entered, and the chattel mortgage ordered foreclosed, and for costs. Defendant complains of said order and judgment, and brings error to reverse the same.

[1] The first assignment of error raises the question of the negotiability of the notes sued on; and plaintiff in error contends that the clause therein, which reads as follows, "The indorsers, guarantors, and assignors severally * * * consent that time of payment may be extended without notice," destroys the negotiability of said notes, and discusses this proposition, in an interesting manner, in an elaborate brief, in which the authorities are reviewed at length. We do not feel, however, that we are at liberty to dwell on this subject, for that Mr. Justice Kane, in *Missouri-Lincoln Trust Co. v. Long*, 31 Okl. 1, 120 Pac. 291, has settled the question against the contention of counsel for plaintiff in error; and we accept the opinion in that case as the law in this state on this question. We are not unmindful of the fact that in the *Long Case*, supra, the note was given in the Indian Territory prior to statehood, and before the uniform negotiable instrument act was passed; but we do not lose sight of the fact that the rule of law announced in that case would and should have been precisely the same had the note sued on been given after the adoption of the uniform negotiable instrument law.

[2] Under this act, an instrument, to be negotiable, must be payable on demand or at a fixed or determinable time, and a fixed or determinable time, within the meaning of that act, is when the instrument provides for a fixed period after date, or on or before a fixed or determinable future time, specified therein, or on or at a fixed time after the occurrence of a specified event which is certain to happen, though the time of happening be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

uncertain. Comp. Laws 1909, §§ 4436, 4439.

As is pointed out by counsel for defendant in error in their brief that, notwithstanding the note in the Long Case, supra, was given in the Indian Territory before statehood, yet this court, in determining its negotiability, followed the law merchant and the modern decisions construing the same. And as was said in *Union Stock Yards Nat. Bank v. Bolan*, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146: "We may note in passing that the uniform instrument law is in substance merely a codification of the law merchant on the subject"—and, this being true, it necessarily follows that decisions of courts, based on the law merchant, are applicable to, and controlling of, the questions arising under the uniform negotiable instrument act.

The opinions in the cases cited in *Missouri-Lincoln Trust Co. v. Long*, supra, by Justice Kane, are nearly all based on the uniform negotiable instrument act, and are not only highly persuasive in their reasoning, but, as we view it, are binding on us as authorities. To hold otherwise would be unwarranted, and would tend to defeat the very purpose of the act. The notes being negotiable, it necessarily follows that *Holtzchue Bros.* were not proper parties, inasmuch as garnishment proceedings could not be based on them. See section 5725, Comp. Laws 1909. *Ferd Focht*, the owner of the notes at the time the suit was filed and tried in the justice of the peace court, was not a party to said action, and Mrs. De Groat was bound to have knowledge of the negotiability of the notes, and should have protected herself by proper allegations in her garnishee answer. *Focht* was not required to give notice of the transfer of the notes to him by Mrs. Foster; neither was he required to take notice of the pendency of the action and the garnishment proceedings in the justice of the peace court. The admission of plaintiff in error, in her answer in the trial court to the effect that "she promised to pay, six months after date, \$50, with interest at 8 per cent.," and the further admission that she was indebted to Mrs. Foster, as was "evidenced by three notes for \$50 each," and (page 20, case-made) "which notes are the very same identical notes sued on in the present action," effectually disposes of the contention that the court erred in ordering a reformation of the first note.

[3] The allegation of plaintiff's petition, reciting the mistake in the execution of the note, was not sufficient authority to authorize the court in ordering a reformation; but these allegations, aided by the admissions of the answer, justify fully the action of the court.

The questions of negotiability of the notes in question having been disposed of, it becomes unnecessary to give further consideration to the other alleged errors, as the dis-

position of the first assignment fully disposes of the others.

No error appearing in the record, it follows that the judgment of the district court of Oklahoma county should be affirmed.

PER CURIAM. Adopted in whole.

WAUGH v. GUTHRIE GAS, LIGHT, FUEL & IMPROVEMENT CO.†

(Supreme Court of Oklahoma. Jan. 7, 1913.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 55*)—PERSONAL INJURIES.

An action for damages for personal injuries, being an action for injury to the rights of a person, not arising on contract, is governed by the third subdivision of section 5550, Comp. Laws 1909, and must be brought within two years after the cause of action shall have accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

2. LIMITATION OF ACTIONS (§ 104*)—FRAUDULENT CONCEALMENT—EFFECT.

Fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 511-513; Dec. Dig. § 104.*]

3. LIMITATION OF ACTIONS (§ 104*)—FRAUDULENT CONCEALMENT—AFFIRMATIVE ACT.

The mere failure to disclose that a cause of action exists is not sufficient to prevent the running of the statute. There must be something more; some actual artifice to prevent knowledge of the fact; some affirmative act of concealment or some misrepresentation to exclude suspicion and prevent inquiry.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 511-513; Dec. Dig. § 104.*]

Commissioners' Opinion, Division No. 1. Appeal from District Court, Logan County; A. H. Huston, Judge.

Action by Le Roy E. Waugh against the Guthrie Gas, Light, Fuel & Improvement Company for damages for personal injury. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Joseph Wisby, John A. Remy, and C. G. Hornor, all of Guthrie, for plaintiff in error. Dale, Bierer & Hegler, of Guthrie, for defendant in error.

SHARP, C. Plaintiff's petition, filed in the district court of Logan county, June 7, 1910, charged that defendant company was on April 7, 1907, engaged in the business of supplying artificial gas to the residents of the city of Guthrie, for use in their residences and places of business, and as such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied April 5, 1913.

had constructed its gas pipe lines and other equipment throughout said city; that plaintiff was a merchant and occupied the ground floor room of a certain store building at No. 114 West Harrison avenue in said city; that said store building was piped for and supplied with water received through the water supply line of the waterworks of said city; that the defendant company's gas line was constructed in the alleyway at the rear of said building, in close proximity with and near the water supply line; and that, by permitting its said gas line to become out of repair to an extent that gas escaped therefrom at a point near the water supply line in the rear of plaintiff's building, said gas was transmitted along, to, and under, the building occupied by plaintiff, and there caused to be ignited and exploded, whereby, and on account of which wrongful and negligent acts, plaintiff sustained permanent and serious physical injuries as described in said petition. Anticipating the plea of limitations, plaintiff sought to avoid that defense by charging that defendant was a public service corporation, and that there devolved upon it, under and by virtue of its franchise and by-laws, the high responsibility of keeping its pipe line and appliances in good repair, etc.; that this duty was one owing not only to its patrons, but to the public in general; that, notwithstanding the duties and obligations due and owing by defendant, it wholly failed to perform them in the above particulars, and further willfully, and after the date of said accident, concealed the facts connected therewith from plaintiff and all persons acting for and in his behalf. The petition alleged: "That the defendant, in order to conceal, and in the act of concealing, the said facts of the cause of said explosion from the plaintiff, at and for some time thereafter was guilty of wrongful, immoral, and unlawful conduct as follows, viz.: By that of one of its officers, agents, or employes, one whose name is unknown to the plaintiff, immediately after said explosion presenting himself at said building and preventing divers persons, who were friends and representatives of the plaintiff, from entering said building and making any investigations whatever as to the cause thereof, and then and there, by words, signs, and gestures, unknown to the plaintiff leading the plaintiff's said friends and representatives to believe that his action was in order to protect, and for the purpose of protecting, the interest of property; by the defendant, subsequent to said explosion; and further by preventing its said officers, agents, and employes from disclosing any facts of the cause thereof to persons other than the officers, agents, and employes of the defendant; and by the defendant making, and causing to be made, false, fictitious, and fraudulent reports as to the cause of said explosion—all of which was done

by the defendant for the purpose of leading this plaintiff to believe that said explosion was not caused by the escape of artificial gas from the defendant's gas lines." It was further charged that plaintiff had made diligent efforts to discover the cause of the explosion by making inquiries from the officers and employes of the defendant, and from other persons, and by examination of the premises and lines of the defendant company, but was wholly unable to discover the cause thereof until within one month of the date of filing his petition.

[1] The sufficiency of the petition was attacked by demurrer; the defendant specifically pleading the two-year statute of limitations. The demurrer was sustained. Plaintiff electing to stand on the sufficiency of his petition, judgment was rendered for the defendant, and, from this judgment, an appeal has been prosecuted. The statute of limitations applicable is, we think, the third subdivision of section 5550, Comp. Laws 1909, which provides that an action for the injury to the rights of another, not arising on contract, and not therein enumerated, shall be brought within two years after the cause of action shall have accrued. *Atchison, T. & S. F. Ry. Co. v. King*, 31 Kan. 708, 3 Pac. 565; *Missouri, K. & T. Ry. Co. v. Wilcox*, 32 Okl. 51, 121 Pac. 656.

[2, 3] Plaintiff's injury was sustained more than two years before the bringing of the action, so that, unless the alleged fraudulent concealment by defendant of the facts serves to postpone the operation of the statute, plaintiff's cause of action was barred by limitations. This is the sole remaining question presented for our determination. The statute contains no exception of the kind; and, the action not being predicated upon fraud, that provision of the statute, authorizing suit to be commenced, in an action for relief on the ground of fraud, within two years after the discovery of the fraud, does not apply. The first three subdivisions of section 5550, Comp. Laws 1909, are identical with the same numbered provisions of section 5610, General Statutes of Kansas 1909. It does not appear, from an examination of the authorities that we have made, that the exact question here presented was ever before the Supreme Court of Kansas prior to the adoption by the territorial Legislature of the above part of the statute, though in the early case of *Voss v. Bachop*, 5 Kan. 59, we find that the Supreme Court of that state refused to permit the plea of the statute of limitations in bar of an action brought by a client against an attorney for money collected and not accounted for. The court, speaking through Kingman, C. J., held that, the allegations of the petition charging that defendant, by his own misrepresentations, had prevented a demand being made on him, said defendant was estopped by his own acts from setting up the statute, and cited in

support of its position the case of *Way v. Cutting*, 20 N. H. 190, a case not involving any professional or fiduciary relationship. In quoting from the latter case the court said: "The principle of natural justice and of positive law that precludes a party from deriving a benefit from his own wrong has from an early period been applied by courts, both of law and equity, to the construction of the statute of limitations. It has accordingly been repeatedly held that a party shall not be protected by the lapse of time during which he has, by his own fraud, prevented the party whom he has injured from asserting his rights at law, and that he, against whom the statute bar is interposed, may avoid it by showing that he has been kept in ignorance of his claim till within the period limited by law for bringing his suit by the fraudulent practices of the party setting up the defense."

The question, in a somewhat changed form, was again before the Supreme Court of Kansas in *McMullen v. Winfield Bldg. & Loan Ass'n*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236. There the default was made more than six years prior to the commencement of the action; but it was charged that the secretary of the company artfully and fraudulently concealed his misappropriations by making false entries, etc., in the books, and that the association had no knowledge of his wrongful and fraudulent acts until shortly before bringing its action. It was observed by the court: "Did the fraudulent concealment interfere with the operation of the statute of limitations? Did the cause of action accrue when the fraud was committed, or not until the fraudulent conduct and defaults were discovered? Courts of equity have been holding that, independent of a statutory provision, the defendant's fraud and concealment of a cause of action will postpone the running of the statute of limitations until such time as the plaintiff discovers the fraud, and this upon the theory that the defendant, having by his own wrong and fraud prevented the plaintiff from bringing his action, cannot take advantage of his own wrong by setting up the statute as a defense. Some authorities confine this rule to proceedings in courts of equity, but hold that at law neither fraud, concealment, nor other circumstance will affect the operation of the statute, unless it is expressly provided for by statute. The weight of authority in this country and in England applies the rule to actions at law as well as to suits in equity. In *Bailey v. Glover*, 21 Wall. 342 [22 L. Ed. 636], Mr. Justice Miller, in holding that concealed fraud was an implied exception to the statute of limitations, equally applicable to suits at law as well as in equity, said: 'Statutes of limitations are intended to prevent frauds, to prevent parties from asserting rights after a lapse of time had destroyed or impaired

the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.' See, also, *Munson v. Hollowell*, 26 Tex. 475, 84 Am. Dec. 582; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382 [28 L. Ed. 396]; *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155 [29 L. Ed. 467]; *Lieberman v. Bank* [8 Del. Ch. 229] 40 Atl. 382; *Lieberman v. First Nat. Bank*, 2 Pennewill (Del.) 416, 45 Atl. 901 [48 L. R. A. 514], 82 Am. St. Rep. 414; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974; 19 Am. & Eng. Ency. of Law (2d Ed.) 245."

Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co. (Kan.) 70 Pac. 933, was an action to recover damages for wrongful discrimination in freight rates. It was held that concealment and fraud constituted as implied exception to the statute of limitations, and that a party who wrongfully concealed material facts, and thereby prevented a discovery of his wrong, or the fact that a cause of action had accrued against him, would not be allowed to take advantage of his own wrong by setting up the statute, the design of which was to prevent wrong and fraud. A rehearing being granted, it was held (68 Kan. 585, 75 Pac. 1051, 1 Ann. Cas. 639) that, although the defendant succeeded in concealing the fact of its discrimination from plaintiff until less than 18 months prior to the filing of the petition, no ground for postponing the operation of the statute was shown. A vigorous dissenting opinion, however, was filed by Johnston, C. J., in which a great number of authorities are cited as sustaining the former position of the court. The rule announced in the majority opinion has since been followed in *Stewart v. Bank*, 68 Kan. 755, 75 Pac. 1055; *Beckham v. Burrton State Bank*, 68 Kan. 833, 75 Pac. 1133; *McAllister et al. v. Fair, Adm'r, et al.*, 72 Kan. 533, 535, 84 Pac. 112, 3 L. R. A. (N. S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973; *Baxter v. Krause*, 79 Kan. 851, 101 Pac. 467, 23 L. R. A. (N. S.) 547; *Caspar v. Lewin*, 82 Kan. 604, 627, 109 Pac. 657. We are not concluded, however, by these opinions, all of them, save *Voss v. Bachop*, supra, being rendered subsequent to the adoption of the statute. *Barnes v. Lynch et al.*, 9 Okl. 156, 59 Pac. 995.

The first authoritative application of this principle to courts of law found encouragement, if not origin, in the language of Lord Mansfield in *Bree v. Holbeck*, 2 Doug. 654 (99 Eng. Rep. K. B. 415), where it was observed: "There may be cases which fraud

will take out of the statute of limitation." In answer to the charge frequently made by different courts that the expression was mere dictum, it was said by Story, J., in *Sherwood v. Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782: "It is by no means a just representation of this case to consider this language as a mere dictum of Lord Mansfield. He must be understood to have spoken in the name of the court; and the leave granted to the plaintiff to amend and reply fraud in the defendant is proof that the court entertained no doubt upon the principal point." It is said by this learned judge in the opinion that the rule announced by Lord Mansfield has often been decided, both at law and in equity, since its decision, and has never been denied in England. Judge Story's opinion contains a complete review of the authorities, both in England and America, up to the time of its rendition. It contains a strong and able presentation of the law, to which little, if anything, except in the way of subsequent authorities, could be added. After reviewing the English authorities, it is said that, with one exception (*Troup v. Ex'rs of Smith*, 20 Johns. [N. Y.] 33), the American cases are in conformity with the rule announced in *Bree v. Holbech*. Among the leading cases, and one cited by Justice Story, is *First Massachusetts Turnpike Corporation v. Field et al.*, 3 Mass. 201, 3 Am. Dec. 124, decided at a time when Parker, J., Sedgwick, J., and Parsons, C. J., were all members of that court, and to which the two latter gave expression of their views in the opinion; both referring to the early English case of *Bree v. Holbech*, supra. The former in the opinion said: "Is this an answer (plea of limitations) which ought to be deemed satisfactory in a court of justice? I think not. If it should, every man would be screened from making satisfaction for injuries resulting from the fraudulent execution of his contracts, if his fraud was attended with such circumstances of artful concealment as to elude detection until after a lapse of more than six years." While it is said by Parsons, C. J.: "The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud."

In *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467, the plea set up the bar prescribed by the second section of the Bankruptcy Act, being section 5057 of the Revised Statutes, which declared: "No suit, either at law or in equity, shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such

assignee, unless brought within two years from the time the cause of action accrued for or against such assignee." In answer to the plea of the statute, various acts of fraudulent concealment were charged. The court observed that the case was substantially the same, so far as the question then before it was concerned, as *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636 (cited in *McMullen v. Winfield Bldg. & Loan Ass'n*, supra), and attention was there called that the case of *Bailey v. Glover* had never been overruled, doubted, or modified by that court; but on the contrary, in *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395, it was reaffirmed, and was distinguished from the case of *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, relied on by the appellants, and concluded by holding that, upon the pleadings and evidence, the suit was not barred by the limitation prescribed in section 5057 of the Revised Statutes. It will be noted that the foregoing statute contains no exception or provision for tolling the statute. An able and scholarly presentation of the case is presented in *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582, where all of the early authorities, both English and American, are reviewed.

In Texas, as with us (section 5542, Comp. Laws 1909), the distinctions between actions at law and suits in equity are abolished. The court arrived at the conclusion that, there being no distinction in that state between legal and equitable remedies, it followed, as a question of legislative intention in the adoption of the statutes of limitation, that the fraudulent concealment by a defendant of the litigation would prevent the statute from running against the plaintiff. It was said: "The fact that we have no distinction in our courts between legal and equitable remedies, instead of repelling this uniform construction that has been given to the statute, would seem to afford a still stronger reason for leading with us to its adoption. For if, as it is justly said, there is no distinction of this character in our judicial system, and the statute must therefore be regarded as binding upon the courts, whether in the exercise of their functions as legal or equitable tribunals, is it not a legitimate conclusion that the Legislature, having adopted the statute as the rule of decision for a tribunal administering both legal and equitable remedies, must have intended to have adopted it as well with reference to the construction previously placed upon it in equity as at law, if the case before the court appropriately required it? If not, the mere fact that legal and equitable powers have been blended, with us, in a single tribunal, cuts a party off from a remedy to which we would be entitled under the same statute, if legal and equitable remedies were administered in different forums. Such is not believed to be the intention in the adoption of our judicial system."

The question is ably considered in *Reynolds v. Hennessey*, 17 R. I. 169, 23 Atl. 639; the court saying: "The statute does not take away the debt, but simply affects the remedy; and these exceptions show how liberally the statute has always been created as a remedial measure. But there is a wide distinction between ingrafting an exception into a statute by construction and construing it according to its obvious intent. The rule laid down by Blackstone of considering the old law, the mischief, and the remedy, when applied to this statute, shows that its purpose was to cut off those cases whose prosecution would, or might, result in fraud. It was clearly not intended to thwart the fundamental maxim that no one may take advantage of his own wrong. Hence, if one by fraud conceals the fact of a right of action for six years, it is not ingrafting an exception on the statute to say he is not protected thereby; but it is simply saying he never was within it, since the protection was never designed for such as he. But whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy. Such a construction also has been so frequently applied that it is now said to have the weight of authority in its favor, although it must be admitted there are strongly expressed opinions the other way. *Busw. Lim.* § 390; *Angell, Lim.* (6th Ed.) c. 18, § 186; 8 *Pars. Cont.* 99."

Among other cases supporting the authorities mentioned are the following: *Snodgrass v. Branch Bank*, 25 Ala. 161, 60 Am. Dec. 505; *Porter v. Smith*, 65 Ala. 169; *Condit v. Holden*, 92 Ark. 618, 123 S. W. 765, 135 Am. St. Rep. 206; *Kane v. Cook*, 8 Cal. 449; *Curran v. Hubbard*, 14 Cal. App. 733, 114 Pac. 83; *Lewis v. Denison*, 2 App. D. C. 387; *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Campbell v. Vining*, 23 Ill. 525; *Grant v. Odiorne*, 43 Ill. App. 402; *Athey v. Hunter*, 65 Ill. App. 453; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Cook v. Railway Co.*, 81 Iowa, 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. Rep. 512; *Carrier v. Railway Co.*, 79 Iowa, 80, 44 N. W. 203, 6 L. R. A. 799; *Eising v. Andrews*, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Boomer Dist. Twp. v. French*, 40 Iowa, 601; *Lancaster v. Springer*, 239 Ill. 472, 88 N. E. 272; *Wood v. Williams*, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79; *Fortune v. English*, 226 Ill. 262, 80 N. E. 781, 12 L. R. A. (N. S.) 1005, 117 Am. St. Rep. 253, 9 Ann. Cas. 77; *Wear v. Skinner*, 46 Md. 257, 24 Am. Rep. 517; *Turnpike Corp. v. Field*, 3 Mass. 201, 3 Am. Dec. 124; *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313, 11 N. E. 81; *Dean v. Ross*, 178 Mass. 397, 60 N. E. 119; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651; *Mast et al. v. Easton*, 33 Minn. 161, 22 N. W. 253; *Bescher v. Paulus*, 58 Ind. 271; *Fisher v. Tuller*, 122 Ind. 31, 23 N. E.

523; *Campbell v. First's Estate* (Ind. App.) 97 N. E. 954; *Cress v. Ivens* (Iowa) 134 N. W. 869; *Deake*, Appeal of, 80 Me. 50, 12 Atl. 790; *Clark v. Goodrum*, 61 Miss. 731; *State v. Yates*, 231 Mo. 276, 132 S. W. 672; *Shelby County v. Bragg*, 135 Mo. 291, 36 S. W. 600; *State v. Hawkins*, 103 Mo. App. 251, 77 S. W. 98; *Hickam v. Hickam*, 46 Mo. App. 496; *Douglas v. Elkins*, 28 N. H. 26; *Quimby v. Blackey*, 63 N. H. 77; *Way v. Cutting*, 20 N. H. 187; *Bowman v. Sanborn*, 18 N. H. 205; *Hughes v. National Bank*, 110 Pa. 428, 1 Atl. 417; *Morgan v. Tener*, 83 Pa. 305; *Campbell v. Boggs*, 48 Pa. 524; *McDowell v. Potter*, 8 Pa. 189, 49 Am. Dec. 503; *Harrisburg Bank v. Foster*, 8 Watts (Pa.) 12; *Reynolds v. Hennessey*, 17 R. I. 169, 23 Atl. 639; *Harrell v. Kelly*, 2 McCord (S. C.) 426; *Railway Co. v. Gay*, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; *Id.*, 88 Tex. 111, 30 S. W. 543; *Anding v. Perkins*, 29 Tex. 348; *Ripley v. Withee*, 27 Tex. 14; *Munson v. Halliwell*, 26 Tex. 475, 84 Am. Dec. 582; *Larsen v. Loan Co.*, 23 Utah, 449, 65 Pac. 208; *Cloyd v. Reynolds*, 44 Pa. Super. Ct. 81; *Boro v. Hidell*, 122 Tenn. 80, 120 S. W. 961, 135 Am. St. Rep. 857; *Ragland v. Owen*, 84 Va. 227, 5 S. E. 91; *Reynolds' Adm'r's v. Gauthrop's Heirs*, 37 W. Va. 3, 16 S. E. 364; *Sherwood v. Sutton*, Fed. Cas. No. 12,782, 5 Mason, 143; *Granger v. George*, 5 B. & C. 149, 7 D. & R. 729; *Clark v. Hougham*, 2 B. & C. 149, 3 D. & R. 322; *Bree v. Holbech*, 2 Doug. 655.

Authorities announcing a contrary rule, in addition to the Kansas cases already cited, are: *Fee, Adm'r. v. Fee, Adm'r.*, 10 Ohio, 469, 36 Am. Dec. 103; *Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413; *Troup v. Smith's Ex'rs*, 20 Johns. (N. Y.) 48; *Leonard v. Pitney*, 5 Wend. (N. Y.) 30; *Allen v. Mille*, 17 Wend. (N. Y.) 202; *Callis v. Waddy*, 2 Munf. (Va.) 511; *Smith v. Bishop*, 9 Vt. 116, 31 Am. Dec. 607; *Hamilton v. Shepherd*, 3 Murphy (7 N. C.) 115; *Pyle v. Beckwith*, 1 J. J. Marsh. (Ky.) 445; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320; *Peak v. Buck et al.*, 3 Baxt. (Tenn.) 71; *Freeholders of Somerset v. Veghte*, 44 N. J. Law, 509; *Blount v. Parker*, 78 N. C. 128; *Murray v. Chicago & N. W. Ry. Co.*, 92 Fed. 868, 35 C. C. A. 62; *Wood on Limitations* (3d Ed.) § 274.

From what we have said, it should not be construed to mean that mere failure to disclose is sufficient to prevent the running of the statute. There must be something more; some actual artifice to prevent knowledge of the fact; some affirmative act of concealment; or some misrepresentation to exclude suspicion and prevent inquiry. *Perry v. Wade*, 31 Kan. 428, 2 Pac. 787; *Lancaster v. Springer*, 239 Ill. 472, 88 N. E. 272; *McBride v. Burlington, etc., Ry. Co.*, 97 Iowa, 91, 66 N. W. 73, 59 Am. Rep. 395; *Wood v. Williams*, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79; *Smith v. Blachley*, 198 Pa. 173, 47 Atl. 985, 53 L. R. A. 849; *State v. Walters*,

31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106; State v. Yates, 231 Mo. 276, 132 S. W. 672. But we think the petition sufficiently met this necessary allegation. It charged that defendant, in various ways, actively made, and caused to be made, false, fictitious, and fraudulent reports as to the cause of the explosion for the purpose of leading plaintiff to believe that said explosion was not the result of the escape and ignition of artificial gas from defendant's mains; that defendant was at all times well aware of the cause of the explosion, and caused secret repairs to be made of its mains and appliances for the purpose of preventing plaintiff from acquiring the knowledge of the cause of the explosion; and in other ways charged defendant with a fraudulent concealment of the facts which would have disclosed to plaintiff his cause of action against defendant, notwithstanding that plaintiff was at all times active and diligent in his efforts and endeavors to discover the cause thereof. It is no sufficient answer to say, as have counsel in their brief, that plaintiff must have known that he was blown up, and realized that he was injured. This he undoubtedly knew; but it was the fact that defendant by its negligence was the cause of the injury that gave rise to the cause of action against it, not the mere fact of the injury. Upon trial the party relying on the fraudulent concealment of the cause of action to avoid the statute would have the burden of proving such concealment. Following what we believe to be the great weight of authority, and keeping in mind that the very purpose of the statute of limitations was to prevent fraud and not to make it secure and successful, we conclude that the petition stated a good cause of action, and that the trial court erred in sustaining the demurrer.

The judgment of the trial court should therefore be reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceeding consistent with this opinion.

PER CURIAM. Adopted in whole.

WILLIAMS v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 19, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 151*)—EVIDENCE—BURDEN OF PROOF.

In a prosecution for murder, if the state proves the killing without tending to show that the offense only amounted to manslaughter or showing facts sufficient to raise a reasonable doubt as to the defendant's justification or ex-

cuse, the unlawfulness of the killing is presumed. Thereupon the burden shifts to the defendant to produce sufficient testimony to raise a reasonable doubt as to his justification or excuse.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.*]

2. CRIMINAL LAW (§§ 763, 764*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence, and they are not bound to believe the testimony or any part of the testimony of any witness when in their judgment a witness may have testified falsely or may have been mistaken; and it is improper for the trial court to give an instruction which in the least trenches upon this prerogative of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

Appeal from District Court, Garvin County; R. McMillan, Judge.

Ben Williams was found guilty in the district court of Garvin county of the offense of manslaughter in the first degree, and his punishment was fixed by the jury at confinement in the penitentiary for the period of four years. Appealed. Reversed.

Thompson & Patterson, of Pauls Valley, for appellant. Charles West, Atty. Gen., for the State.

FURMAN, J. First. The record in this case contains about 800 pages of typewritten matter. Seventeen witnesses testified for the state and 32 witnesses testified for the appellant. So far as the merits of this cause are concerned, the testimony as a whole constitutes a hopeless and irreconcilable maze of contradictions, but it is agreed by all that on Sunday afternoon, the 23d day of October, 1910, there was a negro baptizing near Hennepin, in Garvin county, Okl., and that after the religious ceremonies were over and the crowd had dispersed a fight with pistols occurred on the public road between the appellant, Ben Williams, and the deceased, Calvin Newberry, in which Calvin Newberry was killed and the appellant was wounded.

It would be impossible to make a clear and concise statement of the facts of this case. In fact, after a careful examination of the record, we are unable to state what the facts of the case actually were. From the standpoint of the state there is abundant testimony to sustain a conviction for murder. From the standpoint of the defendant it is a clear case of self-defense. The participants and all of the material witnesses are negroes. Witnesses on each side gave the most positive and direct testimony for and against appellant, and all of the material witnesses are flatly contradicted and are also amply sustained and corroborated. All of the witnesses fully sustained the respective sides by which they were placed upon the stand. This being the condition of the record, if the instructions of the court were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Serfes & Rep'r Indexes

correct, we would affirm the conviction upon the ground that the witnesses were all before the jury, and that the jury were in a much better condition to determine their credibility than the members of this court are.

A number of exceptions were reserved to the charge of the court. We only deem it necessary to notice two of the charges complained of. The sixteenth paragraph of the instructions of the court is as follows: "(16) If after a consideration of all the evidence in this case you believe that the defendant, Ben Williams, was justifiable or excusable in his acts, as those terms have been defined to you in this charge, then in that event he should be acquitted." Section 6854, Comp. Laws 1909, is as follows: "Sec. 6854. Burden of proof in mitigation of murder.—Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Instructions substantially in the language of this statute have been repeatedly approved by this court. See *Lumpkin v. State*, 5 Okl. Cr. 488, 115 Pac. 478; *Culpepper v. United States*, 4 Okl. Cr. 103, 111 Pac. 679, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668; *Prince v. United States*, 3 Okl. Cr. 700, 109 Pac. 241; *Hawkins v. United States*, 3 Okl. Cr. 651, 108 Pac. 561. The construction which we have uniformly placed upon this statute is that, if the prosecution proves the killing without tending to show that the offense only constitutes manslaughter or showing facts sufficient to raise a reasonable doubt as to the defendant's justification or excuse, the unlawfulness of the killing is presumed, and thereupon the burden shifts to the defendant to produce sufficient testimony to raise a reasonable doubt as to his justification or excuse. But we have never held that this burden required the defendant to do more than to offer sufficient testimony to raise a reasonable doubt as to his justification or excuse. The instruction complained of we think states the law too strongly. The court should have instructed the jury that if after a consideration of all of the evidence in the case they believed the defendant, Ben Williams, was justifiable or excusable in his acts, or if they entertained a reasonable doubt upon this subject, they should find him not guilty. It would have been impossible for the jury to misunderstand such instruction or to have been misled thereby.

Second. Section 24 of the instructions of the court is as follows: "(24) If you find that any witness has willfully testified falsely to any material question, then you are at liberty to disregard a part or the whole of the testimony of such witness, except in so

far as the same may be corroborated by other credible evidence."

[1] Under our statute in the first instance, the jury are the exclusive judges of the credibility of the witnesses and the weight of the testimony. They are not bound to believe the testimony or any part of the testimony of any witness, when in their judgment the witness may have testified falsely, or may have been mistaken. There is no statute or principle of law which requires a jury to believe a witness simply because he may be corroborated. To instruct a jury that, if they find that any witness has willfully testified falsely to any material question, then they are at liberty to disregard in part or in whole the testimony of such witness, except in so far as the same may be corroborated by other credible evidence, is liable to create the impression upon the minds of the jury that, where a witness is corroborated, the jury are bound to accept his testimony as true. To this extent such an instruction trenches upon the province of the jury. See *Gilbert v. State*, 8 Okl. Cr. —, 129 Pac. 671; *McKnight v. State*, 7 Okl. Cr. 235, 122 Pac. 1118; *Sims v. State*, 7 Okl. Cr. 7, 120 Pac. 1032; *Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278; *Gibbons v. Territory*, 5 Okl. Cr. 212, 115 Pac. 129; *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381. We do not think, however, that the giving of this instruction is necessarily reversible error, because cases may arise in which such an instruction would be beneficial to the defendant, or in which the evidence was so clear and conclusive as to the guilt of the defendant that there could be no question but that he was not injured by such instruction. The better plan is for the trial court not to attempt to give the jury any instruction as to who they shall believe or who they may disbelieve but to leave this matter to the common sense, sound judgment, and experience of the jurors. This was evidently the intention and purpose of the law.

It is insisted by the Attorney General that in this case the testimony is clear as to the guilt of appellant, and therefore the errors in the instructions of the court are harmless. If the jury believed all of the testimony for the state and rejected all of the testimony for appellant, then the evidence would be clear and conclusive as to the guilt of appellant. But if, on the contrary, the jury believed all of the testimony for the defendant, and rejected the testimony for the state, appellant was clearly justifiable. As before stated, the conflicts in the testimony are positive and irreconcilable. Under these conditions, we think it is error for the court to give an instruction which was calculated to create a misapprehension on the minds of the jurors as to what their rights and duties were in settling the conflicts in the testimony and determining the credibility of the witnesses.

For the errors hereinbefore pointed out the judgment of the lower court is reversed, and the cause remanded for a new trial.

ARMSTRONG, P. J., and DOYLE, J., concur.

MILLER v. STATE.

(Criminal Court of Appeals of Oklahoma. April 19, 1913.)

(Syllabus by the Court.)

1. PERJURY (§ 25*) — INDICTMENT — SUFFICIENCY.

An indictment for perjury need not set out the facts from which it will be made to appear that the alleged false testimony upon which the charge of perjury is predicated was material. It is sufficient if the express averment is made that said testimony was material to the question in issue.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

2. PERJURY (§ 11*)—INDICTMENT—MATERIALITY OF TESTIMONY—DEGREES.

Upon a trial for perjury, the degree of the materiality of the testimony upon which it is based is of no importance. Any false statement made by a witness which detracts from or adds weight and force to the testimony of any witness upon matters that are directly material thereby becomes material itself and constitutes "perjury."

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

Appeal from District Court, Cherokee County; John H. Pitchford, Judge.

Andrew J. Miller was convicted of perjury, and he appeals. Affirmed.

J. Berry King, of Tahlequah, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. [1, 2] First. A demurrer was filed to the indictment upon the ground that it did not set out the facts from which it appeared that the alleged false testimony upon which the charge of perjury was predicated was material. This demurrer was overruled by the trial court. The contention is that the facts must be set out in the indictment showing the materiality of the testimony alleged to be false. With this contention we cannot agree. It would require the pleader to state all of the evidence upon which he relied. This is never necessary. It is enough on this subject for the indictment or information to allege that the testimony which is charged to be false and perjured was material in the case in which it was given. The materiality of false statements is often a mixed question of law and of fact, and the degree of its materiality is wholly immaterial. It is sufficient if it is so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material.

This question has already been fully considered by the court. In considering the question as to whether or not certain testimony given before a grand jury was material, in the case of *Coleman v. State*, 6 Okl. Cr. 265, 118 Pac. 600, this court said:

"If the statement assigned as perjury could not have influenced the grand jury in determining the issue before them, it was not material; but, if the statement was made for the purpose of influencing the grand jury and was such that it might have had this effect, then it was material. It is not necessary that the matter sworn to be directly and immediately material in order to constitute the offense of perjury. It is sufficient if it is so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material by giving weight or probability to or detracting from the testimony of a witness thereto. This is sufficient, and makes the testimony material. It has therefore been held that perjury may be assigned upon false statements affecting a collateral issue as to the credibility of a witness; this being material to the main issue. This was directly passed upon by the Supreme Court of Kansas in the case of *State v. Park*, 57 Kan. 432, 46 Pac. 713. The Supreme Court of that state there laid down the true rule as follows: 'To constitute perjury, the false statements must be material to the subject under consideration, or such as would tend to influence the determination of the issues to be decided. The question whether the defendant had been previously prosecuted and punished for committing grand larceny in Missouri, although in a certain sense collateral to the question on trial, can hardly be treated as immaterial. In the trial wherein false statements are alleged to have been made, Park voluntarily became a witness in his own behalf, and he was therefore subject to the same rules on cross-examination as any other witness. He having assumed the position of a witness, it was competent for the state upon cross-examination to test his veracity and credibility. It is well settled in this state that a defendant may be asked questions disclosing his past life and conduct; and the state may even go to the extent of inquiring if he has ever been convicted of the same offense as that for which he is upon trial. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749; *State v. Wells*, 54 Kan. 161, 37 Pac. 1005. Not only was the statement of the witness therefore competent, but it had an important bearing upon the credit to be given to his whole testimony; and it is generally held to be perjury to swear falsely to anything affecting the credibility of the witness himself or the credibility of another witness in the case. In *Wood v. People*, 59 N. Y. 117, it is held

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that: "It is not necessary that the false statement tends directly to prove the issue in order to sustain an indictment for perjury. If circumstantially material, or if it tends to support and give credit to the witness in respect to the main fact, it is perjury." The Texas Court of Appeals has held that perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue. *Williams v. State*, 28 Tex. App. 301, 12 S. W. 1103. See, also, *United States v. Landsberg* (C. C.) 23 Fed. 585; *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; 2 *Bishop's New Crim. Law*, § 1032; *Clark's Crim. Law of Canada*, 389; *Tiffany's Crim. Law*, 850.

"The degree of materiality is of no importance. Any false statement made by a witness which detracts from or adds weight and force to the testimony as to matters that are directly material thereby becomes material itself and may constitute perjury. Section 195, 3 *Greenleaf on Evl.*, is as follows: 'As to the materiality of the matter to which the prisoner testified, it must appear either to have been directly pertinent to the issue or point in question, or tending to increase or diminish the damages, or to induce the judge or jury to give readier credit to the substantial part of the evidence. But the degree of materiality is of no importance; for, if it tends to prove the matter in hand, it is enough, though it be but circumstantial. Thus falsehood in the statement of collateral matter, not of substance, such as the day in an action of trespass, or the kind of staff with which an assault was made, or the color of his clothes, or the like, may or may not be criminal, according as they may tend to give weight and force to other and material circumstances, or to give additional credit to the testimony of the witness himself or of some other witness in the cause. And therefore every question upon the cross-examination of a witness is said to be material. In the answer to a bill in equity matters not responsive to the bill may be material. But where the bill prays discovery of a parole agreement, which is void by the statute of frauds, and which is denied in the answer, this distinction has been taken: That, where the statute is pleaded or expressly claimed as a bar, the denial of the fact is immaterial, and therefore no perjury, but that where the statute is not set up, but the agreement is incidentally charged, as, for example, in a bill for relief, the fact is material, and perjury may be assigned upon the denial.'"

That it is not necessary for an indictment for perjury to state the facts which show the materiality of false testimony was expressly decided by the territorial Supreme Court in the case of *Cutler v. Territory*, 8 Okl. 101, 56 Pac. 861. Chief Justice Bur-

ford speaking for the court there said: "We have examined the indictment, and find that it contains all the material averments necessary to constitute a good charge of perjury, and that no error was committed in overruling the demurrer. The sufficiency of the indictment is challenged upon the ground that it does not appear from the alleged false matter that the testimony set out was material to any issue before the court. It is now well settled by the weight of modern authority that the materiality need not be made to appear, other than by an express allegation that said matters were material to the question to be determined. This indictment expressly avers the materiality of the alleged false testimony, and is sufficient. *Rich v. U. S.*, 1 Okl. 354, 33 Pac. 804; *Stanley v. U. S.*, 1 Okl. 336, 33 Pac. 1025; *Territory v. Lockhart* [8 N. M. 523], 45 Pac. 1106; *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155; *State v. Sutton*, 147 Ind. 158, 46 N. E. 468; *Shaffer v. State* [87 Md. 124] 39 Atl. 313."

Mr. Bishop, in his *New Criminal Procedure* (volume 2, § 921), says: "The materiality of the false testimony to the issue or point of inquiry being an essential element in the offense, it must be averred. *And the pleader in doing this may at his election say that it was thus material or set out facts from which its materiality in law appear.*"

In 30 Cyc., under "Perjury," p. 1435, it is said: "It is sufficient to charge generally that the false testimony was in respect to a matter material to the issue, without setting out the facts from which such materiality appears."

The law as announced above is properly settled against defendant's contentions, and we deem it unnecessary to cite additional authorities.

Second. Upon the trial of this cause it was proven that one Blue Cromley had previously been tried in the district court of Cherokee county for murder, in which trial appellant was sworn and testified as a witness. His testimony upon the final trial was directly contradictory of statements which he had made as a witness at the preliminary trial of Blue Cromley. Being questioned about the matter, he not only denied having made such statements upon said preliminary trial, but also swore positively that he had not appeared and testified as a witness in such previous trial. It was then proven that as a matter of fact he had testified at the preliminary trial of Blue Cromley and had then testified positively to a different statement of facts to those which he testified to upon the final trial of said Blue Cromley. This denial of his previous testimony and of the fact that he had testified at such previous trial was material, as it tended to affect his credibility as a witness upon said final trial.

We think the evidence sustains the conviction. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

FRANKLIN v. STATE.

(Criminal Court of Appeals of Oklahoma. April 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 627*)—PREPARATION FOR TRIAL—COPY OF ACCUSATION—WAIVER.

Under the Constitution (section 20, Bill of Rights), in all criminal prosecutions the defendant is entitled to a copy of the accusation against him; but, if he be at large so that he can go to the clerk's office, call for, and examine the original accusation and copy it if he desires, the state is under no obligation to make and serve a copy upon him. However, if he demands a copy thereof, the state must furnish it, but, unless he demands it before announcing ready for trial, his right to a copy is waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1399-1408, 1412, 1434; Dec. Dig. § 627.*]

2. CRIMINAL LAW (§ 629*)—PREPARATION FOR TRIAL—SERVICE OF LIST OF WITNESSES—WAIVER.

The defendant in a capital case may waive his constitutional right to be furnished with a list of the witnesses that will be called in chief to prove the allegations of the indictment or information, together with their post office addresses, at least two days before the case is called for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

3. TIME (§ 11*)—COMPUTATION—"DAY."

A day, in legal consideration, is punctum temporis. Fractions of a day are to be disregarded in computations which include more than one day, and involve no question of priority.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 53; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1832-1837; vol. 8, p. 7626.]

4. HOMICIDE (§ 78*)—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, the evidence is held sufficient to support the verdict of manslaughter in the second degree, and that no error was committed on the trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 104; Dec. Dig. § 78.*]

(Additional Syllabus by Editorial Staff.)

5. CRIMINAL LAW (§ 629*)—CONTINUANCE—WAIVER OF RIGHT.

Where counsel for defendant in a homicide case refuses to consent to a continuance until another case on call for that day is tried, this constitutes a waiver of any right defendant may have to a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

6. CRIMINAL LAW (§ 628*)—LIST OF WITNESSES—RESIDENCES.

Where the witnesses, whose names were indorsed on the information, were relatives and near neighbors of defendant, the words "all of Konawa, Okl.," sufficiently designated their post office addresses, within the requirement of Const.

Bill of Rights, § 20, that defendant shall be served with a list of the witnesses together with their post office addresses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1409-1411, 1413-1419; Dec. Dig. § 628.*]

Appeal from District Court, Seminole County; Tom D. McKeown, Judge.

Robert Franklin was convicted of manslaughter in the second degree, and he appeals. Affirmed.

Crump & Fowler, of Wewoka, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen.; and H. A. King, of Oklahoma City, for the State.

DOYLE, J. Plaintiff in error, Robert Franklin, hereinafter referred to as the defendant, was in the district court of Seminole county convicted of manslaughter in the second degree on an information charging him with the murder of Mary Gordon, and in accordance with the verdict of the jury was on August 26, 1911, sentenced to serve a term of two years in the penitentiary. To reverse this judgment an appeal by case-made was perfected.

Briefly stated, the record discloses the following facts: On September 24, 1910, there was a "supper" at the home of Jim Franklin, a brother of the defendant, attended by a number of negroes, among them Mary Gordon, the deceased, and her stepson, Manual Gordon. The defendant had some trouble at the supper with Manual Gordon, and the deceased started home, carrying a shotgun, and was overtaken by the defendant and his brother Houston Franklin, and in a scuffle for the possession of the gun the deceased was shot. She died in a few days from the effects of the gunshot wound.

E. L. Adamson testified that shortly after the deceased had started home he heard her exclaim, "Don't shoot me Houston, don't shoot me;" and then he heard the report of a gun and went to where she was. The defendant and Jesse Ross were with her, and she said that Houston had shot her.

Jesse Ross testified that he was less than 100 yards distant when he heard the shot and went to where she was, meeting the defendant who was carrying a shotgun. While witness was there, the defendant came back and said to the deceased, "I was trying to protect you, wasn't I, Mrs. Mary Gordon?" to which she replied, "No, Robert, don't come here and try to blab that to me, you know you held me and Houston shot me."

Henry Gordon, her husband, testified that the deceased as a dying declaration stated: "Robert held me and Houston shot me. I know the law will have its course, but I do feel sorry for the boys, and I am hoping they won't harm them."

The defendant's sister testified that she waited on the deceased and on the day she

died she said that Houston shot her and Robert held her, and sent for the defendant's mother and said to her, "She did not want the boys punished, and she did not think the boys done it on purpose, and that she would leave it in the hands of the Lord."

The defendant, as a witness on his own behalf, testified that with his brother Houston he started home about 11 o'clock, and met the deceased on the road; that she threw the shotgun down on them and told them to stop; that they jumped off the horse they were both riding, and Houston grabbed the gun and tussled with her, and the gun went off, and the deceased grabbed him and he held her a little while and then laid her down and went back to the house and told them about it.

The record shows that Houston Franklin and the defendant were jointly charged in the original complaint, but it does not appear that Houston was apprehended.

The petition contains the usual assignments that the verdict is contrary to law and is not sustained by sufficient evidence, and that the court erred in overruling the motion for new trial. Also that the court erred in denying a motion for a continuance. However, there is nothing tending to show that the trial court abused its discretion in denying the application. The assignments relied upon for a reversal of the judgment are, in effect, that the court erred in refusing the request of the defendant that he be furnished with a list of the witnesses, together with their post office addresses, two days before said case was called for trial.

The record shows that the crime for which the defendant stood charged was committed on September 24, 1910. The defendant was admitted to bail October 6, 1910. The information was filed January 10, 1911, and indorsed thereon were the names of Henry Gordon, husband of the deceased, Jesse Ross, E. L. Adamson, and Loa Scott, sister of the defendant, and following the names the words "all of Konawa, Okl." The defendant's counsel secured the original papers in the case August 20th, and kept them until the county attorney called for them.

[1] When the case was called for trial August 23, 1911, the defendant objected to going to trial without a list of the witnesses, together with their post office addresses. During the afternoon session, the county attorney in open court, in the presence of the defendant and his counsel, entered the post office address of each witness on the information, and the case was continued until 9 a. m., August 25th, at which time the objection was renewed on the ground that two full days had not elapsed, and the defendant was thereby deprived of his constitutional right, as guaranteed by section 20 of the Bill of Rights, that: "In capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief to prove the al-

legations of the indictment or information, together with their post office addresses."

[3] A day, in legal consideration, is punctum temporis; fractions of a day are to be disregarded in computations which include more than one day, and involve no question of priority. Section 2962, Snyder's Sts.

[5] However, the record shows that the court offered on August 25th to pass the case until a homicide case that was on call for trial that day, was tried, but the defendant's counsel refused to consent. This constituted a waiver of any right the defendant might have to further continuance.

In case of Blair v. State, 4 Okl. Cr. 359, 111 Pac. 1003, this court held: "Under the Constitution of Oklahoma, the defendant is entitled to a copy of the indictment or information filed against him; but if he be at large so that he can go to the clerk's office, call for, and examine the original accusation, and copy it if he desires, the state is under no obligation to make and serve a copy upon him." See, also, Stouse v. State, 6 Okl. Cr. 415, 119 Pac. 271.

[2] The provision of the Constitution referred to does not, as counsel contend, state that, "Defendant shall be served with a copy containing a list of witnesses with their post office address," but states that, "He shall be furnished with a list of the witnesses that will be called in chief to prove the allegations of the indictment or information, together with their post office addresses." The courts have no power to deprive a defendant of this right. However, the right is one that may be waived; and, while a defendant in a capital case is not to be presumed to waive any of his rights, yet where such right is largely for his benefit, or in the nature of a personal privilege, the law is well settled that the defendant may waive such right. Starr v. State, 5 Okl. Cr. 440, 115 Pac. 356. A defendant may plead guilty and thus deprive himself of one of the most valuable rights secured to the citizen—that of a trial by jury. If he can expressly admit away the whole case, then it follows that he can admit away a part of it, but he will not be presumed to have done so. Courts should see that the defendant is protected in all his rights, and no waiver should be implied unless the facts are such to clearly justify it.

[6] In this instance the witnesses whose names were indorsed on the information were the relatives and near neighbors of the defendant, and the words "all of Konawa, Okl.," sufficiently designated their post office address, and if there was any irregularity it affirmatively appears that the defendant expressly waived it. We think the technical objections made are obviously destitute of merit.

[4] To convict of manslaughter in the second degree, it is not necessary to show an intent to kill. It is sufficient to show an unlawful killing, and we think the evidence is ample to support the verdict.

Having examined each of the assignments argued, and finding no prejudicial error in the record, the judgment of the district court of Seminole county is affirmed.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

WEATHERHOLT v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 5, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 301*)—WITHDRAWAL OF PLEA—DISCRETION OF COURT.

A motion to quash and set aside an information should be made before plea, and an application for leave to withdraw a plea of "not guilty" for the purpose of moving to quash and set aside the information is addressed to the sound discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 687; Dec. Dig. § 301.*]

2. INDICTMENT AND INFORMATION (§ 122*)—VARIANCE FROM COMPLAINT.

The complaint before the committing magistrate averred that the killing was effected by means of a shotgun; and the information in the district court averred that the killing was effected by means of a Winchester rifle. *Held*, that this is a sufficient compliance with the constitutional provision (section 17, Bill of Rights) as the means by which the offense was committed are not a constituent element of the crime of murder, and that the variance between the averments of the original complaint and the information filed in the district court are not to the prejudice of the substantial rights of the defendant.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. § 122.*]

3. CRIMINAL LAW (§ 301*)—WITHDRAWAL OF PLEA.

Where the motion to quash and set aside is not made in good faith, and is obviously without merit, and it is evident that substantial justice will not be promoted, nor rights of the defendant prejudiced, an application for leave to withdraw a plea of not guilty for the purpose of presenting such motion was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 687; Dec. Dig. § 301.*]

4. CRIMINAL LAW (§ 927*)—TRIAL—SEPARATION OF JURY.

Section 6851, Comp. Laws 1909, providing that "the jurors sworn to try an indictment may at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in the charge of proper officers," leaves the question of keeping the jury together during the trial of a capital case within the discretion of the trial court. The fact that a juror in a capital case became separated from his fellow jurors at a recess during the trial, and left the custody of the officer who had the jury in charge, is not sufficient ground to grant a new trial; where it does not appear that he had any communication with any one concerning the cause, either directly, by conversation, or indirectly, by overhearing the observations of others, or that he did any act inconsistent with his duty as a juror during such separation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2257-2262; Dec. Dig. § 927.*]

5. CRIMINAL LAW (§ 1163*)—JURY—SEPARATION—PRESUMPTION OF PREJUDICE.

When the jury have separated without leave of the court after retiring to deliberate on their verdict, and before delivering or sealing the same if it be sealed, in violation of section 6896, Comp. Laws 1909, prejudice will be presumed, and the burden of proof is on the prosecution to affirmatively show that the defendant was not prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

6. HOMICIDE (§§ 19, 63*)—MUTUAL COMBAT.

Where the killing was done in mutual combat entered into willingly and in the knowledge of its liability to cause death to one or more of the combatants, all parties who knowingly and intentionally engage in such mutual combat are guilty of murder or first-degree manslaughter, unless it be shown that before the fatal shot was fired they had refused any further combat, and had in good faith withdrawn and sought to avoid further conflict, and that the killing was then done in necessary self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 32, 86, 87; Dec. Dig. §§ 19, 63.*]

7. HOMICIDE (§ 30*)—PRINCIPALS.

One who is present, aiding and abetting in a murder, is guilty as a principal, though another does the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.*]

8. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR.

A defendant who has been convicted of manslaughter in the second degree cannot complain that the court charged the law of manslaughter in the second degree, and that the evidence did not justify such a charge.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

Error from District Court, Ellis County; G. A. Brown, Judge.

Harry Weatherholt was convicted of manslaughter in the second degree, and brings error. Affirmed.

The plaintiff in error, hereinafter referred to as the defendant, was convicted of manslaughter in the second degree in the district court of Ellis county on an information filed in said court October 12, 1909, charging him with the murder of Thomas Morgan in said county on the 27th day of July, 1909, and was sentenced to imprisonment in the penitentiary for a term of 3½ years. The judgment and sentence was entered October 14, 1911. To reverse the judgment, the defendant perfected an appeal by case-made.

The story of the homicide as told by the witnesses for the state is short and simple. The defendant and the deceased disagreed and had some difficulty over the line fence which separated the farms of the respective parties. The defendant had removed the fence, and the deceased had moved it back. On the fatal day the cows of the deceased got through the fence and into the defendant's kaffir corn. The deceased's daughter Elsie testified: That she drove the cows out of the cornfield, and E. F. Powers met her and told her to keep the cows out. She told

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

him they would if they would let them keep the fence up; and he told her not to fix the fence and then went towards his house, and his son Ray, who was with him, went to Weatherholt's. That she had a hammer and some staples and commenced to fix the fence. That presently she saw Mr. Powers and his son and the defendant coming towards her, so she went home and told her folks about the cows being out, and asked her brothers to come and help her fix the fence; and Henry, Hiram, and Arnold said that they would go with her, and they and her father and sister Janette returned with her. That her oldest brother had a 22 pistol, the other two had shotguns, and her father had a 22 rifle. That they went along the fence and straightened it up and started to steeple it. That the defendant, Mr. Weatherholt, and Mr. Powers and his son Ray were standing by an old hay stack. The defendant had a double-barrel shotgun, and the elder Powers had a Winchester rifle. That the three walked up to them, and her father said, "We are fixing the fence to keep the cattle out," and the defendant said, "Shut your mouth; your life is short." That they were all on her father's farm, and they went on fixing the fence. The defendant and Powers followed them. Overtaking them, her father told Powers that he wanted him to keep his dog off the cattle, and Powers said, "Shut your mouth," and fired at him, and the defendant shot also about the same time. That the first shot that the defendant fired struck her father on the hand; and he fired a shot, and said, "That will do," and started home, when he was shot in the back, and died in a few minutes. That the second or third shot after her father fell struck her brother Henry in the back, and he died before the doctor arrived. That all together four shots were fired by Powers and two by the defendant.

The testimony of Janette, Hiram, and Arnold Morgan was in substance the same as that of their sister Elsie.

The widow of the deceased testified: That she had seen the defendant walk along the fence with an old shotgun, and she felt uneasy when the children went to the fence, so, leaving her baby with her daughter Silva, she went about 40 rods from the house and looked, and saw the defendant and Powers following her husband and the children along the fence. That Powers fired the first shot and the defendant the second. Then the shooting became general. That she saw the defendant shoot again, and she went towards them and met her little girl, who said, "They have shot papa, and I think he is dead, and they shot Henry." That Mr. Powers seemed to have been shot, as his son and the defendant helped him as he went away.

Dr. G. E. Irvin testified: That he was a regular licensed and practicing physician located at Gage, and was called to the home of the deceased, Thomas Morgan, and exam-

ined the body. That the wound that caused the death was made by a bullet that had entered his back and passed through his body, and there was also a gunshot wound on the wrist.

The record shows the conviction of both the defendant and Powers for the killing of Henry Morgan at the time of the tragedy, and that they were each sentenced to serve a term of two years' imprisonment, and that after serving a short time the defendant had been granted a parole.

For the defense E. F. Powers was the main witness. He testified: That he talked with Elsie Morgan on the fatal day about the stock trespassing, but did not tell her that he would not permit the fence to be fixed. That he sent his son Ray to tell the defendant that Morgan's stock had been in the crop and went home. That the defendant shortly after came to his home and asked him to go with him to estimate the damage done by Morgan's stock, and he went with the defendant who had a double-barrel shotgun. That he carried his 44 Winchester rifle to shoot jack rabbits. They passed the Morgans near the line fence without stopping. Mr. Morgan made some remark, and the defendant said to Morgan that "he was not afraid of him," and Morgan answered "that we are ready for you right now," that the Morgans went west and they went east into the cornfield and examined the damage, and then took the back track and overtook the Morgans, and Mr. Morgan made some remark to witness about wanting him to keep his dog off the stock, and as he said this he and his son Henry raised their guns and fired, and witness was struck on the head with a rifle ball, knocking him down. That he raised up and shot at Mr. Morgan. That Arnold and Hiram Morgan shot at him, several shot hitting him on the head and shoulder. And witness shot again at Mr. Morgan, and then shot at Henry Morgan, who was shooting at him. That he had heard threats made against him and the defendant by Mr. Morgan, and had noticed that the Morgans often carried guns back and forth to their work. That he had been granted a pardon in the case of his conviction for killing Henry Morgan, and the case against him for the killing of Thomas Morgan had been dismissed.

Mrs. Powers, his wife, testified that she was watching the parties, and the first shot was fired from the Morgans' side of the fence.

Ray Powers testified that the Morgans fired the first shot and the defendant fired two shots.

Joe Bryan and his wife both testified that they witnessed the shooting, and the first two shots were from the Morgans' side of the fence.

Several witnesses testified that they heard the deceased threaten to shoot the defendant.

The defense was justification in self-de-

fense. The defendant did not take the witness stand on his own behalf.

The foregoing statement of facts is sufficient for the purpose of this opinion.

W. H. Springfield and C. B. Warren, both of Gage, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, of Oklahoma City, for the State.

DOYLE, J. (after stating the facts as above). A number of alleged errors in the trial of the case are assigned, which, in so far as they are deemed essential in reviewing the case, will be noted in the order of presentation. The first assignment is the usual one that the court erred in overruling the motion for new trial:

Second. The defendant claims that the court erred in overruling his application for leave to withdraw his plea of "not guilty," and permit him to file a motion to quash the information on the ground that there was a variance between the complaint and information, in that the former charged that the killing was effected by means of a breach loading shot gun, whereas the latter charged that it was by means of a Winchester rifle.

[1] An application for leave to withdraw a plea of not guilty is addressed to the sound discretion of the court. The record shows that on August 18, 1909, the defendant was brought before the county judge, acting as a committing magistrate, and having waived a preliminary examination was held to answer for murder as charged before the district court; that on August 21, 1909, he was admitted to bail by the district judge; that on November 17, 1909, he was duly arraigned and entered a plea of "not guilty," and this application was not made until the case was called for trial April 6, 1911, about 18 months after the plea was entered.

In *Hunter v. State*, 3 Okl. Cr. 533, 107 Pac. 444, it is said: "The facts stated, if true, in a motion to set aside an indictment, must present a case, not of technical, or possible, or hypothetical, but of manifest, prejudice to the substantial rights of the defendant, and where it is plain that substantial justice will not be promoted, nor manifest wrong to the defendant prevented, the indictment should not be set aside on mere technical errors, informalities, or irregularities."

[2] The means with which the offense was committed are not a constituent element of the crime of murder, and while the averments of the means with which the offense charged was committed is a necessary averment to a good information, yet it cannot be said that the variance between the averments of the original complaint and the information filed in the district court was prejudicial to the substantial rights of the defendant. *Williams v. State*, 6 Okl. Cr. 373, 118 Pac. 1006; *Ponosky v. State*, 8 Okl. Cr.

116, 126 Pac. 451; *Tucker v. State*, 8 Okl. Cr. 428, 128 Pac. 313.

[3] The defendant's plea of not guilty was advisely entered, and we think the court did not exercise its discretion unsoundly in refusing to allow the defendant to withdraw his plea for the purpose of presenting a motion to quash the information that obviously was without merit.

Third. Error is assigned upon the rulings of the court in admitting and excluding testimony. Counsel in their brief state: "We do not wish to waive this assignment, but respectfully refer the reviewing court to the record." We do not consider it the duty of this court to examine the transcript of the evidence to determine whether or not the trial court erred in the admission or rejection of testimony and refer counsel to rule 4 prescribing that: "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected, stating specifically the objections thereto."

Fourth. The defendant complains of misconduct of the jury in separating without leave of the court, after having been sworn and placed in charge of the bailiff, and before the case had been finally submitted to them. One of the grounds of the motion for new trial is: "That one of the jurymen, L. H. Oliver, separated from the rest of the jury and went alone to look after his team, and went to a restaurant separate and apart from the rest of the jurors to get his supper, and that the sheriff had to go after him and bring him back to the other jurors." The fact of the separation of the jury as alleged is not denied. The bailiff testified that in taking the jury to supper the first day of the trial he missed the juror Oliver when they reached the hotel, and he went back, and found the juror at a restaurant, waiting for his supper; that he remonstrated with him, and the juror said that he was hard of hearing, and had understood the judge to say to be back at half past 7; that he had a team at the livery barn and had gone to see about that.

The juror Oliver testified that he talked with the judge in regard to getting leave to go and feed his team; that he went straight to the barn and fed his team, and then went to the restaurant where he was found by the sheriff; that he did not speak to any one, and no one spoke to him, and he did not hear any person speak about the case.

The record shows that, upon adjournment on the first day of the trial, the court instructed the bailiff to keep the jury together. This was on Thursday, October 5th; the case was submitted to the jury on October 7th. In support of this assignment, counsel cite the case of *Bilton v. Territory*, 1 Okl. Cr. 566, 99 Pac. 163. In the *Bilton* Case the jury was permitted to separate after the case had been finally submitted and the jury

had retired for the purpose of deliberation. It is not claimed in the case at bar that there was a separation of the jury after the case had been finally submitted to them.

[4] Section 6851, Procedure Criminal, provides: "The jurors sworn to try an indictment, may at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or to be kept in charge of proper officers. The officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to or communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof." Construing this section in the case of *Armstrong v. State*, 2 Okl. Cr. 567, 103 Pac. 658, 24 L. R. A. (N. S.) 776, it is said: "Under this provision the segregation of the jury in felony cases, before the cause is finally submitted, is left in the discretion of the trial court, yet we believe that in the exercise of sound judicial discretion the trial court in a capital case should not refuse a request from either party to place the jury in charge of sworn officers during the progress of the trial. The legal presumption is that jurors perform their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that during the adjournments of a trial the jurors were permitted to separate. The defendant must affirmatively show that by reason thereof he was denied a fair and impartial trial, or that his substantial rights were prejudiced thereby." And in conclusion it is said: "The clear intention of the law-making power is that the mere separation of the jury during the numerous and necessary adjournments incidental to a criminal trial should not result in delaying or defeating the ends of justice, when there is not the slightest presumption or probability or even possibility of injustice to the defendant."

In a homicide case, where the court upon its own motion, after the jurors were sworn to try the case, ordered them into the custody of the sheriff during the progress of the trial, and before the final submission of the case certain of the jurors separated from the others, the Supreme Court of California said: "The direction of the court did not give the defendant the right to control the action of the jury or of the officer in that respect during the pendency of the trial, nor the right to any exception for error or misconduct by reason of a failure to literally comply therewith. The mere fact that the direction of the court was violated does not give to the defendant the right to have the verdict set aside. He must show as fully as if the direction had not been given that one or more of the jurors was influenced in his verdict by some outside influence during or in consequence of such separation." *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263. See,

also, *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

[5] The statute further provides (section 6858, Proc. Crim.) that, before the jury retire to deliberate on their verdict, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, and one of the express grounds for a new trial is: "3d. When the jury have separated without leave of the court, after retiring to deliberate on their verdict, and before delivering, or sealing the same, if it be sealed." Section 6896, Proc. Crim. In *Goins v. State*, 9 Okl. Cr. —, 130 Pac. 513, and cases therein collated, it is held that on proof of a violation of this provision by permitting the jury to separate after the case is finally submitted the defendant is entitled to the presumption that such separation has been prejudicial to him, and the burden of proof is on the prosecution to show that no injury could have resulted therefrom to the defendant.

In the case at bar the burden of showing prejudice was upon the defendant, however, the prosecution assumed the burden by showing that the defendant was not prejudiced thereby, and that the separation was by permission of the court, and it clearly appears that the defendant suffered no injury by reason of such separation. It is also insisted that the verdict is contrary to law, and is not supported by sufficient evidence.

[6] The only conflict between the law in the premises and the verdict of the jury is that there was no evidence tending to reduce the homicide to manslaughter in the second degree. However, the court for some reason not apparent from the record without objection by the defendant submitted to the jury the issue of manslaughter in the second degree. And the defendant cannot complain because the court gave the jury an opportunity to find him guilty of this degree, even though the evidence did not justify such an instruction.

[7] As to the sufficiency of the evidence, one who is present aiding and abetting in a murder is guilty as a principal, though another does the killing. And if the defendant in any way challenged the fight, and went to it with an armed party on the day of the killing, knowing that the other parties were armed with deadly weapons and willing to fight, he cannot afterwards justify the taking of his assailant's life on the ground of necessary self-defense.

[8] The evidence in this case strongly tended to show that the killing was done in mutual mortal combat; and where a homicide is committed in mutual combat, entered into willingly and in the knowledge of its liability to cause death to one or more of the combatants, all parties who knowingly and intentionally engage in such mutual com-

bat are guilty of murder, unless they can prove that, before the fatal shot was fired, they had refused any further combat, and had in good faith withdrawn and sought to avoid further conflict, and that the killing was then in their necessary self-defense. *Driggers v. United States*, 1 Okl. Cr. 167, 95 Pac. 612, 129 Am. St. Rep. 823; *Id.*, 21 Okl. 60, 95 Pac. 612, 129 Am. St. Rep. 823, 17 Ann. Cas. 66; *Evans v. State*, 8 Okl. Cr. 78, 126 Pac. 586; *Wood v. State*, 3 Okl. Cr. 553, 107 Pac. 937. Upon the undisputed facts and the testimony offered on behalf of the defendant, he was guilty at least of manslaughter in the first degree.

The other assignments are untenable, and merit no discussion.

No error appearing in the record prejudicial to the substantial rights of the defendant, the judgment of the district court of Ellis county is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

HIGH v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 12, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1069*)—APPEAL AND ERROR—TAKING OF APPEAL.

In misdemeanor cases the appeal must be taken within 60 days from the date of the judgment, unless the trial judge for good cause shown extends the time for taking the appeal not exceeding 60 days additional. After this time has expired, no appeal can be taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1069.*]

Appeal from Roger Mills County Court; E. E. Tracy, Judge.

N. B. High was convicted of violating the prohibitory liquor law, and he appeals. Appeal dismissed.

E. L. Mitchell, of Cheyenne, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. Section 6948, Comp. Laws 1909, is as follows: "In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered; provided, however, that the trial court may, for good cause shown, extend the time in which the appeal may be taken not exceeding sixty days." In this case the appellant was convicted for a violation of the prohibitory liquor law, and his punishment was assessed at a fine of \$50, and 30 days confinement in the county jail. Judgment was rendered against appellant on the 24th day of August, 1912, but the appeal was not perfected by filing the record in this court until Febru-

ary 20, 1913. As the appeal was not perfected within the time required by law, this court has not acquired jurisdiction of the cause. As no counsel has appeared in this court to represent appellant, we are impelled to the belief that this attempted appeal was used merely for the purpose of securing delay.

The appeal is dismissed for want of jurisdiction, and the cause is remanded to the county court of Roger Mills county, with directions to the trial court to proceed with the enforcement of its judgment.

ARMSTRONG, P. J., and DOYLE, J., concur.

WHITE v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 12, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1130*)—APPEAL AND ERROR—AFFIRMANCE.

Where the defendant appeals from a judgment of conviction, and no briefs are filed, or arguments presented, this court will make an examination of the record proper, and, if no fundamental error is apparent, will affirm the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

Appeal from Pontotoc County Court; Conway O. Barton, Judge.

Baldy White, alias Wallace Owens, was convicted of vagrancy, and he appeals. Affirmed.

Crawford & Bolen, of Ada, for plaintiff in error. Ohas. West, Atty. Gen., and Smith O. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

DOYLE, J. Plaintiff in error, Baldy White, alias Wallace Owens, was convicted in the county court of Pontotoc county of the crime of vagrancy, and was sentenced to pay a fine of \$50. The judgment and sentence was entered on April 6, 1911. No briefs have been filed, and the Attorney General has filed a motion to affirm.

The information charged a violation of section 2790 of the Comp. Laws of 1909, which enacts that: "The following persons are vagrants within the meaning of this act. * * * Fifth, any professional gambler, or gamblers commonly known as tin horn gamblers, card players, or card sharp. * * *" The evidence shows that the defendant conducted a poker room in the city of Ada, and that he had at various times been convicted of gambling in the police court of said city. We have examined the information, the instructions of the court, and the judgment and sentence, and we have discovered no er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

ror which will warrant a reversal of the judgment.

The judgment of the county court of Pontotoc county is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

DECKER v. VERLOOP.

(Supreme Court of Washington. April 12, 1913.)

1. LANDLORD AND TENANT (§ 63*)—UNLAWFUL DETAINER — JURISDICTION — TITLE TO REALTY.

The court in unlawful detainer may not try title to the property; and, where plaintiff alleged ownership in fee, evidence that the deed to him was void was inadmissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 159-163, 165-167, 169, 172-176; Dec. Dig. § 63.*]

2. LANDLORD AND TENANT (§ 290*)—EXISTENCE OF RELATION—ACTS CONSTITUTING.

Where a daughter took possession, with the consent of her father, of property constituting, prior to her mother's death, community property, her possession was permissive only; and, where he subsequently notified her to vacate or pay rent, her retaining possession after demand without paying rent was unlawful.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207-1215; Dec. Dig. § 290.*]

3. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—DAMAGES FOR RENT DUE.

The court rendering judgment for plaintiff in unlawful detainer may enter judgment for double the amount of rent due from defendant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. § 291.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by James H. Decker against Lauretta A. Verloop. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Dailey, of Everett, for appellant. Coleman, Fogarty & Anderson, of Everett, for respondent.

MOUNT, J. Action for unlawful detainer. The complaint in this action is in the usual form. It alleged title of the premises in the plaintiff and that in March, 1911, the plaintiff let the premises, together with the furniture therein, to the defendant until such time as the same might be demanded or required by the plaintiff. That afterwards, on August 1, 1911, the plaintiff demanded the possession of the premises from the defendant, who refused to surrender the possession. That subsequently, on August 19, 1911, the plaintiff notified the defendant, in writing, that the rental for the premises from that date forward would be the sum of \$10 per week. That the defendant continued in possession, is now in possession, and refuses to vacate the premises. That afterwards, on the 4th

day of October, 1911, plaintiff caused to be served on the defendant a notice to pay rent or quit the said premises within three days. The defendant refused to quit or to pay the rent as aforesaid. That there is due on said rental from August 19, 1911, to October 3, 1911, the sum of \$60. For answer to the complaint, the defendant admitted that the notice was served upon her, denied that there was any rent due, and denied generally all the other allegations of the complaint. There was no affirmative defense.

The case came on for trial before the court with a jury. Plaintiff testified, in substance, that the defendant was his married daughter; that he consented that she should move upon the premises until such time as he desired her to vacate; and that she did move upon the premises, and afterwards refused to vacate the same. He also testified that he notified her, on the date named in the complaint, that, unless she vacated the premises, he would charge her \$10 per week rent thereafter; that she failed and refused to pay rent after demand was made therefor, and also refused to vacate the premises. The evidence also showed that a notice in due form was served upon her to pay rent or quit the premises. The defendant testified substantially to the same effect, but offered to show that a deed executed by her mother prior to her death in favor of the father for the premises was void. The court excluded this evidence. The defendant also testified that some of the furniture had been purchased by her from her father and belonged to her. Counsel for the defendant thereupon stated to the court that, if there was any controversy as to the personal property, "we will drop it out and let the title to that be decided in some probate action later on." The plaintiff then moved the court for a directed verdict for possession of the premises, and the court sustained this motion and directed the jury to find in favor of the plaintiff for the restitution of the real property. Judgment was entered to that effect. The defendant has appealed and argues, in substance, that inasmuch as the plaintiff alleged ownership of the real property in fee, which allegation was denied by the answer, the court erred in not admitting evidence to show that the deed from the plaintiff's wife to him was void.

[1] This court has frequently held that title to real property cannot be tried out in an action of this kind. *Monroe v. Stayt*, 57 Wash. 592, 107 Pac. 517, 80 L. R. A. (N. S.) 1102, and authorities there cited.

[2] It was stipulated at the beginning of the trial that the real property in question was the community property of the plaintiff and his wife prior to her death, and the defendant admitted that she went into possession of the property by permission of her father, and also that subsequently he had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

notified her to vacate the premises, which she had refused to do. Her possession of the property was, therefore, clearly permissive, and she was required to vacate upon demand. When she was notified that rental would be charged from the date of the notice, thereafter she was bound to pay such rent or vacate the premises. She refused to do either. After the notice was served upon her to pay rent or quit, she was clearly holding unlawfully.

[3] The trial court found, under the evidence, that \$60 was due for rent, also that defendant was unlawfully withholding the premises. The court entered a judgment for double the amount of rental, viz., \$120. This was proper under the rule in the case of *Hinckley v. Casey*, 45 Wash. 490, 88 Pac. 753.

The judgment is affirmed.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

ROCKWELL v. EDGCOMB.

(Supreme Court of Washington. April 12, 1913.)

PRINCIPAL AND AGENT (§ 145*)—CONTRACT IN AGENT'S NAME—OBLIGATION OF PRINCIPAL.

Where an agent procured in his own name, but for the benefit of his principal, an option contract for the purchase of property on the making of specified payments at specified times, and assigned the contract to the principal, who agreed to make the necessary payments, the option contract was as between the agent and the principal the contract of the principal, but the rights of the vendor were measured alone by the option contract, and he could not compel the principal to make the stipulated payments on the theory that the assignment unconditionally bound him to make the deferred payments.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.*]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge pro tem.

Action by Barnett E. Barinds, prosecuted after his death by T. D. Rockwell, executor, against J. W. Edgcomb. From a judgment of dismissal, plaintiff appeals. Affirmed.

James Kiefer, of Seattle, for appellant. Tucker & Hyland, of Seattle, for respondent.

MOUNT, J. This action was brought by Barnett E. Barinds in his lifetime to recover from defendant upon a contract for the purchase of certain mining claims. The plaintiff died while the litigation was pending, and the executor of his estate was substituted as a party plaintiff. When the case was tried a judgment of dismissal was entered. The plaintiff has appealed.

It appears from the record that Mr. Barinds acquired the claim to the mines in question in the summer of 1909. The defendant thereafter desired to obtain an option to

purchase these mining claims. He was unable to deal directly with Mr. Barinds, and thereupon authorized one J. A. Hall to act for him, and to secure an option from Mr. Barinds. The result was that Mr. Hall in his own name on December 20, 1909, entered into a written contract with Mr. Barinds as follows: "This agreement, made this 20th day of December, 1909, between Barnett E. Barinds, of Seattle, Washington, party of the first part, and J. A. Hall, of the same place, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the payment of five thousand dollars this day paid, the receipt whereof is hereby acknowledged, does hereby covenant and agree to and with the party of the second part, that he will make, execute and deliver to the said First National Bank of Seattle in escrow, a conveyance of all his rights, title and interest in and to an undivided one-third interest in the two quartz mining claims known as 'Jumbo' and 'Ben Bolt,' located July 3, 1905, and recorded July 11, 1905, at the Stewart submining recording office at Stewart, British Columbia, situated at the head of the South fork of Glacier creek about one and one-half miles from the mouth of which is known as Skeena mining district in the Province of British Columbia; said deed to be a quitclaim deed, and to be held by the First National Bank of Seattle, Washington, in escrow and to be delivered to the said J. A. Hall, or his assigns, upon the payment at the option of said J. A. Hall, or his assigns, of the further sum of five thousand dollars, six months from the date hereof, and the further sum of ten thousand dollars on or before one year from the date hereof. It is agreed between the parties hereto that if default be made in the payment of either the five thousand dollars deferred payment due on or before six months from date, or the ten thousand dollars due on or before one year from the date hereof, that then and in that event the sum this day paid shall be forfeited to the party of the first part as liquidated damages, and the party of the second part and his assigns shall forfeit all interest in or right to buy or purchase said interest in said claims, and the said deed shall be returned by the First National Bank of Seattle to the party of the first part. The said J. A. Hall and his assigns assume the burden and expenses of the litigation now pending in the Supreme Court of British Columbia respecting said interest in said claims, and in the superior court of King county, state of Washington, respecting said interest in said claims, wherein Barnett E. Barinds is plaintiff and George E. Green is defendant, so far as expenses hereinafter incurred are concerned. In witness whereof the said parties have hereunto set their hands in triplicate the day and year in this instrument first above written. Barnett E. Barinds. J. A.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hall." Mr. Edgcomb furnished the \$5,000 which was paid upon the contract. Four days later Mr. Hall, in order to protect himself, entered into the following written agreement with Mr. Edgcomb: "This agreement made this 24th day of December, 1909, between J. A. Hall of Seattle, Washington, the party of the first part, and J. W. Edgcomb of the same place, party of the second part, witnesseth: That the said party of the first part in consideration of the sum of \$5,000 and of the covenants hereinafter contained on the part of the party of the second part, has sold, assigned, and transferred, and by these presents does assign, sell, transfer and set over unto said party of the second part and to his heirs and assigns, the annexed option agreement made December 20th, 1909, between Barnett E. Barinds of Seattle, Washington, and the said party of the first part, and all the rights and privileges of the party of the first part under and by virtue of said agreement dated December 20th, 1909. And the said party of the second part, in consideration of the transfer of said agreement, does hereby covenant, promise and agree to and with the said party of the first part that he, the said J. W. Edgcomb, party of the second part, will make the payments of \$5,000 and \$10,000 due respectively in six months and one year from December 20th, 1909, and will pay said sums to said Barnett E. Barinds on the days and times above mentioned and pay and discharge all expenses incurred by or on behalf of Barnett E. Barinds or J. A. Hall in litigation over the interest agreed to be conveyed by Barinds by said option agreement of December 20th, 1909, between said Barinds and one George E. Green in the courts of the state of Washington or the Province of British Columbia, Canada. Witness the hands of the parties. J. A. Hall. J. W. Edgcomb." Thereafter, when the second payment of \$5,000 became due, it was paid by Mr. Edgcomb. Before these contracts were entered into, litigation was pending in the courts of British Columbia involving the rights of Mr. Barinds to any interest in the mining claims. After the second payment on the optional contract had been paid, it was determined by the litigation above referred to that Mr. Barinds had no interest in the mining claims. Thereafter Mr. Edgcomb refused to make the last payment of \$10,000 named in the contract. This action was brought to collect the same, together with \$1,092.53 expenses incurred in the litigation.

It is argued by the appellant that, by the terms of the contract of December 24th by which Hall assigned his interest in the contract of December 20th to Mr. Edgcomb, Mr. Edgcomb unconditionally agreed to make the deferred payments to Mr. Barinds; and that Mr. Barinds consented to the assignment by Hall to Edgcomb upon that condition, and therefore the optional contract became a binding, enforceable obligation as be-

tween Edgcomb and Barinds. It is conceded upon the record that Hall was the agent of Edgcomb, and also that the contract dated December 20th is an optional contract as it appears to be upon its face. This contract was acquired by Hall as agent for Edgcomb. It was, as between Hall and Edgcomb, the contract of the latter, and was so treated because Edgcomb made the payments. The rights of Barinds were measured by the terms of that contract. If payments were not made as agreed, he was at liberty to rescind and retain the payments made. If payments were made, he was bound to convey. The contract by its terms was assignable, and whether assigned or not its terms control. Hall or his assigns were bound to make the payments in order to obtain a deed. The consent of Barinds was not necessary in order to make a valid assignment from Hall to Edgcomb. The contract of December 24, 1909, was a contract between Mr. Hall and his principal, Mr. Edgcomb. Mr. Barinds was not a party to that contract. It simply assigned to Edgcomb the contract of December 20th between Hall and Barinds, and required Edgcomb to make the payments specified in the former contract which Hall was required to make. It did not require anything in addition, but was merely a written agreement on the part of Hall to do what in law he was required to do and on the part of Edgcomb to hold Hall harmless. No new contract was made with Barinds by the execution and delivery of the contract between Hall and Edgcomb. The appellant argues that this transaction is like one where a purchaser takes a tract of land incumbered by a mortgage, and assumes and agrees to pay the mortgage indebtedness; he is liable therefor, and the mortgagee may maintain a personal action upon the covenant of assumption; citing *Solicitors' Loan & Trust Co. v. Robins*, 14 Wash. 507, 45 Pac. 39. Conceding this to be the rule in that kind of a case, it fails in this, because here Mr. Edgcomb assumed only the liability upon the optional contract between Hall and Barinds. There is no obligation to pay; that is to say, he was not bound to make further payments. He could make them or not as he chose. If he did not pay, he could not obtain the deeds or recover payments already made. Nor could Barinds enforce further payments, as is attempted in this case. The written contract between the parties controls this case, and we therefore do not notice other contentions which attempt to vary the terms of the written contract, or that Hall had a secret interest in the mines undisclosed to his principal. All the deferred payments, including the expenses of the litigation, were optional under the terms of the contract.

The judgment is therefore affirmed.

CROW, C. J., and PARKER, GOSB, and CHADWICK, JJ., concur.

BUCHSER v. BUCHSER.

(Supreme Court of Washington. April 10, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 17*)—RIGHT TO ADMINISTRATION.

The surviving husband cannot be denied his statutory right to preference in the issuance of letters of administration on his deceased wife's estate because he claims to own as his separate property land believed by the court to be community property, nor compelled to yield his claim thereto as a condition precedent to the granting of letters.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

2. DESCENT AND DISTRIBUTION (§ 75*)—TITLE OF HEIRS.

Under Rem. & Bal. Code, § 1366, by which the real property of a deceased person vests immediately in the heirs subject only to an administration, the purpose of which is to pay the debts and define the interests of the distributees, the failure to mention such property in a petition for letters of administration does not defeat or even cloud the title of the heir.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 243-251, 260-262; Dec. Dig. § 75.*]

3. EXECUTORS AND ADMINISTRATORS (§ 66*)—INVENTORY — TAKING TESTIMONY AS TO CHARACTER OF PROPERTY.

Under Rem. & Bal. Code, § 1450, requiring administrators to make a true inventory of the estate, and section 1457, providing that, if the administrator shall neglect or refuse to return an inventory, his letters may be revoked, a court may take testimony as to the title to property claimed by an interested party not for the purpose of determining the title which must be determined in an independent proceeding or upon distribution, but for the purpose of determining whether such property should be included in the inventory.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 311-322; Dec. Dig. § 66.*]

4. EXECUTORS AND ADMINISTRATORS (§ 66*)—INVENTORY—PROPERTY IN DISPUTE.

Where a surviving husband, who was also administrator, claimed as his separate estate land which others interested claimed to be community property, it was proper for the court to order it to be inventoried as community property, and to accept a bond from the husband to cover the rents, issues, and profits to protect the estate, if it should be subsequently adjudged that the property was community property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 315; Dec. Dig. § 66.*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Conflicting petitions for letters of administration by John R. Buchser and Annie Buchser. From a judgment granting letters to Annie Buchser, John R. Buchser appeals. Reversed and remanded, with directions.

David Herman and Scott & Campbell, all of Spokane, for appellant. John Sallsbury, of Spokane, for respondent.

CHADWICK, J. Annie Buchser died intestate, leaving an estate in Spokane county, Wash. Her husband, John R. Buchser, applied for letters of administration, and upon the hearing he was questioned as to the value and extent of the property of the estate. He enumerated certain personal property of the value of about \$1,700. In answer to a question put by the court, it developed that he was the owner of 160 acres of land that had been taken up as a homestead, and 80 acres that he had purchased out of the proceeds of timber cut on the homestead. The petitioner husband claimed the land as his separate property. The court was of opinion that it was community property, and that "the real estate ought to be mentioned in the application in order to fix the bond." The matter was thereupon continued to a future date, in order to give counsel for the petitioner time to examine some of the cases heretofore decided by this court.

In the meantime a daughter, Annie Buchser, petitioned for letters. When the matter came on for hearing, the husband, through his counsel, still maintained his position that the real estate was his separate property, but offered testimony as to the rents and profits in order to fix a bond pending the bringing or decision of a case (the record is not clear) in the federal court. The court still insisted that the property should be brought in as community property, and refused to consider the rental value upon the husband's petition; his reason being that, if the property was indeed separate property, there was no justifiable reason for considering its value in this proceeding. The daughter Annie Buchser was then appointed administratrix, and her father has appealed.

[1] The right of administration is a valuable right, and especially so where under our statutes there is a community of interest. The husband is the owner of one-half of the personal property, and should not be denied the statutory preference (section 1389, Rem. & Bal. Code), unless there is some controlling reason.

[2] Under section 1366, Rem. & Bal. Code, the real property of a deceased person vests immediately in the heir, subject only to an administration, the purpose of which is to pay the debts and define the interests of the distributees. The failure to mention such property in a petition for letters of administration can in no way affect the title; the right of the heir is not defeated or even clouded. Nor is the petitioner bound to yield any contention he may have as to title or ownership as a condition precedent to the granting of letters.

[3] An administrator is required to make a true inventory of the estate (section 1450, Rem. & Bal. Code); and it is also provided that, if the administrator shall neglect or refuse to return an inventory, his letters may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

be revoked (section 1457, Rem. & Bal. Code). We have no doubt that the court might under these provisions take some testimony as to the character of and title to property claimed by some interested party. Not for the purpose of determining the title; there is a way to do that by an appropriate independent proceeding if there be a claim by a stranger, or upon distribution if the claim be by one directly interested in the estate. Upon the filing of the inventory the court may " * * * determine prima facie the fact whether or not the property belongs to the estate and is an asset thereof. This adjudication is not binding upon any person afterwards claiming the property in another forum, but is for the purpose only of determining whether the administrator shall be forced to make an inventory thereof." In *re Belt's Estate*, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916. It does not follow that a surviving spouse is to be denied letters, being otherwise competent, because he claims certain property as his separate estate. His interests are not necessarily antagonistic, as was declared by the lower court. "The finding that the surviving husband was incompetent to serve as administrator for want of integrity was evidently based upon the fact that he claimed the whole estate as his own; and the question is, Was the finding justified? We do not think it was. There was nothing in the fact named which showed a want of integrity or disqualification." In *re Carmody*, 88 Cal. 616, 26 Pac. 373.

[4] The title to the homestead property is not deraigned, and we cannot tell whether the claim of the husband is well founded; but, whether it be so or not, it would not be improper for the court to order the property to be inventoried as community property the title to which is disputed, and accept the husband's offer to cover the possible rents, issues, and profits by the usual bond. If it transpires that the property is in fact community property, the estate will be protected. If the title is finally adjudged to be in the husband, the estate has lost nothing.

Reversed and remanded, with instructions to revoke the letters issued to Annie Buchser, and to issue letters to John Buchser, the surviving husband, and to proceed with the administration as indicated in this opinion.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

LA CAFF v. ROSLYN-CASCADE COAL CO.
(Supreme Court of Washington. April 10, 1913.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—QUESTION FOR JURY.

In an action by a miner who was run down by a coal car which another miner was

lowering on the incline behind him, *held* that, under the evidence, the question whether the master furnished defendant with a reasonably safe place to work was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTIONS FOR JURY.

Where plaintiff, a coal miner, was required with the other miners to lower empty cars down the incline and fill them in the chambers with coal, and, after they were filled and hauled out, to lower empty ones, he did not, as a matter of law, assume the risk of injury from defects in the track in the incline which might cause other miners to lose control of their cars in running them down; it appearing that the master made daily inspection of the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Plaintiff, a coal miner, who was required to lower empty cars down the incline of the mine, did not, as a matter of law, become guilty of contributory negligence barring recovery for injuries from being run down by the car of a following miner because he stopped his car for a moment without looking back while he fixed a more effective brake for an approaching grade.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 264*)—PLEADING—VARIANCE—"OBSTRUCTION."

The complaint in an action by plaintiff, who was injured while working in defendant's mine by a car which another miner, in lowering down the incline, lost control of, averred that the second miner fell by reason of an obstruction in the tracks and thus lost control of his car. *Held*, that the term "obstructions" included a depression or hole, and consequently proof that the second miner fell by reason of stepping into a hole did not constitute a variance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4890-4894.]

Department 1. Appeal from Superior Court, King County; Ralph Kaufman, Judge.

Action by Frank La Caff against the Roslyn-Cascade Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant. Pruyn & Hoeffler and E. K. Brown, all of Ellensburg, for respondent.

PARKER, J. The plaintiff, a coal miner, seeks recovery of damages for personal injuries which he claims resulted to him from the negligence of the defendant in its defective maintenance of a track and the space between the rails thereof in one of its tunnels or inclines in its coal mine, which defect was the proximate cause of a car getting beyond control and running down the incline upon and injuring him. The trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

having resulted in a verdict and judgment in favor of the plaintiff, the defendant has appealed.

[1] On November 11, 1910, at the time respondent received his injuries, he was employed as a coal miner by appellant. The incline through which the coal was being removed from the mine was several hundred feet long, and descended into the mine on about a 6 per cent. grade. There branched off from this incline several rooms from which the coal was being mined. There was laid upon the incline a track consisting of iron rails about 2 inches high and 24 inches apart, upon ties about 4 feet long. Branch tracks led into the several rooms. The cars which ran over the track in removing the coal were $3\frac{1}{2}$ feet high, $2\frac{1}{2}$ wide, and 8 feet long, and each car, when empty, weighed about 850 pounds. Each car ran upon four 10-inch wheels, which were sufficiently open so that a stick of wood a foot or more long, called a sprag, could be inserted through a wheel and lock it by the sprag coming in contact with the body of the car. The cars were lowered into the mine along the incline by the miners themselves. A miner would place a sprag in a wheel of his car at the top of the incline, walk behind the car, and hold it from running away as he let it down the incline to the switch leading into his room where he was mining, where he would push the car into his room, and, when he had filled it with coal, he would push it out to the incline track, where the driver, with a mule, would hitch onto the car and draw it out up the incline. The miner would then follow the car out, when he would in the same manner lower another car into the mine for filling. In this manner he would take down the incline, fill, and cause to be removed, from 8 to 12 cars per day. Respondent and one Zupitil, among other miners, were working in the mine in this manner. Respondent was working in a room off the incline, a short distance below the room in which Zupitil was working. On the morning of November 4, 1910, respondent and Zupitil were together at the top of the incline, ready to go to work. Respondent started down the incline with his car, followed by Zupitil with his car some 20 or 30 feet in the rear. When respondent reached a point in the incline almost opposite Zupitil's room, he stopped his car for the purpose of inserting an additional sprag in another wheel of the car. This, he testified, was rendered necessary because the grade of the incline changed at that point and was steeper beyond, and it was customary for him to stop his car at that point for that purpose. An instant after he had stopped, and while he was reaching around to the side of the car to place the extra sprag in a wheel, his leg was caught between the bumpers of Zupitil's car and his own car, whereby he was seriously injured.

It seems that his stop would have been only for a few seconds, even had he not been overtaken by Zupitil's car, for evidently the placing of the extra sprag in a wheel was only the work of a moment. A short distance up the incline from where respondent stopped, probably 20 or 30 feet, being the distance at which Zupitil was following, a branch track led off into a room. Zupitil's testimony is, in substance, that, when he reached this point, he stepped into a hole or depression just behind the lead rail of the switch and tripped upon the rail, causing him to fall and lose his hold upon his car. This resulted in it escaping from him and running down upon respondent. It only required a few pounds' resistance to hold the empty car and control it with one sprag in the wheel on this part of the track. But, when the car was released from Zupitil's hold, it gained some additional momentum which, with its heavy weight was sufficient to strike a heavy blow upon respondent's car, even though it had then acquired but little speed. There was no light in the mine except the lights carried by the miners upon their caps, and Zupitil, while following behind his car, could not see very well ahead so as to plainly distinguish the condition of the ground between the rails along where he would have to walk. Both respondent and Zupitil had worked in the mine for a long time, and had such acquaintance with the conditions of the ground along between the rails as their frequent going in and out of the mine would furnish them. It was necessary to a proper operation of the mine to keep the ground between the rails suitable for the men and the mules to walk on, and it was so used a great deal. The constant passing over it by the mules caused holes to be worn between the ties, which required filling from time to time in order to keep the surface in a properly usable condition. Appellant's trackman passed along the track daily and inspected it with a view to keeping it in proper working order, and this has reference to the ground between the rails as well as the track proper. The depression in which Zupitil stepped when he tripped and lost the control of his car was six to eight inches in depth from the top of the lead rail, and was very close to it, possibly extended under it. The lead rail is the rail of the branch track that crosses diagonally between the rails of the main incline track.

The allowing by appellant of the creation of the depression at the guide rail to the extent of six or eight inches below the top thereof, without repair, by filling in so as to make the ground comparatively smooth for the travel of the men, especially in lowering the cars along the incline, is the principal act of negligence relied upon by respondent for recovery, rested upon the theory that appellant thus violated its duty to

respondent in failing to furnish him a reasonably safe place in which to work. Counsel for appellant argue that it would be imposing on appellant too high a degree of care to require it to keep the ground between the rails any freer from obstructions and depressions than is here shown. In view of the manner in which the miners were required to lower the cars along this incline, the fact that no light was furnished other than the lights in the miners' caps, the fact that the view of the track immediately ahead of a miner, while lowering his car, was in a measure obstructed by his car, and the fact that appellant's trackman was present and passing over the track daily for the very purpose of inspecting and seeing to the keeping of the track, including the space between the rails, in suitable condition for use, we think the question of the reasonable safety of the place was one for the jury, and that it cannot be determined in appellant's favor as a matter of law.

[2] It is contended that, even though appellant did not fully comply with its duty in furnishing respondent a safe place to work, yet, by reason of respondent's knowledge of the conditions there existing, he assumed the risk of being injured in the manner here shown. It is true that respondent must have had some knowledge of the general condition of the ground between the rails over which he and the other miners had to walk in lowering the cars down the incline; but it seems to us, like the question of a reasonably safe place in which to work, the assumption of risk on the part of respondent became a question for the jury in view of the facts we have noted, and especially in view of the fact of the daily inspection of the trackman for the purpose of seeing that the condition of the track, including the space between the rails, was suitable and safe for the purpose for which it was being used. We think that it cannot be decided, as a matter of law, that respondent was doing more than a reasonable man would do under the circumstances in his continuing to work there.

Counsel call our attention to, and place their principal reliance upon, the decision of this court in *Krickeberg v. St. Paul & Tacoma Lumber Co.*, 37 Wash. 63, 79 Pac. 492. We think, however, a critical reading of the facts of that case as there related will show that it is distinguishable from the case before us. In that case it is apparent that the injured plaintiff had a greater degree of control over the horse and truck he was driving than the miners could possibly have over their cars in this case. He even had a choice of tracks, as he was not compelled to have the wheels of his truck run in the same place upon each trip. He was working in the glare of electric lights, so that every defect and uneven feature of the plank road, over which he was driving, was plainly visible to him. It also appears that

his truck had a tendency on previous occasions, while he was using it, to do the very thing that caused his injury. Nor did the mill company assume to render a daily inspection of the road over which the plaintiff was driving the truck. The following cases, cited and relied upon by counsel for appellant, we think are subject to substantially the same distinction: *French v. First Avenue Ry. Co.*, 24 Wash. 83, 63 Pac. 1108; *Ford v. Heffernan Engine Works*, 48 Wash. 315, 93 Pac. 417; *Maver v. Queen City Lumber Co.*, 64 Wash. 567, 117 Pac. 392.

[3] Some contention is made, rested upon the alleged contributory negligence of respondent. We think the only possible foundation for this contention is found in the fact that respondent stopped upon the incline to put an extra sprag into a wheel of his car, without looking back to see if Zupitil's car was close upon him. It seems clear to us, in view of the fact that such a stop was customary with him, that it was apparently necessary; that it would in no event be for more than a few seconds; that Zupitil would probably have control over his car; that the question of respondent's contributory negligence was for the jury. So far as the negligence of Zupitil is concerned, regarding such negligence as that of a fellow servant, we think the evidence is so devoid of any showing of negligence upon his part as to not call for comment from us touching that source of possible contributory negligence as a question of law.

[4] It is contended that the trial court permitted the cause to go to the jury upon an issue of negligence not disclosed by the pleadings. This seems to be rested upon the fact that the negligence alleged in the pleadings refers to "obstructions" on the track and the space between the rails. It is argued that no evidence of obstructions was offered, and that the depression relied upon by respondent as an obstruction was in fact not an obstruction. This contention rests upon a too limited meaning of the word "obstruction." We think the word "obstruction" as there used, applies to anything that interferes with, or renders dangerous, travel along the track, whether it consists of a physical object put there or of the removal of some portion of the traveled way. It has generally been so held when obstructions to public highways are spoken of (that is, a hole in a public highway or a ditch dug across it is in law an obstruction), the same as the building of a fence across it or the placing of any other physical object there. 37 Oyc. 247. In this sense we think the depression into which Zupitil stepped, causing the loss of his hold upon the car, was an obstruction, and that the jury was warranted in believing that it was the proximate cause of respondent's injury.

The judgment is affirmed.

CROW, C. J., and GOSE, CHADWICK, and MOUNT, JJ., concur.

FOSTER v. HINDLEY, Com'r of Public Affairs, et al.

(Supreme Court of Washington. April 9, 1913.)

1. MUNICIPAL CORPORATIONS (§ 191*)—DISCONTINUANCE OF OFFICE — HEALTH OFFICERS.

Under the Spokane charter, providing by section 53 that employes in office at the adoption of the charter should retain such office unless removed for cause, by section 24 that the council should appoint certain officers, not including health officers, and might discontinue other offices, and by section 119 continuing in force an ordinance under the old charter providing for three sanitary inspectors, the office of plaintiff, who was a sanitary inspector at the adoption of the charter, and was placed in the classified civil service under section 55, permitting any employe to be "suspended" by the head of his department by filing a statement of the suspension and his reasons therefor, could be "discontinued" only by the council, and hence the discontinuance of his office by the mayor and the commissioner of public affairs was a nullity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 525-529; Dec. Dig. § 191.*]

2. MUNICIPAL CORPORATIONS (§ 191*)—OFFICERS—COMPENSATION AFTER REMOVAL.

A sanitary inspector who, though wrongfully deprived of his office, held himself ready to perform his official duties, was entitled to his salary while unlawfully separated from such office, and the fact that he declined temporary employment tendered by the city did not affect his right thereto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 525-529; Dec. Dig. § 191.*]

3. MUNICIPAL CORPORATIONS (§ 191*)—OFFICERS—REMOVAL—APPEAL.

Under Spokane City Charter, § 55, providing for suspension from office and appeal therefrom to the civil service commission, a sanitary inspector whose office was discontinued by the mayor, which discontinuance was a nullity, was not required to appeal to the commission.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 525-529; Dec. Dig. § 191.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by H. A. Foster against W. J. Hindley, Commissioner of Public Affairs and Mayor of the City of Spokane, and the City of Spokane. Judgment for plaintiff, and defendants appeal. Affirmed.

H. M. Stephens and William E. Richardson, both of Spokane, for appellants. E. O. Connor, of Spokane, for respondent.

GOSE, J. This action was brought to secure the restoration of the plaintiff to the office of sanitary inspector in the health department of the city of Spokane, and to recover the salary incident to the office during the period of separation. The mayor and the city have appealed from a judgment protecting the plaintiff in each of these alleged rights. The findings in substance are as follows: The respondent was appointed sanitary inspector in the health department of

the city in the month of June, 1909, and continued until he was removed by the mayor on the 31st day of May, 1911. The city adopted a new charter on the 28th day of December, 1910. The commissioners elected thereunder entered into office on the 14th day of March, 1911. In April, 1911, respondent as such inspector was placed in the classified civil service in division B of the health department, class 4, grade 1, which position was "made permanent." The classification was approved by ordinance. On the 23d day of May, 1911, the city by ordinance added and appointed two inspectors in addition to the three appointed under the previous charter and ordinances. On the 31st day of May following there were five such inspectors; the respondent being the senior inspector in rank and period of service. On that day the appellant Hindley as mayor notified him in writing that his office was "discontinued."

[1] The appellants make three contentions: (1) That the removal was regular; (2) that the respondent was not entitled to recover his salary; and (3) that his remedy was by appeal to the civil service commission. Section 53 of the new charter provides: "Employes within the scope of this article [which included the respondent] who are in office at the time of the adoption of this charter shall retain their positions unless removed for cause." Three sanitary inspectors were provided for by ordinance under the old charter. The ordinance was continued in force by section 119 of the new charter. Section 55 provides that any employe may be suspended by the head of the department under which he is employed. It requires the officer making the order to forthwith file with the civil service commission a statement of the suspension and the reasons therefor. The method of procedure in suspension cases was provided for by an ordinance passed on April 27, 1911. Section 24 of the charter provides that the council, after each general election, shall appoint certain enumerated officers, not including health officers, and that it "shall have power to create and discontinue all other offices and employments from time to time and as occasion may require." The respondent was an employe "in office" at the time of the adoption of the charter, and the council, not the mayor, had the power to discontinue his office.

The appellants argue that the health department ceased to exist upon the adoption of the new charter. There was no hiatus in the passing of the city from the old charter to the new. The city continued and remained the same entity. There was no abdication of any of the powers essential to orderly government. The health department was reorganized under the new system, but the necessity for sanitary officers was as ex-

gent under the new charter as the old, and this necessity was recognized, and these officers were placed in the classified civil service as required by section 53 of the charter. This had been done before the mayor sought to discontinue the office which the respondent held. The case is controlled by State ex rel. Powell v. Fassett, 69 Wash. 555, 125 Pac. 963.

[2] The respondent, although wrongfully deprived of his office, held himself ready and willing to perform his official duties. Hence he is entitled to his salary for the period during which he was unlawfully separated from his office. *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612; *United States v. Wickersham*, 201 U. S. 390, 26 Sup. Ct. 469, 50 L. Ed. 798. The fact that he declined a temporary employment tendered by the city does not militate against the enforcement of this right. *Reising v. City of Portland*, 57 Or. 295, 111 Pac. 377, Ann. Cas. 1912D, 895.

[3] Nor was the respondent required to appeal to the civil service commission under the provisions of section 55 of the charter. It has reference to suspensions for cause, not to a case of usurpation of authority. The mayor did not seek to suspend the respondent for cause, but resorted to the subterfuge of discontinuing the office. This power, as we have seen, is lodged in the council. The mayor's letter to the respondent states that "the office that you now hold is discontinued." In his letter of the same date addressed to the civil service commission he reports that, "in accordance with the provisions of rule 12 of the civil service rules, I make the following report of separation from this department. . . . Foster, Horace A., Sanitary Inspector. . . . Cause of separation, reduction of force." The act of the mayor was a nullity, and the respondent properly so treated it. *City of Chicago v. Gillen*, 222 Ill. 112, 78 N. E. 13; *Powell v. Bullis*, 221 Ill. 379, 77 N. E. 575. The judgment is affirmed.

CROW, C. J., and MOUNT and CHADWICK, JJ., concur. PARKER, J., concurs in result.

CORMAN v. SANDERSON et al.
(Supreme Court of Washington. April 8, 1913.)

1. LANDLORD AND TENANT (§ 291*)—ACTION FOR UNLAWFUL DETAINER—PROCEEDINGS—LIABILITY ON BOND.

In an action for unlawful detainer after a bond had been given and a writ of restitution issued and served, defendant moved to increase the penalty of the bond, which motion was granted but no order increasing the bond entered. Plaintiff gave no new bond, but later notified defendant that her goods would be thrown into the street unless she moved out which she did. *Held* that, plaintiff having stood upon the bond already given and having directed the execution of the writ, the motion to increase the

penalty did not render the writ of restitution ineffective or make defendant's removal a voluntary surrender of the premises, and hence she could sue upon the bond actually given.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. § 291.*]

2. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—LIABILITY ON BOND.

In an action for wrongfully suing out a writ of restitution on the bond given to procure such writ, proof that, after possession was recovered under the writ, the action of unlawful detainer was voluntarily dismissed was prima facie sufficient to show that the writ was wrongfully sued out, and justified a recovery on the bond, especially where it was also shown that the tenant was in possession under a lease of record from a former owner and that the landlord knew that fact when the writ was sued out.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. § 291.*]

3. LANDLORD AND TENANT (§ 292*)—WRONGFUL DISPOSSESSION—LIABILITY ON BOND.

In an action for wrongfully suing out a writ of restitution under which possession was recovered, the advance rent paid by the tenant, her damages on account of the removal, and her attorney's fees in successfully defending the action of unlawful detainer were recoverable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 292.*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Alpha Corman against Thomas Sanderson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Howard Waterman, of Seattle, for appellants. Brady & Rummens, of Seattle, for respondent.

MOUNT, J. This action was brought to recover upon a bond given by the defendants in an action for unlawful detainer. The plaintiff recovered a judgment, and the defendants have appealed.

The facts are as follows: In September, 1909, the plaintiff was in possession of a house and lot under a lease which was of record and which expired by its terms on May 31, 1910. She had made a deposit of \$250 under the terms of her lease, which was to be applied upon the rent for the last six months; the rental for that time being \$45 per month. The defendant Sanderson acquired the property while plaintiff was in possession. On November 2, 1909, he began an action against the plaintiff wherein he alleged that she was a tenant from month to month; that he had served notice upon her to quit the premises; that by reason thereof the tenancy had been terminated; and that she was unlawfully detaining the possession of the property, and prayed for a restitution thereof. Upon motion of the plaintiff in that action, the court entered an order for a writ of restitution upon the plaintiff giving a bond to defendant therein in the sum of \$500. The bond was given, with the defendants Keating and Ostrom in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this action as sureties upon the bond. This bond provided that: "Said plaintiff shall prosecute his action without delay and pay all costs that may be adjudged to defendant therein, and all damages which she may sustain by reason of said writ of restitution having been issued, should the same be wrongfully sued out." The writ was thereupon issued and served by the sheriff of King county upon the defendant in that action on November 4, 1909. A day or two later the defendant in that action filed a motion to have the penalty in the bond increased. Upon a hearing of that motion it was granted, but the order was not entered, and the plaintiff therein did not give a new bond, but afterwards notified the defendant in that action that, unless she moved out, her goods would be thrown into the street. Thereafter, in accordance with the writ and these threats, she moved out of the premises. She thereafter filed an answer in the cause and issues were joined. In April, 1911, the case came on for trial to the court with a jury. After evidence was heard, the plaintiff in that action took a voluntary nonsuit and dismissed the action. At that time the defendant's lease had expired, and she was not restored to the possession of the premises. She had been kept out of the use of the premises by reason of said writ of restitution. She thereupon brought this action to recover upon the bond, with the result stated above.

[1] It is argued by the appellants that, after the court had sustained a motion for an increase of the penalty of the bond for the writ of restitution, the writ, though previously served, became ineffective, and that, when the plaintiff in this action moved out after service of the writ and surrendered possession of the premises, she did so voluntarily, and therefore is not entitled to recover upon the bond. This position would probably be sound if the order increasing the bond had been entered, and the appellants in this action had not stood upon the bond already given and thereafter notified the respondent in this action that, if she did not move out, her goods would be thrown into the street. In other words, the plaintiff in this action, being the defendant in the former action and the moving party therein, did not have the order entered. The plaintiffs in that action, being the defendants in this action, took advantage of that situation and stood upon the bond already given and directed the execution of the writ. The respondent here waived her right to insist upon a new bond, and, in obedience to the writ and the threat made by the appellants, moved out of the premises. We think this was not a voluntary surrender of the premises.

[2, 3] Appellants next argue that the court erred in allowing damages, because respondent did not prove any right to possession

of the premises or any damages. The conceded fact that the plaintiff in the action in which the bond was given took a voluntary dismissal thereof at the trial of that action is prima facie sufficient to show that the writ was wrongfully sued out. But, in addition to that fact, it was shown that the respondent had a lease of record from one authorized to make a lease, and that she was in possession holding under that lease. The appellants knew that fact at the time the writ was sued out. The evidence shows, and the court found, that the respondent had paid \$225 advance rent, and that she was damaged \$50 on account of the removal and \$100 for attorney's fees in successfully defending the unlawful detainer action. These were proper items to be allowed.

The judgment is therefore affirmed.

CROW, C. J., and CHADWICK, GOSE,
and PARKER, JJ., concur.

UNION TRUST & SAVINGS BANK v. AMERY.

(Supreme Court of Washington. April 8,
1913.)

1. BANKRUPTCY (§ 178*)—TRANSFERS BY BANKRUPT—PURCHASE BY CORPORATION OF ITS OWN STOCK—RIGHT TO RECOVER PAY- MENT.

Where a corporation, without diminishing its capital stock in compliance with the statute, purchased outstanding shares of stock and paid therefor from its funds, if such purchase resulted in injury to any existing or subsequent creditor, the payment could be recovered back by a trustee in bankruptcy subsequently appointed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

2. BANKRUPTCY (§ 178*)—TRANSFERS—PUR- CHASE BY CORPORATION OF ITS OWN STOCK —RECOVERY OF PAYMENT.

The right of a trustee of a bankrupt corporation to recover a payment made for its capital stock from a person who claimed that he sold the stock to a third person depended on whether the stock was actually sold the corporation, and not on what the stockholder thought, believed, or intended, and hence an instruction requiring a finding that he knew he was selling it to the corporation in order to render him liable was erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

3. BANKRUPTCY (§ 303*)—TRANSFERS—PUR- CHASE BY CORPORATION OF ITS OWN STOCK —BURDEN OF PROOF.

In an action by the trustee of a bankrupt corporation to recover money paid by the corporation for its stock from a person who claimed that he sold the stock to a third person, the burden of proving that the sale was to the corporation was on plaintiff.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 178*)—TRANSFERS—PUR- CHASE BY CORPORATION OF ITS OWN STOCK —RECOVERY OF PAYMENT.

Money paid by a corporation for its out-
standing stock could not be recovered from a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stockholder if he sold the stock to a third person and not to the corporation, and, if a portion of it was sold to the third person, there could be no recovery as to that portion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

5. BANKRUPTCY (§ 804*)—CAPITAL STOCK—PURCHASE BY CORPORATION—ACTIONS—QUESTIONS OF FACT.

In an action to recover money paid by a corporation for its outstanding stock from a person who claimed that he sold the stock to a third person, whether the stock was sold to the corporation was a question of fact.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. § 804.*]

Mount and Parker, JJ., dissenting.

Department 1. Appeal from Superior Court, Spokane County; John B. Yahey, Judge.

Action by the Union Trust & Savings Bank against Benjamin E. Amery. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Campbell & Goodwin, of Spokane, for appellant. H. M. Stephens, of Spokane, for respondent.

GOSE, J. The plaintiff, as a trustee in bankruptcy for the estate of Syphers Machinery Company, a corporation, brought this action for the purpose of recovering from the defendant \$5,500 paid to him by the bankrupt corporation for 5,500 shares of its capital stock, alleging that he sold the stock to it prior to the time it was adjudged a bankrupt, and that it thereby attempted to and did reduce its capital stock. A demurrer to the complaint was sustained, and, upon appeal, the judgment was reversed. Union Trust Co. v. Amery, 67 Wash. 1, 120 Pac. 539. A reference may be had to this case for a fuller statement of the allegations of the complaint. Thereafter, issue being joined, the case was tried to a jury, terminating in a verdict for the defendant. The plaintiff's motion for a judgment non obstante, or in the alternative for a new trial, was denied, and a judgment was entered for the defendant, from which the plaintiff prosecutes this appeal.

The appeal presents two questions: (1) Was the appellant entitled to a directed verdict? and (2) Was the jury correctly instructed? These questions will be considered in the inverse order.

[1] The only question for the jury to determine was, Did the corporation purchase the 5,500 shares of stock, or any part of it, and pay for it from its funds? If it did, and any creditor existing or subsequent was injured thereby, the money so paid may be recovered in this action. Union Trust Co. v. Amery, supra. In that case, after a reference to the provisions of our statute, we

said: "It follows, therefore, that, where the capital stock has not been diminished in compliance with the statute, the original articles of incorporation operate as a continuing representation on behalf of the corporation that its capital stock is unimpaired, and that the impairment of its capital stock in any other manner is a fraud upon its creditors, both as to the corporation and all others who participate in or profit by such an act."

In *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364, the court said: "It is not alleged that the company was insolvent at the time the transaction occurred, but we think that is immaterial, since the thing which was unlawfully done reduced the available resources of a now insolvent company, and, if such reduction had not been made, the amount thereof should now be on hand for the benefit of creditors."

[2] The respondent alleged and contended that he sold the stock to one W. H. Gray. The court instructed: "And if you find that he did sell it [the stock] to the Syphers Machinery Company, and that he knew that he was selling it to the Syphers Machinery Company, the defendant will be liable; otherwise he will not." This was error. The question is, What was actually done? not what the respondent thought, believed, or intended. The elements of knowledge and the good or bad faith of the respondent created a false issue. If the corporation paid any sum of money to the respondent in the purchase of any part of its capital stock on its own behalf to the prejudice of a creditor, it did the very thing the statute was designed to interdict, and such money is a part of its capital stock and a trust fund of the bankrupt.

[3-5] Recurring to the first error assigned (i. e., the right of the appellant to a directed verdict), it suffices to say that the burden of proving the sale to the corporation devolved upon the appellant. If the stock was sold to Gray and paid for by him, as the respondent contends, the appellant cannot recover; and, if Gray purchased and paid for a portion of it, the appellant cannot recover for that portion. It is not a question of bookkeeping, but a question of fact. From an examination of the entire record, we do not feel warranted in saying that there was no question of fact for the jury.

The judgment is reversed, with directions to grant a new trial in harmony with this opinion.

CROW, C. J., and CHADWICK, J., concur.

MOUNT and PARKER, JJ. We think the instruction right and therefore dissent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

TENNES v. AMERICAN BLDG. CO.

(Supreme Court of Washington. April 8, 1913.)

1. LANDLORD AND TENANT (§ 172*)—EVICTION—CONSTRUCTIVE EVICTION.

Under the rule that any intentional or injurious interference by a landlord which deprives the tenant of the means or power of beneficial enjoyment of the premises, or materially impairs such enjoyment, is a constructive eviction, a tenant might treat his landlord's injunction sued out to prevent a sublease authorized by the lease as a constructive eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

2. LANDLORD AND TENANT (§ 178*)—EVICTION—WAIVER BY TENANT.

Where a tenant does not treat his landlord's injunction sued out to prevent a sublease as a constructive eviction, but remains in possession of the premises, he thereby waives his right to treat such injunction as an eviction, since there can be no constructive eviction without a surrender of possession by the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 713; Dec. Dig. § 178.*]

3. INJUNCTION (§ 261*)—WRONGFUL ISSUANCE—MEASURE OF DAMAGES.

A tenant's lease to a subtenant furnishes no basis for measuring the damages sustained by the tenant by reason of an injunction against such sublease, unless the original lease was made in contemplation of a sublease, so that evidence of such damages is inadmissible.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 609; Dec. Dig. § 261.*]

Department 1. Appeal from Superior Court, Spokane County; William A. Huneke, Judge.

Action by J. H. Tennessee against the American Building Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wakefield & Witherspoon and A. C. Shaw, both of Spokane, for appellant. Belt & Powell, of Spokane, for respondent.

GOSE, J. This is an action to recover rent under a written lease. It is alleged in the complaint that on or about November 1, 1909, the plaintiff with one Burns leased the first floor of a building situate in the city of Spokane to the Shubert Theater Company, a corporation, "for a theater entrance to the theater in the rear of said premises," for a term of five years from that date, at an agreed monthly rental of \$250 per month, payable in advance on the 1st day of each month; that thereafter the lessee assigned its lease to the defendant; that it accepted the lease, assumed the obligations thereof, and since the assignment up to and including July, 1911, paid the rent provided in the lease; that by agreement between the plaintiff and Burns the rent became and is the property of the plaintiff; that the defendant has not paid the rent for the months of August, September, October, and November,

1911, and a judgment is demanded for the rent of those months, aggregating \$1,000. The defendant answered, admitting the assignment of the lease to it as alleged in the complaint, admitting that it went into possession of the premises and paid the rent up to July, 1911, and pleaded affirmatively that the lease provided that so much of the leased premises as might not be necessary for or devoted to a theater entrance might be used by the lessee for any lawful purpose; that after the assignment it changed and altered the building in accordance with the terms of the lease so as to make two storerooms, one on either side of the entrance to the theater; that thereafter and about the 1st day of December, 1910, the defendant leased one of the rooms to one Edward Dufresne at a rental of \$200 per month, to be used for a lawful purpose, but that the plaintiff refused to permit Dufresne to take possession of the room, sued out a writ of injunction restraining from him taking possession, and restraining the defendant from leasing the room to him, and that ever since the plaintiff has refused to permit the defendant to lease the room to Dufresne, and it has remained vacant and unoccupied. It is further alleged that the clause in the lease providing that that portion of the building not needed for a theater entrance could be used by the lessee for any lawful purpose was one of the inducements which caused the Shubert Theater Company to make the lease; that by reason of the action of the plaintiff the obligation to pay the rent stipulated has ceased and terminated, "and that the only sum which this defendant should be required to pay is the sum stipulated in said lease, less the sum agreed to be paid by the said Dufresne" for the part leased to him. In the reply the lease from the company to Dufresne is denied on information and belief, and it is denied that the Shubert Theater Company was induced to enter into the lease because of the provision therein that that part of the premises not needed for the theater entrance could be used for any lawful purpose. The averment that the defendant is released from its obligation to pay rent is also denied. The case was tried to the court. The fact that the defendant had not paid the four months' rent was admitted. The defendant then offered in evidence the Dufresne lease and the record in the injunction proceeding, and offered proof tending to show that, at the time it made the lease to Dufresne and at the time of the issuing of the restraining order, Dufresne was solvent. The court found that the lease was made and assigned as alleged in the complaint, that the plaintiff had succeeded to Burns' interest in the rent, and that the defendant had paid certain rent to the plaintiff. The court further found that on or about the 1st day of December, 1910, the defendant leased to Dufresne a portion of the building for the term of three years and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

eleven months, he agreeing to pay therefor \$200 per month; that Dufresne was prevented from entering into the possession of the room by an injunction sued out by the plaintiff and Burns; that the defendant was at all times in the possession and control of the storeroom leased to Dufresne; that it failed to prove that it had been damaged except in a nominal sum by the eviction of Dufresne; that it was not entitled to offset or counterclaim any sum against the rent due the plaintiff except to the extent of one dollar nominal damages for the eviction; that the defendant used reasonable diligence to lease the storeroom leased to Dufresne from the time it was enjoined from subletting to Dufresne, but was unable to do so. A judgment was entered in favor of the plaintiff for the sum of \$999, the full amount of the rent in default less \$1 allowed to the defendant as nominal damages. The defendant has appealed.

[1] The appellant would have been justified in treating the injunction sued out as a constructive eviction. The rule is that "any intentional or injurious interference by the landlord or those acting under his authority, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof or materially impairs such beneficial enjoyment, is a constructive eviction." 1 Am. & Eng. Ency. Law (2d Ed.) p. 471.

[2] It choose, however, to remain in possession of the leased premises, and in so doing it waived its right to treat this as an eviction. "There can be no constructive eviction without a surrender of possession of the premises by the tenant." 24 Cyc. 1130. See, also, to the same effect *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; 11 Am. & Eng. Ency. Law (2d Ed.) p. 479.

[3] The lease from appellant to Dufresne furnished no basis for measuring the damages which the appellant sustained by reason of the injunction, and it was not admissible in evidence for the purpose of proving damages. *Mead v. Kalberg*, 127 Pac. 185. This is based upon the rule that a breach of the original contract does not entitle the injured party to recover as damages the gains or profits of collateral enterprises or subcontracts, where the collateral agreement or subcontract was made after the execution of the original contract. The reason is that the original contract was not made with reference to it, and that it would introduce an element of damages not known by or within the contemplation of the parties at the time they entered into the original contract. The appellant neither pleaded nor proved any damages which the law recognizes, unless it be nominal damages, which the court allowed.

The judgment is therefore affirmed.

CROW, CHADWICK, MOUNT, and PARKER, JJ., concur.

QUAST et ux. v. RUGGLES.

(Supreme Court of Washington. April 5, 1913.)

1. BILLS AND NOTES (§ 147*)—"NEGOTIABLE INSTRUMENTS"—WHEAT ARE.

Under Negotiable Instrument Law (Rem. & Bal. Code, § 3392) § 1, providing that an instrument to be negotiable must be payable to order or bearer, and section 3401 providing that the instrument need not follow the language of the act, but any terms indicating an intention to conform to the requirements thereof are sufficient, a note providing that the makers thereof promise to pay to the payee named a specified sum, with interest at a specified rate, evidenced by interest notes, and that, if default be made in the payment of any of the notes as they mature, the whole amount shall become due, and the mortgagee, his representatives, or assigns may collect the note and foreclose the mortgage, etc., is not negotiable because it is not payable to order or bearer, and because it does not contain language indicating an intention to make it so payable; a transfer by assignment not being equivalent to an indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 363; Dec. Dig. § 147.*

For other definitions, see Words and Phrases, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

2. BILLS AND NOTES (§ 147*)—NEGOTIABLE INSTRUMENTS—STATUTORY PROVISIONS.

Negotiable Instrument Law (Rem. & Bal. Code, § 3401) § 10, providing that the instrument need not follow the language of the act, but any terms indicating an intention to conform to the requirements thereof are sufficient, must be construed in connection with section 3392, providing that an instrument to be negotiable must be payable to order or bearer, and, when so construed, it refers to words of indorsement, and not to words of assignment, and means that to make an instrument conform to section 3392 it is not necessary to use the words "order or bearer," but other apt words showing a clear intent to make the instrument so payable are sufficient.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 363; Dec. Dig. § 147.*]

Department 2. Appeal from Superior Court, Lincoln County; F. K. P. Baske, Judge.

Action by Jacob Quast and wife against Daniel B. Ruggles. From a judgment for plaintiffs, defendant appeals. Affirmed.

Tolman & King, of Spokane, for appellant. W. W. Zent, of Spokane, for respondents.

MORRIS, J. The question presented by this appeal is the negotiability of the following note: "On the first of November, 1920, for value received, we promise to pay to M. L. Bevis the principal sum of \$1,200 (twelve hundred dollars), with interest thereon at the rate of seven per cent. per year, from the date hereof until maturity, payable annually according to the tenor of nine interest notes, each for \$84 and one (1) for \$80.97, bearing even date herewith; both principal and interest notes payable at the office of Bevis Bros., Spokane, Wash. (with exchange on New York). And if default be made in payment of any of said notes so secured, or any part of them, as the same mature, for the space of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thirty days, or if the maker of this note and interest notes attached hereto shall allow the taxes or any other public rates and assessments on the property, or any part thereof, given as security for the aforesaid notes to become delinquent, or in case any taxes or assessments shall be levied against the holder of this note on account of this note, or shall do any act whereby the value of said mortgaged property shall be impaired, then, upon the happening of any of said contingencies, the whole amount herein secured shall at once become due and payable, and the mortgagee, his legal representatives or assigns may proceed at once to collect this note and foreclose the mortgage given to secure said note and sell the mortgaged property, or so much thereof as shall be necessary to satisfy said debt, interest and costs and all taxes, public rates, or assessments that may be due thereon, together with a reasonable attorney's fee, if suit be commenced for the purpose of collecting this debt or foreclosing the mortgage, securing said debt, and also said taxes, public rates, and assessments, and costs incurred by the mortgagee, his representatives or assigns, shall be secured by mortgage, and also in judgment in such foreclosure case. It is expressly agreed and declared that these notes are made and executed under and are in all respects to be construed by the laws of the state of Washington, and are secured by mortgage of even date herewith, duly recorded in Lincoln county of the state of Washington. This note bears interest at the rate of ten per cent. per year, payable yearly after maturity. The makers of this note have the option of paying it any time the interest matures on and after November 1st, 1910. Dated at Spokane, state of Washington, on the 14th day of November, 1910. Jacob Quast, Jr. Tena Quast."

[1] The sections of the negotiable instrument law controlling are section 3392, Rem. & Bal., providing that an instrument to be negotiable "(4) must be payable to order or to bearer," and section 3401: "The instrument need not follow the language of the act but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof." The instrument clearly is not payable "to order or to bearer," and must for this reason be held nonnegotiable, unless we can find in it some language that under section 3401 "clearly indicates an intention" to make it so payable. Appellant contends this language is supplied in the provision accelerating the time of payment on the happening of certain contingencies, and providing in such case "the mortgagee, his legal representatives or assigns, may proceed at once to collect," and the subsequent provision as to payment of taxes and costs by "his representatives or assigns." The mortgage also refers to "party of the

second part, his successors or assigns." The word "assigns," as used in the note and mortgage, does not refer to the payee of the note but to the mortgagee, and indicates nothing more than that the mortgage may be transferred by assignment. The transfer of an instrument by assignment is not the equivalent of its transfer by indorsement.

[2] As interpreting section 3392, the provisions of section 3401 clearly refer to words of indorsement and not to words of assignment, and mean that, in order to make the instrument conform to the requirement of section 3392, it is not necessary to use the words "order or bearer," but other apt words showing a clear intent to make the instrument so payable will be sufficient. This is the general rule adopted by all courts in construing this requirement of the negotiable instrument law. *Zander v. N. Y. Security Trust Co.*, 39 Misc. Rep. 98, 78 N. Y. Supp. 900, affirmed on appeal in 81 App. Div. 635, 81 N. Y. Supp. 1151. The promise to pay in this case was to "Caroline Zander or her assigns," a stronger expression of intent than the one found in the note before us. The court, however, seemed to consider the matter so plain that the mere statement of its ruling was deemed sufficient, and the appellate court with like certainty did not regard the question as open to discussion, but affirmed on opinion of court below. Other supporting cases, all referring to the necessity of the use of the words "order or bearer" or words of like import, are *Fulton v. Varney*, 117 App. Div. 572, 102 N. Y. Supp. 606; *Wettlauffer v. Baxter*, 137 Ky. 862, 125 S. W. 741, 26 L. R. A. (N. S.) 804; *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424; *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N. W. 572.

Other questions are discussed in the briefs, but finding our ruling upon the first point decisive of the appeal we will not refer to them.

Judgment affirmed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

FIRST NAT. BANK OF EVERETT v. WILCOX.

NORTH COAST DRY KILN CO. v. SAME
(Supreme Court of Washington. April 8, 1913.)

CORPORATIONS (§ 52*)—CHANGE OF RESIDENCE—AMENDMENT OF ARTICLES.

Rem. & Bal. Code, § 3708½, providing that a corporation desiring to remove its principal place of business into some other county shall file with the county auditor a certified copy of its certificate of incorporation, must be read in connection with section 3679, authorizing amendments to articles of incorporation, and, when so read, an amendment changing the residence of a corporation must be certified and filed as in case of original articles, and the mere fil-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing after such an amendment in one county of the original articles of incorporation reciting the residence in another county does not give notice of change of residence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 140-150; Dec. Dig. § 52.*]

On petition for rehearing. Denied.

For former opinion, see 130 Pac. 756.

Cooley & Horan and R. Mulvihill, all of Everett, for appellants. B. G. Cheney, of Montesano, and Hayden & Langhorne, of Tacoma, for respondent.

MOUNT, J. The appellant First National Bank of Everett has filed a petition for a rehearing herein because we failed to notice the contention that the place of residence of the corporation was changed to Chehalis county before the conditional bill of sale, dated August 25, 1911, was filed. It is true that a copy of the articles of incorporation was filed in Chehalis county before August 25, 1911, but the articles so filed stated that the principal place of business of the corporation was Tacoma in Pierce county. There was no amendment to the articles changing the principal place of business or residence, as required by section 3679, Rem. & Bal. Code; while section 3708½, Rem. & Bal. Code, provides that "any corporation desiring at any time to remove its principal place of business into some other county in the state shall file in the office of the county auditor a certified copy of its certificate of incorporation." This provision should be read in connection with section 3679, supra, in reference to amendments. That is to say, the stockholder or trustee must make the amendment changing the residence, and the same must be certified in triplicate and filed as in case of original articles. Otherwise confusion and embarrassment would result. The mere filing of the old articles in Chehalis county, stating that the residence was Pierce county, did not give notice of a change of residence, but had the effect of notice that the residence was not changed. The residence was not changed by a mere filing of the unamended articles in another county.

The petition is therefore denied.

CROW, C. J., and PARKER, GOSE, and CHADWICK, JJ., concur.

MCDUGALL v. O'CONNELL et ux.

(Supreme Court of Washington. April 10, 1913.)

En Banc. On petition for rehearing. Granted in part, and denied in part, and original opinion modified.

For original opinion, see 130 Pac. 362.

PER CURIAM. A petition for rehearing has been filed in this case. The original opinion of the court is reported in 130 Pac.

362. In the petition for rehearing our attention is called to an error in the opinion. There we directed generally that the superior court enter a judgment for the appellant, when the direction should have been to enter a judgment for the appellant and against the respondent W. L. O'Connell only, and not against the community composed of W. L. O'Connell and Evelyn F. O'Connell, his wife. The appellant in his brief conceded that the liability upon the contract was that of the husband only.

The original opinion will be modified to the extent here indicated; otherwise, the petition for rehearing is denied.

JENSEN v. T. H. WILLIAMS CO. et al. (Supreme Court of Washington. April 5, 1913.)

1. MASTER AND SERVANT (§ 80*)—ACTION FOR SERVICES—EVIDENCE—SUFFICIENCY.

In an action against a corporation for services rendered, evidence held to support a finding that the services were rendered for another corporation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

2. TRIAL (§ 169*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where the court must say, as a matter of law, that no recovery can be had under any reasonable view of the evidence, a verdict for defendant should be directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.*]

Department 1. Appeal from Superior Court, Snohomish County; John B. Yahey, Judge.

Action by Carl Jensen against the T. H. Williams Company and another. From a judgment for defendant named, plaintiff appeals. Affirmed.

Willett & Oleson, of Seattle, for appellant. Hathaway & Alston, of Everett, for respondent.

GOSE, J. This action was originally commenced against the defendant corporation T. H. Williams Company to recover an alleged balance due for services performed for it at its instance and request. It answered, denying that the plaintiff had performed any service for it. Thereupon the plaintiff amended his complaint, and alleged that the services were performed for both defendants. A joint demurrer to the complaint was overruled. The defendant Snoqualmie Lumber & Shingle Company failing to plead further, an order of default was entered against it. Two causes of action are pleaded. In the first cause of action it is alleged that the plaintiff performed labor for the defendants from the 1st day of January, 1910, to the 1st day of July following, at an agreed wage of \$80 per month. In the second cause of action the allegation is that the plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

performed labor for the defendants from the 1st day of July, 1910, to the 1st day of March, 1911, at an agreed wage of \$85 per month. The defendant T. H. Williams Company, in a separate answer, denied these averments. At the close of the trial the court sustained the challenge of the defendant T. H. Williams Company to the sufficiency of the evidence, and directed a verdict against the defendant Snoqualmie Lumber & Shingle Company. Thereafter a judgment was entered in favor of the plaintiff against the latter company for the amount claimed, and in favor of the defendant Williams Company for its costs. The plaintiff has appealed from the judgment in favor of Williams Company.

[1] The appellant contends that he was employed by and worked for the respondent T. H. Williams Company; whilst it contends that he was employed and worked for its codefendant. The single question presented is whether there was any substantial evidence to support the appellant's contention, and which should have been submitted to the jury. The evidence is that the defendants are separate and distinct corporations; that they conducted separate businesses and kept separate bank accounts; that the Williams Company had its mill at Snohomish; that its codefendant has its mill at Snoqualmie; that the defendants had common officers and a common office; that the Snoqualmie Lumber & Shingle Company has a capital stock of \$25,000; that it had a stockholder, who owned \$5,000 of its stock, who was not a stockholder in the other corporation; that the secretary of the two corporations owned \$5,000 of the stock of the Snoqualmie Lumber & Shingle Company, and nominally held one share of stock in the Williams Company to qualify him as a trustee. The appellant testified that he was employed by and worked for the Williams Company. He admitted, however, that from September, 1909, to July 1, 1910, he served as a foreman and kept the time of the men in the time book of the Snoqualmie Company, upon which the words "Snoqualmie Lumber & Shingle Company" were written in large letters; that he gave the men their time checks, upon which they were paid for their services; that he bought supplies, and that the accounts were made out to the Snoqualmie Company, and that he, in common with the others, was paid in checks signed by the Snoqualmie Company, thus, "Snoqualmie Lumber & Shingle Company, Incorporated, by ———," and upon the end of which was printed the words, "Snoqualmie Lumber & Shingle Company, Incorporation, Manufacturers of Washington Red Cedar Shingles, Snoqualmie, Washington." Following these admissions, the documents were put in evidence. His explanation is that he did not read the printed matter in the time book,

bills, or checks. He can both read and write.

[2] The conviction is irresistible that he knew that he was working for the Snoqualmie Company. Moreover, he worked for the Williams Company at Snohomish, after he left the Snoqualmie Company, from March 1, 1911, to September 5, 1911, and admits that he was paid by its checks for the later service. The declarations of the appellant that he worked for the Williams Company are rendered worthless by his admissions and the record evidence. The admitted facts that he served as foreman for the Snoqualmie Company for a period of nine months, kept its time book, purchased supplies, issued time checks to the men, received the checks of the Snoqualmie Company for himself and his collaborators, upon all of which plainly appeared the name of the Snoqualmie Company, force the conclusion that he knew that he was employed by the Snoqualmie Company. "When the motion is grounded upon the insufficiency of plaintiff's proof, the question presented is whether there is any substantial evidence tending to establish the cause of action sued on. The rule supported by the great weight of authority and by reason is that it is only where the court must say that, as a matter of law, no recovery can be had under any reasonable view of the evidence that a verdict for the defendant will be directed." 88 Cyc. 1576, 1577, clause c. The judgment is affirmed.

CROW, C. J., and OHADWICK, MOUNT, and PARKER, JJ., concur.

CASEY-HEDGES CO. v. WILCOX.

(Supreme Court of Washington. April 5, 1913.)

SALES (§ 474*)—CONDITIONAL SALES—FILING OF CONTRACT—RESIDENCE OF CORPORATION.

Under Rem. & Bal. Code, § 3670, providing that conditional sales of personal property, accompanied by delivery, shall be absolute as to subsequent creditors unless a memorandum of the sales be filed in the county where the buyer resides, a conditional sale contract, to be effective as to a corporate buyer, must be filed in the county specified in the articles of incorporation as the principal place of business of the buyer; a corporation's principal place of business being its residence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the Casey-Hedges Company against T. F. Wilcox, as receiver for the Syverson Lumber & Shingle Company. From a judgment for defendant, plaintiff appeals. Affirmed.

O. M. Nelson, of Montesano, for appellant. B. G. Cheney, of Montesano, and Hayden & Langhorne, of Tacoma, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PER CURIAM. This is an action to recover the possession of certain personal property which it is asserted the plaintiff sold to the Syverson Lumber & Shingle Company, a corporation, on a conditional sale contract which was filed in the office of the county auditor of Chehalis county within the time provided by statute (Rem. & Bal. Code, § 3670). In its articles of incorporation, the Syverson Lumber & Shingle Company designated the city of Tacoma, in Pierce county, as its principal place of business. "The principal place of business must be held to be the residence of the corporation." *First Nat. Bank of Everett v. Wilcox*, 130 Pac. 758. The contract was not filed in the county wherein, "at the date of the vendee's taking possession of the property, the vendee resides." Upon the authority of the case cited, the court correctly held that the plaintiff had no cause of action.

The judgment is affirmed.

BURROUGHS ADDING MACH. CO. v. WILCOX.

(Supreme Court of Washington. April 5, 1913.)

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the Burroughs Adding Machine Company against T. F. Wilcox, as receiver for the Syverson Lumber & Shingle Company. From a judgment for defendant, plaintiff appeals. Affirmed.

O. M. Nelson, of Montesano, for appellant. B. G. Cheney, of Montesano, and Hayden & Langhorne, of Tacoma, for respondent.

PER CURIAM. This case, although brought by a different party plaintiff, involves the same question as *Casey-Hedges Co. v. Wilcox* (No. 11,024) 131 Pac. 205, and, upon the authority of that case, the judgment is affirmed.

CITY OF SPOKANE v. MILES et ux.

(Supreme Court of Washington. April 4, 1913.)

1. MUNICIPAL CORPORATIONS (§ 450*)—SPECIAL ASSESSMENT DISTRICTS—ESTABLISHMENT—JUDICIAL REVIEW.

The court will not change an assessment district established by commissioners appointed under Rem. & Bal. Code, § 7788, except where the commissioners acted arbitrarily or fraudulently, or proceeded on a fundamentally wrong basis.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

2. MUNICIPAL CORPORATIONS (§ 450*)—SPECIAL ASSESSMENT DISTRICTS—ESTABLISHMENT—JUDICIAL REVIEW.

The testimony of witnesses, testifying in proceedings to confirm an assessment roll, that in their opinion the assessment district contained only a small part of the property benefited, and that the district should have included at least additional territory specified, did not overcome the probative force of the report of the commissioners, and the court would not inter-

fere with the district as established by the commissioners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

3. MUNICIPAL CORPORATIONS (§ 437*)—STREET IMPROVEMENTS—LIABILITY OF CITY.

Where no special benefit accrued to a city at large in consequence of a street improvement, no part of the cost thereof could be assessed to it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1061; Dec. Dig. § 437.*]

4. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENTS—ORDINANCE—ORDER OF REFERENCE—VARIANCE.

The variance between an ordinance directing a suit to fix damages from the regrading of a street and providing that the cost of the improvement shall be paid wholly or in part by special assessment on property benefited, and an order of reference to the board of commissioners reciting that it appeared to the court that the ordinance provided that the improvement should be paid for wholly by special assessment on property benefited, and directing the board to levy an assessment thereon, does not affect the validity of the report of the board establishing an assessment district and assessing the whole cost on the property therein.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1064, 1069; Dec. Dig. § 444.*]

Department 1. Appeal from Superior Court, Spokane County; William A. Huneke, Judge.

Proceedings by the City of Spokane for the confirmation of an assessment roll to pay the damages awarded for a change of grade of a street. From a judgment of confirmation, Frank T. Miles and wife appeal. Affirmed.

McCarthy & Edge and Hance H. Cleland, all of Spokane, for appellants. H. M. Stephens and Bruce Blake, both of Spokane, for respondent.

GOSE, J. This is an appeal by certain property owners from the judgment confirming an assessment roll. The assessment was made for the purpose of paying damages awarded to the defendants Miles and wife, caused by a change of grade of Main avenue between the west line of Lincoln street and a point 25 feet east of the east line of Wright street in the city of Spokane. The assessment roll is assailed upon two grounds: (1) It is said that the commission did not include all property benefited by the improvement; and (2) that a part of the cost of the improvement should have been assessed to the city.

In support of the first contention the objectors introduced four witnesses, each of whom expressed the opinion that a greater area should have been included in the assessment district. Three of these witnesses said that the district contained only a small part of the property benefited. One of them said that the district should have been extended west to the lower end of Peaceful Valley, or about 4,000 feet west of the west line fixed by the commissioners. While the other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

witnesses did not agree that the district should have been extended so far to the west, they were unanimous in the view that it should have extended east to Howard street three blocks beyond the point fixed by the commissioners, and that it should have included certain property north of Main avenue immediately west of Monroe street. Main avenue lies south of the Spokane river and runs east and west. Prior to the regrade it passed under the approach to Monroe street bridge, and travelers from the west desiring to cross the bridge to the north side of the river were required to go to Lincoln street one block east of Monroe street and loop back to the latter street. Under the regrade, Main avenue intersects Monroe street, at which point the river is spanned by a bridge which is the principal thoroughfare connecting the two parts of the city. The new grade west of Monroe street will be somewhat easier than the original grade. The city offered no evidence other than the report of the board of eminent domain commissioners. The statute (Rem. & Bal. Code, § 7795) makes this report competent evidence. Our statute (Rem. & Bal. Code, § 7788) provides that the superior court having jurisdiction shall appoint three "competent" persons as commissioners, upon the petition of any city of the class named in the act.

[1] Assessment districts must have a point of beginning and a point of termination. The fixing of these extremes often presents many perplexing questions upon which there would be a never ending variety of opinion. It is therefore of the first importance that some definite rule be laid down for the guidance of trial courts. The best rule that has been announced, and the only practicable working rule, is that the courts should not change the district established by the commissioners, except where the commissioners have acted arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis. *Spokane v. Kraft*, 67 Wash. 245, 121 Pac. 830; *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Seattle*, 62 Wash. 432, 113 Pac. 1112; *Id.*, 46 Wash. 63, 89 Pac. 156; *In re Harvard Avenue North*, 47 Wash. 535, 92 Pac. 410.

[2] Measured by this rule, the evidence is not sufficient to overcome the probative force of the report.

[3] In respect to the second contention, the evidence does not show that any especial benefit accrued to the city at large in consequence of the improvement. "The city, like a private owner, can only be assessed for an improvement where it is especially benefited." *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70. To the same effect, *In re Fifth Avenue*, 66 Wash. 327, 119 Pac. 852.

[4] The ordinance (A-5956) directing the institution of a suit to fix the damages flowing from the regrade provides: "The cost and expense of said improvement shall be paid

wholly or in part by special assessment upon the property benefited thereby." The order of reference to the board of eminent domain commissioners, after reciting that "it appearing to the court that ordinance No. A-5956, under which said suit was begun and prosecuted, provided that the improvement should be paid for *in whole* by special assessment on the property benefited thereby," directed the board "to levy an assessment upon the property benefited in accordance with law." The board reported "that no part of the cost thereof [meaning the improvement] shall be borne by the city of Spokane, as the city of Spokane at large in our judgment has not received any benefit therefrom." It is argued that the variance between the order and the ordinance impairs the probative force of the report. The variance is more apparent than real, and is not of sufficient gravity to impair the force of the report, or to require a resubmission to the commissioners.

The judgment is affirmed.

CROW, C. J., and MOUNT, PARKER, and CHADWICK, JJ., concur.

LACKAFF v. HINZ.

(Supreme Court of Washington. April 14, 1918.)

INTOXICATING LIQUORS (§ 327*)—CONTRACTS—CONSIDERATION—ILLEGALITY.

Plaintiff sold liquor in violation of Rem. & Bal. Code, § 2963, to a minor who was operating a saloon. The minor having failed in business, his father with due authority sold the business to defendant, taking for a part of the price a note for \$814.60 payable to plaintiff, to whom the minor was indebted for liquors, and delivered the note to plaintiff. *Held*, that the consideration for the note was the sale of the business to defendant, and not the sale of liquors by plaintiff to the minor, and hence it was not objectionable for illegality of consideration.

[*Ed. Note.*—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 467-472; Dec. Dig. § 327.*]

Department 1. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by F. J. Lackaff against P. Hinz. Judgment for plaintiff, and defendant appeals. Affirmed.

Miller, Crass & Wilkinson, of Vancouver, for appellant.

PARKER, J. This is an action upon a promissory note executed and delivered by the defendant to the plaintiff on December 23, 1908. The defense is that the note was executed without lawful consideration therefor, in that it was executed in payment of the purchase price of intoxicating liquor sold to a minor in violation of section 2963, Rem. & Bal. Code, then in force. The trial was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

before the court without a jury. Judgment being rendered in favor of the plaintiff, the defendant has appealed. The controlling facts are not in dispute.

On December 23, 1908, one William Smiley was a minor of the age of 20 years and 9 months. For some time prior thereto he had been conducting a retail liquor business at Camas in Clarke county under the required local and federal licenses. While engaged in that business he purchased and received from respondent intoxicating liquors aggregating in value the sum of \$314.60, which sum was unpaid on December 23, 1908. Some two or three weeks prior thereto he failed in his business and left the state. His father, A. Smiley, then took charge of the business, and proceeded to settle with the creditors. The authority of the father to so act is not questioned. Among the claims of creditors paid by A. Smiley in the settlement was the claim of respondent for \$314.60, which was paid by A. Smiley by executing and delivering to respondent his promissory note for that amount. Soon thereafter, on December 23, 1908, A. Smiley, as agent for his son, William Smiley, sold the business, including liquors and other stock in hand, to appellant. A bill of sale was executed accordingly by A. Smiley in the name of his son, William Smiley, reciting a consideration of \$735, and the payment of part thereof by the execution of a promissory note by appellant for the sum of \$314.60 payable to respondent. This is the note here sued upon. This note was delivered to respondent, and thereupon the note theretofore given by A. Smiley to respondent was surrendered and canceled.

Proceeding upon the theory that the note here sued upon was given in payment of the liquor sold by appellant to the minor, William Smiley, and that such sale was in violation of law, it is contended by counsel for appellant that the note is without lawful consideration. This contention is rested upon the general rule that such a sale of liquor does not constitute a lawful consideration supporting and rendering binding the debt so attempted to be created even though evidenced by a promissory note; citing 23 Cyc. 339, and other authorities. The fallacy of this contention it seems to us is found in the fact that the consideration, the lawfulness of which is here involved, is the consideration moving from William Smiley, the owner of the business, to appellant Hinz who gave the note in part payment of the business of William Smiley. Clearly this was not an unlawful consideration. Suppose the note had been given by appellant to William Smiley direct in part payment of the purchase price of the business, wherein would there have been any want of lawful consideration? We know of no law or rule of public policy preventing property of a minor, even though it happens to be intoxicating liquor, being sold; other

than as such sales may be subject to license and revenue laws. We are quite unable to see any legal ground, and none has been suggested by counsel, upon which the purchaser of such property can avoid payment therefor, so far as the lawfulness of consideration is concerned, when he receives good title through such sale. It is not even suggested here that appellant did not receive good title to the business for which he partly paid by the execution of this note. Suppose now that a note so executed to William Smiley be assigned to respondent; is it possible that appellant, the purchaser of the business, having given the note in part payment thereof, could successfully maintain that it was given without lawful consideration because William Smiley contemplated the assignment of it in payment of a debt he was not legally obligated to pay? This, it seems to us, would be a matter wholly foreign to the question of appellant's liability upon his note. Now, so far as appellant's rights here involved are concerned, he is for every practical purpose in this supposed situation. He purchased from Smiley this business. He agreed to pay for it. He gave this note in part payment thereof, and primarily for the benefit of William Smiley. He voluntarily made respondent the payee at the instance of William Smiley, or rather his father, who was acting for him. This did not increase or diminish the amount of his obligation in the slightest degree, nor did it change the fact that the note was given in part payment for the business. The consideration moving from William Smiley to appellant was lawful, and it is the consideration with which we are here alone concerned.

The judgment is affirmed.

CROW, C. J., and MOUNT, GOSE, and CHADWICK, JJ., concur.

WASHINGTON CHARCRETE CO. v. CAMPBELL et al.

(Supreme Court of Washington. April 4, 1913.)
CONTRACTS (§ 117*)—VALIDITY—RESTRAINT OF TRADE.

A contract of sale of a plant for the manufacture of laundry trays, cement blocks, and concrete products, which covenanted that the seller would not re-enter the same business either in Washington or Oregon within five years, was not void on its face as being in restraint of trade; the limit of time and territory stated being reasonably necessary for the successful conduct of such a business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Suit by the Washington Charcrete Company to enjoin A. D. Campbell and others from doing a certain business in Washington. Decree for plaintiff, and defendants appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Peterson & Macbride, of Seattle, for appellants. Munn & Brackett, of Seattle, for respondent.

MOUNT, J. The trial court issued a restraining order in this case, enjoining the defendants from manufacturing or selling laundry trays within the state of Washington, and from soliciting the patronage of present or former customers of the plaintiff. The defendants have appealed from that order.

The facts are not disputed. It appears that on October 30, 1911, the plaintiff, a Washington corporation, purchased from the defendants a plant located in Seattle for the manufacture of laundry trays, cement blocks, and concrete products. At the time of the sale a written contract was entered into, reciting the consideration for the sale and describing the property conveyed. This contract contained a provision as follows: "As a further part of the consideration of said sale parties of the first part [being the defendant Campbell and others] each for himself agrees that he will not either on his own account or as an employé for another, re-enter the business of manufacturing or selling laundry trays in the states of Washington or Oregon within a period of five years from the date of this instrument. Dated at Seattle, Washington, this 30th day of October, A. D. 1911." The defendants are threatening to enter into said business in violation of the terms of the contract.

The point argued in the briefs upon this appeal is that the contract is void upon its face, being a contract in restraint of trade, and because the restrictive clause is wider than the boundaries of the state. There is apparent conflict in the authorities upon the question presented here. But we are satisfied that the general rule as supported by the great weight of authority is that, where the vendor sells the good will of a business, he is bound by any covenant which is reasonably necessary for the success of the business or the preservation and protection of the property which he sells. The limit of time and territory contained in such covenant depends for its validity upon the character and extent of the business, as existing at the time of the sale and reasonably to be anticipated as necessary for the successful conduct of the business in the future. Nearly all the authorities cited in the briefs in this case, and many not so cited, will be found in the note to *Allen Mfg. Co. v. Murphy*, 22 Ont. Law Rep. 539, reported in 20 Ann. Cas. at page 661. This note shows that a majority of the courts "have declined to declare such contracts invalid simply because of their territorial extent," and then cites numerous cases holding that contracts covering entire states and contracts covering more than one state and also

covering the whole United States have been declared valid, depending upon the nature and extent of the business. In the same note the cases relied upon by the appellants here are also cited.

We deem it unnecessary to further recite or comment upon the cases here. In this case the property sold was a manufacturing plant for laundry trays and other products of like nature. Naturally the market for such products would not be merely local, but might reasonably extend to the limits of the state and possibly beyond. It is plain from the contract itself that the parties to it understood that the business would extend beyond the limits of the state, if it had not already at that time done so, because the contract provides that the vendors will not "re-enter the business of manufacturing or selling laundry trays in the states of Washington or Oregon"; the inference being clear that the business at that time had extended to those limits. In *Knapp v. Jarvis Adams Co.*, 135 Fed. 1008, 70 C. C. A. 536, the court said: "All such covenants do in some degree restrain trade. Whether the restraint is permissible by law depends upon the facts. The party who alleges that the restraint is such as to be in law obnoxious is bound to prove the facts which make it so. There can be no presumption, from the fact that there is some restraint in the instant case, that it is an unlawful one. With respect to the territory to which the restriction should apply, the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go." The appellants in this case make no showing that the contract is in fact in restraint of trade. They rely wholly upon the face of the contract. This contract upon its face is valid according to the great weight of authority, as we have seen above.

The order appealed from is therefore affirmed.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

BRIGGLE v. COX et ux.

(Supreme Court of Washington. April 4, 1913.)

TENANCY IN COMMON (§ 87*)—SALE—CONFIDENTIAL RELATIONS.

Although one tenant may sell his interest without informing his cotenant of matters which he might ascertain for himself, yet, where they both deal jointly in a sale of their interests or divisions as a whole, any secret consideration received by one must be accounted for to the other; the relation being confidential, if not fiduciary.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 106; Dec. Dig. § 87.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—14

Department 1. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by P. A. Briggie against C. E. Cox and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

C. E. Ellis and Carl W. Swanson, both of Spokane, for appellants. McWilliams, Weller & McWilliams, of Spokane, for respondent.

GOSE, J. On and for about one year prior to the 2d day of September, 1911, the plaintiff and the defendants were the joint owners of a contract entitling them to purchase a tract of land in Kootenai county, the state of Idaho. They also owned jointly certain personal property which was then upon these premises. About the middle of August, 1911, they made a parol partition of the land, and divided a portion of the personal property. In pursuance of this arrangement, they took possession of the tracts in severalty, and severally commenced fencing. On the 2d day of September, 1911, the fencing of the respective tracts was substantially completed. There was no exchange of conveyances between the parties. On the last-named date and while the exchange rested in parol, the plaintiff and the defendants jointly assigned the contract for the purchase of the Idaho land to Dennis Moylan and John Moylan, and jointly transferred to them the personal property upon the Idaho land in exchange for 1,400 acres of land situated in Garfield county, in this state, which the Moylans conveyed to the plaintiff and the defendant Ida May Cox, and which they later partitioned. There was a balance of \$6,000 due upon the purchase price of the Idaho land, and the land in Garfield county was mortgaged for \$8,000. The exchange of properties was subject to these burdens. The defendant C. E. Cox in the exchange received \$1,500 as boot money, a fact not then known by the plaintiff. This suit was brought to recover one-half of that sum. The plaintiff was successful in the court below, and the defendants have appealed.

The court found, in addition to the facts stated, that the appellants represented to the respondent that they could exchange the contract for the Idaho land, subject to the unpaid purchase price, together with all the personal property located thereon, for the Garfield county land, subject to the mortgage upon it, and that the basis of the exchange was "equity for equity" in the respective properties; that, relying upon this statement that the exchange was "equity for equity," the respondent jointly with the appellants executed and delivered to the Moylans an assignment "of all their individual interest" in the contract in exchange for a conveyance of the land in Garfield county to the respondent and the appellant Ida May

Cox; that the trade was a joint one upon the part of the parties to this action; that about the 1st day of November following the respondent first learned that the appellants had secured an additional consideration, consisting of a mortgage for \$1,500 upon the Idaho land, taken in the name of one McMullan for the benefit of the appellants, for the purpose of concealing from the respondent the real nature of the transaction; that on the 18th day of December following McMullan assigned the mortgage to the appellant C. E. Cox; and that the mortgage was paid on the 13th day of May, 1912. The findings are supported by the evidence.

The assignment of the contract, the deed from the Moylans, and the mortgage from the Moylans to McMullan were all executed on the 2d day of September. The mortgage was not recorded until the 2d day of October following. The assignment of the mortgage was executed on the 18th day of December, but was not filed for record until the 15th day of May following; that being the date upon which it was paid.

The record makes it clear that the appellant husband led the respondent to believe that the properties were to be exchanged unit for unit, or, as the court found, equity for equity; the Moylans receiving in addition the personal property then upon the land in Idaho. The respondent so testified. He also said that after he had seen the Garfield county land he told the appellant that it did not square with the representations, either in respect to quality or the quantity of fallow land, and that he then said to him: "If you want to trade for it, go ahead. I will be with you. I did not want to be a stumbling block for him." He further stated that the appellant said: "We will just trade all of the Cox and Briggie stuff for the Garfield county land and the crop that's on it." The appellants did not examine the land in Garfield county, and the appellant husband said that he told the respondent that he had agreed upon terms of exchange, provided the respondent would convey his interest in the contract and the personal property; that he did not say the exchange was equity for equity, but that each understood that he was making his own bargain. The fact that the mortgage was taken in the name of McMullan, a resident of the state of Nebraska, and withheld from the record for a month after its execution, together with the further fact that the assignment to appellant was not filed for record for several months after its execution and not until the mortgage was paid, lends distinct color to the respondent's version of the conversation. The honest transaction rarely pursues the devious or obscure path. It rather chooses to follow the plain, beaten way, and proclaims itself as it really is.

The authorities cited by the appellants upon the proposition that a parol partition be-

tween tenants in common, followed by the parties taking possession and making permanent improvements in severalty, operates in equity as a severance of the cotenancy, announce correct principles of law. *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213; *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457; 30 Cyc. 161; *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941; *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. 881; *Willey v. Bonney's Lessee*, 31 Miss. 644; *Wood v. Fleet*, 36 N. Y. 490, 93 Am. Dec. 528; *Freeman on Cotenancy and Partition* (2d Ed.) § 402. In *Graves v. Smith* and *Cade v. Brown* this court held that a parol contract for the sale of land, where the vendee takes possession and makes permanent improvements, takes the transaction out of the statute of frauds. The same equitable principles apply to a parol partition of land.

The appellants also suggest the admitted rule that one cotenant is at liberty to sell his interest in the property to the other or to a stranger at such price as he deems satisfactory, and that he is not called upon in such cases to disclose all he may know, or to inform his cotenant of matters which, by the exercise of reasonable diligence, he might ascertain for himself.

There are, however, other circumstances in this case of such cogency as to render these principles inapplicable. The relations between the respondent and the appellant husband were confidential, if not fiduciary. In such case, if there be any, though slight, false suggestion or misrepresentation, the transaction is fraudulent. While the parties had severed the cotenancy, the court found that they dealt jointly with both the real and personal property. They contributed the consideration for the Garfield county land in equal parts, and received a conveyance executed to the respondent and the appellant wife jointly. Moreover, they paid a commission to the broker who negotiated the sale out of the joint personal property. In short, they treated the cotenancy as existing. It follows that the appellants may not avail themselves of a secret profit which, when exposed to light, was a part of the consideration for the common property. 38 Cyc. 15; *Garr v. Boswell* (Ky.) 38 S. W. 513; *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81; *Walker v. Evans*, 98 Mo. App. 301, 71 S. W. 1086. In *Garr v. Boswell* a mother and her children sold a tract of land which they jointly owned. Two daughters each received a secret bonus from the purchaser. There was no evidence of any misrepresentation. In holding that the money thus obtained should be divided between the parties as the balance of consideration was divided, the court said: "We concede the right of one joint tenant to sell his interest in land without consulting his cotenants, and at any time and price he may choose. But when,

as in this case, the parties propose to sell together, and the act of one is dependent upon the act of the others, good conscience and fair dealing require that one should not undertake secretly to procure for himself more than it is understood and agreed each and all shall have. The fact that those who do not participate in the secret arrangement receive what they were, with the lights before them, willing to take cannot affect the question."

The judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

STRANDALL v. ALASKA LUMBER CO.

(Supreme Court of Washington. April 15, 1913.)

CORPORATIONS (§ 503*)—VENUE—"TRANSACTION BUSINESS."

Rem. & Bal. Code, § 206, provides that an action against a corporation may be brought in any county where the corporation transacts business, or transacted business, at the time the cause of action arose. Held that, where a corporation sent an agent to W. county, where he purchased lumber from plaintiff, had the same loaded on cars and shipped out of the state on defendant's order, such purchase was the transacting of business in W. county, and hence the corporation was suable there for the price, though none of its officers resided in that county, and its place of business was in another county.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7058-7060.]

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Action by A. Strandall against the Alaska Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Millon & Houser, of Seattle, for appellant. Neterer & Pemberton, of Bellingham, for respondent.

MOUNT, J. The plaintiff recovered a judgment against the defendant in the court below on account of a balance found due from the defendant to the plaintiff from the sale of two car loads of lumber. The defendant has appealed.

But one question is presented upon this appeal. It is argued by the appellant that the superior court of Whatcom county was without jurisdiction to try the case. It is conceded that the defendant is a domestic corporation having its principal place of business in King county. None of its officers reside in Whatcom county where the case was brought. The defendant sent an agent to Whatcom county, where the plaintiff lived, to purchase lumber. This agent purchased two car loads of lumber which were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then located in the respondent's mill yard in Whatcom county. A contract was entered into therefor. Thereafter plaintiff loaded the lumber upon cars in accordance with the contract and shipped the lumber out of the state upon order of the defendant. Previous to this time the defendant had purchased other lumber from the plaintiff in car load lots, which was shipped out of the state in the same way.

The complaint alleged, among other things: "That the cause of action arose in Whatcom county and the defendant transacted business at the time the same arose in said Whatcom county."

The statute provides (section 206, Rem. & Bal. Code) as follows: "An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this Code."

It is argued, in substance, by the defendant that the purchase of the lumber from the plaintiff in Whatcom county is not transacting business in that county, within the meaning of the statute. Prior to the year 1909, the statute provided: "An action against a corporation may be brought in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation." In 1909 this statute was amended so as to read as first above quoted. See Laws 1909, p. 69; Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798.

It will be observed that the words "where the corporation transacts business or transacted business at the time the cause of action arose" have been inserted into the previous statute, evidently for the purpose of authorizing suits to be brought in the county where the corporation transacts business, whether it has an office for that purpose in such county or not.

In Hayworth v. McDonald, 67 Wash. 496, 121 Pac. 984, we held that the execution of a bond in an attachment suit was such a transaction of business as to authorize an action in the county where the bond was filed.

In Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 Pac. 658, where a foreign corporation was engaged in assembling car load lots of household goods from different persons and forwarding them to different points outside the state, it was held that the appellant was doing business within this state.

It is plain, we think, that, where the defendant was purchasing lumber from the

plaintiff and ordering such lumber shipped from plaintiff's mill direct to other points, the corporation was transacting business within Whatcom county, where the mill was located. The superior court therefore had jurisdiction to try the case.

The judgment is affirmed.

CROW, C. J., and PARKER, CHADWICK, and GOSE, JJ., concur.

HARRIS v. STEWART et al.

(Supreme Court of Washington. April 9, 1913.)

1. CORPORATIONS (§ 121*)—SALE OF STOCK—FRAUD—RESCISSON—ACTIONS—EVIDENCE.

In an action to rescind the purchase of the capital stock of a drug company on the ground that defendant as plaintiff's confidential agent misrepresented the value of the stock, evidence held insufficient to establish any confidential relation between plaintiff and defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 506; Dec. Dig. § 121.*]

2. CORPORATIONS (§ 117*)—SALE OF STOCK—MISREPRESENTATIONS—RELIANCE.

Even though a seller who occupied a confidential relation toward plaintiff misrepresented the value of the capital stock of a drug company, plaintiff, who was experienced in that line and made an independent investigation, learning the value of the property, is not entitled to a rescission on account of the misrepresentations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

3. CORPORATIONS (§ 117*)—SALE OF STOCK—FRAUD—RESCISSON—RIGHT.

Where a sale of corporate stock was induced by the seller's fraudulent misrepresentations and concealment of his ownership, the buyer cannot, after discovering the true facts, stand by for more than a year and then be allowed to rescind.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by R. E. Harris against Alexander B. Stewart and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank E. Green and Brady & Rummens, all of Seattle, for appellant. Higgins & Hughes, Force & Ballinger, and Hyman Zettler, all of Seattle, for respondents.

MOUNT, J. The plaintiff brought this action to rescind a purchase of the capital stock of a drug company known as the Raven Drug Company in Seattle, and to recover from the defendant Stewart the money paid by plaintiff for the stock of that company. The plaintiff seeks to recover upon the ground that Mr. Stewart was a large owner of the stock of the company, which was unknown to the plaintiff at the time of the purchase; that Stewart recommended the purchase of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the stock as a good investment; that plaintiff relied upon that recommendation and regarded Mr. Stewart as a friend and confidential agent; that, after the purchase of the stock, plaintiff learned that it was of no value; and that this fact was known to the defendant Stewart at the time of the purchase. These facts were all put in issue. The case was tried to the court, and findings were made against the plaintiff and the action was dismissed. Plaintiff has appealed.

[1] He argues that the judgment should be reversed upon disputed questions of fact wholly. It appears that the plaintiff had been in the drug business in the state of Montana for several years prior to the year 1909. In that year he sold his Montana business and came to Seattle. In August he called upon Mr. Stewart and was introduced by plaintiff's brother, who was then in the employ of the Stewart & Holmes Drug Company. Mr. Stewart was the president of the Stewart & Holmes Drug Company, which did a large wholesale drug business. Plaintiff had had some dealing with the Stewart & Holmes Drug Company prior to the time he came to Seattle. Soon after plaintiff arrived in Seattle, he sought employment as a traveling salesman from the Stewart & Holmes Drug Company. Mr. Stewart did not employ the plaintiff, but suggested that he go into business in Seattle, and suggested that he purchase an interest in the Raven Drug Company. The stock of that company was all held in the name of H. S. Elwood, but was owned by Elwood who owned one-half thereof in his own right, and Mr. Stewart who owned a quarter of the stock, and by Mr. Hoge who owned the other quarter. Mr. Stewart did not disclose his interest in the stock, but agreed to arrange a meeting between plaintiff and Mr. Elwood, which was done. Plaintiff thereupon entered into negotiations with Mr. Elwood, which resulted in the purchase by the plaintiff of one-half of the capital stock of the Raven Drug Company for \$14,700. Before the purchase was made, the plaintiff examined the stock and books of the company, and learned the condition of the company and the amount of its debts, and the names of the creditors, one of whom was the Stewart & Holmes Drug Company to the amount of \$6,000. It was finally agreed between Mr. Elwood and the plaintiff that the purchase money paid by the plaintiff for the stock should go toward the liquidation of the debts and not be paid to the stockholders. This was accordingly done. In August, 1909, the plaintiff with Elwood went into possession of the business. Two or three months later plaintiff learned that Stewart was a part owner of the stock of the Raven Drug Company, but made no complaint and did not offer to rescind the sale. The business was continued by plaintiff and Elwood for more than a year

when in November, 1910, the plaintiff became president and sole manager of the business of the Raven Drug Company and about a month later sold his interest.

[2, 3] There are at least three grounds any one of which is sufficient to sustain the conclusion of the trial court: (1) The plaintiff failed to show that there were any confidential relations existing between him and the defendant Stewart. (2) Even if there were such relations, the plaintiff did not rely thereon, but made an independent investigation of the property he bought, learned its value, and the debts existing against it, and purchased with the full knowledge of the condition thereof; he was experienced in the business and purchased, not upon representations of the defendant Stewart, but upon his own knowledge and judgment. And (3) after the plaintiff learned of defendant's interest—if such interest was material—and after he had been in actual possession for a period of two or three months and knew all about the business, he made no complaint and did not offer to rescind the contract on that account. It was his duty upon discovering the facts to at once announce his intention to rescind. *Eldridge v. Young America, etc., Mining Co.*, 27 Wash. 297, 67 Pac. 703. This he did not do.

The judgment must therefore be affirmed.

CROW, C. J., and PARKER, GOSE, and CHADWICK, JJ., concur.

JOHNSON v. MANN.

(Supreme Court of Washington. April 9, 1913.)

1. ATTORNEY AND CLIENT (§ 140*)—EXPRESS CONTRACT—INVALIDITY.

If an attorney intentionally misrepresented to his client the magnitude of the services he was to perform for the purpose of obtaining a greater fee, he would only be entitled to the reasonable value of his services, instead of the contract price.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 336-349; Dec. Dig. § 140.*]

2. PAYMENT (§ 89*)—RECOVERY OF PAYMENTS—ACTIONS AGAINST ATTORNEY—BURDEN OF PROOF.

In an action against an attorney to recover a fee paid under a contract on the ground that the attorney misrepresented the seriousness of the offense charged and the value of his services, the burden of proof was on plaintiff to show such misrepresentations; a contract for professional services as an attorney not being looked upon with disfavor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 291-296; Dec. Dig. § 89.*]

Department 1. Appeal from Superior Court, Spokane County; William A. Huneke, Judge.

Action by Andrew Johnson against S. A. Mann. From a judgment for plaintiff, defendant appeals. Reversed for further proceedings.

Lucius G. Nash, of Spokane, for appellant. Crandell & Crandell, of Spokane, for respondent.

GOSE, J. On the 6th day of March, 1911, the plaintiff was arrested upon two criminal charges and lodged in the city jail in the city of Spokane, where he remained in confinement until the 15th day of March following. In one of the complaints the plaintiff and two other persons were charged jointly with having conspired together to kill one N. S. Pratt. In the other complaint the plaintiff and the same persons were jointly charged with having threatened to kill the said Pratt. Several days after the plaintiff had been arrested, the defendant, an attorney at law, called upon him in the city jail; whether at the request of the plaintiff or at his own instance being a disputed question, the plaintiff asserting the latter, and the defendant the former. At this interview the plaintiff gave the defendant the following order: "Spokane City Jail, March 15, 1911. Chief of Police: Kindly deliver to bearer, Mr. S. A. Mann, the sum of two hundred & fifty dollars (\$250.00) money held by your office to my credit, as part atty. fees. Andrew Johnson, Prisoner. O. K. W. J. Doust, Chief of Police. O. K. by W. D. Nelson." The city authorities then held \$763 of the plaintiff's money, out of which fund the order was honored. The defendant then commenced to act as attorney for the plaintiff and as such got him admitted to bail; \$500 cash being furnished therefor by the plaintiff. The plaintiff is 63 years of age, can read and write, was born in Sweden, came to this country when he was 21 years of age, lived 11 years in St. Paul, had lived 4 years in Spokane, has been a citizen of this country for a quarter of a century, and is a common laborer by occupation. He brought this action, alleging his arrest and confinement in the city jail; that he had never before been incarcerated; that his arrest and confinement caused him great bodily fear and apprehension; that on the 15th day of March, while confined in jail and in a troubled state of mind, the defendant came to him and represented that he (the plaintiff) was charged with a very serious offense "of which he was liable to be convicted and for which he was liable to be sentenced to the penitentiary for a long term"; that he (the defendant) could "secure plaintiff's release and discharge" from prison, but that "it would require a great deal of work and money expended" to the amount of \$250; that there was no evidence against the plaintiff and no work was required to secure his release and discharge; that these representations were false and untrue; that "believing and relying on said representations of defendant herein set forth in this complaint, this plaintiff signed an order whereby defendant was enabled to and did draw and receive \$250 of

plaintiff's money; and that thereby, and as a result of defendant's herein alleged and aforesaid false and fraudulent representations to plaintiff, this plaintiff was injured and defrauded out of his property and money in the sum of \$250." It is further alleged that the plaintiff was discharged without a trial; that the defendant rendered no service and expended no money; that immediately after his release from jail and on the 16th day of March the plaintiff, having discovered the fraud, notified the defendant of the fact, informed him that he did not desire him to act as his attorney, and demanded a return of the \$250, which the defendant refused. The prayer is for a judgment for \$250 and interest from the date of the order. Issue was joined on the charges of solicitation and fraud. The case was tried to a jury and resulted in a verdict for \$250, which was made effective by a judgment entered for that amount with interest from the 6th day of December, 1911. The defendant has appealed.

The errors assigned are (1) error in denying the appellant's motion for a nonsuit, and (2) error in denying his motion at the close of the trial for a directed verdict. These assignments presented a single question, namely, the sufficiency of the evidence to support the verdict. The charges of fraud when condensed are three in number: (1) That the respondent if convicted might be sentenced to a long term of imprisonment in the penitentiary; (2) that the appellant could clear him; and (3) that it would require "a great deal of work and money expended."

The respondent testified that the appellant told him in the jail that he "was liable to go to the penitentiary," that it frightened him, and that the appellant said that he could not promise to clear him. When asked by his attorney whether he believed the statement that he might be sent to the penitentiary, he answered, "I don't know to believe or not." He further said that the appellant told him that the charge "was very serious." After he had been admitted to bail, he, with a committee of three persons appointed by a labor union of which he was a member, called upon the appellant. The evidence touching this visit is: "Q. Tell the jury now what you said and what was said to Judge Mann up there. A. Well, I asked him for the money. 'I want that money.' I said, 'If you give me \$200 back I will let you have \$50.' So he said: 'No, I won't give you a cent. I won't give you a cent.' Q. Did you say anything at that time about not wanting him to do anything for you? A. No. Well, no I—he didn't do anything for me, never done any service, never done anything. Mr. Crowe: Well, of course, that is a conclusion, and I move that it be stricken. Q. And did you tell him that you did not want him to work for you any more after that? A. I can't recollect that. Q. You can't recollect? A. No."

A member of this committee testified: "A. We told Judge Mann we considered a fee of \$250 for defending Mr. Johnson was pretty high, considering Mr. Johnson's circumstances and the nature of the case. So we had quite a long talk with the judge. All four of us, I believe, spoke with him, and the judge contended that— Mr. Crowe: I object to the statement. Mr. Crandall: Q. What did the judge say? A. The judge said that the fee was normal. If they had gone to other lawyers they would charge as much more. So we told him then that we believed we would discharge him from the case, and that he should take his fee pay out of the fee and return the balance back. Q. What did the judge say to that? A. He said he had gone to a great deal of trouble and work in the case up to that time and his discharge from the case—he didn't think there would be any balance; he thought he had earned it all. Q. Did he refuse to give back any of the money? A. Yes, sir."

Another member of the committee testified that: "A. We told Mr. Mann that we thought \$250 was unreasonable for a case of that kind, and the nature it was, and that we could get other lawyers for a smaller sum. And he said he thought it was very reasonable, and we asked him if he objected to our getting another lawyer. He said he didn't. We asked him if he would give us the money back, and he said that he would not, and we told him then that we would hire another attorney. * * * Q. I will make it a little more specific. What was the offense charged against Mr. Johnson? A. My understanding at that time that he was a witness for these other two men. Q. You thought \$250 was too much for getting a witness out of jail—is that it? A. Yes, sir. Q. Did you know at that time there was a charge of conspiracy against Mr. Johnson? A. I don't remember. Q. Did you know at that time that there was a charge of threatening to kill against Mr. Johnson, an entirely distinct and separate case? A. No, sir."

The statute, Rem. & Bal. Code, § 2267, provides that the penalty for a conviction for a gross misdemeanor, which includes a conspiracy to commit a crime (Rem. & Bal. Code, § 2382), shall be imprisonment in the county jail "for not more than one year or by a fine of not more than \$1,000, or both." It may be remarked that the offense of conspiring to commit murder is a serious offense. The respondent's version is that the appellant represented that the penalty was imprisonment in the penitentiary. This the appellant denies. The record and other undisputed evidence show that the respondent was admitted to bail upon the application of the appellant before the committee waited upon him; that later the appellant argued a demurrer to the complaint, investigated the facts so far as he could, obtained an order

giving the respondent a separate trial, sat in the trial of the other defendants, and at its conclusion moved and obtained a discharge of the respondent.

[1] We are not aware of any principle of law, and no authority has been called to our attention, which would permit the respondent to recover the entire amount paid to the appellant, allowing him nothing whatever for his services. The theory of the case was, and the court instructed, that the respondent must recover the \$250 or nothing. The authorities cited by the respondent state the admitted rule that, where an attorney purchases property from his client and the latter seeks a rescission upon the ground of fraud, the conduct of the attorney will be subjected to the closest scrutiny, and the burden will be upon him of proving that his conduct was open and honest, and that he advised his client as fully and disinterestedly as he would have done had the client been dealing with the third party. This rule is based upon the fiduciary relation which exists between an attorney and his client, which arises concurrently with the closing of the contract of employment. The rule and its limitations are stated in the note to *Shirk v. Neible*, 83 Am. St. Rep. 185, as follows: "In matters other than those concerning fees, an attorney and client are not absolutely prohibited by law from contracting with each other; nor does the law declare all such contracts either void or voidable, but such a transaction is closely scrutinized by the courts and often declared to be voidable when it would be deemed unobjectionable between other persons." The statute, Rem. & Bal. Code, § 137 et seq., provides a method for a change of attorneys in cases pending in court. Under the statute there can be no change of attorneys in a case pending until the charges of the attorney have been paid. The appellant, however, had his fee, and the respondent was at liberty to discharge him and employ other counsel if he chose to do so. The evidence does not show a discharge. Clearly the respondent may not recover the entire sum paid to the appellant. The appellant is entitled to the contract value of his services unless he intentionally misrepresented the penalty of the crimes or the magnitude of the services to be performed. If he did so misrepresent, he is entitled to the reasonable value of his services. The respondent may not have both the services and the money. If I pay a grocer \$1 for a package of flour weighing 10 pounds upon his representation that it weighs 20 pounds, I cannot keep the flour and recover the \$1. I may return the flour and have my dollar, or I may recover an amount representing the difference between the value of the package as it was and as it was represented to be.

[2] The case was commenced and tried upon a fundamentally wrong theory. The court correctly instructed that the burden of proof

was upon the plaintiff. This is because a contract for the employment of an attorney for professional services, unlike a contract between an attorney and client in matters of property, is not looked upon with disfavor, and the burden of proving the fraud was upon the respondent.

The judgment is reversed, with directions to permit the parties to recast their pleadings so as to present two questions: First. Was the respondent overreached as we have defined that term in making the contract? Second. If so, what was the reasonable value of his services?

OHADWICK, MOUNT, PARKER, and MAIN, JJ., concur.

SCHEUERMAN INV. CO. v. LANDOWNERS' CORPORATION.

(Supreme Court of Washington. April 7, 1913.)

BOUNDARIES (§ 37*)—ACTION TO ESTABLISH—SUFFICIENCY OF EVIDENCE.

In an action to establish a boundary, where plaintiff claimed under a grantor, who had received two deeds, the first of which fixed the westerly boundary 35 feet west of the second, and who had surveyed the land on the ground according to the first deed, but had platted an addition to a line six feet west of the line of the second deed, and where defendant claimed under a conveyance making his easterly boundary the westerly boundary of the addition, evidence held to establish the boundary as the westerly line of the addition as it was surveyed on the ground.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Scheuerman Investment Company against the Landowners' Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Preston & Thorgrimson, of Seattle, for appellant. James Kiefer, of Seattle, for respondent.

PARKER, J. The object of this action is to settle a land boundary dispute. On April 9, 1890, Christian Scheuerman, who was then the owner of the adjoining tracts of land now owned by the parties to this action, conveyed by deed to Albert M. Brooks a tract of land the south and westerly boundaries of which were described therein as follows: "Commencing at the quarter section post between section ten (10) and fifteen (15), township twenty-five (25) north, range three (3) east, W. M. and running thence due north, variation twenty-two (22) degrees and forty (40) minutes east, twenty-three hundred and fifty-five and fifty-five hundredths (2355 & 55-100) feet to a granite monument [this being the beginning point on the south boundary of the land conveyed]; thence west four hundred (400) feet; thence in a northerly

direction making an angle of ninety-four (94) degrees and sixteen (16) minutes with the first course thirteen hundred and ninety-three (1393) feet to the shore of Puget Sound. * * * " This deed appears to have been recorded at the request of Brooks, the grantee, in the auditor's office of King county on April 11, 1890. On May 13, 1890, there was signed and acknowledged another deed by Scheuerman, purporting to convey to Brooks land the south and westerly boundaries of which were described as in the deed of April 9, 1890, except the call west from the granite monument was stated therein as 364.53 feet; the difference in the description of the two deeds being a strip of land 35.47 feet wide lying along the westerly boundary, which strip of land is approximately the land here in controversy. Of this deed Brooks has no remembrance and no idea why it was executed. It appears to have been recorded on May 26, 1890, at the request of one Wheeler. There is, however, nothing in the record showing that Wheeler caused it to be recorded at the instance of Brooks, and we have no further information pointing to the fact that Brooks ever voluntarily received this deed. It purports upon its face to have been executed for the purpose of correcting the description in the deed of April 9, 1890, and recites as follows: "This instrument is made to correct the description in a certain deed, bearing date the ninth day of April, 1890, made by Christian Scheuerman to Albert M. Brooks and which deed is recorded in Volume 97 of Deeds on page 227 of deed records in the auditor's office in King county, state of Washington." In March, 1891, Brooks caused Bay Terrace addition to the city of Seattle to be surveyed and staked upon the ground, and a plat thereof in usual form to be recorded in the auditor's office of King county. This survey and plat covers a large part of the land described in the deeds above mentioned, and it was the evident intent of Brooks to thus survey and plat the land clear up to his westerly boundary. The initial point of the plat as designated thereon is the southwest corner of the southwesterly block thereof, "which is 363.8 feet west of, and 2385 feet north of, the quarter section corner" mentioned as the beginning point in the description in the deeds. The granite monument is not mentioned upon the recorded plat. The westerly boundary of the plat is six feet to the west of this initial point. As this addition was actually surveyed and staked upon the ground, its westerly boundary conforms substantially to the description in the first deed to Brooks, though according to the designation of the initial point on the paper plat as recorded, the plat may seem to more nearly conform to the description in the second deed to Brooks. It is to be noticed, however, that the granite monument does not control the location of this westerly boundary of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plat. Plaintiff's land consists of a number of lots in the westerly tier of blocks of the plat, the westerly line of the lots being within six feet of the westerly line of the plat, the alley of that width being between. The plaintiff holds these lots by mesne conveyances from Brooks. In July, 1893, Christian Scheuerman executed and delivered to Lizette Backus a deed for a tract of land, the easterly boundary of which is therein described as: "Commencing at the southwest corner of Bay Terrace addition to Seattle recorded in the office of the county auditor of King county, state of Washington, in Volume seven (7) of plats on page 61 running north 4° 16' west thirteen hundred and ninety-three (1,393) feet more or less, along the line of said Bay Terrace tract, to high-water mark on Puget Sound." Defendant holds this tract of land by mesne conveyances from Lizette Backus. We do not find anything in the record warranting the conclusion that the land in dispute is in the physical possession of any one. These, in substance, are the material facts, as we view them, from which the respective rights of the parties are to be determined. From a decree in favor of the plaintiff, adjudging the true easterly line of the defendant's land to be the westerly line of Bay Terrace addition as it was surveyed and staked upon the ground, the defendant has appealed.

The claims of appellant rest almost wholly upon the force and effect to be given to the second deed from Scheuerman to Brooks, purporting to be a deed of correction of the description in the first deed. It seems to us that the facts above summarized leave little to be said touching the correctness of the learned trial court's disposition of the case. It seems that Brooks claimed title under the first deed to him, in conformity with which he platted the addition and caused it to be surveyed and staked upon the ground. The purported deed of correction is not shown to have been executed under such circumstances as warrant the conclusion that Brooks was thereby divested of title to the strip lying between the westerly boundaries of the descriptions in the deeds, and which he clearly acquired by the first deed. We are also of the opinion that the seemingly nearer conformity of the recorded plat with the description of the purported correction deed does not warrant the view that Brooks thereby adopted that deed as a correction deed. We have noticed that the plat is not controlled by the granite monument, and it may be that a survey north and west from the quarter section corner, ignoring the granite monument, as was done in the original survey and location of the addition upon the ground, would locate the southwest corner of the addition 400 feet west of the granite monument, as called for in the first deed to Brooks under which he evidently claimed title. This record lends fully as much sup-

port to the view that such a location of that corner is in conformity with the description in the first deed, as to the view that the granite monument is in fact located due north of the quarter corner. We conclude that the westerly boundary of Bay Terrace addition is as originally surveyed and staked upon the ground, and that it is also the easterly boundary of appellant's land.

The judgment is affirmed.

CROW, C. J., and MOUNT, CHADWICK, and GOSE, JJ., concur.

PACIFIC HARDWARE CO. v. OLSEN et al.

(Supreme Court of Washington. April 4, 1913.)

CONTRACTS (§ 198*)—BUILDING CONTRACTS—CONSTRUCTION.

A building contract provided that the contractor should provide all the materials and perform all the work of constructing and completing the building, except the heating and electric work as shown by the drawings and described in the specifications. The specifications provided that the contractor should furnish and install all construction work and rough hardware, such as nails, spikes, bolts, sash pulleys, etc., and should allow \$500 for the purchase of the finishing hardware, that is, locks, butts, door stops, etc., to be selected by the architect. *Held*, that the contractor was required to furnish the finishing hardware to the amount of \$500, to be selected by the architect, but that any amount over that sum should be paid by the owner.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-877, 879-883; Dec. Dig. § 198.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by the Pacific Hardware Company against O. E. Olsen and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hathaway & Alston, of Everett, for appellants. Cooley & Horan and R. Mulvihill, all of Everett, for respondent.

GOSE, J. This action was brought to recover a balance of \$556.11, for finishing hardware which the plaintiff sold and delivered to the defendants Olsen and Mellen, which was used by them in the construction of a courthouse at the city of Everett in Snohomish county. The firm of Olsen & Mellen had a contract for the construction of the courthouse. The contract provides that: "The contractor shall and will provide all the materials and perform all the work for the construction and completion of a courthouse * * * in the city of Everett * * * (except the heating and electric work) as shown on the drawings and described in the specifications prepared by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

Siebrand & Helde, architects." The specifications which were made a part of the contract contained this clause: "Contractor shall furnish and install all construction rough hardware such as nails, spikes, bolts, sash weights, roller bearings, sash pulleys and copper sash chain, Tabor sash fixtures, etc. He shall allow \$500 for the purchase of the finishing hardware, i. e., locks, butts, coat hooks, door stops, etc., to be selected by the architects." The defendant Title Guaranty & Surety Company, as surety, and the contractors as principals, executed a bond to the state conformable to the provisions of the Code, Rem. & Bal. § 1159. The plaintiff in due time filed notice of its claim with the county auditor as provided by Rem. & Bal. Code, § 1161. This action was brought upon the bond, and a judgment was entered in favor of the plaintiff for the full amount of its claim. The defendants have appealed.

The appellants contend that the contractors were not obligated to furnish any finishing hardware, but at that the contract read with the clause of the specifications which we have set forth required the architect to select such material to be paid for by the county and \$500 to be deducted from the contract price. The two quoted clauses must be read together. The contract proper provides that the contractor shall furnish *all* the materials and perform *all* the work for the "construction and completion" of the courthouse, "except the heating and electric work." The clause in the specifications does not designate either who shall furnish or who shall install the "finishing hardware." To determine upon whom these duties rest we must look to the body of the contract. We there find that these obligations are expressly imposed upon the contractors. It is significant, also, that the finishing hardware is not contained in the excepted items. While the clause in the specifications is not altogether clear, we think a fair and sensible construction means that the contractors shall furnish finishing hardware to the amount of \$500 to be selected by the architect, and that if they furnish more than that amount the county shall repay them the excess.

Section 1159 provides that the bond shall be conditioned "that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics and subcontractors and materialmen." The respondent has brought itself within the terms of the bond. The evidence is that it furnished the hardware to the contractors, and that it was actually used in the completion of the courthouse. The architect testified as to the meaning of the clause in the specifications. We do not think that, when the clauses are read to-

gether, any extrinsic aid is needed in their interpretation.

The judgment is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

SPINA v. ARCADIA ORCHARDS CO.

(REIDT, Intervener).

(Supreme Court of Washington. April 15, 1913.)

1. CONTRACTS (§ 300*)—PERFORMANCE—TIME—DELAY—EXCUSE.

Defendant orchard company, knowing that it did not have title to the standing timber on certain land, employed plaintiff to clear the land on or before November 13, 1910. The owner of the timber, however, refused to allow plaintiff to clear the land until it had finished its logging operations thereon, by which plaintiff and his subcontractor were delayed until September 15, 1911. *Held*, that such delay, not being due to the fault of plaintiff or his subcontractor, was excused and was not a breach of the contract barring the subcontractor's right to recover the balance due under such contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. § 300.*]

2. CONTRACTS (§ 256*)—PERFORMANCE—ABANDONMENT.

That a contractor for the clearing of certain land entered into a subcontract by which the subcontractor agreed to complete the work was not an abandonment of the work by the contractor, under the rule that there cannot be an abandonment to particular persons or for a consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1151; Dec. Dig. § 256.*]

Department 2. Appeal from Superior Court, Spokane County; Thos. E. Grady, Judge.

Action by Allesandro Spina against the Arcadia Orchards Company, in which Stephen Reidt, a subcontractor, intervened. From a judgment in favor of intervener, defendant appeals. Affirmed.

Happy, Cullen, Lee & Hindman, of Spokane, for appellant. J. W. Marshall and Wm. S. Lewis, both of Spokane, for respondent.

MAIN, J. This action was brought by Allesandro Spina, the plaintiff, against the defendant, Arcadia Orchards Company, a corporation. Stephen Reidt came into the action by complaint in intervention. After the issues were joined, a settlement took place between Spina and the Orchards Company. The cause was then tried upon the issues made up by the complaint in intervention, the answer thereto, and the reply. The complaint in intervention stated a cause of action upon a contract for clearing land. The cause was tried to the court without a jury. The material facts are as follows: On June 17, 1910, the Orchards Company entered into a written contract with Reidt, whereby the latter was to clear certain lands which were described in the contract. The contract,

so far as now material, was as follows: "Party to the second part agrees to vigorously proceed with the clearing of said land, and to completely clear same on or before the 13th day of November, 1910. All of said clearing to be done in a thorough workmanlike manner. Payment shall be indorsed upon the face of this contract as same is received by the party of the second part." From the excerpt quoted it will be observed that the work was to be completed "on or before the 13th day of November, 1910." In pursuance of the contract Reidt went upon the land and began the clearing thereof, with labor and equipment sufficient to have completed the work within the time specified. At the time the contract was entered into, the Orchards Company did not have title to the standing timber upon the land; but this was then owned by the Standard Lumber Company, a corporation. This company refused to allow Reidt and his men to clear the lands until it had finished its logging operations thereon. The Orchards Company at the time the contract in question was entered into knew of the lumber company's title to the timber and its right to enter upon the land and remove the same. Reidt did not have actual knowledge of the right of the lumber company. Reidt prosecuted the work of clearing under the contract as rapidly as the lumber company would permit, until November 16, 1910, on which date he entered into a subcontract with Allesandro Spina and Jean Olivets to complete the clearing. Thereafter Spina and Olivets went upon the land and performed the work and labor required under the contract between the Orchards Company and Reidt, as required by the subcontract. The work was completed by them on or about the 15th day of September, 1911, and was accepted by the Orchards Company. Upon the completion of the work the difference between the amount called for by the contract between the Arcadia Orchards Company and Reidt and the sum paid to Reidt and the subcontractor amounted to \$801. At the conclusion of the trial, judgment was entered for this amount, together with interest thereon from the 15th day of September, 1911. From this judgment the Arcadia Orchards Company appeals.

Two questions are presented for determination: (1) Did the failure to complete the work within the time specified in the contract preclude a recovery thereon? (2) Was there an abandonment of the contract by Reidt?

[1] I. The failure to perform the contract was due to the conduct of the lumber company, which, as above stated, had a superior right upon the land until it had removed the timber therefrom. This right was known to the Orchards Company when the contract was executed, and it also knew that Reidt was prevented from performing the contract by the action of the lumber company. The evidence shows that the delay was not due

to the fault of Reidt. Upon this question the trial court specifically found: "That the defendant, Arcadia Orchards Company, knew of the outstanding title of the said lumber company, which was of record in the auditor's office of Spokane county, Wash., and knew of the claims of the said lumber company and its president to the timber growing upon said lands, and the rights of the said lumber company to have ingress and egress to the lands for the purpose of cutting and removing said timber, and of the acts of said lumber company and its employees in driving the plaintiff in intervention and his men from said lands, and in preventing them from carrying out the said contract. (5) That the plaintiff in intervention prosecuted work under said contract from time to time as often as he was able to on account of the acts of the said lumber company and its said agent until on or about the 16th day of November, 1910, when the plaintiff in intervention made and entered into a subcontract with the plaintiff herein and one Jean Olivets." These findings are sustained by the evidence. In view of the attendant facts and circumstances, the failure to perform the contract within the time specified does not prevent a recovery thereon.

[2] II. The second point made by the appellant is that the respondent abandoned the contract. The facts stated show that a subcontract was executed, and that the work provided for in the original contract was completed by the subcontractor. The entering into the subcontract did not constitute an abandonment. A contract is not abandoned when rights under it are transferred to particular persons. In *Watts v. Spencer*, 51 Or. 282, 94 Pac. 39, it is said: "There is no such thing as abandonment to particular persons or for a consideration."

The judgment will therefore be affirmed.

OBOW, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

VILLANI v. WASHINGTON BRICK, LIME & SEWER PIPE CO.

(Supreme Court of Washington. April 4, 1913.)

1. MASTER AND SERVANT (§§ 97, 101, 102*)—MASTER'S DUTY TO FURNISH SAFE PLACE OF WORK.

It is a master's duty to furnish a reasonably safe place to work, and guard against such danger as would be anticipated by one of ordinary prudence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 163, 171, 174, 178-184, 192; Dec. Dig. §§ 97, 101, 102.*]

2. MASTER AND SERVANT (§§ 223, 246*)—RISKS ASSUMED—CONTRIBUTORY NEGLIGENCE.

While a servant assumes all the usual risks, he does not assume the risks arising from a sudden peril not incident to his employment, where he does not have time to exercise the deliberation which one of ordinary prudence

would do when confronted with a known danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 652-658, 789-794; Dec. Dig. §§ 223, 246.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES—JURY QUESTION—ASSUMED RISK.

In an action for injuries to an employé by having his finger crushed on an elevator drum by the elevator cable when it suddenly started without cause, whether plaintiff who caught hold of the wrong cable acted as a man of ordinary prudence would have acted was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Angelo Villani against the Washington Brick, Lime & Sewer Pipe Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Cannon, Ferris & Swan and Walter A. White, all of Spokane, for appellant. S. A. Mann and Lucius G. Nash, both of Spokane, for respondent.

CHADWICK, J. The appellant was engaged in the manufacture of brick near Clayton, Wash., and plaintiff, with two others, was engaged in running a push car from the clay pit to an elevator. The elevator was set in a frame and operated between three floors or levels. Plaintiff and those with him were returning with an empty car, and had pushed it partly onto the elevator when the car stuck. Plaintiff was ahead and the two others behind the car, and they were pushing and hauling when the elevator started down. The car tipped off at the second level, and the elevator descended to the bottom and almost immediately started up again. The car was stopped and started by a cable attached to controllers. This cable was pulled up or down as the operator desired the elevator to move. Plaintiff took hold of one of the cables carrying the elevator, and his finger was crushed on the drum over which the cable worked.

Plaintiff disclaims any reliance upon the factory act, and the court instructed the jury that he could not recover anything on account of the insufficiency of the elevator and equipment. The jury answered the following special interrogatories: "Do you find from the testimony that persons using an elevator such as the one in question usually and customarily guarded the drum upon said elevator? Answer: Yes. Did the plaintiff know at all times prior to the accident that this drum was not guarded? Answer: Yes. Did the plaintiff act with reasonable care in taking hold of the cable, which wound around the drum, under the circumstances? Answer: Yes." There is some testimony tending to show that the cables could have been conveniently guarded. So that the only ques-

tion left in the case is whether, under the circumstances, plaintiff was negligent in taking hold of the wrong cable.

[1, 2] It is the duty of the master to furnish a reasonably safe place to work, and to guard against such dangers as would be anticipated by a man of ordinary prudence. Upon this theory plaintiff would not have any right of recovery, for he is charged with the assumption of all usual risks. But this rule is not to be applied without its exceptions if the testimony warrants it, and that is that the servant is not bound by it in the face of a sudden peril not incident to his employment, where there is no time to deliberate and the impulse of self-preservation can be said to usurp the judgment that a man of ordinary prudence would exercise when confronted with a known danger. His judgment is to be measured by the immediate circumstances. While there is much testimony to show that it was impossible for the elevator to stop and start without the intervention of the plaintiff or his fellow servants, there is still enough to sustain the verdict of the jury that it did start automatically; that it was running away.

[3] If plaintiff in his extremity took hold of the wrong cable, it is for the jury to say whether he acted as a man of ordinary prudence would have acted under the same or similar circumstances. We think the verdict can be sustained by reference to *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651, *Williams v. Ballard Lumber Co.*, 41 Wash. 346, 83 Pac. 323, *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114, and *Cook v. Chehalis River L. Co.*, 48 Wash. 619, 94 Pac. 189.

Affirmed.

CROW, C. J., and PARKER, MOUNT, and GOSE, JJ., concur.

SUMNER LUMBER & SHINGLE CO. v. PACIFIC COAST POWER CO. et al.

(Supreme Court of Washington. April 8, 1913.)

1. NAVIGABLE WATERS (§ 1*)—OBSTRUCTION—ACTION—BURDEN OF PROOF—NAVIGABILITY.

The navigability of streams, or that they possess a capacity for valuable floatage, is a question of fact which he who asserts it must prove.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

2. NAVIGABLE WATERS (§ 1*) — RIGHTS OF PUBLIC — "NAVIGABLE OR FLOATABLE STREAM."

A "navigable or floatable stream" is one that in its natural condition, without artificial means or aids, is susceptible of floating timber products from the forest to the mill, including streams which are subject to annually occurring freshets of sufficient volume to float logs or shingle bolts; but a stream upon which, between defendant power company's intake of wa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ter for a reservoir and its tailrace returning the water to the stream, it would be impossible to drive shingle bolts without men and teams assisting in breaking up jams, opening new channels, and clearing the banks and bars, and requiring an expenditure of money therefor, was not a "navigable or floatable stream."

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

3. NAVIGABLE WATERS (§ 36*)—TITLE—BED OF STREAM.

The title to the bed of a small stream which is only navigable for the purpose of floating timber is in the riparian owner.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

4. NAVIGABLE WATERS (§ 22*) — RIPARIAN RIGHTS—PRIORITY AND EXTENT.

The right of a power company, a riparian owner, to use the water of a floatable stream for power purposes by construction of a dam, intake, storage reservoir, and tailrace returning the water to the stream at a distance below the intake, and the right of the boom company to drive shingle bolts, are correlative, and each must use his right with due regard to the existence and protection of the other.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 100-103, 105, 106, 108-120, 182, 260; Dec. Dig. § 22.*]

5. NAVIGABLE WATERS (§ 1*)—EVIDENCE AS TO NAVIGABILITY—MEANDER.

That a stream is not meandered does not, of itself, establish its character as a navigable or nonnavigable stream, and indicates nothing more than that, in the opinion of the officers ordering the survey, the stream was not navigable.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

6. WATERS AND WATER COURSES (§ 52*)—RIPARIAN RIGHTS—DIMINUTION OF FLOW.

An upper riparian owner is entitled to a reasonable use of the stream, and any interruption in its flow unavoidable by a reasonable and proper use is permissible, although it diminishes the natural flow to the lower owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 44; Dec. Dig. § 52.*]

7. WATERS AND WATER COURSES (§ 139*) — APPROPRIATION—RELIEF.

In this state, where no notice of appropriation is required for taking water for power purposes, the right relates back to the first substantial act of the appropriator for the acquisition of the right, whether that act be the actual commencement of construction work or other necessary work incidental thereto, provided that reasonable diligence is exercised in finally perfecting the appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 139.*]

8. WATERS AND WATER COURSES (§ 140*) — RIPARIAN RIGHTS—PRIORITY.

A power company acquiring all riparian rights attached to all lands abutting a river on either bank between its intake and tailrace, and establishing its rights as an appropriator, is entitled to such riparian rights as against land subsequently becoming riparian by reason of a change in the river's course.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 140.*]

9. NAVIGABLE WATERS (§ 1*)—EVIDENCE AS TO FLOATABILITY—SIZE.

The floatability of rivers and streams is not to be determined by their size, but by their capacity for valuable public use in their natural condition.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action for injunction by the Sumner Lumber & Shingle Company against the Pacific Coast Power Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to dismiss.

James B. Howe, of Seattle, and John A. Shackelford, of Tacoma, for appellants. El N. Steele and Troy & Sturdevant, all of Olympia, for respondent.

MORRIS, J. The respondent company operates a shingle mill near the mouth of the Stuck river. In connection with its mill it maintains a boom, and has included in its boom plat filed with the Secretary of State all of the Stuck river, and the White river from its union with the Stuck river up beyond Buckley. The Pacific Coast Power Company maintains a large electric power plant near Dieringer. To obtain water for generating this power it has obtained, through the purchase of riparian lands or the acquirement of water rights, all of the riparian rights (except as to one small piece that will be hereafter referred to) upon the White and Stuck rivers between points near Buckley and Dieringer, a distance of approximately 18 miles. At the point near Buckley the power company has constructed a dam, and by flume and canal conveys the water from its intake to Lake Tapps, which is used as a reservoir for storage of the water for use at such times as the natural flow would prove insufficient for the purpose required. From Lake Tapps the water is conveyed to the power house, and thence, through a tailrace, it finds its way into the Stuck river. Prior to the incorporation of the power company on January 17, 1908, the Tacoma Industrial Company and the White River Power Company had acquired water rights and lands along the White river, and as early as 1903 engineering and construction work had commenced by one or the other of these companies. At the time of appellant's incorporation these other companies conveyed all their rights and property to it. Appellant then proceeded with the development of the power scheme and the construction of its power plant, and up to the time of trial had expended in construction work about \$5,000,000; the plant being completed in October, 1911. The respondent was incorporated in July, 1908, and began the construction of its mill, which was completed and started operations in October, 1908. In August, 1910, the shingle company purchased the cedar

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon a tract of land located some distance above the dam and intake of the power company, under which contract it was bound to remove the cedar within three years. This land is referred to in the record as the St. Paul land. In August, 1911, subsequent to the commencement of this action, the shingle company agreed to purchase from the Northern Pacific Railway 40 acres of land on White river, between the dam and intake of the power company and the point where the water is returned to Stuck river. This land is referred to as the Northern Pacific land. When the power company acquired all the riparian rights on these rivers in 1908, this Northern Pacific land was not riparian to either river. Subsequently the White river changed its course, and as a result of such change about 250 feet of this Northern Pacific land now abuts on the river. This action was commenced by the shingle company to enjoin the power company from maintaining its dam and diverting the waters of White river at its intake, alleging that such diversion would destroy the two rivers as a water highway and prevent the shingle company from getting its timber or that of others to its mill, and destroy its business as a booming company. The court below granted such an injunction, and the power company has appealed.

The appeal presents only questions of law; all the material facts being conceded. In determining the respective rights of these parties to the rivers and the use of their waters, the first point to be decided is the character of these two rivers. They are practically one river, and will be treated as such. Respondent company made its first drive in September, 1908, since which time it has made 14 drives from points below appellant's intake and 4 drives from above the intake. In order to make these drives, it has expended about \$700 in improving the river for driving purposes, in removing boulders and other obstructions, making new channels, and other like work. There is much testimony in the record as to whether it is possible to make a drive without the use of the banks, it being conceded, as we understand it, that such drives could not be made without using the bed of the stream; and, while there is no dispute as to the fact that no drive has been made without the use of the banks, the lower court seemed impressed with the opinions of witnesses that it could be done, and found "that in driving shingle bolts down the said rivers to plaintiff's mill drivers have been accustomed to frequently go upon the banks of the streams above the line of high-water mark, but that it is not necessary so to do, although it is necessary in driving on the said streams for the drivers to go upon the bed of the streams." Whether or not a drive could be made without the use of the banks, we are unable to say. We think it is better to take

the facts as they appear, rather than the opinions of witnesses, given for the purposes of obtaining or defeating relief in litigation. It is clear, however, that it would be impossible to drive these rivers without men and teams assisting in breaking up jams, opening up new channels, and keeping the bolts from lodging on the banks and bars. We not only have the evidence of witnesses as to what was done, but, through the medium of about 200 pictures, we have been able to get a fair view of the difficulties encountered and the obstacles overcome in making a drive. It is apparent that, if dependency was had upon the natural condition of these streams, few, if any, shingle bolts would ever reach respondent's mill. The river is a glacial stream, subject to material variation during each summer day on account of the glacial tide. A chart showing the flow is in the record. From this chart it appears that it is not an unusual thing for the flow to increase or diminish nearly 100 per cent. within a day or two. The result of this intermittent flow is that the bolts are lodged all over the bed of the river, which, on account of numerous past floods and erosions, averages nearly 100 feet, and require constant handling to keep them in the drive.

[1-3] The navigability of streams, or that they possess a capacity for valuable floatage, is a question of fact, and he who asserts it must prove it. To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable. This rule was first announced by this court in *East Hoquiam Boom Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001, where it was said: "It is well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway." The same rule was announced in *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821. In *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199, a new element of floatability was announced in holding that streams which can, during annually recurring freshets, be used profitably for the floating of logs must be held to be public highways for such purposes; that, while in such streams the title to the beds might be in the riparian owner, such title was subject to an easement in the public to use the stream for floating logs and timber products; and, while such use as a public highway could not be denied, the easement was confined to the stream, and neither the banks nor the soil in such a stream as the one then being considered could be used as an aid to floatability without the landowner's consent, or right obtained by operation of law. We next had occasion to rule on this same question in *Monroe Mill Co. v. Meuzel*, 35 Wash. 487, 77 Pac.

813, 70 L. R. A. 272, 102 Am. St. Rep. 905, and, following *Watkins v. Dorris*, it was held that a stream which, in its natural state, is capable of floating shingle bolts after heavy rains and during freshets, which occur with periodic regularity in the spring and fall of each year, without the storage of water by dam is a navigable stream for the purpose of floating shingle bolts and other timber products. As determining that such a rule was in this state one of necessity, it was there said: "The reasons leading to the holding in this state and others, where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose are founded upon commercial convenience and necessity, because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities without great expense. Nature, has, however, provided numerous streams which flow out from these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated it seems reasonable that these highways should be used for such purposes. It is true the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent landowner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the landowner for the timber product to float along with the already running water, provided it is so done as not to damage his land. His rights in the latter particular must, however, be strictly and carefully guarded. Under the former decisions of this court, and for the further reasons herein assigned, the court did not err in holding that Woods creek is a navigable stream for the floatage of shingle bolts." To which was added later on in the opinion: "We believe we went as far as we should go in the interest of public convenience when we held, in *Watkins v. Dorris*, supra, that private landowners hold the bed of unmeandered streams subject to the easement of driving timber products over the land. But we tried to make it clear in that case that the timber driver must confine himself and his operations to the highway itself, the bed of the stream, until the landowner consents to the use of the banks, or until the right to their use has been acquired in a lawful manner. If more emphatic statement of that rule is necessary, we now wish to be understood as making it, with all needed emphasis. The fundamental principle of right in the landowner to control his own premises, outside of the bed of the stream, must not be violated."

The navigability of a stream that will float timber products during natural freshets

was next determined in *State ex rel. U. T. Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017, and the previous cases followed. It was, however, said in that case that the fact that the use of the shores added to the convenience of driving the timber did not affect the question of the natural navigable capacity of the stream, quoting from *Olson v. Merrill*, 42 Wis. 203: "A stream is none the less navigable because persons using it are induced by convenience to prefer unlawful to lawful means in aid of the use." That it was not intended to depart from the rule of the prior cases is evident from what is next said: "Where the use of the shore rights is required to facilitate the driving of logs, they must be acquired by private treaty or by condemnation." Our latest statements of the rights as to the banks and beds of these small streams is found in *Berryman v. East Hoquiam Boom & Logging Co.*, 68 Wash. 657, 124 Pac. 130, where it was held that the right to damage riparian lands by splash dams could be acquired by prescription, but if not so acquired "persons have no right to use or interfere with the beds or banks of a stream without the riparian owner's consent."

From these decisions it can be gathered that the present rule in this state is that a navigable or floatable stream is one that in its natural condition, without artificial means or aids, is susceptible of floating timber products from the forest to the mill, and that streams which are subject to annually occurring freshets of sufficient volume to float logs or shingle bolts are considered floatable in their natural condition, and that as between the riparian owner and the timber driver the driver must confine himself to the stream itself, and cannot make use of the banks until the right to such use is obtained by grant, prescription, or eminent domain. That such is the rule in other states, where the law has been molded to fit natural conditions and necessities as referred to in *Monroe Mill Co. v. Menzel*, supra, is apparent from the following cases: *Carlson v. St. Louis River Dam & Imp. Co.*, 73 Minn. 128, 75 N. W. 1044, 41 L. R. A. 371, and note 72 Am. St. Rep. 610; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Pearson v. Rolfe*, 76 Me. 380, where it is said: "The log driver takes the waters as they run, and the bed over which they flow as nature provides. Nor has any person the right, unless upon his own land, or under legislative grant, to improve its navigation. * * * It is settled in this state that the riparian owner owns the bed of the river to the middle of the stream. He owns all the rocks and natural barriers in it. He owns all but the public right of passage. The right of passage does not include any right to meddle with the rocks or soil in the bed of the river." In

Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184, in discussing the same relative rights, it is said the right of the public in a navigable or floatable stream is a right only to the stream "in its natural state and ordinary capacity," and that those terms include periodical fluctuations in the volume and height of the water "recurring as regularly as the seasons," and that "any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation." In *Haines v. Hall*, 17 Or. 165, 20 Pac. 331, 3 L. R. A. 609, we find a similar condition to that shown in this record. In order to drive the logs down the stream, men were employed and stationed along the bank with cant hooks and other appliances to prevent the logs from lodging, and to roll them back into the stream, drag them over gravel bars, turn them around bends, break jams, etc. In dealing with this situation the court said: "A stream that cannot be used without employing the means and appliances which the appellant made use of, in order to float his logs down this one, certainly ought not to be regarded as a public highway for any purpose." In *Felger v. Robinson*, 3 Or. 455, the court makes use of this language: "Any stream in which logs will go by the force of the water is navigable." *Kamm v. Normand*, 50 Or. 9, 91 Pac. 448, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698, after reviewing numerous authorities, reaches the same conclusion.

[4] Following the rule as established by these authorities and many others examined, but not cited, we reach the conclusion that this river, between the intake and tailrace of the appellant, is not a navigable or floatable stream. If we should announce a different conclusion and hold that it was floatable, the right of respondent to make such use of it would not be superior to appellant's right as a riparian owner to use the water for power purposes. In such a case the rights would be correlative, and each must use his right with due regard to the existence and protection of the other. *Middleton v. Flat River Boom Co.*, 27 Mich. 533; *Buchanan v. Grand River Co.*, 48 Mich. 364, 12 N. W. 490; *White River Log & Boom Co. v. Nelson*, 45 Mich. 578, 8 N. W. 587, 909. So that even under such a holding we could not sustain the lower court in enjoining the appellant from its use of the water.

[5] Stuck river is not meandered, while White river is meandered only upon the right bank. That a stream is not meandered does not, of itself, establish its character as a navigable or nonnavigable stream. It would indicate nothing more than that, in the opinion of the officers ordering or making the survey, the stream was not navigable. *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 88 Am. St. Rep. 821; *Lown-*

dale v. Grays Harbor Boom Co., 21 Wash. 542, 58 Pac. 663.

Respondent contends that it has riparian rights under its ownership of the timber on the St. Paul land above the intake. It has, however, no ownership in those lands, having acquired only the right to remove the cedar timber therefrom. Appellant's use of the water in no way infringes upon any riparian right attaching to these lands, nor interferes to any extent with the flow of water to which the land itself is entitled by reason of its riparian situation. Neither does it appear to us that respondent's riparian rights below the tailrace are in any way interfered with. It contends that appellant, as an upper riparian owner, has no right to disturb the flow of the river in any manner so as to increase or diminish the flow at any particular time, citing *Cooley on Torts*, 694; that it is an unreasonable detention of waters to gather it into reservoirs and discharge it occasionally in order to increase the natural flow. Referring to the language of the entire section from which this citation is taken, we find that, while it sets forth the general rule that each riparian owner is entitled to the steady flow of the stream according to its natural flow, it also adds that to apply this rule strictly would be to preclude the best use of flowing waters, and where power is desired the rule must yield to the necessity of gathering the water into reservoirs, and that such use is a proper and lawful use when made in good faith and for a useful purpose, with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances, and that for this purpose it is not unreasonable nor unlawful to detain surplus water not used in the wet season and discharge it in proper quantities in the dry season. We have before referred to the fluctuations in the natural flow of these streams. We think it is established by this record that, while appellant was feeding its reservoir, there was an interference with the flow past respondent's riparian lands; that since the plant has been completed the flow of the water has been equalized below the tailrace, and no interruptions to speak of have occurred.

[6] Neither do we think it is the law that there can be no diminution whatever to the natural flow of the stream to the lower owner in the use made by the upper owner. Such a rule would deny the upper owner any valuable use of the water. Each owner is entitled to a reasonable use, and any interruption in the flow unavoidable by a reasonable and proper use is permissible. *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, 26 L. R. A. (N. S.) 222; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Red River Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194.

[7, 8] The next question to be determined is whether the Northern Pacific land is en-

titled to riparian rights as against appellant. At the time appellant acquired its rights on the river this 40-acre tract did not abut upon the river. The rights acquired by appellant included all riparian rights attaching to all lands abutting the river on either bank, between its intake and tailrace. Subsequently the river changed its course, and at the time of the trial ran across one end of the 40 for a distance of about 250 feet. Respondent contends that the rule applicable to gradual erosion on one bank and gradual accretion on the other should be applied. While that rule is well established, it does not seem to us that it is a proper one whereby to measure these water rights. Appellant, under the doctrine of relation, became possessed of the right to the use of the water in this river in January, 1908. Its rights as an appropriator then became fixed and established, and are superior to the rights of respondent as the owner of land becoming riparian subsequent to that appropriation. In states such as ours, where no notice of appropriation is required for taking water for power purposes, the right relates back to the first substantial act of the appropriator for the acquisition of the right, whether that act be the actual commencement of construction work or other necessary work incident thereto, provided always that reasonable diligence is exercised in finally perfecting the appropriation. Kinney on Irrigation and Water Rights, § 747, where this rule is announced and the supporting cases cited. Respondent attacks the diligence of appellant in proceeding with its work; but, without referring to the evidence which leads us to a different conclusion, we think it abundantly appears that, for a work of such magnitude, appellant proceeded with all proper diligence, and that at no time from its first adoption of its plan to the final completion of the plant, so far as this record discloses, can it be said there is any act, or the lack of any act, on the part of appellant that would indicate any abandonment or desire to unnecessarily prolong its construction work. We therefore hold that appellant's rights as a prior appropriator are superior to the rights obtained by respondent by reason of the Northern Pacific land becoming riparian. There is no question submitted by this appeal as to the floatability of these rivers during annually recurring freshets. In fact, it is conceded that, if floatable at all, they are only so during the summer months, and that during the winter months or other times when the streams are subject to freshets or high water it is impracticable, if not impossible, to drive shingle bolts, as the current is so swift the bolts will, to use the expression of one witness, "duck" the boom and pass beyond it.

In citing other cases from our own state we should have referred to the case of Kalama Electric Light & Power Co. v. Kalama

Driving Co., 48 Wash. 612, 94 Pac. 469, 125 Am. St. Rep. 948, 22 L. R. A. (N. S.) 641, which, as here, was a contest between a power company, claiming the right to the use of the water as a riparian owner and prior appropriator, and a driving company, claiming the right to create artificial freshets by means of splash dams upon which to drive logs during seasons when the natural flow of the stream was insufficient. That case differs from this, in that it was there held that, because of the stream being floatable at times of natural recurring freshets, it was navigable. The driving company also had the right to construct dams and gather water for artificial flows. The rule announced was that the power company, as a riparian owner and prior appropriator, had the superior right to water for power purposes, and could enjoin the driving company from retarding the flow of the stream in order to gather the water in its dams for the purpose of creating artificial splashes. While the facts are not parallel, the principle upon which the decision rested—the superior rights of the riparian owner and prior appropriator—is valuable in determining the rights submitted by this appeal.

[9] Counsel for respondent, in his argument, called attention to the fact that a number of streams in this state, smaller than White river, have been held floatable. This may be true. The floatability of rivers and streams is, however, not to be determined by their size, but by their capacity for valuable public use in their natural condition, irrespective of their size. The right to the use of the waters of these rivers for booming and driving purposes is sought by respondent principally, if not entirely, for its own use in bringing shingle bolts to its mill. While it has the power, under its incorporation, to act in such capacity for the public, it never has done so, but has confined its operations to driving and booming shingle bolts intended for its own mill. These facts are worthy of mention only in suggesting that, in so far as the public use or benefit is affected, the use of the water of these rivers as desired by appellant serves a great public need, while that of respondent is, in effect, for its own private use.

The judgment is reversed and the cause remanded, with instructions to dismiss.

MOUNT, MAIN, ELLIS, and FULLERTON, JJ., concur.

IN RE LEARY AVE. IN CITY OF SEATTLE.
(Supreme Court of Washington. April 7, 1913.)

1. MUNICIPAL CORPORATIONS (§ 311*)—PUBLIC IMPROVEMENTS — PRELIMINARY ORDINANCES—AMENDMENT.

Under Rem. & Bal. Code, § 7769, providing that, when a city shall desire to condemn or

damage land, it shall provide therefor by ordinance, and that, unless such ordinance shall provide that the improvement shall be paid for wholly or in part by special assessment upon property benefited, compensation therefor shall be made from the general funds of the city, and section 7790, providing that it shall be the duty of the eminent domain commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion of the total cost will be of benefit to the public and what proportion a benefit to the property to be benefited and apportion the cost accordingly, but that the legislative body of the city may, in the ordinance initiating the improvement, establish an assessment district which shall be conclusive on the commissioners, an ordinance initiating an improvement and defining the assessment district could be afterwards amended so as to leave the determination of the property benefited by the improvement to the eminent domain commission, since ordinances providing for public improvements may be amended so long as vested rights of individuals are not adversely affected, and the only vested right of a person whose property is assessed for the improvement is the right to notice of the assessment and to an opportunity to be heard, which was not affected by such amendment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 823, 825; Dec. Dig. § 311.*]

2. MUNICIPAL CORPORATIONS (§ 323*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—RIGHTS OF PERSONS ASSESSED.

While owners of property liable to be assessed for a contemplated improvement may have a natural right to peaceably assemble and protest against the improvement, they have no absolute right to have their protest granted or to maintain an action or proceeding in the courts if the protest is not granted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 842-846; Dec. Dig. § 323.*]

3. EMINENT DOMAIN (§ 178*)—PARTIES—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—RIGHTS OF PERSONS ASSESSED.

An owner of property liable to be assessed for a public improvement has no legal right to appear by counsel in the trial of the condemnation cases against the persons whose property will be taken or damaged by the improvement; the duty of conducting such proceedings devolving upon the city.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 479, 484-487; Dec. Dig. § 178.*]

4. MUNICIPAL CORPORATIONS (§ 311*)—PUBLIC IMPROVEMENTS — PRELIMINARY ORDINANCES—AMENDMENT.

Where the section of an ordinance initiating a public improvement which provided that the cost should be paid by special assessment upon an assessment district therein described was thereafter repealed, thus leaving such cost to be paid by the city, an ordinance amending such section by making it provide for the payment of the cost by special assessment upon property specially benefited was not invalid on the ground that there was no section on which the amendment could operate owing to the previous repeal of that section, since the ordinance could be amended by adding an additional section, which was all that the amendment did in effect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 823, 825; Dec. Dig. § 311.*]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Proceeding by the City of Seattle to condemn private property for the laying off, opening, widening, extending, and establishing of Leary avenue in the city of Seattle, and changing and establishing of the grades, and grading and regrading thereof, as provided for and specified in Ordinance No. 21303 of said city, approved July 2, 1909. From an order setting aside an assessment of benefits and directing a new assessment, the city appeals, and from a part thereof certain property owners file cross-appeal. Reversed and remanded, with instructions.

James E. Bradford, C. B. White, and M. S. Good, all of Seattle, for appellant. Farrell, Kane & Stratton, Kerr & McCord, and T. F. Bevington, all of Seattle, for respondents.

FULLERTON, J. In June, 1909, the city council of the city of Seattle, by Ordinance No. 21303 duly enacted and approved, provided for the establishment of a public street and highway to be known as Leary avenue. The highway as laid out began in the northerly part of the city and extended in a southeasterly direction to a connection with certain other principal highways theretofore established by the city; the purpose of the highway being to furnish the residents of the part of the city through which it extended a more direct route on better grades to and from the business center of the city than the existing streets afforded them. The ordinance prescribed the width of the proposed street, and established the grades thereon. As laid out the street extended in part along and across existing streets and highways, some of which were required to be widened and the established grades thereon to be changed to make them conform to the requirements of the new street, and extended in part across lands in private ownership which had theretofore been laid out and platted into lots and blocks. The ordinance also directed that condemnation proceedings be begun to acquire the necessary right of way, and to ascertain the amount of damages the construction of the highway would entail upon holders of property taken and damaged by its construction. Proceedings for that purpose were thereafter begun and prosecuted to a conclusion by the corporation counsel, terminating in judgments in favor of such property holders, totaling \$351,000; the judgments being entered on January 17, 1911.

Section 5 of the ordinance provided: "That the improvement provided for in this ordinance be paid for by special assessment upon property specially benefited, included in the following described district: [Describing it.] Any part of the costs of said improvement that is not finally assessed against the property included in the above described district shall be paid from the general fund of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

city of Seattle." On February 10, 1911, the city council passed Ordinance No. 26450, repealing section 5 above quoted. On April 6, 1911, it passed Ordinance No. 26898, repealing Ordinance No. 26450, the repealing ordinance. On May 22, 1911, it passed an ordinance amending section 5 of the original ordinance (No. 21303) by making the same read as follows: "Sec. 5. That the improvement provided for in this ordinance be paid for by special assessment upon property specially benefited in the manner provided by law. Any part of the costs of said improvement that is not finally assessed against the property specially benefited shall be paid from the general fund of the city of Seattle." Subsequent to the passage of these ordinances, the city caused to be filed in the condemnation proceedings its supplementary petition, praying the court that an assessment be made for the purpose of raising the amount necessary to pay the compensation and damages awarded in that proceeding; praying, further, that the matter be referred to the eminent domain commission of the city of Seattle with instructions to make such assessment "in the manner provided by law." The court granted the petition, and thereafter the commission made an assessment upon the property they deemed to be specially benefited by the proposed improvement and returned their assessment into court in the form of an assessment roll. In making the assessment the commission found a much greater area of territory to be specially benefited by the improvement than that which was included in the district described in section 5 of the initiatory ordinance (No. 21303), and assessed a considerable portion of the sum of money necessary to be raised on property lying outside the boundaries of such district.

On the return of the roll a time was fixed for a hearing thereon, at which a number of persons whose property was affected by the assessment appeared and protested against the same, some of whom owned property outside of the district described in the initiatory ordinance, and some of whom owned property within such district. After a hearing on the protests, the court sustained the same as to all persons owning property lying outside of the district described in the initiatory ordinance, and overruled it as to those owning property inside of such district, setting the assessment made by the commission aside, and directing that a new assessment be made in which the whole of the amount awarded in the condemnation proceeding, after deducting therefrom such proportion, if any, that the commission should find to be a benefit to the city generally, be assessed upon the district described in the initiatory ordinance. The city appeals from the whole of the order, and the property owners inside of the original district ap-

peal from that part of the order directing a further assessment to be made.

[1] The statutes applicable to the questions suggested by the appeals are found in Rem. & Bal. Code at sections 7769, 7785, and 7790. These sections read in part as follows:

"Sec. 7769. When the corporate authorities of any such city shall desire to condemn land or other property, or damage the same, for any purpose authorized by this act, such city shall provide therefor by ordinance, and unless such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, compensation therefor shall be made from any general funds of such city applicable thereto. If such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, the proceedings for the making of such special assessment shall be as hereinafter prescribed, in this act."

"Sec. 7785. When the ordinance under which said improvement is ordered to be made shall not provide that such improvement shall be made wholly by special assessment upon property benefited, the whole amount of such damage and costs, or such part thereof as shall not be assessed upon property benefited shall be paid from the general fund of such city or town, and if sufficient funds therefor are not already provided, such city or town shall levy and collect a sufficient sum therefor as part of the general taxes of such city or town, or may contract indebtedness by the issuance of bonds or warrants therefor as in other cases of internal improvements."

"Sec. 7790. It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be a benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion, and having found said amounts, to apportion and assess the amount so found to be a benefit to the property upon the several lots, blocks, tracts and parcels of land, or other property in the proportion in which they will be severally benefited by such improvement: Provided, that the legislative body of the city may in the ordinance initiating any such improvement establish an assessment district and said district when so established shall be deemed to include all the lands or other property especially benefited by the proposed improvement, and the limits of said district when so fixed shall be binding and conclusive on the said commissioners: And provided further, that no property shall be assessed a

greater amount than it will be actually benefited."

It seems to have been the opinion of the court below, and it is contended by the respondents in this court, that a municipality desiring to establish and improve a street must in the ordinance initiating the proceedings determine the manner in which it will provide the fund necessary to meet the cost and expense of the same; and, if it determines in such ordinance that the whole or some part of such fund shall be raised by special assessment upon property benefited, it must provide in such ordinance whether it will leave the determination of the district to be assessed to the eminent domain commission provided by law to make the assessment or fix such district in the ordinance itself, and when it does so provide no subsequent changes therein can be made which will affect the property interests of the individual. In support of these contentions it is argued in the briefs that a property holder whose property is proposed to be assessed has an absolute right to appear before the body having authority to initiate the improvement and protest against the same; and to appear by counsel in the condemnation proceedings and be heard as to the justness of the claims of persons whose property is taken or damaged by the construction of the improvement, and "especially to object to and resist the entry of any agreed verdicts, which" are commonly entered in such causes.

We have not, however, been able to agree with the ruling of the trial court or with the contentions of the respondents. It is conceded by all authority that ordinances providing for public improvements may be amended so long as vested rights of individuals are not adversely affected thereby. This rule is self-evident, and follows from the very power the city has to enact ordinances. If therefore there were no vested rights affected by the amendment in this instance, and the amendment is sufficient in itself, there can be no valid objection to the amendment. The question then is, did the amendment affect a vested right? It seems to us that it cannot be so held because of either of the reasons suggested by the respondents which we have mentioned.

[2] While property owners whose property is liable to be assessed for a contemplated improvement may have a natural right to peaceably assemble and protest against making the improvement, they have no absolute right to have their protest granted, or absolute right to maintain an action or proceeding in the courts based on the right if their protest is not granted. Rights of this character must be based upon some positive law or statute especially conferring the right as it does not exist as part of the inherent law of the land. That there is no such law or statute is conceded; hence, it

must follow we think that no vested right is denied by the failure to give property holders whose property is liable to be assessed to pay the cost of a contemplated improvement an opportunity to protest against such improvement.

[3] Nor does a property holder whose property is liable to be assessed for a public improvement have a legal right to appear by counsel in the trial of the condemnation cases against the persons whose property will be taken and damaged by the making of the improvement. The duty of conducting these proceedings is devolved by statute upon the city, and since it has the responsibility of properly conducting the proceedings it must follow that it and it alone has the lawful right to appear in such proceedings, or to be represented therein by counsel.

Nor do we perceive any valid reason which supports the contention. The city must, of course, initiate and carry on a public improvement in the manner prescribed by the laws governing the procedure, and it is an admittedly essential element of a valid assessment that the owners of property on which an assessment is proposed to be levied have notice of the assessment and an opportunity to be heard as to its validity and amount before it becomes a fixed charge upon their lands. But these mark the extent of their absolute rights, and, since there is no statute or charter provision of the city forbidding the amendments of ordinances in the particular here attempted, it cannot be claimed, of course, that the amendment is in violation of the positive law governing the procedure; and, since the amendment preceded the assessment and the notice to the property holders, it is equally plain that they are precisely in the same situation that they would have been in had the district described in the initiatory ordinance included all of the lands that are included in the roll returned by the board of eminent domain commission. They can make every objection against the assessment roll now they could have then made, and this being so, it is manifest we think that no vested right of the property holder has been invaded by the amendment of the ordinance.

The principal cases cited as sustaining the respondents' contention are *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26, *Cincinnati v. Seasingood*, 46 Ohio St. 296, 21 N. E. 630, and *Houston v. McKenna*, 22 Cal. 550. The case from this court announces the rule that the city could not change its method of assessment from a "plan according to valuation to the later one of per front foot" if such change in method caused the particular property holder to pay a greater sum than he would have been called on to pay under the valuation scheme, but that "otherwise they have no right to complain." The case from Ohio seems to be rested on the principle that the city was required by the law governing

the procedure to determine in the initiatory ordinance under which of three several methods of making the assessment it would pursue, and that it was not permissible to thereafter change the procedure. The case from California was rested on an entirely different principle, namely, the inviolability of contracts. It has not seemed to us that either of these cases announce a rule contrary to the rule necessary to be followed in order to uphold the assessment before us, although the reasoning on which the Ohio case is rested may seem to be so contrary. But that this court did not intend in the case of *Spokane v. Browne*, supra, to hold that the property holder whose property is liable to be assessed had a vested interest in the proceedings initiating a public improvement is evidenced by the later cases of *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364, and *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367, and the cases following those decisions. In the first of these cases we sustained the constitutionality of the statute of 1893 (Laws 1893, c. 95, which provided for a reassessment for local improvements where for any cause the original assessment is annulled, set aside, or declared void by the judgment of a court, saying in the course of the opinion that it was within the power of the Legislature to provide "for a reassessment in all cases where the assessment had been held to be void whether for irregularities or for want of prerequisites which went to the jurisdiction of the council to levy the assessment and to order the work done." In the second case we reaffirmed the first decision, and held, further, that the reassessment could be made on property benefited, although not included in the original district attempted to be assessed. This latter principle was again affirmed in *Bellingham Bay Improvement Company v. New Whatcom*, 20 Wash. 231, 55 Pac. 630. The rule announced in these cases is clearly contrary to the idea that the property owner has a vested interest in the proceedings initiating a public improvement, or with the idea that an assessment district once established cannot be changed no matter how erroneous or inequitable it may be; for surely, if it is within the power of the Legislature to call upon property benefited by a public improvement to pay the costs of making the same by a proceeding initiated after the improvement has been completed under an entirely invalid proceeding, it cannot be that vested rights are conferred upon the owners of the property assessed by the proceedings initiating the improvement.

Other cases cited from this court and quoted from at length as sustaining the judgment of the trial court are *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441, *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393, and *State ex rel. Barber, etc., Pav. Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11. But without reviewing them at length we think they contain

nothing that militates against the rule we here announce. All that they contain pertinent to the case in hand is that a city in making a street improvement, if it is to charge the cost to the property benefited, must substantially comply with the provisions of the law empowering it to make the improvement—a principle to which we may subscribe we think without holding invalid the proceedings followed by the city in the present instance.

[4] It is further urged that there was no valid amendment of the statute, and hence any assessment attempted to be made thereunder is invalid. The precise contention in this, the first repealing ordinance, which repealed section 5 of the initiatory ordinance, eliminated therefrom the section providing that the improvement should be paid for by special assessment on property benefited, which by the provision of the statute above quoted relegated the cost to the general fund of the city; that the second repealing ordinance, which repealed the first repealing ordinance, did not have the effect of reviving section 5 of the initiatory ordinance, so that the ordinance then stood as if originally enacted without section 5; and that in consequence the last ordinance, which purported to amend section 5 of the initiatory ordinance, was invalid for the reason that there was no section 5 in the initiatory ordinance upon which the amendment could operate. But we have not been able to agree with the contention. An ordinance can be amended by adding thereto an additional section as well as by amending an existing one, and we think that this is what the amendment here questioned does in effect. The references to the ordinance amended are merely for the purposes of identification; and, if these references taken as a whole make clear the purposes of the amendment, it is sufficient, even though in part they may be inaccurate or even misleading. There is no difficulty on this score with the present amendment. It sets forth the title of the original ordinance, and recites that section 5 thereof is amended to read in a particular manner. And notwithstanding we find on examining prior ordinances that the section 5 which is purported to be amended has been repealed we know that the purpose of the lawmaking body was to make this particular amendment a part of the original ordinance. There being no doubt as to its purpose, the courts are obligated to give it effect. It has been frequently held that a statute unconstitutional because containing objectionable provisions in a particular section may be made constitutional by an amendment removing the objectional provisions. *State ex rel. v. Cincinnati*, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; *Allison v. Corker*, 67 N. J. Law, 596, 52 Atl. 382, 60 L. R. A. 564; *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92; *Lynch v. Murphy*, 119 Mo. 163,

24 S. W. 774. These cases are analogous to the case at bar. An unconstitutional section in an act is as much invalid as is a section that has been formally repealed, and, if the one may be amended, it is difficult to conceive a reason that would deny the right to amendment to the other. We think, therefore, that the amendment is valid, and that the provisions of the ordinance as amended must be pursued in making the assessment to meet the costs of the improvement.

We have not noticed specially the contentions of the appellants other than the city. Their objections are determined, however, by what is said concerning the amendment to the initiatory ordinance, and require no further consideration.

The judgment appealed from is reversed and the cause remanded, with instructions to reinstate the roll returned by the eminent domain commission and proceed with a hearing thereon, after notice, in the manner required by law.

CROW, C. J., and MAIN, ELLIS, and MORRIS, JJ., concur.

WOLPERS v. CITY OF SPOKANE.

(Supreme Court of Washington. April 4, 1913.)

1. MASTER AND SERVANT (§ 278*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence in a servant's action for injuries from the falling of a temporary arch on which he was working, in which defendant claimed that its fall was due to an unusual and violent windstorm which ordinary prudence could not have guarded against, *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

2. TRIAL (§ 139*)—QUESTION FOR JURY.

The test of whether a question is for the jury or for the court, as a matter of law, is whether the minds of reasonable men would differ thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

3. MASTER AND SERVANT (§ 205*)—MASTER'S LIABILITY—ASSUMPTION OF RISK—RISKS OUTSIDE OF WORK.

A servant engaged upon the construction of a temporary bridge arch, requiring engineering oversight, did not assume the risk of the falling of the arch from a high wind, as distinguished from the risks incidental to the work itself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

4. NEW TRIAL (§ 29*)—CONDUCT OF COUNSEL—REPRESENTATIVE OF PARTIES.

Plaintiff's claim for personal injuries, while in the employment of defendant city, was rejected by the city under the advice of its corporation counsel, and on a second trial the former corporation counsel appeared as counsel for the plaintiff, explaining that he had had nothing to do with the case in behalf of the

city. *Held*, after verdict for the plaintiff, that, in view of the explanation and the fact that the case had been twice tried and twice appealed, the conduct of counsel seemingly violative of professional ethics was not ground entitling the city to a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29.*]

Department 1. Appeal from Superior Court, Spokane County; William A. Huneke, Judge.

Action by Joseph F. Wolpers against the City of Spokane. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 66 Wash. 633, 120 Pac. 113.

Cannon, Ferris & Swan and Walter A. White, all of Spokane, for appellant. Roche & Onstine and Morrill, Chester & Skuse, all of Spokane, for respondent.

CHADWICK, J. [1, 2] Plaintiff was a carpenter in the employ of the defendant city. He was working upon a false arch which the city was erecting for the purpose of constructing a permanent concrete bridge across the Spokane river. The arch fell, throwing plaintiff upon the rocks below. He was so injured that a jury returned a verdict against the defendant in the sum of \$5,000. The false arch was a temporary wooden structure, and, as we are informed, was built to sustain the longest span of concrete construction in the world. It was guyed by lines, probably ten on the upstream side and ten on the downstream side of the bridge. The arch had received some support from an old steel bridge, which was built in the same place. In the progress of the work, this was cut in the center, and it is doubtful whether it supported the arch in any degree at the time it fell.

The first question presented is the sufficiency of the evidence to sustain the verdict. It is the contention of the city that it was not guilty of any negligence, and that respondent assumed the risk of his employment, saying: "The testimony shows conclusively that the methods adopted and the precautions taken by the appellant in the performance of the work in which it was engaged were ample and sufficient under ordinary circumstances and conditions, and that the falling of the temporary arch was due to an unusual and violent windstorm which ordinary prudence and foresight could not have anticipated or guarded against." We cannot agree that the testimony is conclusive upon this point. It is true that certain witnesses said that in their judgment the arch was sufficiently guyed to stand the strain of an ordinary wind; but there is testimony tending to show that the placing of the arch had not progressed satisfactorily, and had caused some dissensions and discussions between the engineers and workmen. Some say it "buckled" or "listed." It "leaned" upstream to an extent variously

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

estimated from 6 to 18 inches, necessitating the loosening of the guy wires on the upstream side so that the others might be tightened. The weather observer testified that winds having a velocity of from 30 to 52 miles an hour had occurred during the past 30 years. The jury was warranted in finding that the wind was not unusual or unprecedented. The arch stood high above the stream and was so constructed as to make an efficient barrier to the wind. We think that the case clearly called for the intervention of a jury. Whether the arch was constructed and braced so as to stand under ordinary conditions may excite a difference in the minds of reasonable men, and this is the supreme test when a court is called upon to pass upon these questions as matters of law.

[3] Nor do we think plaintiff assumed the risk because of the changing character of the work. Men are called upon to meet the hazards of construction; but, in all work requiring engineering oversight, they are surely not to be charged under that line of cases holding that a workman is bound to know and assume the risks of such changes as the necessities of construction require. In those cases the proximate cause is found in some change or development incident to the plan of construction, while here the destructive agency was a thing apart which the workman could not guard against or avoid by any exercise of care. He had a right to proceed with his work in confidence that the master had guarded against such dangers as might arise from outside causes, as distinguished from those incidental to the work itself. *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481. Our judgment is that there was evidence to sustain the verdict, and that plaintiff should not be held to have assumed the risk.

[4] This case was before this court and reported in 66 Wash. at page 633, 120 Pac. at page 113. At that time Mr. A. M. Craven was corporation counsel. Prior to Mr. Craven's incumbency, and at the time of the accident, one of the present attorneys for the plaintiff was corporation counsel of the city of Spokane. Plaintiff presented his claim, but it was rejected by the city under the advice of the corporation counsel's office. Counsel says: "I did not * * * have anything to do with the case, in drawing the pleadings or otherwise, and took no part in it for the city, and, while my name appears on the answer, same was prepared by the other attorneys for defendant who had complete charge of the case throughout. Mr. L. F. Chester became a member of the firm of Morrill, Chester & Skuse about a month ago, and, before becoming a member of the firm, he was retained by the plaintiff to assist in the trial of the case, and fully expected to do so, but yesterday was unexpect-

edly called out of the city to be absent several days, and has asked me to take his place, and I cannot see any reason why I should not do so. I make this explanation so your honor will understand the circumstances under which my name appears at one time as one of the attorneys for defendant, and I now appear at this time as one of the attorneys for plaintiff." It is contended that, by thus appearing, counsel has violated the ethics usually governing the conduct of attorneys, and is guilty of such misconduct as should entitle the city to a new trial. We think, in the light of the whole record, it would be unjust to order a new trial. The case has already been twice tried and twice appealed, and, granting that the conduct of counsel is seemingly violative of the ethics of the profession, we think, in the light of counsel's explanation that he had nothing to do with the former trial, it would be unjust to punish plaintiff to the extent of putting him to the stress of a new trial.

It is further contended that the damages are so excessive as to indicate passion and prejudice on the part of the jury. We have examined the evidence, and, while the damages seem to be substantial, they are not so great as to indicate that the jury was so controlled.

Judgment affirmed.

CROW, C. J., and MOUNT, GOSE, and PARKER, JJ., concur.

ROGERS v. VALK.

(Supreme Court of Washington. April 4, 1913.)

1. MASTER AND SERVANT (§ 219*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK—UNSAFE PLACE.

The safe place doctrine is the correlative of the doctrine of assumption of risk, the servant assuming those risks which are open and obvious and necessarily incident to the work, while the master is bound to exercise reasonable care, considering the nature of the work in hand, to eliminate from the place of work unnecessary dangers, and to keep the servant's environment reasonably safe, so far as compatible with the practical performance of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

2. MASTER AND SERVANT (§ 107*)—LIABILITY FOR INJURIES—PLACE RENDERED UNSAFE BY THE CHARACTER OF THE WORK.

The safe place doctrine applies to the tearing down of an old building; the fact that the necessary dangers are more numerous by reason of the nature of the work not absolving the master from the exercise of care to eliminate unnecessary dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

3. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action by a workman employed in tearing down an old building for injuries sus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tained when the floor on which he was working fell under the additional weight caused by pulling down a portion of the roof, evidence held to make a question for the jury as to the foreman's negligence in adopting a dangerous plan of work, or in failing to tell the men of a safer place to stand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 124*)—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.

It was the duty of a foreman in charge of the work of tearing down an old building, before directing workmen to pull down a portion of the roof so that it would fall on the floor on which they were standing, to inspect and satisfy himself that the floor would sustain the added weight, or to direct them to a reasonably safe place to stand, if there was such a place, or, if neither of these courses would furnish reasonable safety, to adopt some other reasonably safe plan; and his failure to do so was a failure to exercise reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

5. MASTER AND SERVANT (§§ 222, 245*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

A servant assumes the risk or is guilty of contributory negligence by obeying an order only when the danger therefrom is open, patent, and obvious to all parties, so plain that reasonable men might not differ as to its existence, and so imminent that a reasonably prudent man would not obey the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651, 682, 778-788; Dec. Dig. §§ 222, 245.*]

6. MASTER AND SERVANT (§ 288*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Whether a workman, engaged in tearing down an old building, assumed the risk of the floor on which he was standing giving way by obeying an order of the foreman to pull down a portion of the roof so that it would fall on such floor was a question for the jury, where the floor was supported on three sides by brick walls and also by a chimney, which had originally extended from the basement through the roof, in view of the evident belief of the experienced foreman, as implied by his order, that the floor would sustain the added weight, since reasonably prudent men might well have differed as to the danger which would result from obedience to the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

7. MASTER AND SERVANT (§ 245*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

A workman, engaged in tearing down an old building, was not guilty of contributory negligence in obeying an order of the foreman to pull down a portion of the roof so that it would fall on the floor on which he was standing, and which gave way under the added weight, unless there was a safer place to stand, of which he knew.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 778-788; Dec. Dig. § 245.*]

8. MASTER AND SERVANT (§ 289*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a workman's action for injuries, caused by the floor of a building which was being torn down giving way under the weight of a portion of the roof which he had been ordered to pull down, evidence as to whether there was any safer place for him to stand, of which he knew,

held to make a question for the jury as to his contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1069, 1090, 1092-1132; Dec. Dig. § 289.*]

Department 2. Appeal from Superior Court, Spokane County; William A. Huneke, Judge.

Action by William A. Rogers against Albert Valk. Judgment for plaintiff, and defendant appeals. Affirmed.

Davis & Rhodes, of Spokane, for appellant. Fred M. Williams and R. M. Webster, both of Spokane, for respondent.

ELLIS, J. This is an action for personal injuries. In November, 1910, the defendant, Valk, entered into a contract with defendant Spokane school district No. 81 for tearing down and removing the ruins of a brick high school building which had been partially destroyed by fire. For the prosecution of the work about 75 men were employed by the defendant, under the superintendence of a foreman. Among these, the plaintiff, a common laborer, began work on the 12th day of November. The fire had destroyed a large part of the floors, but had left of the third floor, in the southeast corner of the building, a part covering a space which, so far as we are able to gather from the evidence, was about 20 feet square and supported by the south and east walls of the building on two sides, while the inner part was sustained by a chimney, which had originally extended from the basement through the roof of the building, and was located at or near the inner corner of the remaining piece of floor. Two witnesses testified that the floor was supported also on the west side by an inner partition wall. While this remaining floor seems to have been damaged by fire, it was apparently considered by the foreman and the laborers as sufficiently strong for the men to work upon in removing parts of the wall above it and fragments of roof. The roof of the building had consisted of timbers overlaid with slate, and there was a part remaining at the southeast corner after the fire which had been the covering over a dormer closet or window. This remnant of roof was sustained by a main rafter, called a "hip" rafter, extending about 16 feet over the third floor, and at a distance above the floor variously estimated at from 10 to 15 feet. As a part of the equipment for the work, the defendant had on the ground and in general use a wire cable of sufficient length to reach to the top of the walls, and operated by a team of horses and a capstan or drum, which cable was used to pull down the brick walls or portions thereof. Shortly prior to the accident complained of the foreman had caused this cable to be adjusted to the fragment of roof, above mentioned, intending to pull it

down, but, fearing that by reason of the timbers being firmly attached to the outer wall or gable of the dormer the wall would also be thrown down, caused the cable to be removed, and sent a laborer to cut away the main or hip rafter and the upright supports of the dormer roof. Late in the afternoon of November 21st, the ninth day of the plaintiff's employment, and while he was at work on the third floor above mentioned, the foreman came up and directed the plaintiff and some fellow laborers to throw a rope over the end of the main rafter, which projected diagonally over the floor, and by means of the rope to pull the fragment of roof down. The evidence fairly shows that the foreman instructed the plaintiff to secure a particular rope, and where to find it and use it for pulling down the roof, and thereafter immediately went below. The plaintiff procured the rope as directed, and he and two fellow laborers, after some difficulty, placed the rope over the end of the rafter, and then, standing on the floor with the plaintiff nearest the middle of the floor, the three together pulled on the rope, and the roof fell, carrying with it a part of the outer brick wall or gable. Under the weight of this roof and the mass of bricks the floor gave way and fell through the two floors below to the basement, carrying the plaintiff with it and inflicting the injuries complained of. At the close of plaintiff's evidence a motion for nonsuit was made and overruled. The verdict was for the plaintiff. Each of the defendants moved for judgment notwithstanding the verdict. The motion of the school district was granted. That of the defendant Valk was denied. Judgment was entered upon the verdict, and he has appealed.

The appellant has made 10 assignments of error, but they are all directed to, argued, and may be by us considered, under three heads. It is argued (1) that there was no evidence of negligence or any violation of duty on the appellant's part; (2) that the respondent assumed the risk of the danger which resulted in his injury; (3) that the respondent was guilty of contributory negligence.

[1, 2] The negligence charged was that the appellant failed to exercise reasonable care to furnish the respondent a reasonably safe place in which to work, and that the plan of work adopted was unnecessarily dangerous. The appellant contends that the safe place doctrine is not applicable where the conditions of work must, of necessity, be constantly changing, as in the tearing down of an old building. Two cases are cited in which the doctrine is broadly stated that "the work of tearing down an old building * * * is almost necessarily attended with danger, and in such case the rule that it is incumbent on the master to furnish to the servant a reasonably safe place in which

to work does not apply as in ordinary cases." *Western Wrecking & Lumber Co. v. O'Donnell*, Adm'r, 101 Ill. App. 492, 498; *Merchant v. Mickelson*, 101 Ill. App. 401. While the rule thus broadly stated is supported by these and many other authorities from other jurisdictions which might be cited, it has never been adhered to by this court, and seems to us as indefensible in logic as it is pernicious in practice. It ignores the humane considerations which underlie the rule. The safe place doctrine is the correlative of the doctrine of assumption of risk. The one cannot be defined without a clear apprehension of the scope of the other. The servant assumes those risks which are open and obvious and necessarily incident to the work, but only those. The master is chargeable with the result of dangers by him unnecessarily injected into the work or place of work. The safe place doctrine simply stated is just this: It is the duty of the master to exercise reasonable care, considering the nature of the work in hand, to eliminate from the place of work unnecessary dangers; that is to say, it is his duty to use reasonable care to make and keep the servant's environment reasonably safe, so far as compatible with the practical performance of the work. It seems neither logical nor humane to hold that, while ordinarily it is the duty of the master to exercise reasonable care to eliminate unnecessary dangers, still where the necessary dangers are more numerous by reason of the nature of the work, and because they are, by the constantly changing conditions, necessarily augmented from time to time, therefore the master is absolved from the exercise of any care to eliminate the unnecessary dangers. The true distinction is, we believe, that announced in *McLeod v. Chicago, Milwaukee, etc., R. Co.*, 65 Wash. 62, 70, 117 Pac. 749, 753, where we said: "It is next contended that the safe place rule has no application to the situation here presented, because the false work was being removed, and the conditions were necessarily changing and dangerous, as in the construction, demolition, or repair of a building. But the servant does not assume the risk of every danger, even in such cases. As in other cases, he assumes the risk of such dangers only as are necessarily incident to the work. The difference is not in the rule, but in the greater number of dangers incident to the work. The real question in any case is as to what constitutes reasonably careful conduct on the part of the master looking to reasonable safety for the men." In *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. Rep. 1058, we expressed the same view, as follows: "If it is a master's duty to furnish the servant a safe place in which to work, it is just as much his duty to furnish that safe place where the work to be performed is the demolition or tearing down of a building as

where it is its construction in the first instance." See, also, *Etheridge v. Gordon Construction Co.*, 62 Wash. 256, 113 Pac. 639.

[3] Under the rule so stated, whether upon the evidence the appellant was guilty of negligence was a question for the jury. The foreman was a man of 30 years' experience in the construction and demolition of buildings. The respondent had had little experience in such work. The floor in question seems to have been reasonably safe for the men to walk over and work upon, but not for the precipitation upon it of the roof of the dormer and bricks of the gable. The foreman testified that the weight of the hip or dormer roof falling "would not have affected the floor any," but that when the gable wall fell also it caused the fall of the floor. That he appreciated this danger beforehand is evidenced by the fact that he ordered the timbers of the roof, which were imbedded in the wall, cut away. Yet when he ordered the men to pull the roof down with a hand line he made no inspection to see if these timbers had been sufficiently cut. The evidence tends to show that he called the men away from the cutting of these timbers before that work was completed. He also testified that there was a certain narrow strip of floor to the west of the partition wall supporting the west side of the floor where the men stood upon which they might have stood with safety in pulling the roof down; but he did not call the respondent's attention to this, and there is no evidence that the respondent knew that this strip was any safer than the rest of the floor. In fact, the evidence as to the existence of this safe strip is vague and unsatisfactory. The evidence shows that the roof could have been pulled down with the cable provided for, and ordinarily used for such work, with perfect safety to the men. One of the men, who claims to have assisted the respondent in pulling the roof down, testified that he suggested the use of the cable, but the foreman said: "No; you can pull it all right with the rope." The foreman denied this, and also denied that the man in question was there at all. But the credibility of the witnesses was clearly for the jury. In view of these things, it was for the jury to say whether, by the plan of work adopted, or by the failure to tell the men of a safer place to stand, of which there is no evidence that they knew, the foreman did not inject into a necessarily hazardous work an added and unnecessary danger.

[4] Unquestionably it was the duty of the foreman, as representing the master, to inspect and satisfy himself that the floor would sustain the added weight, or to direct the respondent to a reasonably safe place to stand, if there was such a place, while performing the order. If neither of these courses would furnish reasonable safety,

then it was the master's duty to use the cable as usual, or adopt some other reasonably safe plan. The failure to do any of these things was a failure to exercise reasonable care.

[5, 6] The next question is, Did the respondent assume the risk of this added danger as a matter of law? He was acting under a direct order from the foreman. The rope used, which was only 30 or 40 feet long, was the specific rope which the foreman directed to be used. He knew that with such a rope the men must stand somewhere upon the floor to do the work as ordered. If there was a safer place to stand than where they stood, there is no evidence that the respondent and the other two men knew of it, and the evidence is positive that the foreman did not tell them of it, though he claims to have had it in mind. In executing the foreman's order the respondent proceeded exactly as he was warranted in interpreting that order. In such a case the questions of assumption of risk and contributory negligence approach each other so closely as to blend and be determinable upon the same principles. The servant assumes the risk of obedience, or is guilty of contributory negligence in obeying the order, only when the added danger so incurred is open, patent, and obvious alike to man and master, and so plain that reasonable men might not differ as to its existence, and so imminent that a reasonably prudent man would not obey the order. "In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order." 1 Labatt, Master and Servant, § 439, p. 1241; *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 241, 118 Pac. 36; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; *Campbell v. Winslow Lumber Co.*, 66 Wash. 507, 119 Pac. 832; *Offutt v. World's Columbian Exposition Co.*, 192 Ill. 567, 51 N. E. 651, 653; *Gundlach v. Schott*, 192 Ill. 509, 61 N. W. 332, 85 Am. St. Rep. 348. Considering the fact that the floor was supported on three sides by brick walls and also by the chimney, and the evident belief of the experienced foreman, as implied by his order, that the floor would sustain the added weight which the execution of the order would obviously impose, we cannot say that reasonably prudent men might not well differ as to the danger which would result from obedience to the order. The question of assumption of risk was one for the jury.

[7, 8] The respondent was not guilty of contributory negligence in obeying the order, unless there was a safer place to stand, and he knew of that fact. Of this there was no evidence so conclusive as to take the question

from the jury. If there was a more secure strip of floor on which he might have stood, there was no evidence that he knew of it. It is suggested that he might have stood upon the fire escape, but there was absolutely no evidence that such a course would have been practicable. It is also suggested that he might have stood upon the wall of the building, but this was obviously impracticable. When the dorrner gave way in response to the pull, the danger of falling from the wall would seem more obvious than the danger that the floor would fall. Upon the whole record it seems to us that the questions of negligence, contributory negligence, and assumption of risk were all for the jury, under proper instructions. The instructions given fairly covered the law as we conceive it to be, as applied to the facts. The judgment is affirmed.

MAIN, FULLERTON, MORRIS, and MOUNT, JJ., concur.

JOBE v. SPOKANE GAS & FUEL CO.

(Supreme Court of Washington. April 12, 1913.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—APPEAL FROM NONSUIT.

Where the trial court withdrew a case from the jury and dismissed the action, the Supreme Court would accord verity to the evidence most favorable to plaintiff and give it its full probative effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. MASTER AND SERVANT (§ 107*)—LIABILITY FOR INJURIES—DANGEROUS AGENCIES.

A master employing inherently dangerous agencies, such as powder or other explosives, must exercise a degree of care for the safety of the servant commensurate with the danger reasonably to be anticipated, in order that extra hazards may be eliminated or reduced to a minimum.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

3. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Whether it was negligence for an employer, in blasting, to attach several charges of powder, placed in holes about four feet deep, to the firing wire and explode them simultaneously by one application of the battery, making only one report and rendering it impossible to determine whether all had exploded or not, due to the fact that the charges would sometimes shoot downward without disturbing the upper layer of earth, instead of exploding only one at a time, was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010, 1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 217*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Equal knowledge of a danger is not alone the test of whether a servant assumes extraordinary and unnecessary risks created by the master's negligence; and added danger, in order to be assumed, must be patent, open, ob-

vious, and voluntarily, as well as knowingly, encountered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 203*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

A servant usually assumes the risk of those ordinary dangers necessarily incident to the work, and only those.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

6. MASTER AND SERVANT (§ 288*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Whether a servant assumes unnecessary risks imposed by the master's negligence is usually a question of fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

7. MASTER AND SERVANT (§ 288*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé was engaged in blasting by means of charges of powder placed in holes about four feet deep and exploded simultaneously with only one report, making it impossible to determine whether all had exploded, as the charges might shoot downward without noticeably disturbing the upper layer of earth. The battery used to explode the charges had several times failed to explode some of the charges, and plaintiff told the foreman that on this account only one charge should be attached to the battery. The foreman, however, thereafter made the connections himself, and continued to fire the charges simultaneously. After attempting to explode two charges, he told plaintiff that they had shot down, and to clean the holes out. While doing so, plaintiff was injured by the explosion of a charge not previously exploded. *Held*, that whether the danger from the employer's negligence in having the charges exploded simultaneously was so imminent and certain that plaintiff, by continuing in the employment, assumed the risk was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

8. MASTER AND SERVANT (§ 289*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

In an action for injuries to a workman engaged in blasting, sustained, while cleaning out holes after charges of powder were exploded, by the steel drill which he was using exploding a charge not previously exploded, evidence *held* to make a question for the jury as to whether he was negligent in using the drill.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

Department 2. Appeal from Superior Court, Spokane County; J. M. Easterday, Judge.

Action by S. P. Jobe against the Spokane Gas & Fuel Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Laughon & Lavin, of Spokane, for appellant. Danson, Williams & Danson, A. E. Gallagher, and Geo. D. Lantz, all of Spokane, for respondent.

ELLIS, J. This is an action to recover damages for personal injuries. It is here on appeal from a judgment withdrawing the case from the jury and dismissing the action.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We will therefore throughout designate the appellant as plaintiff, the respondent as defendant.

[1] The evidence in many particulars was conflicting. That, however, is immaterial to the present inquiry, since we must accord verity to the evidence most favorable to the plaintiff and give it its full probative effect. There was evidence from which the jury might have found the following facts: The defendant was engaged in excavating a trench, about four feet deep, in the southern part of the city of Spokane, for the purpose of laying a gas main. Where the accident occurred, the excavation was being made in a rock formation; the upper stratum, 18 inches to 2 feet in thickness, being hard and solid; the lower portion to the bottom of the excavation being soft, friable, and broken. The work was being done by blasting with Dupont gelatine powder, placed in drilled holes a little over an inch in diameter and about 4 feet deep. These charges were exploded by means of an electric battery attached to a firing wire connected with thin wires attached to caps embedded in the gelatine. When more than one charge was attached to the firing wire, they were all exploded by one application of the battery; the explosions being simultaneous, so that but one report was made. In such a case it was impossible to determine from the report whether only one or more than one, or whether all, the charges so attached had exploded. In a formation such as here encountered it was not uncommon for the charge to shoot downward, shattering the softer lower stratum of rock without breaking or noticeably disturbing the upper solid layer. In such case, if more than one charge was attached to the battery when the electric current was applied, it was impossible to determine from the appearance of the surface whether more than one of the charges had exploded. Under these conditions there was no way of determining whether any, and, if any, which, of the charges had missed fire, except by removing the tamping and exploring the holes. The plaintiff, a man of many years' experience in blasting, had been for some months prior to September 9, 1911, in the defendant's employ as a powder man, and on that date, and for two or three days before, had been working in the vicinity above mentioned. There were three crews of three men each engaged in drilling holes; the plaintiff being a member of one of these crews. His duties required him to assist in drilling the holes and to personally load the holes with powder, attach the thin cap wires to the firing wire, and operate the battery. Where the bottom of the hole was in soft rock or earth, a quantity of sand was first tamped therein, the sticks of powder then inserted one upon the other, $3\frac{1}{2}$ sticks being ordinarily used, and the cap pressed into the last half stick. The remainder of the hole was filled to the top

with sand, thoroughly tamped by means of a wooden stick. On the day in question some 9 or 11 charges had been set off prior to the accident. While usually the plaintiff attached the cap wires to the firing wire and turned the crank on the battery to explode the holes, on the day in question the defendant's foreman in charge of the work, himself an experienced powder man, had personally attached the wires and manipulated the battery in discharging all but one of these charges. This happened as follows: On several occasions prior to this time the battery had failed to explode charges attached to the firing wire. This occurred once on August 25 and again on August 30, 1911, when two charges had been attached, and but one had exploded. On another occasion, when so attached, the battery had failed at first to explode either charge, but without readjusting the wires, on turning the crank several times, both exploded. These failures were attributed by the plaintiff and another experienced powder man to the weakness of the battery. Four or five days before the accident the plaintiff had told the defendant's superintendent of construction, who had general charge of its construction work, that the battery was not working properly, and he had replied: "All right; I will see about it." On the morning in question, before the accident occurred, the plaintiff told the foreman in immediate charge of the work that no more than one charge should be attached to the battery at one time, as the ground was soft at the bottom, that the battery did not work properly, and that he feared an accident. The foreman replied that he knew all about the batteries, and he was in a hurry and wanted to get the muckers to work. Thereafter until the accident the foreman made the connections and fired the charges himself. The plaintiff had loaded the last two holes, about four feet deep and about three feet apart, in the manner above described. The foreman connected the wires and used the battery to explode the charges. After the report, when the logs which had been placed over the holes were removed and the dirt scraped away, both holes looked the same. The sand tamping was practically undisturbed in both. Neither hole had been affected on the surface. They looked alike. The foreman then said to the plaintiff: "They have both shot down, and you will have to clean the holes out." The plaintiff began pumping the sand out of one of the holes with a sand pump, and when down about the depth of the tamping the pump dropped about six inches, which the plaintiff and several other expert powder men testifying for both plaintiff and defendant stated would indicate that the charge had exploded. Some pieces of rock had come in from the side of the hole interfering with the work of further clearing it, but before attempting to remove this rock the plaintiff proceeded to

pump the sand from the other hole. The same thing happened. The pump sank down in the same way, and rock had also come in from the side of the hole. He took a drill and removed the rock from this hole and then returned to the hole first pumped out and, after attempting, without success, to remove the rock with a wooden scraper or spoon, used the drill as before, and while he was cutting away the rock the explosion occurred, causing the injury. There was a conflict in the evidence as to the extent of the explosion. The drill was not thrown out of the hole. Some of the defendant's witnesses testified that if the amount of powder placed in the hole had exploded the drill would have been thrown out. Other witnesses testified that the noise was about the same as any shot which goes down, and that in that character of ground the drill would not necessarily be blown out of the hole by the full explosion of the charge. The negligence charged was failure to adopt a reasonably safe method of work, considering the known character of the ground, in attempting to discharge more than one blast at a time, and failure to furnish a reasonably efficient battery. The answer denied the allegations of negligence and set up the affirmative defenses of assumed risk and contributory negligence.

[2] Was the defendant guilty of the negligence charged? In the employment of inherently dangerous agencies, such as powder or other explosives, it is the duty of the master to exercise a degree of care for the safety of the servant commensurate with the danger reasonably to be anticipated. 1 Labatt, Master and Servant, § 16; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. It is not holding an employer to an unreasonable duty to require him to take all reasonable care to reduce to a minimum the hazards of an inherently hazardous employment. Any extra hazard, not necessary to the practical performance of the work, which might be anticipated and, by the exercise of reasonable care on the master's part, avoided, it is the master's duty, by the exercise of such care, to eliminate. "The correct juristic concept is that which is indicated by the remark that 'reasonable care is care proportional to the danger to be guarded against, and, in dangerous situations, means great care.'" 1 Labatt, Master and Servant, § 16, p. 30; Sprague v. New York & N. E. R. Co., 68 Conn. 345, 36 Atl. 791, 37 L. R. A. 638. This is especially true as applied to the plan or method of operation deliberately adopted by the master or his representatives. When that plan is inherently defective and unnecessarily dangerous, its adoption is negligence, entailing a liability upon the master for resulting injuries.

"The accident was not caused by a mere oversight or negligent act appertaining to a

mere detail; but it followed as a natural and necessary consequence of a defective plan and method of operation directed by the foreman, and being carried out under his immediate presence and under his personal direction and supervision. The plan or method of operation was a matter to be chosen and determined upon by the master or his representative; and when, as in this case, it was inherently defective and unnecessarily dangerous, the responsibility for any injury occasioned thereby must be laid at his door." Ball v. Megrath, 43 Wash. 107, 109, 86 Pac. 382, 383.

"It was the duty of the city in doing this work, confessedly dangerous and attendant with many risks, to do it in such a way as to reduce the danger to a minimum, and not increase it by careless and negligent methods of operation." Blair v. Spokane, 66 Wash. 399, 405, 119 Pac. 839, 841; Etheridge v. Gordon Construction Co., 62 Wash. 256, 259, 260, 113 Pac. 639; Rogers v. Valk, 131 Pac. 231, just decided. 1 Labatt, Master and Servant, § 118.

[3] In view of these principles, it seems plain that the question of the primary negligence of the defendant was, under the evidence, one for the jury. Had but one blast been attached to the battery at the time, as urged by the plaintiff, the noise of the explosion, or its absence would have furnished a sure test as to whether the charge was still there or not. In rock of this character, where the blasts were liable to shoot down, the surface of the ground furnished no such test. Such a plan of operation was entirely compatible with the practicable performance of the work, and would have exposed the plaintiff to no unnecessary danger. Had there been an explosion, he could have proceeded with perfect assurance of safety to clear out and recharge the hole. Had there been no sound of an explosion, he could have merely pumped out the sand, superimposed above the old charge a new one, and exploded the whole—a plan described by expert witnesses as usual and safe in such cases. There was evidence sufficient to sustain a finding that the battery was weak. It had repeatedly failed to do the work expected of it, and of this the master had been notified. Whether, where there is perfect connection, a current which will fire one blast will fire two or more up to the capacity of the battery, and beyond that capacity will fire none, the evidence leaves in doubt. It may be doubted, therefore, whether the weakness of the battery had any causal connection with the failure of the charge which caused the injury to explode. Whatever may be said of the second allegation of negligence, there was ample evidence to take the case to the jury upon the first. The plan of work adopted exposed the plaintiff to an unnecessary danger.

[4-6] Did the plaintiff assume the risk of

this added and unnecessary danger? The trial court, in deciding that he did, placed the decision upon the ground that, notwithstanding any prior negligence of the master, a new condition had arisen, the dangers of which were equally within the knowledge of the plaintiff and the defendant's foreman, and that therefore the plaintiff, acting upon equal knowledge with the master, assumed the risk. This is unsound, in that it ignores an ingredient essential to the assumption of extraordinary and unnecessary dangers created by the master's negligence, viz., that the added danger, in order to be assumed, must be patent, open, obvious, and voluntarily, as well as knowingly, encountered. Equal knowledge is not alone the test. The danger must be palpable, and not only knowingly, but voluntarily, incurred. Herein lies the distinction between the assumption of ordinary risks necessarily incident to the work, in the absence of any breach of duty on the master's part, and those arising from the master's negligence. The servant assumes usually, as a matter of law, the risk of those ordinary dangers necessarily incident to the work, and only those. Whether he assumes the risk of unnecessary dangers imposed by the master's negligence is usually a question of fact depending, not alone upon his knowledge of the danger, but upon its certainty, imminence, and obvious character, and upon his free and voluntary action in the premises as indicating an assent to the master's conduct and an acceptance of the consequent risk. Many cases make a distinction even more marked, to the effect that the servant never assumes the risk of the master's negligence. We said in *Blair v. Spokane*, 66 Wash. 399, 403, 404, 119 Pac. 839, 841: "As to the defense of assumption of risk, while it is true that an employ  assumes all the dangers inherent in the work and that are ordinarily incident thereto, it does not follow that he assumes the risk of his employer's negligence. The risks assumed by the servant are those, and those only, that are obvious after the master has discharged the duty imposed upon him by law of using ordinary care and prudence in making the servant's work reasonably safe, and in providing him with a reasonably safe place in which to do that work." *Howland v. Standard Mill & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *American Window Glass Co. v. Noe*, 158 Fed. 777, 86 C. C. A. 133. Considered purely as a question of assumption of risk, unmodified by the element of assent to be deduced from the servant's free choice with knowledge and appreciation of the danger, the doctrine so stated is obviously sound; but with these modifying elements present and controverted the doctrine is accordingly modified, and the question becomes one of fact for the jury, whenever the minds of reasonable men may differ upon it. *Pearson v. Federal Min.*

& Smelting Co., 42 Wash. 90, 84 Pac. 632; *Etheridge v. Gordon Construction Co.*, 62 Wash. 256, 113 Pac. 639; *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51; *Chicago & A. R. R. v. House*, 172 Ill. 601, 50 N. E. 151; *Louisville & N. R. Co. v. Kelly*, 63 Fed. 407, 11 C. C. A. 260; *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247.

[7] The danger here encountered by the plaintiff was not a certain, palpable, open, and obvious danger. It was hypothetical. His continuance in the employment with knowledge that the master's negligence in attaching, over his protest, more than one blast in this soft substratum had exposed him to an added, unnecessary, possible danger cannot be said, as a matter of law, to constitute a voluntary assumption of the added risk. A new danger was injected into his environment with his knowledge, it is true, but over his objection. His judgment was overridden by that of the foreman, backed by the foreman's authority as such. The situation was the same, in legal contemplation, as if he had attached the blasts himself under a direct order from the foreman. The real danger lay in the uncertainty, caused by the master's negligence, as to whether there was any risk to assume. Whether this danger, though its presence was appreciated, was so imminent and certain of disastrous consequences as to make it incumbent upon the plaintiff, as an ordinarily prudent man, either to quit work, or to assume the risk, was a question for the jury. He did not voluntarily encounter a certain, imminent, and palpable danger, as was the case in *Waterman v. Skokomish Lumber Co.*, 65 Wash. 234, 118 Pac. 36, and other cases relied upon by the defendant.

[8] Finally, Was the plaintiff guilty of contributory negligence in using the steel drill under the circumstances? Both he and the foreman believed that the charges had both shot down. He proceeded cautiously till satisfied that they had. Of five expert powder men who testified both for the plaintiff and the defendant, all save one, the foreman, said, in effect, that when, in pumping the sand out of the hole, the pump dropped down below where the powder ought to be they would conclude that the charge had exploded, and would deem it safe to use the drill in cutting out pieces of rock which could not be removed with a spoon or scraper. When asked how they would have proceeded under like circumstances, they all prescribed a course of conduct practically the same as that pursued by the plaintiff. Whether, after having satisfied himself by the circumstance of the sudden dropping of the pump, a circumstance usually relied upon by other powder men, that the charge had shot down, he was guilty of contributory negligence in using the drill was a question for the jury. In the light of the evidence we cannot say that the minds of reasonable men might not.

differ as to whether he acted as an ordinarily prudent powder man would have acted in the same circumstances. There was evidence sufficient to take the case to the jury upon every controverted issue.

The judgment is reversed, and the cause is remanded for a new trial.

CROW, C. J., and MORRIS, MAIN, and FULLERTON, JJ., concur.

WRIGHT v. SUYDAM.

(Supreme Court of Washington. April 4, 1913.)

1. VENDOR AND PURCHASER (§ 3*)—CONTRACT OF SALE OF LAND—OPTIONS.

A contract expressly stating that \$100 was received as part payment upon the purchase price of land, followed by provisions clearly contemplating the consummation of a sale of land, although providing that the purchaser, if he breached the contract, should be only liable to the extent of such payment, was not an option but was a contract for the sale of land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. VENDOR AND PURCHASER (§ 133*)—CONTRACT FOR SALE OF LAND—MUTUALITY.

A contract for the sale of land, providing that the title must be satisfactory to the purchaser, does not give the purchaser an arbitrary right to reject a good marketable title so as thereby to lack mutuality.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. § 133.*]

3. VENDOR AND PURCHASER (§ 13*)—CONTRACT FOR SALE OF LAND—CONSIDERATION.

An obligation to forfeit \$100 was a sufficient consideration to support a promise of another to convey land valued at about \$3,000 upon the payment of the balance of the purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. § 13.*]

4. VENDOR AND PURCHASER (§ 23*)—UNILATERAL CONTRACT FOR SALE OF LAND—MUTUALITY.

The fact that a contract for the sale of land was signed only by the owner does not show a want of mutuality.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 28; Dec. Dig. § 23.*]

5. SPECIFIC PERFORMANCE (§ 32*)—SALE OF LAND—MUTUALITY.

The fact that the purchaser in a contract for the sale of land is liable on a breach only for liquidated damages does not affect his right to enforce specific performance on the ground of want of mutuality of remedies, where he has tendered the agreed price and has kept the tender good.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.*]

6. SPECIFIC PERFORMANCE (§ 101*)—CONTRACTS—MUTUAL CONCURRENT AND DEPENDENT OBLIGATIONS.

An owner cannot claim that a contract of sale for land, where the payment of the purchase price was to be concurrent with the delivery of the deed, has lost its vitality on account of delay, where he has not at any time

offered to perform or made any demand and has not sought to rescind.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311-317; Dec. Dig. § 101.*]

7. SPECIFIC PERFORMANCE (§ 13*)—CLAIMS—DEFENSES.

In an action for specific performance of a contract to convey land, where plaintiff does not ask for damages in the alternative, but claims that defendant has not disqualified himself to convey title, the fact that defendant may have no title and may never have had is no defense, since he only has to make a deed and is not concerned with any controversy that might arise between plaintiff and other parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30-32; Dec. Dig. § 13.*]

8. ABATEMENT AND REVIVAL (§ 15*)—DISCONTINUANCE OF PRIOR ACTION BEFORE TRIAL.

Although, at the time of a plea of abatement on the ground of the pendency of a prior action, such an action was pending, it cannot be held to have been vexatious, where, at the time of the trial on the merits, such prior action had been dismissed without prejudice.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111-117; Dec. Dig. § 15.*]

En Banc. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by George E. Wright, Executor and Trustee of W. Hammond Wright, deceased, against Hendrick Suydam. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Roberts and Bausman & Kelleher, all of Seattle, for appellant. Wright & Kelleher and Edward W. Allen, all of Seattle, for respondent.

PARKER, J. This action was commenced on May 18, 1910, by W. Hammond Wright against Hendrick Suydam to enforce specific performance of the following written contract: "Received of W. Hammond Wright the sum of one hundred dollars as part payment upon purchase price of the following described real estate with the appurtenances thereto, situate in King county, state of Washington, to wit: * * * The balance of the purchase price of the said premises is seventy-nine hundred dollars to be paid in cash, upon delivery of deed. The undersigned owners of said premises agree within fifty days to deliver to the purchaser an abstract of title prepared and certified by a reputable and approved abstract company, showing title to said property in said owners in fee simple, free from all liens and incumbrances as herein stated, and good and marketable, and to convey such title to the purchaser, his heirs or assigns, by warranty deed prepared by the purchaser, with full covenants satisfactory to the purchaser. If upon investigation title to the said premises shall be found to be insufficient in any of the respects aforesaid, either in fact or as shown in the abstract, or shall be unsatisfactory to the attorney for the purchaser, the purchaser may at any time thereafter at his option

elect to have the sums of money theretofore paid by him as part payment of the purchase price immediately repaid to him, and in the event of such election the owners shall return such sums and all further obligation upon their part shall then cease; provided, however, that such election cannot be exercised until after thirty days after the objections to title are pointed out in writing to the owners, which length of time is allowed to them to remedy the same. If title to the said described premises shall not be subject to objection in any of the respects aforesaid, and shall be satisfactory to the attorney for the purchaser, and the purchaser shall fall upon his part to perform any of the terms of this agreement, then the said sum of money first above mentioned shall be retained by the undersigned owners as liquidated damages, and they shall also be entitled to a return to them of the said abstract, and neither party shall be under any further liability. Deed is to be executed immediately upon examination of abstract, or within time allowed to owners to cure objections. Purchaser is to have twenty days after delivery of abstract within which to examine title. Time is of the essence of each of the provisions of this agreement. Dated at Seattle, Washington, this August 14, 1908. [Signed] Hendrick Suydam, Owner."

The cause was tried and submitted to the court upon the merits on October 25, 1910, when it was taken under advisement by the court. Thereafter, on May 26, 1911, W. Hammond Wright died in King county, being then a resident thereof, leaving a will wherein George E. Wright was named as executor and trustee, and whereby the land here involved was devised to him as such. Thereupon George E. Wright, as such executor and trustee, was substituted as plaintiff. On April 29, 1912, findings of fact and conclusions of law were made and filed by the court in favor of the plaintiff and against the defendant, and a decree rendered accordingly as prayed for. From this disposition of the cause, the defendant has appealed to this court.

The facts are, in substance, as follows: The contract above quoted was entered into between Suydam and Wright on August 14, 1908, the date it bears, and \$100 then paid by Wright to Suydam upon the purchase price of the land as therein stated. At that time the legal title thereto was held by the Stevenson-Sanders Land Company, a corporation; it being about 9 acres of a 40-acre tract owned by that company. Suydam's interest in the land at that time was under a contract for the purchase of the entire 40-acre tract heretofore entered into by him with that company, upon which contract he had paid only a part of the purchase price. The nature of Suydam's interest in the land at that time became known to Wright a short

time thereafter. The following, among other findings, were made by the court: "On or about the 5th day of September, 1908, as provided in the said agreement, the defendant delivered the said abstract of title to the attorney for the said W. Hammond Wright, but, before the time allowed by the said agreement for the examination thereof had elapsed, negotiations arose between the said W. Hammond Wright and the defendant with respect to a modification of the terms of the said agreement proposed for the purpose of accommodating the same to certain alleged defects in title, and thereupon the defendant, by express language as well as by conduct, agreed that the time for the examination of the said abstract and for the performance of the terms of the said agreement by said W. Hammond Wright should be extended for a reasonable length of time. Thereafter, and before the expiration of such reasonable time, and while such negotiations were still in progress, and without any intimation of his desire to terminate them, the defendant went to the office of the attorney for the said W. Hammond Wright, during the attorney's absence, and withdrew the said abstract, and upon the 19th day of October, 1908, delivered the same to one William Pitt Trimble, with whom the defendant, unbeknown to the said Wright, was then negotiating a sale of the said premises. The said William Pitt Trimble, with full knowledge of the said contract, referred to in paragraph 3 preceding, purchased the said premises, and at his request, and as a part of the transaction in question, the defendant Suydam upon the 24th day of October, 1908, entered into a written contract to convey the said premises, together with other premises, to his mother-in-law, Catherine O. Denny, and upon the same day, and as a part of the same transaction, the said Catherine O. Denny assigned the contract last mentioned to the said William Pitt Trimble, and upon the 16th day of May, 1910, the defendant Suydam, pursuant to the said contract and assignment thereof, executed a warranty deed of the premises in question to the said William Pitt Trimble. Upon the 22d day of September, 1908, without informing him of his negotiations with the said Trimble, the defendant requested the said W. Hammond Wright to receive back the said deposit of \$100 and to consider the said agreement of August 14, 1908, canceled. This request the said W. Hammond Wright refused. At no previous time had the defendant signified an intention or desire to cancel the said agreement or to repay the said deposit money, and at no time, either before or after this date, did the defendant tender performance of the terms of the said agreement set forth in paragraph 3 by him to be performed, or demand performance of the terms of the said agreement to be performed by the said W. Hammond Wright."

On September 28, 1908, Wright commenced an action in the superior court for King county against Suydam and the Stevenson-Sanders Land Company, seeking specific performance of the contract, and filed notice of the pendency thereof in the office of the auditor of King county. A trial of that action in the superior court resulted in judgment in favor of Suydam, denying the relief prayed for. Appeal was thereupon taken by Wright from that judgment, which was thereafter affirmed by this court. Upon petition for rehearing, this court modified its decision of affirmance to the extent of directing the superior court to vacate its judgment, and in lieu thereof enter a judgment dismissing the action without prejudice to the right of appellant therein to commence a new action. This disposition of that case in this court may be found in 59 Wash. 530, 537, 108 Pac. 610, 110 Pac. 8. Judgment of dismissal without prejudice was accordingly entered in that action by the superior court after the commencement of this action. On September 23, 1909, after the rendering of the first judgment in the superior court, and before the commencement of this action, Suydam acquired title to the land by conveyance from the Stevenson-Sanders Land Company in pursuance of this contract with that company. This deed of conveyance was recorded in the office of the auditor of King county on February 19, 1910. Wright did not receive knowledge of the execution of this deed until after its recording. On May 16, 1910, Wright caused to be prepared a deed of conveyance for execution in pursuance of his contract with Suydam, presented it to Suydam, tendered him the balance of the purchase price, and demanded that he execute the deed, which tender and demand were refused. Thereafter, on the same day, this action was commenced in the superior court, and notice of the pendency thereof duly filed in the office of the auditor of King county. On the same day, as we have already noticed, Suydam executed a deed of conveyance for the land to William Pitt Trimble. This deed was not recorded in the office of the auditor of King county until some time later. In this and the former action Wright's wife was joined as plaintiff, but she has disclaimed all interest in the controversy, and hence we have not referred to her as a party.

The argument of counsel for appellant upon the questions of fact involved is directed particularly to the finding of the trial court that there was an agreed extension of time for the examination of the abstract and the consummation of the sale. It is insisted that this finding is not warranted by the evidence, and also that such a contract would have to be in writing to become legally binding, in the light of the statute of frauds, since it would involve the modification of a contract for the sale of lands. The view we take of the nature of the contract and of the

respective rights thereunder, which will be hereafter noticed, renders it unnecessary for us to follow this contention and determine whether there was any such agreement then made binding in law. There are, we think, other controlling facts touching the life and vitality of the contract after the expiration of the times therein specified for doing the things agreed to be done upon the part of the respective parties; that is, the fact that at no time did Suydam ever tender performance of the contract to Wright or demand any performance thereof from Wright, and the fact that Wright never at any time claimed rescission of the contract because of defective title. These facts were in effect found by the trial court, and we think are fully sustained by the evidence. We are satisfied from the evidence that the request made by Suydam of Wright, for the return of the \$100 paid upon the purchase price, was not made or claimed as a matter of right, nor upon the ground of failure on the part of Wright to perform his part of the contract. We notice this fact in view of the language of the finding above quoted, which might be considered as not clear in this regard.

[1] The argument of counsel for appellant, upon the questions of law involved in the merits of the case, proceeds upon the theory that the contract amounts to no more than a mere option to purchase, under which Wright's privilege of purchase ceased upon the expiration of the time agreed upon for his examination of the abstract, assuming that he did not then elect to exercise his option without any notice or claim given or made by Suydam to Wright looking to the termination of the option, and that, viewed as a contract for the sale of the land, the contract lacks mutuality and therefore cannot be enforced as such. That the contract is not an option in form is apparent from a casual reading of it. It is expressly stated therein that the \$100 was received from Wright as part payment upon the purchase price of the land, followed by provisions clearly contemplating the consummation of a sale of the land from Suydam to Wright, amounting to an agreement on the part of Suydam to sell and on the part of Wright to purchase. The argument is in substance that Wright cannot, under the terms of the contract, be compelled to specifically perform (that is, that he cannot be compelled to take the land and pay the balance of the purchase price even though the title is satisfactory to him); that the only remedy available to Suydam is that he may retain the \$100 paid upon the purchase price as liquidated damages resulting from Wright's failure to perform; and that therefore the contract is in substance a mere option. This is a plausible argument, but loses sight of the substance of the contract and rests solely upon the provisions thereof relating to the remedy

available to Suydam in the event Wright fails to perform. The fact remains, however, that the contract constitutes an agreement on the part of Suydam to sell, and on the part of Wright to purchase, the land. This, we think, distinguishes it from a mere option contract, which, upon the failure of the prospective purchaser to exercise his option rights within the time agreed upon, would automatically cut off such right without any notice given or demand made for performance by the owner of the land.

In 1 Warvelle on Vendors (2d Ed.) § 125, the distinction between an option and a contract for sale is commented upon as follows: "There is a marked distinction between an option of sale and a contract for sale, although such distinction is frequently overlooked. If, without consideration, an option is a mere proposal which may be retracted at any moment, if given for a consideration, it amounts to nothing more than a privilege to purchase at a certain price or within a certain time. It is not a sale; it is not even an agreement for a sale; at best it is but a right of election in the party receiving same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. If, based upon a consideration, it cannot be extended beyond the time limited without a new consideration, and even though this is attempted and such extension is evidenced by a writing, it is still nudum pactum and void." 39 Cyc. 1232; 21 Am. & Eng. Ency. Law (2d Ed.) 931.

Now the fact that the contract by its terms confines Suydam's remedy against Wright to the recovery of liquidated damages (and that is what the right to retain the \$100 paid upon the purchase price in effect amounts to) does not change the fact that the contract is on Suydam's part a promise to sell and on Wright's part a promise to purchase. An agreement in a contract, specifying and limiting the particular remedy available to a party to the contract upon the breach thereof by the other, does not change the respective mutual promises which constitute the substance of the contract. Wright did not contract and pay for a mere privilege to purchase land at a future time, but he agreed to purchase and paid part of the purchase price. We are of the opinion that the contract is one for the sale of land; both parties being bound thereby as seller and purchaser respectively, though the remedy of Suydam, upon breach by Wright, may be confined to liquidated damages. Our decisions in *Jones v. Ellenfeldt*, 28 Wash. 687, 69 Pac. 368, and *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131, cited and relied upon by counsel for respondent, are not opposed to this view, since the contracts therein involved and regarded as options contained no agreement whatever, either express or implied, on the part of the prospective purchasers to purchase.

[2] Viewed as a contract for the sale of the land, do its terms disclose: (1) Such want of mutuality of obligation from each party to the other that the law will decline to recognize it as a binding contract; or (2) such want of mutuality of remedy, available to each of the respective parties upon a breach by the other, that the law will not enforce specific performance against Suydam in favor of Wright because such remedy would not be available to Suydam upon a breach by Wright? It is insisted that such want of mutuality of obligation is evidenced by the terms of the contract providing that the title should be satisfactory to Wright, and that he may, upon the title proving unsatisfactory to him, however arbitrarily he decides that question, have returned to him the \$100, and in that manner rescind the contract. In so far as the fact that the terms of the contract make the consummation of the sale dependent upon title being satisfactory to Wright is concerned, we think that he is not, by the terms of the contract, entitled to arbitrarily reject the title. This question was reviewed by us in *Dean v. Williams*, 56 Wash. 614, 106 Pac. 130, where there was involved a contract quite similar to this in so far as the right of the purchaser to reject the title is concerned. We held in that case that the purchaser did not have the right to arbitrarily reject the title, notwithstanding the contract seemed in terms to so provide, but that he was bound to accept a good, marketable title. See, also, *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499. We think that Wright was in this respect bound by the terms of the contract to the extent of being liable to forfeit the \$100 paid upon the purchase price as liquidated damages, so that there was no lack of mutuality of obligation in this respect.

[3] Nor do we think there was any lack of legal mutuality of obligation because of the fact that Wright may satisfy all obligations of the contract upon his part to perform by forfeiture of the amount paid upon the purchase price. His obligation to forfeit this sum was a sufficient consideration to support the promise made by Suydam to convey, upon the payment of the balance of the purchase price. Clearly this was sufficient mutuality of obligation.

[4] It also seems plain, under our former decisions, that the fact that the contract was unilateral in form, being signed only by Suydam, would not show a want of mutuality. *Western Timber Company v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 6 L. R. A. (N. S.) 397, 114 Am. St. Rep. 137, 7 Ann. Cas. 667; 36 Cyc. 623, 624.

[5] The question of want of mutuality of remedies, as affecting appellant's right to enforce specific performance of the contract as well as by an action to recover damages, is one at first thought of seeming difficulty, in view of the fact that Suydam's remedy

for a breach on the part of Wright is limited to liquidated damages, measured by the amount paid upon the purchase price. Counsel for appellant invoke the general rule that there must be mutuality of remedy as well as of obligation in order to enable either party to invoke the remedy of specific performance. In 2 Pomeroy's *Equitable Remedies*, § 769 (supplementary to Pomeroy's *Equity Jurisprudence*), the learned author states the rule, which seems to be subject to numerous exceptions, as follows: "The frequent statement of the rule of mutuality, 'that the contract, to be specifically enforced, must as a general rule be mutual (that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other),' is open to so many exceptions that it is of little value as a rule. But, in view of the firm place that the doctrine of mutuality has obtained in the courts of equity, it seems well to attempt a restatement that shall be more free from exceptions. The following form seems to meet the cases generally. If, at the time of the filing of the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff, then the contract is so lacking in mutuality that equity will not compel the defendant to perform, but will leave the plaintiff to his remedy at law. This rule, it is believed, covers the circumstances in equity where, according to the weight of authority, the court refuses its aid for lack of mutuality. So far as there is a principle of mutuality, it is a mutuality of remedy in equity at the time of filing the bill that is required, and not a mutuality in the terms of the contract when the contract is made. Equity is entirely willing to grant plaintiff the performance he applies for, but, if it finds that in doing so the defendant, without fault, is left in turn to a remedy at law only, it refuses to lend its aid to such an unequal result. Therefore any original lack of mutuality in the terms of the contract will have no influence if the court finds that giving the plaintiff his relief will no longer leave the defendant to the law for relief."

Now it is apparent that Suydam will in this controversy not be left to his remedy at law. Indeed, in view of the fact of Wright's tender, which has at all times been kept good, Suydam will not require any remedy at either law or equity to enforce his rights. He is in substantially the same position as if respondent had entirely performed his part of the contract, including that part which was not specifically enforceable against him. One of the numerous exceptions to the rule is where the plaintiff's unenforceable promise has been performed. In 2 Pomeroy's *Equitable Remedies*, § 771, the author further observes: "So long as such a contract remains executory, the filing of the bill does

not make the remedy mutual, and in these cases equity refuses specific performance against the defendant because of the lack of mutuality; in fact, because it would leave defendant in the unjust position of having no assurance of performance on plaintiff's part. But that equity is concerned only with the mutuality at the time of filing of the bill is clearly shown by those cases where the contract is executed on plaintiff's part. The terms are the same, but defendant would no longer need to trust an inadequate remedy at law, and equity compels him to perform." In the text of 36 Cyc. 631, the rule is stated as follows: "If plaintiff has performed his unenforceable promise, the fact that before such performance there was a lack of mutuality in the remedy is no defense." Numerous cases are there cited in support of the text.

The case of *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519, is in principle much like this. There the defendant was seeking specific performance by his answer in a suit to cancel the contract. It appeared that the contract would have been unenforceable in equity on the part of the plaintiff because certain land which he was to receive as part consideration for the performance of the contract on his part was not described, but was to be selected by the defendant, and was to be of a certain kind and within a certain distance of a railroad. Disposing of the contention that, by reason of this fact, there was a want of mutuality of remedies, the court observed: "In the case at bar, although the contract may have been originally, as regards its performance by the defendant, beyond the jurisdiction of the court, the only obstacle in the way has been removed in the manner provided for by the terms of the agreement. The defendant alleges in his answer that he has selected out, set apart, and appropriated to the contract, as he was authorized to do, certain described tracts of land, completely answering the requirements of the instrument as to quantity, quality, and location; that he has properly executed and tendered conveyances thereof, and in all things stands prepared and willing to perform the contract on his part. Upon the allegations of the answer, there is absolutely nothing in the way of a decree which will fully and equitably protect and enforce the rights of both parties. If these allegations prove true, defendant is entitled to specific performance."

We are of the opinion that, at the time of the commencement of this action and since then, by reason of Wright's tender, the defense of want of mutuality of remedies is not available to Suydam in this action. Indeed, he is in such a situation that he needs no remedy, except that the appellant's tender be kept good, and this is properly provided for in the decree.

[8] Had the contract lost its vitality and the further right of the parties thereunder

come to an end at the time of the tender of the balance of the purchase price on the date of the commencement of this action? We have seen that on that day Wright tendered to Suydam the full amount of the balance of the purchase price, at the same time demanding a deed in pursuance of the contract, that Suydam had not theretofore at any time offered to perform or made any demand upon Wright to perform the contract; and that Wright had not theretofore sought to rescind on account of defective title. It is plain, from the terms of the contract, that the payment of the balance of the purchase price and the conveyance of the land to be made by Suydam to Wright are mutual, concurrent, and dependent acts, to be performed by the respective parties at the same time. Under our repeated holdings, these facts would prevent Suydam from successfully claiming that Wright is not entitled to a conveyance, as provided by the terms of the contract. See *Lewis v. Wellard*, 62 Wash. 590, 114 Pac. 455, where our former decisions on the subject are reviewed.

[7] It is insisted by counsel for appellant that respondent cannot have a decree for specific performance, because appellant did not have at the time of the rendering of the decree, and has not since then had, any title to convey. In view of the fact that appellant has voluntarily disqualified himself from performing his contract, to whatever extent he may be so disqualified, the fact that respondent is not asking damages in lieu of a conveyance from appellant, but is willing to take a conveyance from him in compliance with the terms of the contract, and that respondent is resting his right upon the theory that appellant has not disqualified himself from conveying in pursuance of the terms of the contract, we think that appellant cannot now be permitted to say that any conveyance he might now make in pursuance of the contract will not vest title in respondent. Appellant may have divested himself of title by conveyance to Trimble to the extent of estopping himself to claim title as against Trimble, but that does not prevent respondent from proceeding upon the theory that appellant is not disqualified from performing the contract by conveyance in pursuance of its terms. Surely appellant cannot be permitted to avoid performance by claiming disqualification to perform, when such performance does not involve any act of greater difficulty than the mere execution of a deed. There is nothing rendering even slightly difficult the execution by appellant of a deed such as this contract calls for. We would have here a quite different question if respondent were asking for a conveyance or damages in the alternative, and were conceding disqualification to perform on the part of appellant. We are not here concerned with any controversy which may arise between respondent and Trimble after conveyance is made to

respondent in pursuance of this contract. Enough appears, however, to show that, by reason of Trimble's notice of respondent's rights under this contract, respondent's claim of right as against Trimble is apparently not unfounded. No authority has been called to our attention touching this contention of appellant. We think, however, it is fully answered by the remarks of Prof. Pomeroy in his *Specific Performance of Contracts* (2d Ed.) § 438, as follows: "The general doctrine is firmly settled, both in England and in this country, that a vendor whose estate is less than or different from that which he agreed to sell, or who cannot give the exact subject-matter embraced in his contract, will not be allowed to set up his inability as a defense against the demand of a purchaser who is willing to take what he can get with a compensation. The vendee may, if he so elect, enforce a specific performance to the extent of the vendor's ability to comply with the terms of the agreement, and may compel a conveyance of the vendor's deficient estate, or defective title or partial subject-matter, and have compensation for the difference between the actual performance, and the performance which would have been an exact fulfillment of the terms of their contract." The fact that compensation is not here sought does not lessen the force of this doctrine as applicable here.

[8] At the time this action was commenced, the former action against Suydam and the Stevenson-Sanders Land Company to enforce specific performance of this contract was still pending in this court upon appeal; that is, while our original opinion had been filed, deciding the case against Wright, it was not then finally disposed of upon rehearing, and of course no formal judgment of dismissal without prejudice had then been entered in the superior court, as directed by us in disposing of the petition for rehearing. Upon these facts, Suydam sought an abatement of this action upon the ground of another action pending, and now insists that the trial court erred in not dismissing this action for that reason. There is some controversy as to the question of abatement being timely raised in this action by proper motion or plea. However that may be, it appears that our decision upon the rehearing of the former case, directing its dismissal without prejudice, was rendered August 6, 1910, and the formal order of dismissal was entered in the superior court on October 18, 1910, while the trial of this action occurred October 25, 1910. It is apparent, then, that no other action was pending at the time this action was tried upon the merits. In the text of 1 Cyc. 25, the prevailing rule touching abatement under such circumstances is stated as follows: "The tendency of the later cases and a preponderance of authority sustain the doctrine that it is a good answer to a plea of the pendency of a prior action

for the same cause that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine, the plea will be overruled unless the prior suit is pending at the time of the trial of the second." This is in harmony with the remarks of Justice Dunbar, made in *Harris v. Fidalgo Mill Co.*, 38 Wash. 160, 171, 80 Pac. 239, where he said: "It is not enough to show that another action is pending, but it must appear that such action would be liable to become vexatious, and also that full relief could have been obtained in the former action." It is plain that the former action could not have been vexatious nor afford the relief here sought by respondent at any time after the commencement of this action.

It is worthy of note, in connection with what we have here said, that the former action was against both Suydam and the Stevenson-Sanders Land Company. The thing sought in that action was not conveyance from Suydam alone, but conveyance from Suydam and the Stevenson-Sanders Land Company. This relief, it was manifest, could not be granted in that action, because the land company had not then received the purchase price, and therefore it could not be compelled to convey. Had the relief there sought been only a conveyance from Suydam, the questions involved would have been quite different. It is true that in our opinion (59 Wash. 530, 536, 108 Pac. 610, 110 Pac. 8) we said that "a decree requiring Suydam to convey would be an idle and fruitless thing." This remark, however, was not necessary to a decision of any question there involved, and, since the writer of this opinion was the writer of that one, he feels free to say here that the language quoted should not have been there used.

We conclude that the decree of the learned trial court properly disposed of the rights of the parties here involved and that it should be affirmed. It is so ordered.

CROW, C. J., and MOUNT, FULLERTON, GOSSE, MORRIS, ELLIS, and MAIN, JJ., concur.

COLISEUM INV. CO. v. KING COUNTY et al.

(Supreme Court of Washington. April 11, 1913.)

1. JUDGMENT (§ 249*) — CONFORMITY TO PLEADINGS.

At the expiration of a lease by a county of land for an amusement park, the county took possession and refused to have an appraisal of the improvements made by the lessee, as provided by the lease. The lessee sued to enjoin interference with removal of the improvements, charging that the county intended to convert them to its own use by renting them to plaintiff's subtenants, and prayed for a receiver and for judgment for the rents collect-

ed by the county. *Held*, that a decree, based on plaintiff's right to possession until payment of the appraised value of the improvements, which required the county to pay over the rentals collected, after deducting the rent reserved in the lease to plaintiff, though in substance a judgment at law, was not improper because of the equitable nature of the pleadings; the action being in effect one for conversion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 485; Dec. Dig. § 249.*]

2. COUNTIES (§ 146*)—LEASE OF COUNTY PROPERTY—IMPROVEMENTS BY TENANT.

In an action by the lessee of a county for the conversion of his improvements, which the lease provided should be appraised at its termination, it is immaterial whether the county commissioners had the power to delegate to appraisers the power to value the improvements, where they refused to permit the appraisal and took possession.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 212; Dec. Dig. § 146.*]

3. LANDLORD AND TENANT (§ 157*) — IMPROVEMENTS BY TENANT—COMPENSATION.

Where a county leased land for an amusement park for a term certain, with the right to the lessee for an extension to a date set, unless the land were needed for county purposes, in which case the lessee should be entitled to 60 days' notice and might remove his improvements, and further that if the land were leased to any other person after the date set the value of the improvements should be appraised and paid to the lessee, and where, at the expiration of the extended term, the county terminated the lease on 2 days' notice, took possession of the buildings, refusing to arbitrate their value, and continued to rent out the privileges to concessionaires, the county could not contend that it did not take possession with intention of leasing the property, nor claim the buildings because not removed before expiration of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572, 574-582, 584-600, 602-607; Dec. Dig. § 157.*]

4. COUNTIES (§ 122*)—CONTRACTS—MEASURE OF DAMAGES.

It is competent for a county leasing land on which the lessee intends to put up buildings to contract what the measure of damages shall be at the termination of the lease, in case the county takes possession for the purpose of leasing the buildings to someone else, and that such measure shall be based, not upon the right of removal, but upon the right of possession.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 122.*]

5. LANDLORD AND TENANT (§ 157*)—COUNTIES—DAMAGES.

Where a county leasing land agreed to arbitrate the value of improvements on the land at the termination of the lease if they elected to use such buildings, but it took possession and refused to arbitrate and converted the buildings, the measure of damages was the value of the buildings at the time of conversion, not for wreckage purposes, but for the use they were put to; and the time they were used and may be used in the future should be considered.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572, 574-582, 584-600, 602-607; Dec. Dig. § 157.*]

En Banc. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by the Coliseum Investment Company against King County and others.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment for plaintiff, and defendants appeal. Reversed.

John F. Murphy and Robt. H. Evans, both of Seattle, for appellants. Kerr & McCord and Maurice D. Leehey, all of Seattle, for respondent.

CHADWICK, J. On the 2d day of April, 1906, the county of King leased to one George B. Lamping, in consideration of the sum of \$500, payable in advance, certain property owned by it, to wit, lots 1, 4, 5, and 8, in block 33, of C. D. Boren's addition to the city of Seattle, for a term of two years from and after the 1st day of April, 1906. The lease provided: "It is further mutually agreed and understood by the parties hereto that if, at the end of the said period of two years, the use of said premises shall not be required for immediate use by the said party of the first part for county purposes, the said party of the second part is to have the option and right of renewing or extending said lease on the same terms until such time as said premises shall be required for immediate use by said party of the first part for such county purposes: Provided, however, that said renewal or extension shall in no event extend beyond the 1st day of April, 1911: Provided, however, that if this lease shall have been extended so as to continue to the 1st day of April, 1911, and the party of the first part should determine to further lease said premises, and does not lease to the party of the second part, then the party of the second part, or his heirs, assigns, executors, or administrators, in consideration of the improvements that may have been placed on said premises, shall have the right to have said improvements appraised by three disinterested appraisers, one to be selected by each of the parties hereto, and the two so selected to choose a third, the party of the first part shall thereupon be required to immediately pay to the party of the second part value of said improvements as appraised. Said appraisement to be conclusive and binding upon parties hereto: Provided, that if at any time subsequent to said first day of April, 1906, said premises should be required for immediate use by the party of the first part for county purposes, the board of county commissioners shall have the right and power, by first giving sixty days' notice of its intention to do so, to fully terminate and end said lease at any time so designated by such notice, and when said lease has been terminated in the way herein mentioned, the party of the second part shall, within sixty days thereafter, remove all buildings, structures, property and debris of every character placed thereon by him, and, if not so removed within the time aforesaid, the same shall be forfeited to the said party of the first part." Lamping entered into possession of the prop-

erty, and shortly thereafter assigned his interest in the lease to the Coliseum Investment Company. That company made valuable improvements, and beginning with October, 1906, enjoyed a large rent return; the gross figures being \$2,350 per month. No notice was given by the county of its intention to cancel the lease at the end of the second year period mentioned therein, and the investment company held over until the 30th day of March, 1911, when, without giving it any opportunity to remove its buildings, the county served notice upon it that its lease was terminated, and also served notice upon all its tenants that they must thereafter attorn to the county. The notice given to the investment company was in the form of a resolution, adopted on the 29th day of March, 1911, and is in form as follows:

"Whereas, the lease made by King county on the 2nd day of April, 1906, with George B. Lamping, to lots 1, 4, 5, and 8, in block 33, C. D. Boren's addition to the city of Seattle, expires by limitation on April 1, 1911; and whereas, the board has considered the proposition of again leasing said premises, and has concluded that the best interests of the county do not justify the further leasing of said property: Now, therefore, be it resolved that the board of county commissioners express at this time its intention not to again lease said property, and that notice of the intention of the board be given to the assignees of said George B. Lamping, lessee. Dated this 29th day of March, 1911. David McKenzie. M. L. Hamilton. A. L. Rutherford.

"Attest: Otto A. Case, Clerk, by N. H. Wardall, Deputy."

Mr. Lamping, who was a witness at the trial, and who was interested in the Coliseum Investment Company, testified that he called upon the commissioners prior to the 1st day of April, 1911, endeavoring to ascertain their then intentions, and to have an appraisement of the buildings if they were not going to continue the lease. This is denied by the commissioners, but it is not denied that at some time, probably in the month of April, a request for an arbitration and appraisement was made. At about the same time the commissioners were informed that the Coliseum Investment Company intended to remove the buildings, and were informed by the commissioners, who in all things have acted under the advice of the prosecuting attorney's office, that the county did not admit the ownership of the buildings to be in the Coliseum Investment Company, and would, if any attempt was made to remove the buildings, have the sheriff stop the work. The county has since that time leased the buildings, and has collected approximately \$30,000 in rents. This action was brought by the Coliseum Investment Company, alleging the facts as we

have briefly detailed them, and grounding their action upon an allegation that the county intended to convert the improvements to its own use and to continue leasing the property to the tenants of the investment company indefinitely. It asks that the county and its officers be restrained from interfering with the plaintiff in the removal of the buildings, that a receiver be appointed, and that a judgment be rendered for the amount of rents collected during the time the buildings had been detained and used by the county. A trial was had, and the court concluded, as a matter of law, that the plaintiff was entitled to remain in the possession of the premises and to collect the rents until the value of the buildings could be fixed by a board of arbitration, and the amount so fixed paid to the investment company. The court further concluded that the county had no legal right or claim to the improvements as of date April 1, 1911. A decree was accordingly entered, requiring the county, after reserving \$500 per month rent, to pay over the balance of all rentals collected by it to the investment company. The case is brought here on the appeal of the county.

[1] It is first contended that plaintiff has no standing in equity. While the suit has been prosecuted as an equitable proceeding, the decree of the court is, in effect, a judgment at law, and it would serve no end to turn the respondent out of court when the right of the case can be determined, and without doing violence to either party. The case is after all one of conversion, and if this court can direct a judgment at law it will not deny relief because of the form of the pleadings. This is not denied by counsel. It is said in their brief: "Plaintiff could have brought suit to recover compensation for said building; in other words, by trial of said action in a court before a jury. The plaintiff would receive the same measure of compensation that would have been granted at the hands of a board of appraisers, or at least the right of compensation would have been fully protected."

[2] Counsel insists, however, that the board of county commissioners had no authority to delegate away the discretionary power and duty which the law imposes on them by the appointment of a board of appraisers to determine the reasonable market value of the buildings. As we view the case, it is unnecessary to pass upon this question. People may, either in their own behalf or as representatives, agree to arbitrate; if they do not, the law will provide a remedy. In our judgment, it is immaterial whether the county commissioners have declined to arbitrate, or whether they have not the power. It is enough that they have refused, and having refused the respondent is entitled to pursue the usual remedy; that is, a suit for the value of its property.

[-3] The only question left in this case is whether the lease expired on April 1, 1911, and carried with it all the right and interest of the respondent in the buildings. The appellants admit that "respondent could have been compelled, under the terms of the lease, to have removed the buildings at any time between the 2d day of April, 1908, and the 1st day of April, 1911, had the county, by proper notice, required such action to be taken." The commissioners, who were witnesses, testified very frankly that, for a long time prior to the 1st day of April they had intended to terminate the lease and take over the buildings. Simple justice would demand, if this case was one between individuals, that the notice referred to in the quotation just made should have been given. We know of no rule that will exempt the county from the exercise of good faith in its dealings. It might allow the lease to expire without a notice, but it is bound by its contract. It is provided: "That if the lease shall have been extended so as to continue to the 1st day of April, 1911, and the party of the first part shall determine to further lease said premises, and does not lease to the party of the second part, then the party of the second part, or his heirs, assigns, * * * in consideration of improvements that may have been placed on said premises, shall have the right to have said improvements appraised," etc. It is clear that it was not intended by anybody, when the contract was drawn, that the county should take over the buildings without compensation or opportunity to remove them. The parties were dealing at that time in good faith one with the other, and it was intended that Mr. Lamping and his successors would be entitled (1) to a certain lease until April 1, 1908; (2) a possible lease until April 1, 1911, with the right of removal of the buildings if the county desired the immediate use of the property for county purposes; (3) the value of the buildings in the event of a continued leasing. The spirit of the contract is that, unless the property is required for immediate county use and is leased to any one other than the respondent, the county will pay for that which it takes. In the light of the contract the county cannot be heard to say that it did not take possession of the property with the intention of leasing it, for it is leasing it. Respondent is entitled to compensation for the buildings which the county has converted. Appellants cite many cases holding that the right of removal must be exercised while the tenant is in possession, and insist that the possession of the buildings was voluntarily surrendered. We do not so read the record. It is true that the respondent obeyed the order of the county commissioners. They did not proceed to demolish the buildings when told that they would be stopped by the strong arm of the law. The time has passed when a man's legal rights are to be

based upon a show of violence. There is a growing tendency on the part of the courts to put no penalty upon gentlemanly conduct. *Nor. Pac. Ry. Co. v. Wadekamper*, 128 Pac. 909.

[4] Neither is there any merit in the contention of appellants that the respondent's measure of damages depends, not upon the right of removal of the improvements, but upon the right to the possession of the premises. The cases cited to sustain this proposition are not in point, for the reason that it is competent for parties to contract a measure of damages, and they have done so in this case.

[5] The judgment of the court is erroneous, in so far as it directs the commissioners to pay over the rents collected to the respondent. The measure of damage is the value of the buildings as of date April 1, 1911. In considering such value it is proper to take into consideration the use to which the buildings had been put and are being put, the time they have been used, and the time they may be used in the future.

Inasmuch as the county has refused to arbitrate, either willfully or because it has not the power, the case will be remanded, with instructions to the lower court to direct the framing of an issue, and to call a jury to determine the value of the buildings, not for wreckage purposes, as suggested by counsel for appellants, but in view of the uses to which the county has put the property. That this issue may be more clearly presented the pleadings may be amended.

Reversed, with instructions to proceed as directed in this opinion. The parties will pay their own costs on appeal.

CROW, C. J., and GOSE, PARKER, MOUNT, ELLIS, and FULLERTON, JJ., concur.

HAUGE v. WALTON et ux.
(Supreme Court of Washington. April 1, 1913.)

1. NAVIGABLE WATERS (§ 42*)—DISPOSITION BY STATE—"SHORE LAND."

Rem. & Bal. Code, § 6841, which declares that "shore lands" are lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water, was not intended to affect the title to any island, although it might be joined with the mainland by a strip of shore land.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6495-6497.]

2. NAVIGABLE WATERS (§ 42*) — NATURAL WATER COURSE—RIPARIAN RIGHTS—ISLANDS.

Where the law of the state is that the owner of the upland has a riparian proprietorship and ownership in the bed of a stream or lake, extending to the thread thereof, an unconsidered fragment of land along the shore of

the stream or lake will attach to the government subdivision adjoining it, and an island with no navigable channel intervening will pass to the nearest land abutting the shore by virtue of riparian ownership.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.*]

3. NAVIGABLE WATERS (§ 36*)—DISPOSITION BY UNITED STATES—GRANT TO STATE—RIGHTS INCLUDED.

The federal government has granted to the state of Washington title to all tide and shore lands and to the beds of all navigable streams and lakes.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

4. NAVIGABLE WATERS (§§ 37, 42*)—WASHINGTON—SHORE LANDS—HIGH-WATER MARK.

The owner of a government lot who purchased the abutting shore land from the state took to the line of ordinary high-water mark, but took no title to an island which in the dry season was connected with his lot by a strip of uncovered land, and which in the winter time was covered by about a foot of water, since such strip was without water intervening between the shore, and was to be treated as land.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-226, 253-255, 285; Dec. Dig. §§ 37, 42.*]

5. EJECTMENT (§ 9*)—TITLE TO SUPPORT.

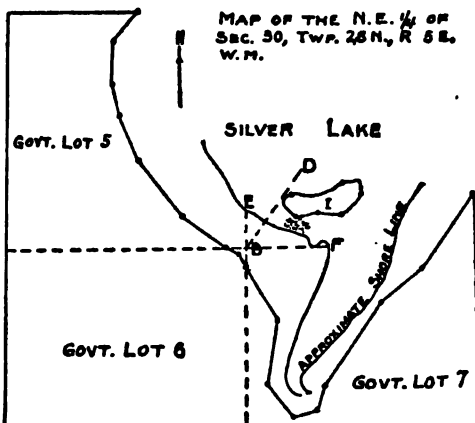
Plaintiff in ejectment must recover on the strength of his own title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by John Hauge against A. Walton and wife. Judgment for plaintiff, and defendants appeal. Remanded, with orders to dismiss.

The plat will illustrate our discussion:



Chas. K. Jenner and G. J. Hodge, both of Seattle, for appellants. Hathaway & Alston, of Everett, for respondent.

CHADWICK, J. There is no statement of facts, and the only question open is whether or not the findings sustain the judgment of the lower court. It is insisted that the find-

ings were made upon an indefensible theory of law, and that no lawful judgment can be entered thereon. This necessitates a more complete discussion than would otherwise be necessary. There are some unchallenged remarks in the briefs, and we shall adopt them and the findings as our warrant for the following statement: Plaintiff is the owner of lots 6 and 7, as shown on the plat. A stranger to this action owns lot 5. About five years before the commencement of this action, defendants had permission of the owners of lot 5 to settle on the island, which has an area of about three-quarters of an acre. They have since resided thereon. In the dry season there is a strip of uncovered land connecting the island with the shore. This strip is indicated on the plat by small dots. In the winter time this strip is covered by about 12 inches of water. As soon as plaintiff discovered the presence of the defendants, he began this action to oust them. From a judgment of ouster, defendants have appealed.

In the year 1906 plaintiff purchased the shore land abutting lot 7, and now claims title thereto under a contract from the state. A memorandum decision rendered by the trial judge indicates that it was his opinion that the island, being unsurveyed by the government of the United States, was shore land, and passed from the state to the plaintiff under his contract. The court did not make a specific finding to this effect. Indeed, the findings seem to have been drawn upon a different theory, to which we shall presently refer.

[1] We shall not go into a discussion of the law of shore lands, for we are agreed that the island is not, and cannot from the very nature of things be called, shore lands. "Shore lands are lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water." Section 6641, Rem. & Bal. Code. There is nothing in this definition or the statutes to indicate that it was ever the purpose of the state to convey title to any upland, although it might be joined, as this island is, with the mainland by a strip of shore land.

[2] The only theory, therefore, upon which the findings of the trial judge can be sustained is that the island is an unsurveyed island or neglected fragment such as is mentioned in *U. S. v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, and it is likely that counsel, in drawing the findings which the court has signed and which have been brought to us, had in mind the rule of law which attaches these small islands and fragments to the adjoining or abutting property. We understand this rule to be that, if there be a fragment of land along the shore of a lake or stream, it will attach to the government subdivision adjoining it, or if it be an island, and there is no navigable channel intervening, that it will

pass to the nearest land abutting the shore. In order, therefore, to settle a difference that might arise between the owner of government lot 5 and government lot 7, for each might contend that he was the owner of the small fragment "B-B-F," the court bisected the fragment with the line "B-D," and held the island to be then abutting and appurtenant to government lot 7. The fault in this theory lies in this: That wherever the right to claim small islands as a part of the upland has been applied, it has been where under the law of the state the owner of the upland had a riparian proprietorship extending to the thread of the stream or lake. He then takes title in virtue of his riparian ownership. 29 Cyc. 354; *Whitaker v. McBride*, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Frantzini v. Layland*, 120 Wis. 72, 97 N. W. 499; *Sliter v. Carpenter*, 123 Wis. 578, 102 N. W. 27.

[3] The government of the United States has granted to the state of Washington title to all tide and shore lands and to the beds of all navigable streams and lakes. This title is asserted in the Constitution of the state, in various acts of the Legislature, and acts amendatory thereto, and has been sustained by repeated decisions of this court.

[4] Plaintiff took under his patent to the line of ordinary high water. That line marked the limit of his boundary. "Unquestionably, the Supreme Court of the United States has uniformly held that grants of uplands bordering on navigable waters convey to the grantees title down to the line of ordinary high water of such navigable waters, but they have just as uniformly held that the answer to the question whether it conveys more than this depends upon the local law of the state wherein the granted lands lie. If the local law recognizes such grants as extending to low-water mark, or to the thread of the stream, it will be so recognized by the federal authorities; but if the state limits the grant to the line of ordinary high water, as our state does, this line will be held to mark the boundary of the grant. This is founded on the principle that the shores and beds of all bodies of water, whether navigable or unnavigable, belong to the state on which they are situate, and that it is for the state to say whether or not it will assert its title to such shores and beds, or whether it will surrender them to the upland proprietor." *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Grays Harbor Boom Co. v. Lonsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267. See, also, *Van Sicken v. Muir*, 46 Wash. 38, 89 Pac. 188; *Washougal, etc., Trans. Co. v. Dalles P. & A. Nav. Co.*, 27 Wash. 490, 68 Pac. 74; *Nassa v. Seaborg*, 64 Wash. 164, 116 Pac. 658. In this case there is an intervening proprietorship which was held and maintained by the state until it was purchased

by plaintiff under his contract. The state, so far as we are informed, has never attempted to assert title to the island as a part of its shore lands; therefore, plaintiff not having taken anything beyond the line of ordinary high water (granting his complete title to the fragment "E-B-F") from the government, and having no claim to the island as shore lands of the state, it follows that he has no title to sustain the action which he now brings.

In the case of *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, the government surveyor limited his survey at what he called a marsh, and meandered along it so as to leave it between the meander line and the navigable waters of Lake Erie. The court held that the patentee of abutting land could not claim the marsh land as a part of the grant, for, having bought a fractional part of a section and having paid for that part, she was limited to the very lands conveyed to her and for which she had paid, and that her title did not extend beyond the meander line or, as we have declared the law to be in this state, beyond the line of ordinary high water. That case is in principle identical with this one. Here there was a fractional lot. The government limited its grant to the line of ordinary high water, and plaintiff has all that he ever earned or purchased; the source of his title being unknown to us. In *French Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800, the court held that, where a survey showed a meander line bordering on a tract of marsh or swamp lands, the grant terminated at the meander line, and did not carry swamp lands lying between it and the shore. See, also, *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; *Kirwin v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698. The cases sustaining the right to claim islands, as we have said, depend upon a riparian proprietorship in the bed of the stream, and presuppose and rest upon the fact that there is intervening water the bed of which belongs to the abutting owner. The cases we have just cited illustrate the distinction between those cases and the case we have at bar. "As in them the swamp and boggy land is to be treated as land" (the *Niles Case*, *supra*), so is the whole theory of our state ownership of tide, shore, and swamp lands made to rest upon the theory that such land is land, and not water. According to the plat that is submitted in evidence, it is evident that there is no intervening water between the shore land and the island, and a judgment based upon a conclusion that the owner of government lot 7 can claim title to the unsurveyed island upon the theory that it is an island abutting and appurtenant to his land has not the sustaining grace of the law.

[5] While we have not followed the argu-

ment of counsel, we nevertheless agree that the findings of the lower court were drawn upon an indefensible theory of the law, and that plaintiff has no title, it being the rule in this class of cases that a plaintiff must recover upon the strength of his own title. It follows that the case will be remanded and dismissed. Whatever the rights of the defendants may be, we do not undertake to say. It is enough that plaintiff has no interest.

Remanded, with orders to dismiss.

CROW, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

PEABODY et al. v. CITY OF EDMONDS et al.

(Supreme Court of Washington. April 4, 1913.)

1. APPEAL AND ERROR (§ 1218*)—REMITTITUR—RECALLING.

The Supreme Court may recall a remittitur for the purpose of correcting a mistake or enforcing its judgment if application therefor is made with due diligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.*]

2. APPEAL AND ERROR (§ 1218*)—REMITTITUR—RECALL—DILIGENCE.

Where a remittitur was sent down by the Supreme Court July 3, 1912, an application to recall remittitur made on March 6, 1913, was not made with due diligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.*]

Department 1. On motion to recall remittitur. Motion denied.

See, also, 68 Wash. 610, 123 Pac. 1018.

S. J. White, of Edmonds, and George W. Louttit, of Everett, for appellants. Coleman, Fogarty & Anderson, of Everett, for respondents.

PER CURIAM. In this cause an opinion was filed on June 1, 1912 (68 Wash. 610, 123 Pac. 1018). The remittitur was sent down on July 3, 1912. Thereafter, on March 6, 1913, the appellants filed in this court a motion to recall the remittitur in order that a further opinion may be filed directing and instructing the city council as to the manner in which a new assessment shall be cast, and advising them as to what interest shall be allowed on special warrants heretofore issued.

[1] This court lost jurisdiction of the cause, when the remittitur went down. For the purpose of correcting a mistake, or enforcing its judgment, this court may recall a remittitur, if application therefor is made with due diligence. *Port Angeles, etc., Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *State ex rel. Burke v. Board of County Commissioners*, 61 Wash. 684, 112 Pac. 929.

[2] There is no contention that any mistake was made in the original opinion, nor

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has application for a recall of the remittitur been made with due diligence.

The motion is denied.

NATH v. OREGON R. & NAVIGATION CO.
(Supreme Court of Washington. April 10, 1913.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—CONSIDERATION OF EVIDENCE.

In passing upon the sufficiency of the evidence to sustain a finding, after denial of a directed verdict, the Supreme Court must consider it most favorably to respondent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. COMPROMISE AND SETTLEMENT (§ 8*)—VALIDITY—POLICY OF LAW.

The law favors settlements of claims for personal injuries, and will sustain such a settlement if fairly made and not procured by fraud or overreaching.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 17-31, 33; Dec. Dig. § 8.*]

3. COMPROMISE AND SETTLEMENT (§ 28*)—PERSONAL INJURIES—PROOF OF FRAUD.

To avoid a settlement for injuries on the ground of fraud, the fraud must be shown by clear and convincing proof, especially where the validity of the settlement was not questioned for more than two years.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 91-94; Dec. Dig. § 28.*]

4. RELEASE (§ 57*)—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence held not to sustain a finding that a release for personal injuries was procured through fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

Department 1. Appeal from Superior Court, Walla Walla County; Thomas H. Brents, Judge.

Action by George Nath against the Oregon Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions to dismiss.

W. W. Cotton and W. A. Robbins, both of Portland, Or., and Dunphy, Evans & Garrecht, of Walla Walla, for appellant. John F. Watson, of Walla Walla, and Nuzum & Nuzum, of Spokane, for respondent.

CROW, C. J. Action by George Nath against the Oregon Railroad & Navigation Company to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

For some years respondent had been working for appellant under written contract, unloading coal from cars into chutes. He employed his own help, and was paid by the ton for coal handled. The chutes were located on an elevated trestle approached by a railway track having a 10 per cent. grade. On the trestle and opposite the chutes the track was practically level. Cars of coal

were placed at the upper end of the elevated track near the chutes. As the coal was unloaded, respondent and his assistants would move a car with a pinch bar upon the level track from chute to chute, controlling it with blocks upon the track and a hand brake. On February 18, 1907, respondent was on one of the cars which was being moved from one chute to another. His assistant, with a bar, was pinching the car along, intending to spot it opposite the last chute toward the inclined track. In the progress of the work respondent attempted to control the car with a hand brake. The brake would not work. Respondent lost control, and the car started down the incline. To save himself, respondent jumped from the car and was injured. He contends that appellant was negligent in failing to inspect the brake and in not furnishing proper and safe appliances.

The controlling question on this appeal is whether the trial court erred in denying appellant's motion for a directed verdict. Several defenses were pleaded, upon which appellant now relies. We only find it necessary to consider the defense that respondent had made a settlement with appellant, and had released it from further liability. Respondent contends that the release was fraudulently procured, and was void.

[1, 2] In passing upon the sufficiency of the evidence to sustain a finding that the release was void, we must consider it most favorably to respondent. Thus considered, it shows that the accident occurred on February 18, 1907; that respondent sustained serious injuries to his feet and legs, although no bones were broken; that he was taken to appellant's hospital, where he was attended by Dr. E. E. Shaw, the physician and surgeon of the appellant corporation. Within a few days appellant contended, and respondent seems to have conceded, that being a contractor, and not appellant's servant, respondent was not entitled to hospital and surgeon's care at appellant's expense. Respondent remained at the hospital a short time, when he was removed to his home. About two weeks after the accident he had an interview with one George Smith, appellant's claim agent, relative to a settlement of his claim for damages. He testified that Mr. Smith said he should not hire a lawyer; that his injuries were temporary; and that appellant would see that all was right, but that no definite terms of settlement were then discussed. He further testified that he again saw Mr. Smith a week or ten days later; that Smith then made him an offer, which was refused; that afterwards on April 16, 1907, at their last interview, they agreed upon a settlement for \$430, which was then paid by appellant; and that respondent then signed the release. No contention is made that respondent was not in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his right mind; nor was it shown that he did not read the release. There is nothing in the record to show that he complained of the settlement or attempted to rescind it until the commencement of this action, more than two years thereafter. He now seeks to avoid the release on the ground that Dr. Shaw and the claim agent assured him that his injuries were not permanent, but that he would recover within five months from the date of the accident. He testified that he trusted and confided in them. Even though Dr. Shaw and the claim agent did tell respondent he would recover within five months, and even though he believed these statements, yet no fraud has been shown. The evidence is not sufficient to sustain a finding that Smith's and Shaw's statements were false or fraudulent, or that they were anything further than an honest expression of opinion, in which respondent concurred. A physician and surgeon cannot be held responsible for an honest mistake or error in judgment. It is not contended that Dr. Shaw was not competent or qualified. The evidence shows that he has been employed by respondent since the occurrences of which respondent now complains. The law favors an amicable settlement of claims of this character, and when such a settlement appears to have been fairly made, and has not been secured by fraud, false representations, or overreaching, it must be sustained. *Owens v. Norwood White Coal Co.* (Iowa) 133 N. W. 483, 491; *Schweikert v. John R. Davis Lumber Co.*, 147 Wis. 242, 249, 133 N. W. 136; *Railway Co. v. Bennett*, 63 Kan. 781, 66 Pac. 1018.

[3, 4] To avoid a settlement on the ground of fraud requires clear and convincing proof. The most convincing evidence should be required in a case such as this, where the validity of the settlement was not questioned for more than two years. If respondent was defrauded and misled, as he now contends, he should have discovered that fact long prior to the commencement of this action. Yet he retained the money, worked for appellant at hard labor, and for more than two years made no attempt to rescind. The undisputed evidence shows that on November 1, 1907, less than 9 months after his injury, he was employed by appellant as one of its bridge repairing crew; that he worked 26 days in November, 27 days in December, a number of days in January, 1908, and also in the following February and March; yet during all this time there was no suggestion by him that he had been defrauded. In *Garver v. Great Northern Railway Co.*, 56 Wash. 519, 106 Pac. 192, it appeared that plaintiff, an employé of a transfer company, while engaged in unloading freight, was injured by defendant's negligence. Thereafter a settlement was made, whereby, in consideration of \$500, he released the company.

Later plaintiff contended that the alleged settlement had been fraudulently obtained; that he did not know it was a settlement; that he understood he was being compensated for loss of time only; that he reposed special confidence in the claim agent and the physician of the company; that they misrepresented the probable extent and duration of his injuries; and that he did not know the nature or contents of the papers which he executed. Yet his evidence disclosed that his mind was clear; that he knew what occurred at the time the settlement was made; that the claim agent first suggested a settlement for the sum of \$175, but that finally it was made for \$500. The lower court held that the settlement was binding, and this court in affirming its decision held that no fraud had been practiced upon the plaintiff, as he had an opportunity to read the release, failed to do so, retained the \$500, and had dealt at arm's length with the defendant. In this case it is not asserted that appellant did not understand the settlement he was making. His only contention is that he was deceived by the opinion of the physician and claim agent, which, he insists, were representations of fact. After a careful consideration of the entire record, we conclude that sufficient evidence to sustain a finding that the release was fraudulently obtained has not been produced. The motion for a directed verdict should have been sustained.

The judgment is reversed and the cause remanded, with instructions to dismiss.

PARKER, CHADWICK, GOSE, and ELLIS, JJ., concur.

BOOTHE v. SUMMIT COAL MINING CO.
et al.

(Supreme Court of Washington. April 10, 1913.)

1. CORPORATIONS (§ 320*)—RIGHT OF PLAINTIFF IN REPRESENTATIVE ACTION.

A stockholder who prosecutes to a favorable termination a suit in his own behalf and in behalf of others similarly situated is entitled to a reasonable attorney's fee as well as necessary disbursements if the benefit of the suit goes to the corporation, but not if he obtains the advantage from such suit individually.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

2. CORPORATIONS (§ 320*)—RIGHT OF PLAINTIFF IN REPRESENTATIVE ACTION.

Where the whole stock of a corporation was in effect owned by B. and L. equally, although a few shares were owned by others conceded to be dummies, and B. brought a suit against the corporation and L., who had the control thereof, for an accounting, which was treated as an action between partners and a receiver, granted on that theory, and which was litigated by each of the parties solely for his own benefit, B. would not be allowed an attorney's fee and disbursements under the rule allowing them to a minority stockholder, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

each would be required to pay his own expenses; the allowance of costs and attorney's fees in such a matter being within the sound judicial discretion of the court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

3. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE.

Where the Supreme Court in an action between the two owners of the entire capital stock of a corporation determined on disputed evidence and in the light of the original contract between them that one of the parties was not entitled to more than \$125 a month for his services to the corporation, this was the law of the case, and would be adhered to on a subsequent appeal where no new facts appeared.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

4. PARTNERSHIP (§ 83*)—RIGHT TO COMPENSATION FOR SERVICES.

A partner cannot claim compensation from the partnership in the absence of an agreement therefor, even though he is more active in the business or performs greater or more valuable service than his copartner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 181; Dec. Dig. § 83.*]

5. PARTNERSHIP (§ 83*)—RIGHT TO COMPENSATION FOR SERVICES.

Where it was agreed on a sale of a half interest in a corporation that each of the parties should draw the same amount for his services, one of the parties was not entitled to more than that amount, although he rendered exceptional services to the corporation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 181; Dec. Dig. § 83.*]

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kaufman, Judge.

Action by L. F. Boothe against the Summit Coal Mining Company, R. J. Linden, and others. From the judgment, plaintiff and the defendants named appeal. Remanded, with directions to modify.

Kerr & McCord, of Seattle, for appellant Boothe. J. L. Corrigan, of Seattle, for appellant Summit Coal Mining Co.

CHADWICK, J. This case has been thrice appealed, 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255, 59 Wash. 611, 110 Pac. 536, and 63 Wash. 630, 116 Pac. 269. In the first appeal the case was remanded with instructions to appoint a receiver and to take an accounting; this court saying: "From all the evidence and circumstances before us, we conclude that Linden's raise of salary was made to divert the profits of the corporation to himself, without due regard to the rights of Boothe, and that Linden should account for all salary received by him in excess of \$125 per month. Evidence was offered to show that his services were worth \$400 per month. This evidence was contradicted, but, under the circumstances, we shall not enter upon its consideration, the raise having been improperly made in violation of Linden's agreement with Boothe, and without the latter's knowledge and consent." An

accounting has been had, and Boothe and Linden have both appealed.

[1] One of the items allowed Boothe is the sum of \$5,000, \$2,500 for counsel fees and \$2,500 for costs and moneys disbursed by him in the preparation of his case and pending the several trials thereof. The rule undoubtedly is that, where a stockholder in his own behalf and in behalf of others similarly situated prosecutes a suit to a favorable termination and the benefit goes to the corporation, he will be entitled to recover a reasonable attorney's fee as well as his necessary disbursements. 3 Cook on Corporations, § 379; Baker v. Seattle-Tacoma Power Company, 61 Wash. 578, 112 Pac. 647, Ann. Cas. 1912C, 859; McMillan v. Northport Smelting & Refining Company, 49 Wash. 76, 94 Pac. 761. Such allowances are rarely, if ever, made, unless it is made to appear that some advantage is obtained for the corporation as distinguished from the interest of the individual stockholder.

[2] In the first appeal (55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255) it was strenuously insisted that a court of equity would not in any event appoint a receiver for a solvent corporation. Without denying that doctrine, but expressly reaffirming it, we took occasion to say that this case was exceptional. "It is sui generis." The parties Boothe and Linden are equally interested in the corporation. Some other names are connected with it as stockholders, but it is not denied by either party that these are dummies. We likened the case to one of partnership, and said that the conditions existing would not be permitted in a partnership, and that, if they were partners, a receiver would unquestionably be granted. We then decided the case upon the theory of partnership as it was announced by this court in Whipple v. Lee, 46 Wash. 266, 89 Pac. 712, although that case is not cited in our opinion. If we had not applied the law of partnership, a receiver would have been denied. At all times plaintiff Boothe has been fighting for no one but himself, and against no one but Linden. The interest of no third party is involved. Boothe now relies upon the rule allowing an attorney's fee to a minority stockholder in a corporation. He was allowed a receiver upon the theory of partnership. The relation of the parties is the same to-day as it was when that order was made, and we see no reason why our attitude toward this case should be changed to serve Booth's interest or convenience.

The rule is well stated in the syllabus to the case of McCormick v. Elsea, 107 Va. 472, 59 S. E. 411: "Except in rare instances, the power of the court to require one party to contribute to the fees of the counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures to the common benefit

of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose fund is sought to be charged are antagonistic to the party for whose benefit the suit is prosecuted. The case in judgment belongs to the latter class, and fees were properly refused."

"It is only where one party is, under the principles of equity, entitled to proceed for the benefit of all who stand in a like situation with him, and consequently where the counsel whom he employs stand in a sense as representing all, that counsel are entitled to have their fees paid out of the common fund which they have recovered for the benefit of all." 5 Thompson on Corporations, p. 5586.

It has been held that a minority stockholder could not recover even in a corporation case where his interest is entirely personal. There must be some advantage to the corporation. *Ex parte Gray*, 157 Ala. 358, 47 South. 286, 131 Am. St. Rep. 62; 2 Cook on Stock & Stockholders, § 748. In *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, the power of the court to allow compensation in the way of attorney's fees and costs out of a trust fund is learnedly discussed. The court found the interest of the complainant to be personal; that he was not suing for the benefit of the trust: "He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. * * * We can find no authority whatever for any such charge by a person in his situation. * * * It would present too great a temptation to parties to intermeddle in the management of valuable property funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time, and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support." *Boothe*, being an equal partner with *Linden* in the concern, stands in the same relation to the concern as would a creditor or any other person whose interest is entirely personal. As we read the record, it would be manifestly unfair to charge either *Linden* or the corporation with this \$5,000. The allowance of costs and attorney's fees is a matter of discretion with the court. In friendly suits where counsel renders a nonpartisan service, it may be that such fees should be allowed as a matter of right (*Patrick v. Patrick* [N. J. Ch.] 63 Atl. 848), or where the court can say that they should be allowed by way of punishment (30 Cyc. 750).

We admit the right of a court, it is sometimes a duty, to meet these costs and expenses out of a common or trust fund, but it is not a right or a duty to be arbitrarily exercised. It is rather to be exercised in sound judicial discretion, and in furtherance of equity and justice. *Boothe* has shown no right or equity over his adversary. As we read the record,

he is no better than *Linden*. He has done nothing for the common good. If *Linden* has sought advantage, so has *Boothe*. We do not hold that either of them has been dishonest, but they have been selfish. Some of *Linden's* claims have been rejected as illegal and some of *Boothe's* claims are unreasonable, and wholly unsupported by any competent evidence. If he did not turn his claims into money, it is because he did not have the opportunity. If he has gained anything, it has been his gain and he should pay for it. The "others," who become, because of their relation to a common fund, a supporting element to the doctrine that a court may allow these fees, are lacking in this case. "We have carefully considered the authorities cited under this point of the appellants. Most of them relate only to costs as such between party and party and whether to be imposed personally or upon the fund. These have no bearing upon the subject under discussion. From the opinions in others, or the language of text-books, expressions are culled to the effect that a fund in court must bear the expense of its administration; that costs in chancery depend upon conscience and the whole merits of a case; that counsel fees out of a common fund belonging to the parties to the action may be allowed; and that the power of the court over funds in its hands to award costs to be paid out of the fund has often been recognized. * * * What is meant by these authorities is no more than this, that the control of the fund furnishes the opportunity and imposes the duty of recognizing every substantial equity and every existing right in making the distribution, and they leave still before us the inquiry, what right or equity in the petitioners could arm the court with power to transfer to them a portion of the fund beyond their normal share? If there is not such equity, there is no such power, for the court does not sit as a bandit, dividing booty." *Matter of Atty. Gen. v. North Am. L. Ins. Co.*, 91 N. Y. 57, 43 Am. Rep. 648. We cannot, therefore, in conscience charge the corporation with *Boothe's* attorney's fees and costs without making a like allowance for *Linden*. Equity will be best served by charging each party with his own expenses; for, as hereinbefore said, this is not a controversy between a corporation and a stockholder, but between two men, acting as partisans and in their own behalf. The demerit of *Boothe's* claim in this behalf can be quickly illustrated. The allowance of \$5,000 was made in part to pay for the services of expert accountants. The accountant in charge was not appointed by the court so far as we can see, but in all things acted as the agent of *Boothe*. He was a witness at the trial and his partisanship was evident. He even assumed to construe the original contract between the parties when asked by the court

to answer a question of bookkeeping. "The question presented, therefore, is whether it [the allowance of fees] is proper, where an expert is employed and is acting for one of the parties to charge the same against the losing party as a part of the costs of the action. If the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by, and act under the direction of, the court. Where, as in this case, he is the employé of one of the parties, the temptation to act in the interest of such party must be apparent. * * * If either party sees proper to employ the services of an expert for his own benefit, the court should not require the opposite party to pay for the services thus rendered." *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754.

[3] Counsel for appellant earnestly contends that inasmuch as the record shows valuable services rendered by Linden between the time of Boothe's retirement, and the appointment of the receiver, he should be entitled to recover the amount now claimed as his salary. Linden has credited himself on the books with \$400 a month, aggregating \$9,050. The trial court followed our former opinion, 55 Wash., as the law of the case, although he adhered to his former opinion that the agreement between Boothe and Linden that each should draw \$125 a month was in anticipation of dividends, and it was not to be drawn as salary. Whether this holding was right or wrong is not now open to discussion. This court is inclined to hold to the doctrine called "the law of the case."

In *Seattle v. Northern Pacific Ry. Co.*, 63 Wash. 129, 135, 114 Pac. 1038, 1040, it is said: "It is urged with great earnestness that the law of the case was not correctly announced upon the former hearing, and many authorities are cited which hold that the party who is primarily liable cannot stay out of a case and dictate what defenses shall be interposed. We are disposed, however, to treat the conclusion reached on the former hearing as the law of the case. We are aware that this rule is not an inflexible one and binding upon this court. It is, however, fair to the litigants and the trial court, conducive to orderly procedure, and withal sound judicial policy. We have so ruled in many cases." In reaffirming the doctrine of that case, we do not understand that it is necessary to hold as counsel insists that we could not in a case involving a disputed fact hold to a rule different from a former pronouncement, where there was additional evidence or a showing that a mistake of fact had been made. In this case the right of Linden to draw a salary of \$125 a month and no more was determined by this court upon disputed evidence and in the light of the original contract.

[4] Nothing further is urged in his behalf,

except that he has rendered exceptional service in selling coal. This may be admitted. Linden is bound by that rule which prevents a partner from claiming compensation from a partnership in the absence of an agreement therefor. This rule rests upon sound reason. It is the duty of partners to devote their whole time to carrying on the business of the firm. 22 Am. & Eng. Ency. Law, 121. In the same text it will be seen that a partner is not entitled to compensation because he is more active in the business or performs greater or more valuable service than his copartner. "Each partner is taking care of his own, and the law never undertakes to settle between partners their various and unequal services in relation to the joint concern." 22 Am. & Eng. Ency. Law, 121-123; 30 Cyc. 448, where the authorities from almost every state in the Union are collected.

[5] There are some exceptions to these rules, but the testimony does not bring Linden within any of them. Considering the relation of the parties to the corporation at the time the contract was made, the fact that each of them was to draw a like amount would indicate that neither of them should have a right to claim for the reasonable value of his services. They would have shared equally in the end for the contract was made in good temper and in keeping with their then present intentions. The net earnings of the company would have been paid in dividends.

All other items considered by the court have been carefully reviewed by us. They involve questions of fact only. We find nothing in the record that would warrant us in further disturbing the findings of the court.

The case will be remanded, with instructions to modify the decree to the extent indicated in this opinion. Linden will recover his costs in this court. The parties will pay their own costs in the court below.

CROW, C. J., and MOUNT, GOSE, and PARKER, JJ., concur.

STEINHAUER et al. v. HENSON.

(Supreme Court of Colorado. March 3, 1913.
Rehearing Denied April 7, 1913.)

SALES (§ 24*)—CONTRACTS OF SALE—WHAT CONSTITUTES.

A memorandum, stating that pictures were left with deceased on approval which might be exchanged at any time for face value, does not show an executed contract of sale, under which title passed, but only an option to purchase which did not pass title; the case being different from an option to return a purchase if the buyer did not approve. Consequently the buyer was under no obligation to return the pictures at any particular time, and unless his option was exercised no actual sale ever resulted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 49-51; Dec. Dig. § 24.*]

Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Claim by Julian E. Henson against Lula E. Steinhauer and John A. Ewing, as administrators of the estate of Frank L. Smith, deceased. From a judgment of the county court disallowing the claim, claimant appealed to the district court, where the claim was allowed, and defendants bring error. Reversed and remanded.

John A. Ewing, of Denver, for plaintiffs in error. James J. Banks, Francis J. Knauss, H. E. Luthe, and C. R. Bell, all of Denver, for defendant in error.

MUSSER, C. J. Henson was engaged in selling paintings in Denver and made his headquarters at a certain studio where his pictures were on exhibition. About January 14, 1910, Smith and his wife visited the studio. After the visit and on the same day, or the next, three paintings were taken by Henson to Smith's residence, where they were at the time of Smith's death, which occurred on May 9th following. After the latter part of January, Henson did not make the studio his headquarters, but what pictures he had were taken to his residence. Early in February, Henson, leaving his residence in charge of a servant, went to Europe, where he remained until July. After his return, he filed a claim against Smith's estate for the paintings left at Smith's residence. The county court disallowed the claim. On appeal, the district court, after a trial to the court, allowed the claim against the estate. Aside from the above facts, the only material evidence introduced by Henson was the following memorandum:

"Denver, Colo., Jan. 25, 1910.

"Pictures left with Mr. Smith on approval:

1 water color by Gabrini (Music Master)....	\$1,200 00
1 water color by Ter Burgh (Dutch Mill)...	250 00
1 oil by De Meester (Shore Scene).....	450 00

\$1,900 00

Cr. by old frame..... 10 00

\$1,890 00

"The above paintings may be exchanged at any time for face value (that is the price paid plus the increased market value).

"J. E. Henson,

"American Agent, L'Ouvre.

"Frank L. Smith."

It was admitted that the signatures were those of Henson and Smith. Henson con-

tends that this memorandum is evidence of a sale to Smith with the option of returning the paintings if the latter did not like them. The administrators contend that the memorandum shows that Smith did not buy the pictures, but that they were left with him with the option to purchase them if he liked them. If the parties understood that a sale had been made, they certainly would have used words to express that understanding. The idea of a sale is a simple one and could have been simply expressed by the use of the words "sold to" instead of "left with," if the parties so understood it. "Pictures sold to Mr. Smith on approval" would be easily understood to mean that Smith bought the pictures with the option of returning them if he did not like them. "Pictures left with Mr. Smith on approval" would be a simple way to express the idea that the pictures were left with Smith with the option to purchase them if he liked them. The rest of the memorandum would then mean that if Smith bought them he was to have them at the prices named, receive credit for an old frame, and have the privilege of exchanging the pictures at any time for face value as expressed. Smith did not agree to return them at any particular time. Of course, if he did not choose to exercise his option to take the pictures in a reasonable time, Henson could have recalled the option and retaken them. We do not say that Smith would have been called upon to move within a reasonable time, but, if he had been, he had no opportunity to do so, for Henson went away in a few days after the date of the memorandum and remained away until after Smith's death. An option to return a purchase, if one does not approve, is different from an option to purchase, if one does approve. In the former case, the title passes, subject to the right to rescind and return; in the latter, the title does not pass until the option to buy is determined. The former is a sale and delivery; the latter a bailment which may be converted into a sale, at the option of the bailee. *Hunt v. Wyman*, 100 Mass. 198.

The transaction between Henson and Smith was a bailment with the option to purchase, and as the option was never determined no sale took place. It follows that the judgment of the district court was wrong and is reversed and the cause remanded.

Reversed and remanded.

GABBERT and HILL, JJ., concur.

In re SENATE RESOLUTION NO. 9.

(Supreme Court of Colorado. March 28, 1913.)

1. STATUTES (§ 21*) — JUDICIAL DISTRICT — CHANGES.

Under Const. art. 6, § 14, providing that the General Assembly, when two-thirds of each house concur therein, may increase or diminish the number of judicial districts and judges thereof, the concurrence of two-thirds of the members of each house is not necessary to the validity of a bill to change judicial districts by moving a county into another district; both districts remaining otherwise intact.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 18-27; Dec. Dig. § 21.*]

2. JUDGES (§ 11*)—REMOVAL—CHANGE OF JUDICIAL DISTRICTS.

The mere fact that one county is detached from one judicial district and attached to another will not remove the judges of either of the districts; the same still remaining duly constituted districts.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 42, 43-45; Dec. Dig. § 11.*]

Questions submitted to the Supreme Court by Senate Resolution No. 9. Questions answered.

There has been submitted to this court by the honorable Senate of the Nineteenth General Assembly, now in session, the following resolution:

"Senate Resolution No. 9.

"By Senator Cornforth.

"Whereas, there is now under consideration by the Senate of the Nineteenth General Assembly of the state of Colorado Senate Bill No. 19, by Senator Van Tilborg, entitled, 'A bill for an act to detach the county of Teller from the Fourth judicial district of the state of Colorado, and to attach the said county of Teller to the Eleventh judicial district of the state of Colorado for judicial purposes, and to repeal all acts and parts of acts inconsistent with this act;'

"And whereas, said bill has passed on second reading by said Senate on the 17th day of March, 1913, receiving eighteen votes in favor thereof, and said bill is now pending for third reading before the Senate of the Nineteenth General Assembly;

"And whereas, it is believed that a two-thirds vote is necessary to pass this bill in conformity with section 14 of article 6 of the Constitution of the state of Colorado:

"Now, therefore, be it resolved, by the Senate of the Nineteenth General Assembly of the state of Colorado, that the Supreme Court of the state of Colorado be and it is hereby requested to give its opinion upon and in answer to the following question:

"First. Does it require a two-thirds vote of the Senate and the House of Representatives of the state of Colorado to change the boundary lines of judicial districts in said state?

"Second. Does the removal of one county from one judicial district in the state into

another judicial district in the state operate as a removal from office of the judge or judges of the district from which the county is removed?

"And be it further resolved, that a copy of this preamble and resolution be forthwith transmitted to the said Supreme Court.

"I herewith certify the above resolution duly and regularly adopted by the Senate of the Nineteenth General Assembly.

"[Signed] S. R. Fitzgarrald, President.

"Attest: Mark A. Skinner, Secretary."

Fred Farrar, Atty. Gen., and Francis E. Bouck, Deputy Atty. Gen.

PER CURIAM. [1] Section 14 of article 6 of the Constitution, referred to in said resolution, is as follows: "The General Assembly may (whenever two-thirds of the members of each house concur therein) increase or diminish the number of judges for any district, or increase or diminish the number of judicial districts and the judges thereof. Such districts shall be formed of compact territory, and be bounded by county lines; but such increase, diminution, or change in the boundaries of a district shall not work the removal of any judge from his office during the time for which he shall have been elected or appointed."

It will be noticed that the increase, diminution, or change in the boundaries of a judicial district referred to in that section is such as is brought about by the formation of a new judicial district or the abolition of an existing one, and does not relate to a change in boundaries produced by taking one county from a district composed of more than one county and adding it to another.

By Senate Bill No. 19, now pending on third reading in the Senate, it is proposed to take Teller county from the Fourth judicial district and attach it to the Eleventh judicial district. The Fourth judicial district is composed of more than one county, and that district will remain, should the bill pass. Under such circumstances the bill does not require a concurrence of two-thirds of the members of each house.

[2] We take it that by the second interrogatory the honorable Senate desires to know what judge or judges will preside over the district court in Teller county, in the event that that county is attached to the Eleventh judicial district. In that event the judge of the Eleventh judicial district would preside over the district court in Teller county the same as in any other county of that district, and neither of the judges of the Fourth judicial district would be removed from office. Our answers are limited to a consideration of the aforesaid section of the Constitution.

WHITE and BAILEY, JJ., do not participate.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 181 P.—17

LIUTZ v. DENVER CITY TRAMWAY CO.

(Supreme Court of Colorado. Jan. 6, 1913.
Rehearing Denied April 7, 1913.)

**1. STREET RAILROADS (§ 93*)—OPERATION—
NEGLECT—WHAT CONSTITUTES.**

Where a woman stepped in front of a moving street car only a few feet away, which struck her almost the instant that she was on the track, it was not negligence for the motorman to fail to drop the fender, for the human mind is not held to such a high degree of diligence in the face of unforeseen contingencies.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

2. TRIAL (§ 229*)—INSTRUCTIONS—REPETITION.

In an action against a street car company for the death of a pedestrian, where plaintiff submitted evidence on two causes of action, one bottomed on the theory that defendant was negligent in failing to stop the car, and the other that the injuries were caused by the negligent backing of the car off deceased, the giving at defendant's request, of numerous instructions which directed a verdict for defendant upon various contingencies is not reversible error; for, while the court may properly refuse an instruction covered by those given, the defendant was entitled to have the confusion cleared, and the matter fairly presented to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 513; Dec. Dig. § 229.*]

**3. APPEAL AND ERROR (§ 978*)—REVIEW—
DISCRETION—NEW TRIAL.**

The granting of a new trial rests largely in the discretion of the trial court, and consequently its denial of a new trial, sought on the ground that the jury were tampered with, will not be disturbed on appeal, unless the verdict is manifestly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

4. NEW TRIAL (§ 49*)—GROUNDS.

Where a litigant made it a practice to attempt to influence jurors, verdicts in its favor by jurors so influenced should be set aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. § 49.*]

**5. NEW TRIAL (§ 143*)—IMPEACHMENT OF
VERDICTS—AFFIDAVITS.**

Under Rev. Code, § 236, providing that affidavits of jurors may be used to impeach the verdict for misconduct in resorting to the determination of chance, an affidavit can be used to impeach the verdict for no other misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

**6. NEW TRIAL (§ 143*)—IMPEACHMENT OF
VERDICT.**

In general, affidavits of jurors stating the ground upon which they rendered their verdict will not be received so as to impeach it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

**7. NEW TRIAL (§ 44*)—VERDICTS—IMPEACH-
MENT BY AFFIDAVIT OF JUROR.**

Where one juror made affidavit that he consented to the verdict only because he understood that they would be locked up and required to sleep in vermin infested beds, a new trial was properly denied where it appeared that, though other jurors heard some remarks as to the beds, they understood them as a joke, that the verdict was returned immediately after the evening meal long before bedtime, and that the

complaining juror made no attempt to have the authorities provide proper beds.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80-85, 105; Dec. Dig. § 44.*]

8. NEW TRIAL (§ 49*)—IMPROPER INFLUENCING OF JURY.

While a new trial should be granted if the attorney of the successful parties improperly influenced the jury, or that the verdict was rendered by them in hope of reward or in return for past favors, yet the fact that the attorney for the successful litigant treated four of the jurors to one cigar apiece in response to a jocular suggestion is not ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. § 49.*]

Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action by John Lutz against the Denver City Tramway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Stark & Martin, George S. Redd, and George Stidger, all of Denver, for plaintiff in error. Gerald Hughes and Howard S. Robertson, both of Denver, for defendant in error.

MUSSER, J. This cause was in this court before, and the former opinion is reported in 43 Colo. 53, 95 Pac. 600. The facts relative to the accident, in which the wife of the plaintiff in error received injuries which caused her death, are substantially the same in this record as narrated in the former opinion.

Mrs. Lutz, a young and vigorous woman, started diagonally across Larimer street, in Denver, near its intersection with Twenty-Fifth street, obviously intending to board an approaching car at the usual place on the opposite side of Twenty-Fifth street. She was carrying a small child in her arms, and as she proceeded she signaled the car. A gong was sounded. She stepped upon the track immediately in front of the car, was struck by the fender or rail guard, which projected forward from the front of the car over the rails, fell upon it, struggled an instant, and then fell from the fender on the right side in the space between the fender and the front wheel. She stepped upon the track at about the middle of Twenty-Fifth street. The car was running slowly, evidently slowing up to make the stop on the opposite side, for there was evidence that the brake had been applied. There was nothing in the situation to indicate to the motorman that she was about to attempt to cross the track before the car had passed her. Her signals indicated that she knew the car was approaching, and the gong reminded her of that fact. The car was moving at a lawful rate of speed. The brakes were in good order. One witness testified that the car was five or six feet from her when she stepped upon the track, and another that it was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not more than seven or eight feet away. The motorman testified that he was not more than six feet from her. These witnesses evidently estimated the distance with reference to the body of the car. Another testified that the projecting fender was not more than fifteen inches from her. Another testified that she was struck when she was about to step on the track and when she stepped on the track. So that she must have been struck by the fender almost the instance she stepped on the track. The motorman immediately further applied the brake, and the car was stopped within eight or ten feet after she was struck. When the car was stopped, Mrs. Liutz was lying on her stomach and the front wheel was resting between her limbs near the trunk or on the right limb and pelvis at the junction with the thigh on the side toward the rear of the car. Her trunk was outside of the rails, and the limbs were resting upon them. The motorman and conductor immediately jumped off when the car stopped, and, after looking, decided that it was necessary to get the car off the body before it could be taken out. The car was backed very slowly twelve or eighteen inches, and Mrs. Liutz was then easily taken out and removed to a hospital, where she died the next day. Her right limb was fractured below the knee, and there was another injury at the junction of the right thigh and pelvis, including both of them somewhat.

There were two causes of action in the complaint. The first was based upon negligence in operating the car, in not stopping it in time to prevent the injury, and in not dropping the fender so as to prevent the body of Mrs. Liutz from getting under the car. The second cause of action alleged the same things except with reference to the fender, and further alleged that the injury was inflicted by negligently backing the car after it had stopped. The lower court directed a verdict for the defendant company on the first cause of action, and submitted to the jury the second cause of action with reference to the backing of the car, and the jury returned a verdict for the defendant company. It is contended that the court erred in directing a verdict for defendant on the first cause of action. In the former opinion it was held that up to the time the car stopped the company was not guilty of any negligence, and that the injury to Mrs. Liutz by the forward motion was due entirely to her own negligence in stepping upon the track immediately in front of the car.

[1] Upon reading the record now before us, we are not inclined to change the view of the matter heretofore announced, and the reasons are so fully discussed in the former opinion that it is unnecessary to discuss them here. Upon reading the whole record, it appears clear that only one conclusion can be drawn from the evidence, and that

is that any injury which was inflicted upon Mrs. Liutz by the forward motion of the car was due solely to her own act in stepping upon the track so immediately in front of the car that it was impossible to prevent injury to her, and that the motorman did all that in reason could have been expected of him. It is contended that, even though Mrs. Liutz was negligent in stepping upon the track, the evidence showed that the front end of the fender was about a foot above the rails, and if the motorman would have dropped it, as he might have done, she would not have gotten under the car, or at least there was a chance for the jury to say she would not. Many authorities are cited to the effect that notwithstanding the negligence of a plaintiff, if the defendant observed or should have observed such negligence in time to avert injurious consequences by the exercise of reasonable care, it is the duty of the defendant to exercise such care. That is commonly called the doctrine of last clear chance. This can be answered in two ways. It clearly appears from the evidence of all the witnesses who testified with any knowledge of how Mrs. Liutz fell from the fender that she did not fall from it in front so that it would pass over her, but that she fell off at the side in the space between the fender and the front wheel. Under these circumstances, it is unlikely that the dropping of the front end of the fender would have availed anything.

If we are wrong in this, it nevertheless is plain that, in order to apply the doctrine mentioned to a state of facts, the circumstances must be such as to present a last clear chance to avert injury by the exercise of reasonable care. In this case the situation itself, as detailed by the witnesses, clearly indicates that there was not a fair opportunity, or any opportunity within reason, for the motorman to have overcome the consequences of Mrs. Liutz's act. These circumstances clearly show that her stepping on the track and falling from the fender were practically simultaneous, and that her negligence occurred for all practical purposes simultaneously with her fall from the fender and under the car. The circumstances, the suddenness of the whole transaction, the practically simultaneous occurrence of her negligence, and her falling under the car excluded the idea of any chance for the motorman to have saved her. The facts and circumstances were clear and undisputed, fixed and unalterable, and no expert testimony could throw any light on them or change their inevitable result. To say that there was a chance would be to require of the human mind and muscle a rapidity and unerring precision of thought and action of which they are incapable, especially when that mind must have been shocked by the sudden appearance of instant and awful danger to a human being. Under such circum-

stances, what might be done in an ordinary situation, when there is no danger apparent or imminent, is inapplicable. The case of *Weitzman v. Nassau E. R. Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905, which the plaintiff in error says is exactly in point here, is entirely different in its facts. There, the motorman testified that he saw the child 20 feet away on the track before it was struck by the fender, and the child was carried a distance of from 32 to 150 feet on the fender. After the motorman saw the child the car ran at least 52 feet, while the motorman testified that the car could have been stopped in 45 feet. Such a state of facts is altogether different from the situation presented here, and this remark is applicable to the many other authorities cited. In *Griffith v. Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, the circumstances with reference to the stepping upon the track and the suddenness of the collision were substantially the same as here, and it was there held that "the facts which would warrant an application of the doctrine, invoked by counsel, of a liability for an injury notwithstanding the negligence of a person injured, did not exist."

[2] As has been said, the contention that the fatal injuries were caused by negligently backing the car was submitted to the jury. Complaint is made of several of the instructions given at the request of the defendant. In each of them the jury were told that, if they found a certain state of facts, the verdict should be for defendant. There was some repetition in the instructions, but it cannot be said that any one was the counterpart of the other. It is claimed that what repetition there was tended to confuse the jury, and that the frequent use of the phrase "verdict for defendant" gave undue prominence of the idea that the jury should so find. Each instruction was clear enough in itself, and no claim is made that any of them incorrectly stated the law or recited facts not deducible from the evidence. Many authorities are cited showing that repetition in the instructions is to be avoided. All of them, however, save one, are to the effect that it is not error to refuse a correct instruction when the charge already contains the same thing expressly or substantially. This is undoubtedly good law, but that is far from saying that repetition is reversible error. In the one case of *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152, the court condemned the practice of repetition in instructions, but refused to say whether it was reversible error or not, and did not intimate what it would do in that behalf were it necessary. Of course, unnecessary repetition in the charge is to be condemned, but that is not saying that it must be regarded as reversible error. It might become so if it tended to confuse the jury. In the present case, however, the instructions, even with the repetition they may have contained, cleared con-

fusion rather than produced it. The conflicting claims of plaintiff were likely to produce confusion. It was first contended that the fatal injury was inflicted by the car before it stopped in its forward motion, and next that it was inflicted not by the forward motion, but by negligently backing it after it had stopped. The testimony introduced by the plaintiff to support each of these claims was blended together. Now the fact was that the plaintiff could not recover on his first contention because in that case the injury would have been caused by the negligence of Mrs. Liutz, and if that contention were true the second could not be, and if the second contention were true the first could not be. It was very likely that such a state of affairs would produce confusion in the minds of the jury, and it was very proper for the court to give instructions that would place the matter clearly before them in its various phases. This is what the instructions did. The plaintiff was not entitled to have the confusion which he created continue with the jury, while the defendant was entitled to have the matter fairly presented to them. We cannot say that the repetition of the phrase "verdict for the defendant" would prejudice them when the facts were clearly presented upon which such a verdict should be based. If they did not find the facts as predicated in any of the instructions, they certainly knew that their verdict should not be for the defendant, and if the facts were as predicated they could not render any other verdict.

In the motion for a new trial it was alleged: (1) That the Tramway Company made it a practice to keep two men about the courthouse to mingle with prospective jurors, talk with them particularly with reference to Tramway cases, and by flattery, ridicule, and other insidious means endeavor to improperly influence them so that verdicts might be returned for the company. (2) That one of the jurors in this case had been informed that, if a verdict was not reached before bedtime, the jury would be compelled to sleep overnight in beds infested with vermin, and that rather than sleep in such a bed the juror, against his will, agreed to the verdict for the defendant. (3) That the attorney for defendant was guilty of misconduct in treating the jurors to cigars after the receipt of the verdict.

When these charges were brought to the attention of the court, an investigation was ordered, and plaintiff was directed to produce his evidence. A hearing was had, much testimony was taken, and the court found that the charges were not sustained, and overruled the motion for a new trial.

[3] Unless the finding of the court was manifestly against the weight of the testimony, or its discretion was abused, we cannot disturb this finding. It is enough to say that in the cold record before us there

does not appear sufficient evidence to sustain the charges. The district judge saw the witnesses on the stand, observed their demeanor, interrogated many of them himself, and was much more competent to judge of their testimony than an appellate court.

[4] If the first charge were true, that the Tramway Company made it a practice to influence jurors as alleged, such a practice is to be condemned in the severest terms. The district court in such a case has it within its power to severally punish any who may resort to such an evil practice, and should not hesitate to employ drastic measures to stamp it out. It is the duty of attorneys of the court, who are aware of such conditions and have evidence thereof, to co-operate with the court in bringing offenders to punishment and in putting a stop to such a condition of corruption. Verdicts influenced thereby should unhesitatingly be set aside. However, before anything can be done, sufficient evidence must be produced. Men cannot be punished or verdicts set aside for such a reason upon mere suspicion and without evidence. If there is any evidence at all in this record of such a practice, it is very meager indeed, and there is no evidence whatever that the jurors in the present case ever heard of it or were in any manner influenced in their present verdict thereby. On the contrary, it affirmatively appears uncontradicted that the jury was free from such an influence.

[5] An affidavit of the juror, who claimed that his verdict was induced by what he had heard of the condition of the beds, was filed to support that charge. Section 236, Rev. Code, provides when an affidavit may be used to impeach the verdict of a jury, and this court has held that no affidavit of a juror will be received to impeach the verdict for misconduct of the jury except as provided in that section, and that is when the verdict is brought about by a resort to the determination of chance. *Richards v. Richards*, 20 Colo. 303, 38 Pac. 323. The particular misconduct that is sought to be charged to the jury in this case was that there was some conversation to the effect that, if a verdict was not reached, they would have to sleep in beds infested with vermin.

[6] As a general rule, affidavits of jurors stating the ground upon which they rendered their verdict will not be received to impeach it. *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265.

[7] In the hearing on the motion for a new trial each of the other 11 jurors were interrogated with reference to this matter. Many of them said that they heard some remarks with regard to vermin in the beds, but it did not seem to make any impression upon them, and some of them regarded the talk more in the nature of a joke. The verdict was rendered immediately after the evening meal, quite a while before bedtime, and before the juror would know that he was

to sleep overnight in the beds provided by the county. He did not know that the beds were in such a condition. He did not attempt in any way to have the authorities provide proper beds. There was nothing in the situation to alarm him or to cause him to violate his sworn duty as a juror. There was no error committed in overruling the motion on that ground.

[8] The facts with reference to the treating of jurors with cigars appear to be as follows: The jury agreed on their verdict in the evening, sealed it, and dispersed to their homes. The next morning they returned the verdict into court. It was received, and they were dismissed. After this, in going down the elevator to the lower floor of the courthouse, defendant's attorney and some of the jurors were together. Some one said something about cigars, and, on reaching the floor where they were to be obtained, the defendant's attorney treated each of four jurors to one cigar. There is no statute in this state forbidding such a thing. The occurrence seems only to have been an innocent one, and is the only one of its kind shown in this record. How it could have influenced the verdict which had been returned and received cannot be conceived. The cases cited by plaintiff in error are not in point. The Vermont cases—*Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588, and *Shattuck v. Wrought Iron R. Co.*, 69 Vt. 468, 38 Atl. 72—were based upon a statute. In *Marshall v. Watson*, 16 Tex. Civ. App. 127, 40 S. W. 352, one of the parties during an adjournment and while the case was on trial entertained two of the jurors at a restaurant. Afterward the verdict was returned in favor of the host. In *Johnson v. Hobart* (C. C.) 45 Fed. 542, and *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344, the matter occurred before the cases were submitted to the juries for verdict. In *McLaughlin v. Hinds*, 151 Ill. 403, 38 N. E. 136, the attorneys for each party and some of the jury entered a saloon and indulged in cigars and drink after the verdict. The court refused to set the verdict aside because each party was guilty, and said it would not hesitate to do so if the attorney for the successful party had been alone with the jury. The remark did not apply to the actual facts in the case, and besides the conduct of the attorneys and jurors was flagrant, and was enough to show, if participated in by the successful attorney and the jurors, that the latter were so prejudiced in his favor as to taint the verdict. The conduct complained of occurred after the verdict was reached and sealed, and before its return into court. In *End. R. of O. of K. P. v. Steele*, 107 Tenn. 1, 63 S. W. 1128, some of the jurors, when examined for service, had answered that they had not served on a jury within two years, when the fact was that they had and were thereby rendered incompetent. This fact was linked with the fact that they drank with the brother of the plaintiff after the verdict

to show that they were anxious to sit upon the case, and that they were not the fair and impartial jurors that the parties had a right to demand. *Scott v. Tubbs*, 43 Colo. 221, 95 Pac. 540, 19 L. R. A. (N. S.) 733, was a condemnation proceeding. After the jury had viewed the premises and before they returned to the courtroom or made their award, four of the jurors accompanied the petitioner, at his invitation, to a saloon and drank with him. This court correctly held that a new trial should have been granted. Courts should guard the purity of the jury with jealous care, and see to it, as far as within them lies, that jurors are not tampered with so that the verdicts that are returned may be free from taint and prejudice, and be the honest convictions of the jury upon the law and the evidence. Too great a care in this behalf cannot be taken, yet at the same time courts should not misconceive their duties and go so far as to work injustice. In *Vane et al. v. City of Evanston*, 150 Ill. 616, 37 N. E. 901, the rule was announced: "That customary offices of civility, and ordinary hospitality or courtesy, extended by the successful litigant, when not designed or calculated to influence the juror or jurors in their consideration of the case, and which are devoid of suspicion, will not afford sufficient ground for setting the verdict aside and awarding a new trial." And in *Gale v. N. Y. C. & H. R. R. Co.*, 53 How. Prac. (N. Y.) 385, it is said: "When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict." These utterances of the courts and others of like character are quoted and the principles therein announced followed in the case of *Mo. Pac. Ry. Co. v. Bowman*, 68 Kan. 489, 75 Pac. 482. There is an entire absence of any indication that the attorney for the defendant treated the jurors to cigars in any other spirit than one of civility, hospitality, and courtesy that came to him on the spur of the moment after the verdict, without any design or forethought, but upon a jocular suggestion, as such things often innocently occur. It does not appear that it was customary for him to do so, or that the jurors bore such relations to him that they expected it of him. The act is entirely devoid of suspicion. It could not have influenced a verdict already rendered. It might be said, upon ethical grounds, that the act of the attorney was indiscreet, but that affords no reason for setting aside the verdict. The judgment is affirmed.

Judgment affirmed.

WHITE and GARRIGUES, JJ., concur.

MONTEZUMA VALLEY IRR. DIST. et al. v. LONGENBAUGH.

(Supreme Court of Colorado. March 3, 1913.)

1. STATUTES (§ 207*)—CONSTRUCTION—CONFLICTING PROVISIONS.

The court in construing a statute must consider in connection with each other all provisions pertaining to the same subject, and this rule applies especially where different sections of a statute are, when read separately and considered literally, inconsistent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 284; Dec. Dig. § 207.*]

2. WATERS AND WATER COURSES (§ 225*)—IRRIGATION DISTRICTS—ESTABLISHMENT—STATUTORY PROVISIONS.

Acts 1901, p. 198, authorizes the organization of irrigation districts on petition of the owners of land susceptible to one mode of irrigation from a common source, except that, where irrigation ditches have been constructed, the land watered thereby shall be exempt. An owner signed a petition for the establishment of a district to embrace described territory, including his land, while he had ditches and water rights to irrigate it. The district was created without right to acquire the ditches or water rights, and for two years he paid district taxes. Subsequently a judgment adjudging the validity of the district and confirming the issuance of bonds was rendered, and no appeal was taken therefrom. Pursuant to the judgment, the district incurred a large indebtedness. Held, that the owner was estopped from attacking the validity of the district, and he could not maintain a suit to enjoin the collection of district taxes levied on his land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 317; Dec. Dig. § 225.*]

Error to District Court, Montezuma County; Charles A. Pike, Judge.

Action by George M. Longenbaugh against the Montezuma Valley Irrigation District and others. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. F. Mowry, of Cortez, for plaintiffs in error. Goudy & Twitchell and J. H. Burkhardt, all of Denver, for defendant in error.

HILL, J. This action involves the validity of certain irrigation district taxes upon certain lands included in an irrigation district organized under our former irrigation district act entitled "An act to provide for the organization and government of irrigation districts," etc., approved April 12, 1901. Soon after the approval of this act, which contained an emergency clause, the defendant in error, in conjunction with many other landowners, signed and caused to be presented to the board of county commissioners of Montezuma county a petition praying for the organization of the Montezuma Valley Irrigation District. The boundaries of the proposed district as set forth in the petition included 320 acres of land owned by the defendant in error. The county commissioners duly considered the petition, made certain findings of fact, and, following the procedure

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prescribed by the act after the election therefor, declared the district as such duly organized under date of December 4, 1901. Its boundaries as defined by the board included the above lands of the defendant in error. He paid irrigation district taxes upon them for the years 1904 and 1905. Prior to the institution of this suit, the district had contracted a large bonded indebtedness for a water system for the purpose of supplying the lands in the district with water for irrigation purposes. The regularity of the proceedings relative to the organization of the district and the issuance of the bonds (the evidence of this indebtedness) was duly confirmed by decree of the district court May 12, 1906, as provided for by the act. No exception was taken to, or appeal from, this decree; no question is raised concerning the regularity of any of these proceedings. Upon January 13, 1909, which was more than seven years after the organization of the district, and more than two years after the date of the decree of confirmation, the defendant in error instituted this suit to restrain the district board, the county treasurer, and the county assessor from levying and collecting irrigation district taxes upon these lands. He also prays the court to decree that they are no part of the district.

As grounds for this relief he alleges that prior to the organization of the district, and during all times since, he owned and possessed ditches previously constructed of sufficient capacity, and also owned sufficient water rights for the irrigation of this land, which he has ever since been using for the irrigation of all of it, with the exception of about 10 acres. He also alleges, and it is conceded, that the district was not organized or formed to purchase, acquire, lease, or rent the plaintiff's alleged ditches or water rights, and that it has never made purchase of any of them.

Numerous defenses were presented. The relief prayed for was granted, save and except as to 10 acres. The defendants bring the case here for review upon error.

Section 1 of the Irrigation District Act of 1901, p. 198, reads: "Whenever a majority of the resident freeholders owning lands in any district susceptible to one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act, and when so organized, each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district. Provided, that where ditches, canals or reservoirs have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches, canals or reservoirs is appropriated, such ditches, canals, reservoirs and franchises, and the land sub-

ject to be watered thereby, shall be exempt from operation of this law, except such district shall be formed to make purchase of such ditches, canals, reservoirs and franchises, and that this law shall not be construed to in any way affect the rights of ditches, canals and reservoirs already constructed." It is claimed that the lands of the defendant in error come within the proviso in the above section, and are therefore exempt from the operation of the act, the district not being formed to make purchase of the ditches, etc., in existence at the time of its organization used for the irrigation of this land. There is evidence concerning previous ditches, their enlargement since the organization of the district, also evidence concerning what is termed private water rights used in the irrigation of a portion of this land. It is conflicting. If this was the only question raised, it might be proper to sustain the judgment, but a more serious difficulty confronts us.

[1] The defendants pleaded and introduced evidence to sustain an estoppel. It has universally been held in the construction of a statute that all matters therein pertaining to the same subject should be considered in connection with each other. This rule is especially applicable here for the reason that, when the different sections and provisos in this act are read separately and thus considered literally, they cannot be harmonized, but are in conflict and inconsistent with each other.

[2] Section 2 provides that a petition shall be filed with the board of county commissioners which embraces the largest acreage of the proposed district, signed by a majority of the resident freeholders who are qualified electors of the proposed district, who shall also own a majority of the whole number of acres belonging to the resident electors of the proposed district; that the petition shall set forth and particularly describe the boundaries of the district, and shall pray that the lands included therein be organized into an irrigation district under the provisions of the act. Also, that when the petition is presented, the board of county commissioners shall hear it, and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define the boundaries, provided that said board shall not modify said boundaries so as to exempt from operation of the act any territory within the boundaries of the district proposed by said petitioners, which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any land, which will not in the judgment of said board be benefited by irrigation by said system, be included in such district. Another proviso in this section states: "That any person whose lands are susceptible of irrigation from the same source shall, upon application of the owner to said board, be

entitled to have such lands included in said district." Sections 9 and 10 provide what the board can do in securing sundry systems of waterworks, etc., for the irrigation of the lands in the district, etc. Section 13 for the issuance of bonds, etc. Sections 29 to 38, inclusive, provide for changing the boundaries of the district after its organization and allowing, under certain conditions, contiguous territory to be included therein.

It is admitted that the defendant in error voluntarily signed the petition for the organization of the district; that the petition set forth the boundaries of the proposed district, which embraced therein the three hundred twenty acres of land in question; that when he signed it he was the owner of this land, and that he knew the contents of the petition. He thereby prayed that the proposed district as then defined, which included this land of which he was then the owner, be organized into an irrigation district under the provisions of this act. Thereafter, during the years 1904 and 1905 he paid irrigation district taxes thereon, and thereby again recognized the proper inclusion of these lands in the district.

It also appears that in 1906 proceedings for the approval of the validity of the district and the confirmation of certain bonds were had and became final, to which he made no objections, although the regular statutory notices were given of these matters, yet not until over two years thereafter, and until after a large indebtedness had been contracted by the district for the purpose of supplying the lands therein with water for irrigation purposes, did he take any steps to have his land declared exempt from the operation of the law. It will be observed that the proviso in section 1 of the act exempting certain lands from its operation depends upon certain questions of fact, namely, that ditches, canals, and reservoirs have been constructed before the passage of the act; that they have sufficient capacity to water the land thereunder for which the water taken in such ditches, canals, and reservoirs is appropriated, provided, further, except such district shall be formed to make purchase of such ditches, canals, reservoirs, and franchises.

When the defendant in error signed the petition for the organization of this district, he knew, as he admits, the actual facts concerning his land, the ditches and waters therefor, if any, yet regardless of these facts which he now states existed he prayed that an irrigation district be organized to include them. This petition was an allegation, as well as an admission by him, that this land was such as could properly be included in such an irrigation district (not being formed to make purchase of any ditches or waters then owned by him), and also as the owner that he desired it included. Under the last proviso in section 2 of this act, had his land not been included in the proposed irrigation district, yet was susceptible of irrigation

from the same source (a fact here admitted), upon application to the board, he probably would have been entitled to have had it included in the district. His signing the petition and thereby praying for the organization of a district to include the lands named then owned by him was the same in substance as a statement therein by him that this land was such as could be, and a prayer that it be, included in the district. The commissioners having acted favorably upon his request, their action is in the nature of a judgment, and the facts as then represented by him upon which they acted are not thereafter open to attack by him. In this respect he is estopped from thereafter making claim to a different state of facts than his previous acts would imply.

In 16 Cyc. at page 796 it is said: "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." At page 799 it is also said: "A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved." At page 801 the author further states: "If in a particular transaction or course of dealing the authority, capacity, character, or status of one of the parties is recognized as one of the basic facts on which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character." The above general rules are sustained by both reason and authority. We think they are applicable here. The authority of the board to include this land which rested upon a certain state of facts was not only recognized by the plaintiff, but with knowledge of all facts he assumed that it was such as would give the board jurisdiction over it, and by his actions he took a position in harmony therewith, and by his signed petition prayed that the board act accordingly. Under these circumstances he ought not now be heard to say that the facts are different than what his former petition would imply, and for which reason that the board was without jurisdiction to do what he had previously prayed them to do.

Under one of the provisos in section 2 of the act, if omitted, he probably could have had his land included in the proposed district by presenting his individual petition to the board for that purpose, the land being susceptible of irrigation from the same source. If such a petition had been presented, and the board had included his land, under such circumstances could it be consistently urged (after the district had contracted a large indebtedness with which to supply water for

all the lands, including that in question) that he could then be heard to say that the facts were different than what his former petition would imply, and for which reasons his lands were not a part of the district? We do not think so. We see no difference, in substance, between the signers of the two petitions. The first is to secure the organization of the district to cover the lands therein named of which the signers of the petition are the owners of a majority of the acreage. The second is to allow the signer to have his land included as a part of the proposed district, if he so desires, although not included in the original petition. Section 2 provides that the original petition shall be signed by a majority of the resident freeholders who are qualified electors of the proposed district, who shall also own a majority of the whole number of acres belonging to the resident electors of the proposed district. Assuming, arguendo, that the name of the defendant in error was necessary to be counted to make a majority of the resident freeholders who are qualified electors, or was necessary to be counted as one of those owning a majority of the acreage of the proposed district, and that this land was necessary to be included for that purpose, under such circumstances it has repeatedly been held that the signer will not be allowed to thereafter dispute such questions of fact. *Beaver Borough v. Davidson*, 9 Pa. Super. Ct. 159; *Ferson's Appeal*, 96 Pa. 140; *Lake City v. Fulkerson*, 122 Iowa, 569, 98 N. W. 376; *Bidwell v. City of Pittsburgh*, 85 Pa. 412, 27 Am. Rep. 662; *Dewhurst v. City of Allegheny*, 95 Pa. 437; *Broad Street, Church's Appeal*, 165 Pa. 475, 30 Atl. 1007; *Matter of Cooper et al.*, 93 N. Y. 507; *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143; 7 Am. & Eng. Ency. of Law, p. 20, notes; *Pepper v. City of Philadelphia*, 114 Pa. 96, 6 Atl. 899; *McKnight v. City of Pittsburgh*, 91 Pa. 273. We think that the reasons and rules announced in the above cases are applicable here, and that the facts and circumstances of this case justify the application of the principle of estoppel. This makes unnecessary any consideration of the other reasons urged for a reversal of the judgment.

For the reason stated the judgment is reversed and the cause remanded, with instructions to dismiss the action at the costs of the plaintiff.

Reversed.

MUSSER, C. J., and GABBERT, J., concur.

MONTEZUMA VALLEY IRR. DIST. et al.
v. JOHNSON. †

(Supreme Court of Colorado. March 3, 1913.)

Error to District Court, Montezuma County; Charles A. Pike, Judge.

Action by Lillian Hartman Johnson

against the Montezuma Valley Irrigation District and others. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. F. Mowry, of Cortez, for plaintiffs in error. Charles A. Johnson, of Durango, for defendant in error.

HILL, J. This action involves the validity of certain irrigation district taxes upon certain lands included in an irrigation district organized under our former irrigation district act, approved April 12, 1901. Soon after the approval of this act, which contained an emergency clause, the defendant in error, in conjunction with many other landowners, signed and caused to be presented to the board of county commissioners of Montezuma county a petition praying for the organization of the Montezuma Valley Irrigation District. The boundaries of the proposed district as set forth in the petition included 80 acres of land owned by the defendant in error. The county commissioners duly considered the petition, made certain findings of fact, and, following the procedure prescribed by the act, after the election therefor, declared the district as such duly organized under date of December 4, 1901. Its boundaries as defined by the board included the above lands of the defendant in error. She paid irrigation district taxes thereon for two years. Prior to the institution of this suit the district had contracted a large bonded indebtedness for a water system.

The regularity of the proceedings relative to the organization of the district and the issuance of the bonds (the evidence of this indebtedness) was duly confirmed by decree of the district court upon May 12, 1906, as provided for by the act. No exception was taken to, or appeal from, this decree; no question is raised concerning the regularity of any of these proceedings. Upon August 22, 1907, which was more than six years after the organization of the district and more than one year after the date of the decree of confirmation, the defendant in error instituted this suit to restrain the district board, the county treasurer, and the county assessor from levying and collecting irrigation district taxes upon these lands. She also prayed the court to decree that they are no part of the district. As grounds for this relief, she alleges that prior to the organization of the district and during all times since there were ditches constructed of sufficient capacity to water these lands, and that waters from certain natural springs and seepage were and had been so appropriated by this plaintiff and her grantors to water the said lands, and they were at all times mentioned watered and irrigated from said natural springs and seepage by and through said ditches. She also alleges, and it is conceded, that the district was not or-

† Rehearing denied April 7, 1913.

ganized or formed to purchase, acquire, lease, or rent the plaintiff's alleged ditches or water rights acquired from said natural springs, seepage or otherwise, and that the district has never made purchase of any of them.

Numerous defenses were presented, including that of estoppel. The relief prayed for was granted. The defendants bring the case here for review upon error.

The pleadings as well as the facts necessary to consider are substantially the same as those in case No. 7,197, Montezuma Valley Irrigation District et al. v. George M. Longenbaugh, 131 Pac. 262, decided at this term. For the reasons there stated, the judgment is reversed and the cause remanded, with instructions to dismiss the action at the cost of the plaintiff.

Reversed.

MUSSER, O. J., and GABBERT, J., concur.

SPRINGHETTI et al. v. HAHNEWALD et al.

(Supreme Court of Colorado. March 8, 1913
Rehearing Denied April 7, 1913.)

1. PLEADING (§ 416*)—OBJECTIONS—DEMURRERS—WAIVER.

Where defendants answered and went to trial on the merits, they waived the right to question the ruling on their demurrer for misjoinder.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1397-1400; Dec. Dig. § 416.*]

2. EXECUTION (§ 423*)—BODY EXECUTION—FORM OF ACTION—"FOUNDED UPON."

Under Rev. St. 1908, § 3024, providing that in a civil action, when it shall appear that it is founded on tort, and the verdict of the jury or the finding of the court shall state that in committing the tort defendant was guilty of either malice, fraud, or willful deceit, the plaintiff may have execution against the body of the defendant, an action by those induced by defendant's false representations to buy a mining claim to recover back the price paid is an action "founded upon" tort, which means "bottomed upon," entitling plaintiffs to body execution, though the action itself was in the nature of an assumpsit, the purchase having been rescinded.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1214-1221, 1223; Dec. Dig. § 423.*]

3. MINES AND MINERALS (§ 59*)—ACTION—EVIDENCE.

In an action to recover back the purchase price of a mining claim which plaintiffs had bought because of defendants' fraudulent misrepresentations, evidence that defendants exhibited a fake check for a large amount as showing the price one of them paid for a share in the mine is admissible.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 170, 171; Dec. Dig. § 59.*]

4. PARTIES (§ 88*)—MISJOINDER—MODE OF OBJECTIONS.

Under Mills' Ann. Code, § 55, providing that, if an objection to misjoinder be not taken either by demurrer or answer, the defendant shall be deemed to have waived it, the objection cannot be raised by motion for non-

suit where defendants' demurrer for misjoinder had been overruled, and they pleaded to the merits without alleging the same in their answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 145-147; Dec. Dig. § 88.*]

5. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDING.

A finding by the trial court on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

6. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR.

Defendants, who owned a lease and had an option on a worthless mine, induced plaintiffs to purchase it, and plaintiffs also purchased the interest of one of the owners on whose share defendants had the option. In an action by plaintiffs to recover back the moneys paid defendants, it was decided that plaintiffs were not entitled to any relief on account of the purchase direct from the owner. *Held*, that under Mills' Ann. Code, § 78, providing that errors not affecting the substantial rights of the parties shall be disregarded, defendants could not complain that this judgment allowed plaintiffs to rescind in part and affirm in part, for the claim was worthless, and to have compelled plaintiffs to rescind in toto would have imposed upon defendants the burden of paying for the worthless interest which plaintiffs had acquired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Error to District Court, Lake County; Charles Cavender, Judge.

Action by Albert Hahnewald and another against Louis Springhetti and another. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

R. D. McLeod and James T. Hogan, both of Leadville, and Barnett & Teller, of Denver, for plaintiffs in error. John A. Ewing, of Denver, for defendants in error.

GABBERT, J. Defendants in error, plaintiffs below, brought an action against plaintiffs in error, as defendants, to recover sums of money which, it was charged, had been obtained from them by fraud and willful deceit on the part of the defendants, and also to cancel all indebtedness or claims of indebtedness against the plaintiffs in favor of the defendants growing out of the same transaction. At the time this suit was instituted there was another action pending by Springhetti against Albert Hahnewald on a \$3,000 note, which had been given by Hahnewald to Springhetti in connection with the above transaction, and it was agreed that that suit should abide the result of the trial of this action. The case was tried before the court, and the issues made by the pleadings found in favor of the plaintiffs, and a finding made that in committing the wrongs complained of in the complaint the defendants were guilty of malice, fraud, and willful deceit, and procured from the plaintiffs the sum of \$5,333.33 by means thereof. Judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment was rendered accordingly, which provided that, if the amount which the plaintiffs were adjudged to recover from the defendants was not paid within 30 days from the date the judgment was rendered, then plaintiffs might have an execution against the bodies of the defendants under which they could be committed to jail for a term of 1 year, unless the judgment was sooner paid. The defendants bring the case here for review on error.

The complaint alleged that plaintiff Albert Hahnewald and defendant Louis Springhetti were the owners of an undivided one-half interest each in a lease upon the Chautauqua lode mining claim; that at the same time the defendant Julius Muller was the owner of an option to purchase an undivided six-tenths interest in this claim from the owner, by virtue of which Muller was entitled to purchase such interest within a time specified for the sum of \$2,400; that defendant Springhetti and plaintiff Paul Hahnewald were engaged in making preparations to work the property under their lease, and that during this time prospecting was done in a shaft thereon, and workings connected therewith, and that this prospecting was done by one Louis Beati, who took orders from the defendant Springhetti, neither of the plaintiffs having any control or direction over such work in any way; that defendants for the purpose of inducing these plaintiffs to purchase from Springhetti his one-half interest in the lease, and the option held by Muller, falsely represented to the plaintiffs that in the workings in which Beati was prospecting great values in minerals were disclosed, and for the purpose of consummating such fraud caused material to be taken from these workings with which they mixed gold and silver in such manner that assays of such material showed high values; that for the purpose of deceiving and defrauding these plaintiffs they further falsely represented to them that in workings on the premises there was a large quantity of high grade ore which had been hidden and covered up by material which had fallen from the roof, and also falsely represented to the plaintiffs that defendant Muller and other persons associated with him had paid the sum of \$10,000 in cash for the half interest of Springhetti in the lease; that in truth and in fact the material taken from the premises and assayed was of no value whatever, until the same had been so mixed with gold and silver that an assay thereof would disclose great values; that plaintiffs believed the representations made to them by the defendants in regard to the presence of valuable ore in the mine, and the sale of Springhetti's interest in the lease, and, relying upon these representations, they purchased from Muller a two-thirds interest in the lease, and also a two-thirds interest in the option to purchase held by Muller, pay-

ing therefor the sum of \$6,999.99, and agreed to pay the further sum of \$3,000, for which they executed their note. The complaint then alleges that prior to the commencement of the action, and as soon as they discovered the fraud which had been practiced upon them, the plaintiffs notified the defendants that, upon the return of the sum of money which they had paid, they would convey to the defendants the interest in the lode mining claim which they had acquired in the lease and the purchase of the option, and by apt statements in the complaint tendered and offered to assign these interests. The plaintiffs prayed judgment against the defendants for the amount they had paid, and for a judgment canceling all indebtedness, or claim of indebtedness, against them in favor of the defendants growing out of the transaction, and for a finding, decree, and judgment of the court that the defendants were guilty of malice, fraud, and willful deceit in the statements and representations made by them in procuring such sums of money, and that upon such finding, judgment, and order the plaintiffs have an execution as provided in the statutes of the state of Colorado against the bodies of the defendants, under which they might be committed to jail under writ of execution against their bodies, as provided by law.

[1] To this complaint the defendants demurred upon the ground that there was a misjoinder of plaintiffs, and also upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled. After this ruling the defendants answered. Counsel for defendants contend the demurrer should have been sustained. The objection to overruling the demurrer for misjoinder of parties plaintiff is not available to the defendants upon this review. By answering and going to trial upon the merits, they waived the right to question the ruling upon the demurrer for alleged misjoinder. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642; *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922; *City of Canon v. Manning*, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272.

[2] From the argument of counsel for defendants, we understand the contention is made that the court erred in overruling the general demurrer, for the reason it appears facts are not stated in the complaint sufficient to justify a body judgment against the defendants, in that the action is for a rescission of the contract entered into by the plaintiffs, and for the recovery of the amount paid by them; and, while the ground for rescission is deceit, they may not recover as for a tort that with which they parted, as, by electing to rescind the contract, they have waived the tort, and their action is in assumpsit for money had and received, in which character of action a body judgment

cannot be rendered. Where a party to a contract discovers that he has been defrauded, either one of two remedies is open to him—to rescind the contract and recover that which he has paid, or to sue for damages on account of the deceit. Whichever remedy he pursues, however, is based upon fraud.

Section 3024, Rev. Stats. 1908, provides that in a civil action, when it shall appear from the pleadings and summons that it is founded upon tort, and judgment is rendered in favor of the plaintiff, and the verdict of the jury or the finding of the court shall state that in committing the tort complained of the defendant was guilty of either malice, fraud, or willful deceit, then, in such case, the plaintiff may have execution against the body of the defendant. In the case at bar, the plaintiffs elected to rescind the transaction with the defendants and recover the money which they had been induced to pay by reason of such fraud and deceit, and for the cancellation of all indebtedness to the defendants growing out of the transaction. The basis, therefore, of the right of plaintiffs to rescind was the wrong which the defendants were charged with having committed, and the right to recover that with which they had parted was based upon the same ground; so that it appears clear the action of the plaintiffs was founded upon a tort. In other words, their right of action and the relief which they demanded grew out of an alleged tort, and this, we think, is what the statute means by an action founded upon tort, irrespective of what the action itself might be denominated in legal parlance. This is manifest from the language of the statute, which speaks of an action "founded upon tort." "Founded upon" means the bottom, or foundation, on which something rests or relies; so that, in speaking of an action founded upon tort, one was meant the basis or foundation of which was a tort.

[3] Testimony was admitted to the effect that Springhetti had represented to plaintiffs that Muller had paid him \$10,000 for his interest in the lease, and exhibited to them Muller's check in that sum. This, it is urged, was error, for the reason that a statement of a vendor as to the price paid for an article, though false and made with intent to deceive, will furnish no ground for action. In the circumstances of this case, the rule contended for is not applicable. It appears the Muller check was drawn on a bank where he did not have a cent to meet it, and was afterwards returned to the drawer; that the transaction between Springhetti and Muller, according to testimony adduced, was a mere subterfuge which they pretended was genuine, by the passing of a worthless check pursuant to an understanding between them that it would never be presented to the bank upon which it was drawn, the purpose of which was to cause the plaintiffs to be-

lieve that it was a bona fide transaction, because the property contained large quantities of valuable mineral. In brief, from the testimony of plaintiffs, it was a farce sale, which was part of a concerted scheme of defendants to induce plaintiffs to believe that the property contained valuable ore bodies. The statement of the sale was relied on by plaintiffs, and as it was an artifice on the part of defendants, in connection with other frauds and false representations made and resorted to for the purpose of deceiving the plaintiffs, it was properly admitted in evidence.

[4] At the conclusion of the testimony, the defendants moved for a nonsuit, based upon the ground that the evidence disclosed there was no community of interest between the plaintiffs in the subject of the suit; that is, that there was no joint interest, and hence they could not maintain a joint action. What the evidence may disclose on this subject we do not deem it necessary to consider, for the reason it presents the question that there was a misjoinder of plaintiffs. Section 55 of Mills' Code provides that if an objection to a misjoinder of parties plaintiff be not taken, either by demurrer or answer, the defendant shall be deemed to have waived the same. In the case at bar the defendants demurred to the complaint upon the ground of misjoinder, but, as previously stated, having answered after this demurrer was overruled, they waived the right to question such ruling. Thereafter they could only raise it by answer, provided, of course, the alleged misjoinder did not appear on the face of the complaint. They interposed no such defense, and therefore, under the provisions of the Code, waived it. *Keys v. Morrison*, 3 Colo. App. 441, 34 Pac. 259; *Sams Automatic Car Coupler Co. v. League*, supra.

[5] It is also contended on behalf of defendants that the evidence is insufficient to sustain the judgment rendered because it does not establish any conspiracy between the defendants, or that they, or either of them, committed the frauds charged. It is unnecessary to undertake a review of the testimony further than to say that in our opinion it is ample to establish the fraud and conspiracy charged in the complaint. There may be some conflict in the testimony bearing on these subjects; but that conflict was decided in favor of the plaintiffs, and therefore such finding will not be disturbed on review, when the finding made by the trial court is fully sustained by the evidence.

[6] In the judgment rendered the court decreed that plaintiffs were not entitled to any relief on account of the purchase of the four-tenths interest in the property from the owner, who had given an option to purchase her interest to Muller. This, it is urged, was error, for the reason that it allowed the plaintiffs to affirm in part and rescind in part; that is to say, if plaintiffs were en-

titled to rescind, the judgment should have required them to rescind in toto by restoring to Muller his option to purchase so much of the fee as they purchased under the option. It appears from the testimony that plaintiffs purchased their interest in the title to the property from the owner direct, and paid her the money therefor, so that none of this purchase money ever came into the hands of the defendants. Such being the case, the trial court evidently determined that they should not be held for the amount of such purchase. If this was error, it was in favor of the defendants, because, if they were entitled to be placed in statu quo in respect to the option, then they should have been required to repay the plaintiffs the amount which they had expended in securing title to the four-tenths interest. This would have increased the judgment something like \$1,600. The Code (section 78, Mills') provides that errors in proceedings which do not affect the substantial rights of the parties shall be disregarded. We have often decided that error without prejudice will not work a reversal on review. The trial court evidently found (and the evidence fully sustains such finding) that the property was practically worthless. Such being the fact, and even if it be conceded that defendants were entitled to be placed in statu quo, with respect to the four-tenths interest, they cannot complain when, for such alleged error, they have escaped being required to pay \$1,600 or more, for that interest which it appears is of no substantial value.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

LE MASTER v. PEOPLE

(Supreme Court of Colorado. March 3, 1913.
Rehearing Denied April 7, 1913.)

1. DEPOSITIONS (§ 90*)—ADMISSIBILITY IN EVIDENCE.

Depositions of nonresident witnesses, taken in the presence of accused, are properly admitted under Rev. St. 1908, § 7278, providing that such depositions shall not be used if, in the opinion of the court, the personal attendance of the witness may be had; it being admitted that the depositions of the witnesses in question were taken so that they could return to their homes.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248-255, 258-260; Dec. Dig. § 90.*]

2. CRIMINAL LAW (§ 442*)—DOCUMENTARY EVIDENCE—HANDWRITING.

In a prosecution for embezzlement letters written by accused in the regular course of business and received as such may be admitted without expert proof of accused's signature.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027; Dec. Dig. § 442.*]

3. CRIMINAL LAW (§ 402*)—SECONDARY EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement carbon copies of letters written by witnesses in reply to those received from accused are admissible, where, upon accused's objection, he was requested to produce the originals, but stated his inability to do so, and the witnesses testified that the carbon copies were made at the same time the originals were mailed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 887, 888; Dec. Dig. § 402.*]

4. CRIMINAL LAW (§ 400*)—SECONDARY EVIDENCE—IMPRESSION COPY BOOK.

In a prosecution for embezzlement an impression copy book, in which a witness testified were copied letters written by accused material to the offense, is properly admitted without an attempt to produce the originals; it appearing that they were mailed to nonresidents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.*]

5. EMBEZZLEMENT (§ 39*)—EVIDENCE—REPORT OF CORPORATION.

In a prosecution for embezzlement of the funds of an insolvent corporation, a certified copy of the annual report of the corporation, which accused dominated, is admissible, when tending to show the criminal intent of accused.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 62; Dec. Dig. § 39.*]

6. EMBEZZLEMENT (§ 39*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement by the dominating member of an insolvent corporation, who took the funds of the corporation claiming them to be due him for back salary, the books of the corporation showing payment of accused's salary account are admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 62; Dec. Dig. § 39.*]

7. CRIMINAL LAW (§ 444*)—DOCUMENTARY EVIDENCE—IDENTIFICATION.

In a prosecution for embezzlement by accused, who dominated an insolvent corporation and appropriated funds thereof, testimony by an employé of the company and by the trustee in bankruptcy of the corporation that the books offered were the books of the corporation sufficiently identifies them to warrant their admission in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.*]

8. WITNESSES (§ 46*)—COMPETENCY.

In a prosecution for embezzlement by accused, who dominated an insolvent corporation and took the proceeds of some sales of goods purchased on credit under a claim of back salary, the fact that an employé of the corporation had been supported, pending the trial, by a seller who instigated the prosecution does not render him incompetent, but goes merely to the weight of his evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 108; Dec. Dig. § 46.*]

9. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR.

In a criminal prosecution the rejection of evidence subsequently admitted is harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

10. WITNESSES (§ 350*)—IMPEACHMENT.

In a criminal prosecution, where a witness, who had been incarcerated with accused in the county jail, testified to a conversation with accused, it was not error for the trial court to refuse to make witness state, on cross-examina-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion, upon what charge he had been incarcerated, since, it being shown that he had been in jail for some time, but not that he had been convicted of crime, he could not be impeached except as any other witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.*]

11. CRIMINAL LAW (§ 472*)—EVIDENCE—EXPERT TESTIMONY.

In a prosecution for embezzlement by accused, who dominated an insolvent corporation, and who took, under claim of back salary, the proceeds of cash sales of goods bought on credit, testimony by an expert accountant is admissible, where the books of the corporation which were in evidence, were voluminous and intricate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 472.*]

12. EMBEZZLEMENT (§ 39*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for embezzlement against accused, who dominated a corporation, and who took, under a claim of back salary, the proceeds of sales of goods which he purchased on credit, evidence of the insolvency of a corporation is admissible on the question of his criminal intent.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 62; Dec. Dig. § 39.*]

13. EMBEZZLEMENT (§ 23*)—WHAT CONSTITUTES.

Where moneys of an insolvent corporation were fraudulently taken, it is no defense to a prosecution for embezzlement to show that they were taken with the consent of the officers and stockholders.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 31-35½; Dec. Dig. § 23.*]

14. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS.

In a prosecution for embezzlement of the funds of an insolvent corporation, the court charged that to convict the jury must believe that the corporation was insolvent, and that accused fraudulently converted moneys belonging to the corporation for the payment of a fictitious claim due himself, and also further charged that the payment of the claim in good faith, without any intention to defraud, was a complete defense, and that in order to convict they must find that the corporation was under the control of accused and was insolvent, and that knowing this he took the corporation's money to his own use under fraudulent claim. Held not erroneous as telling the jury that if the corporation was insolvent it would be unlawful for it to pay accused's claim, and that his payment of his claim in good faith would render him guilty; for instructions must be considered as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

D. F. Le Master was convicted of embezzlement, and he brings error. Affirmed.

Thomas M. Morrow, of Denver, for plaintiff in error. Benjamin Griffith, Atty. Gen., and George D. Talbot, Sp. Counsel, of Denver, for the People.

HILL, J. The plaintiff in error was convicted of embezzling \$3,700 from the D. F. Le Master Brokerage Company, a corpora-

tion. He brings the case here for review upon error.

It is earnestly urged that the evidence is insufficient to sustain the verdict. The defendant contends that, while he appropriated the money, he was guilty of no crime, for the reason that he was entitled to it as and for salary for services previously rendered to the corporation, and that he had the consent of the company to so apply the money. The people claim, first, that the defendant had been paid his salary in full, and that the claim of \$3,700 for back salary was a trumped-up claim; second, that if the company was indebted to him for salary, it being insolvent to his knowledge, and owing various parties large amounts for flour which it had but recently purchased on credit and sold for cash, it was fraudulent for him to thus convert the money so due them to his own use, and that, even assuming he was a creditor, because he was also a director, an officer, and its manager, his duty was to hold this money in trust for all the creditors; that upon account of these facts and the circumstances under which he appropriated it he was guilty of embezzlement. It is unnecessary, in an opinion, to analyze or set forth in detail the evidence pertaining to the transaction. It is sufficient to state that we have given it careful consideration, and are of the opinion that there is sufficient evidence to justify the verdict.

[1] Prior to the trial, depositions of witnesses residing in Kansas were taken in the presence of the accused, pursuant to a waiver of notice by him. These were taken under the provisions of general sections 7277-7279, Revised Statutes 1908. When the district attorney offered to read these depositions to the jury, counsel for the defendant objected, claiming that no proper foundation was laid; that there was no showing that the witnesses could not be produced. The objection was overruled. We find no error in this respect. Section 7278, supra, provides "that such deposition shall not be used if, in the opinion of the court, the personal attendance of the witness might be procured by the prosecution or is procured by the accused." It stands admitted that these witnesses were residents of Kansas; their depositions were taken in order that they might return to that state. By the ruling it was evidently the opinion of the court that the personal attendance of the witnesses might not be procured by the prosecution; there was no offer by the defense to produce them. The statute says, "if, in the opinion of the trial court," etc.; we find no abuse of the discretion exercised.

[2] Complaint is made to the admission in evidence of certain letters purporting to have come from the D. F. Le Master Brokerage Company. It is claimed there was no attempt to identify the signature as the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

handwriting of D. F. Le Master. They were received in the regular course of mail; their contents were in connection with a general line of transactions between the corporation (of which the plaintiff in error was the controlling factor) and the sundry witnesses, and were introduced principally for the purpose of disclosing the transactions which led up to and disclosed from what source the corporation received the money which the jury found was thereafter embezzled by the defendant. We do not understand that it requires the testimony of an expert in handwriting to make admissible letters of this character. We think they were sufficiently identified for the purposes offered.

[3] Complaint is made to the admission in evidence of carbon copies of letters written by witnesses in reply to those received from the defendant's company, either written or dictated by him. Upon his objections to the copies the defendant was requested to produce the originals; he stated his inability to do so, and from his counsel's statements it appears that the allowance of time after the request was made would have been of no assistance in this respect. The witnesses testified that the carbon copies were made at the same time, and that the originals were properly mailed, etc. Under these circumstances we think the copies were properly admitted.

[4] A Mr. Grandt testified that he had been employed by the D. F. Le Master Brokerage Company. An impression copy book was placed in his hands, which he identified as belonging to the company, and he referred to copies of various letters therein, stating that the originals, of which the impressions in the book were copies, had been written and mailed to various persons and companies; that he wrote the greater majority of the letters at the dictation of the defendant. The pages in this book thus referred to by the witness were offered in evidence. It is claimed that this was prejudicial error, as no effort was shown to have been made to obtain the originals. We do not think so. The object of this testimony was to show the criminal intent of the defendant. The letters were shown to have been mailed to sundry people and companies in other states, who were beyond the jurisdiction of the court. The book contained impression copies taken at the time; we think this sufficient without further showing to justify their admission. This was, in substance, the defendant's impression book of his own letters. It contained declarations against interest, and for this purpose was properly admitted. D. & R. G. R. Co. v. Wilson, 4 Colo. App. 355, 36 Pac. 67.

[5] A certified copy of the annual report of the D. F. Le Master Brokerage Company, filed in the office of the Secretary of State March 2, 1910, was offered in evidence over the objection of the defendant. We find no

objection to this evidence. It likewise went to show the criminal intent of the defendant; if otherwise, it was harmless error.

[6] The books of the D. F. Le Master Brokerage Company were properly admitted in evidence, as well as the defendant's salary account therein, showing what he had been paid, etc. All had a bearing upon his contention that he had, in good faith, appropriated this \$3,700 to his own use upon account of salary. This line of testimony was especially applicable when it is considered that this was practically a one-man corporation.

[7] It is claimed that the books of the company were not properly identified. J. F. Spencer testified that he was the trustee in bankruptcy of the D. F. Le Master Brokerage Company; that as such trustee he had the books of that company; and that he recognized the books in the court before him as the books of the company. A Mr. Grandt testified that he had been employed by the company; that the defendant was in charge of its affairs; and that he recognized the books in court as the books which he saw while employed by the company. We think the books were sufficiently identified.

[8] Many exceptions were taken to the evidence of E. D. Kellogg; he had been in the employ of the D. F. Le Master Brokerage Company just prior to the time it went into bankruptcy. It is claimed that while thus employed he was engaged in giving alleged information to the attorneys for certain Kansas millers from whom this company purchased flour; that just before it went into bankruptcy Kellogg was discharged; that he was immediately taken to Kansas and there supported and maintained by the Phillipsburg Milling & Elevating Company; that this concern was responsible for the defendant's prosecution; and that this witness swore to the original information in this case. Unquestionably Mr. Kellogg's testimony was very damaging to the defendant in disclosing his criminal intent, but whether or not his evidence was manufactured, as claimed, was for the jury to determine. The facts above named, if true, did not make him incompetent to testify.

[9] It is claimed that the court erred in refusing to admit in evidence page 13 of the minute book of the corporation, when John Bernard, a witness called by the defendant, identified the page and book. Thereafter the defendant took the stand, and this identical evidence was admitted during his examination. This eliminates any question of prejudicial error concerning its original rejection.

[10] One James W. Bennett, who had been incarcerated in the county jail several times prior to the trial, testified to an alleged conversation between himself and the defendant while both were in jail. Counsel claims an inspection of his evidence will show that the alleged conversation had no bearing what-

ever on the issue of the case. If that is true, we fail to appreciate wherein any prejudicial error was committed. It would be harmless error at least. Upon cross-examination the court declined to compel the witness Bennett to answer what the first charge was on which he had been incarcerated. The evidence disclosed that the witness was then in jail, and had been for some time. He was not asked if he had ever been convicted of a crime. If he had not been, but was awaiting trial, we think the general rule concerning impeaching testimony was applicable to him the same as any other witness. *Tollifson et al. v. People*, 49 Colo. 219, 112 Pac. 794. The witness' history, pertaining to his sojourn in the county jail, was gone into quite fully. The jury had this before them with which to determine the weight to be given his testimony. The extent to which counsel may go upon cross-examination in such matters is largely within the discretion of the trial court. We cannot say that the court abused its discretion in the respect referred to.

[11] E. F. Arthur, an expert accountant, was permitted to testify that he had made an examination of the books of the D. F. Le Master Brokerage Company and as to certain facts which they disclosed, one of which was that the company was insolvent at the time of the alleged embezzlement. It is claimed this was prejudicial error. The books were in court subject to inspection; they were quite voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion concerning their exact condition. Under such circumstances resort may be had to the aid of an expert bookkeeper to examine and explain the true state of their condition, etc. *Brown v. First National Bank*, 49 Colo. 393, 113 Pac. 483.

[12] It is further urged that it was prejudicial error to thus show the insolvency of the corporation; that as the charge was for embezzlement it was immaterial whether the corporation was solvent or insolvent. This last statement is unquestionably true; but when we consider that this was in fact what is commonly termed a one-man corporation, and that man was the defendant, its solvency would have a bearing upon the question of his criminal intent, when it is shown, and in fact admitted, that he at this one time took \$3,700 of its funds and appropriated it to his own use, under the alleged claim of back salary then owing him by his corporation.

About 120 assignments of error have been made pertaining to the admission and rejection of testimony. We have answered in detail what appears to us to be the most important. It would unnecessarily lengthen this opinion to thus answer all; we have considered them, but find no prejudicial error in this respect.

[13] Numerous assignments are made pertaining to instructions given, refused, and modified. They all center around the correctness of instruction No. 10, which, in substance, advised the jury that, while it is essential, to constitute the crime of embezzlement, that it be proved beyond a reasonable doubt that the moneys were taken and converted without the consent of the corporation, nevertheless that the officers and directors could not legally consent to a fraudulent transaction, and that when, knowing the insolvency of the corporation, etc., they fraudulently consented to such a transaction that such consent was illegal, and the appropriation would still constitute the crime of embezzlement.

The rule that it is no defense, to a charge of embezzlement of the funds of a corporation, to show that the moneys were taken by its consent, where the officers and stockholders fraudulently consented thereto, in reason is supported by an overwhelming weight of authority. *Reeves v. State*, 95 Ala. 31, 11 South. 158; *United States v. Harper* (C. C.) 33 Fed. 471; *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51; *Taylor v. Commonwealth*, 119 Ky. 731, 75 S. W. 244; *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358; *State v. Browning*, 47 Or. 470, 82 Pac. 955; *Secor v. State*, 118 Wis. 621, 95 N. W. 942; *State v. Foust*, 114 N. C. 842, 19 S. E. 275; *State v. Nicholls*, 50 La. Ann. 699, 23 South. 980; *People v. Butts*, 128 Mich. 208, 87 N. W. 224; *Saranac & L. P. R. R. Co. v. Arnold*, 167 N. Y. 368, 60 N. E. 647; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *Holmes et al. v. Willard*, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

[14] It is further claimed that this instruction is erroneous, because it tells the jury that if the corporation was insolvent it would be unlawful for it to pay the defendant's claim and thereby make him a preferred creditor, because it says that the stockholders and directors cannot consent to an unlawful act on the part of the corporation; that from this language, if the payment was unlawful, although made in good faith, the defendant had to be found guilty. We do not so understand the instruction; but, to the contrary, it says that the jury must further believe from the evidence, etc., that this was done while the company was insolvent, and with the intention that the money was to be fraudulently converted from the corporation and fraudulently diverted from the payment of the creditors of the corporation, etc. As we read them in the manner there used, the words "fraudulently converted" and "fraudulently diverted" apply to criminal acts, which include the intent, and not to where it was done in good faith, yet was in fact unlawful. In addition, it is elementary that instructions must be considered as a whole. By instruction No. 9 the jury were told that it would

be a complete defense, if the moneys were taken by the defendant on a claim for back salary, if this was done in good faith, and without any intention on his part to defraud the corporation or its creditors, etc.; yet if the claim for back salary was not made in good faith, but if it were a mere pretense or show or device on his part to obtain the money and convert it to his own use, and to give the transaction the appearance of legality it was put upon the ground of a claim for back salary, that it would not constitute a defense. By instruction No. 11 the jury were told, in substance, that in order to convict they must find that the company was under the control and management of the defendant; that it was insolvent; that this condition was known to the defendant; that he had this money in his possession by virtue of his employment, and with this knowledge of the company's condition that he applied and converted the money to his own use under a claim or pretense that the same was due him for back salary, which had not been paid, and that this claim for back salary was not, as a matter of fact, a bona fide claim, and was not made in good faith, but was a mere pretense on the part of the defendant to convert the money to his own use, instead of letting the corporation apply the money to the payment of all its debts.

When instructions Nos. 9 and 11 are considered in connection with No. 10 complained of, we are of opinion that they eliminate any possibility of conviction, in case the money was taken under a claim for back salary, made in good faith, and also any question concerning the consent of the board of directors to the application of these funds in payment of back salary, if given in good faith, regardless of whether it was intended to give a preference to the defendant or otherwise. This makes unnecessary any consideration of the question of the validity of the acts of the officers of an insolvent corporation, where, in good faith, they attempt to make a preference in favor of one creditor.

Perceiving no prejudicial error, the judgment is affirmed.

Affirmed.

MUSSER, C. J., and GABBERT, J., concur.

McGOVERN, Coroner, v. BOARD OF COM'RS OF CITY AND COUNTY OF DENVER.

(Supreme Court of Colorado. March 3, 1913. On Petition for Rehearing, April 7, 1913.)

1. CORONERS (§ 7*)—COMPENSATION.

Rev. St. 1908, § 2577, providing compensation to coroners for "each day actually employed in making an inquest," does not allow

compensation for services in investigating cases of sudden death in which the coroner deemed no inquest necessary, nor can the coroner recover therefor on a quantum meruit.

[Ed. Note.—For other cases, see Coroners, Cent. Dig. §§ 7-10; Dec. Dig. § 7.*]

On Petition for Rehearing.

2. OFFICERS (§ 94*)—COMPENSATION—FORM OF BILLS.

Rev. St. 1908, § 1219, providing in part that where no specific fees are allowed by law the time necessarily devoted to any service charge in an account submitted to the board of commissioners shall be specified, does not provide for compensation to public officers, but only directs how bills for services for which compensation is actually allowed by law, where no specific fee is fixed, shall be made out.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 132, 133, 136-138, 140, 141; Dec. Dig. § 94.*]

Error to District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by E. P. McGovern, as coroner of the City and County of Denver, against the Board of County Commissioners of the City and County of Denver. Judgment for defendant, and plaintiff brings error. Affirmed.

Paul J. McGovern, George F. Dunklee, and Oscar E. Jackson, all of Denver, for plaintiff in error. Smith & Brock, of Denver, for defendant in error.

BAILEY, J. The complaint alleges, among other things, that plaintiff was at all times mentioned therein the regularly elected, qualified, and acting coroner of the city and county of Denver; that as such officer it was his duty, upon being informed of the violent or sudden death of a person within his jurisdiction, the cause of which was unknown, to immediately view the body and make investigation respecting the cause and manner of the death, and if satisfied that death was not procured by another person, or by unlawful means, no suspicious circumstances appearing, to deliver the body to the friends or relatives of the deceased for interment; that from February 3, 1909, to January 5, 1911, as such officer, he was informed of the violent or sudden deaths of five hundred and seven persons, and made separate investigation and inquiry in each case, in compliance with the statute; that he necessarily spent one day in each case, which service was reasonably worth \$5.00 a day, aggregating a total of \$2,535.00, and prays judgment for that amount. The parties stipulated that monthly accounts of such services were regularly itemized, presented to, and disallowed by the defendant, and also finally presented to it for the total amount above specified and disallowed on January 1, 1911. A general demurrer was interposed to the complaint and sustained. The plaintiff elected to stand by his cause as made; the court thereupon dismissed the action, at the cost

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—18

of plaintiff, who brings the case here on error to review that judgment.

[1] The statute relative to compensation of county coroners, section 2577, Revised Statutes of Colorado 1908, reads as follows:

"In counties of every class the coroner shall be allowed the sum of five dollars per day, for each day actually employed in making an inquest and ten cents per mile for each mile actually and necessarily traveled in going to and returning from the place of inquest, to be paid out of the county treasury. For all services performed in the place of sheriff, the coroner shall receive the same fees as are allowed to the sheriff for like services."

The compensation claimed in this suit is not for services rendered in conducting inquests, but for investigating cases of violent or sudden death in which the coroner deemed no inquest necessary. It is plain that the fee fixed by statute, which is the only compensation provided for county coroners, is purely for services rendered when an inquest is actually held. The sole question, therefore, is whether a county coroner may recover from the county compensation for official service other than as provided by statute. It has been determined in this state that a county clerk, judge or treasurer may not recover additional compensation under like circumstances, and there is no reason why any other county officer, whose compensation is fixed in fees, should be permitted to do so. *Garfield County v. Leonard*, 26 Colo. 145, 57 Pac. 693; *Garfield County v. Beardsley*, 18 Colo. App. 55, 70 Pac. 155; and *Mitchell v. Wheeler*, 20 Colo. App. 159, 77 Pac. 361.

In the case of *Garfield County v. Leonard*, supra, speaking of a like proposition to that presented here, the court said:

"The remaining items in this account consist of claims for services performed, which are public in their character, like giving election notices, canvassing vote, recording abstract of official vote, issuing certificates of election, preparing tax list of county and state taxes and other services of a similar nature. The performance of these duties devolved upon appellee in his capacity as county clerk. The statute does not provide that for services rendered for which no special fee or other remuneration is provided, the county clerk shall be paid a reasonable compensation; no implied assumpsit existed between appellee and the county for services rendered by him in the capacity of clerk for which no fees were specially fixed by law. *Locke v. City of Central*, 4 Colo. 65 [34 Am. Rep. 66]. * * * Upon what theory, then, can it be maintained, that when he performs official duties imposed by law for which no compensation is provided, he shall be paid therefor by the county, in the absence of any provision to that effect? The performance of duties enjoined by law is not of itself the rendition of services at its instance,

and to hold that the county must pay therefor, would create a liability against it which has no existence, either expressly or by implication, and result in injecting into the law, a provision entirely foreign to its letter and spirit. * * * When appellee assumed the duties of his office, he did so subject to its burdens. *Turpen v. Board of Commissioners*, 7 Ind. 172. His compensation for official acts being regulated by statute, he is only entitled to charge for those services to which compensation by law attaches (*Debolt v. Trustees, Cincinnati Twp.*, 7 Ohio St. 237), for the rule is inflexible, that an official can demand only such fees or compensation as the law has fixed and authorized for the performance of his official duties (*Town of Carlyle v. Sharp*, 51 Ill. 71; *Board of Commissioners v. Barnes*, 123 Ind. 403 [24 N. E. 187]), and the statute having imposed upon appellee the duty of performing services which he incidentally rendered in the discharge of his general official duties for the performance of which no compensation is provided, cannot require the county to pay therefor. His remuneration for such services was had in the compensation received for those to which it specially attached, and which the legislature intended as an equivalent for the duties he was required to perform, for which none was provided. *Cole v. White*, 32 Ark. 45."

Where certain fees are prescribed for an official, as compensation, it is fundamental that he is not entitled to demand and receive any other, different or additional pay. Where the only compensation provided for a public officer for the discharge of his official duties consists of fees, and certain duties are imposed upon him by law, for which no compensation is provided, he cannot recover for services in the performance of such duties on the basis of a quantum meruit, or at all, the conclusive presumption being that compensation for such services is covered by the allowance made for the performance of other official acts for which fees are prescribed. The performance of certain duties, without compensation in a feed office, is a burden attaching practically to all such official positions, and this burden is voluntarily assumed by an officer when he accepts the place, as he is presumed to know the requirements of the law.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

On Petition for Rehearing.

BAILEY, J. [2] On application for rehearing, it is contended, under section 1219, Revised Statutes of 1908, which is in part as follows: "No account shall be allowed by the board of county commissioners, unless the same shall be made out in separate items, and the nature of each item stated, and where no specific fees are allowed by law

the time actually and necessarily devoted to the performance of any service charged in such account shall be specified; which account so made out shall be verified by affidavit," etc.—that the coroner is entitled to compensation for the services in question according to their reasonable worth. This section does not provide or undertake to provide for compensation. It simply directs how bills for services, for which compensation is due, but for which no specific fee is fixed, shall be made out. That is, applying the statute to the claim in suit, if there were a law to the effect that in addition to the regular fees fixed by statute, the coroner, for the services in question, should receive reasonable compensation, to be allowed by the board of county commissioners and paid out of the county treasury, he would have a claim for submission under this section. Since, however, there is no statute allowing compensation for such services, the coroner has no claim on this account, and it was properly disallowed.

If the decision in 3 Colo. App. 576, 34 Pac. 583, Board of County Commissioners v. Leonard, is in any particular in conflict with the foregoing views, it was to that extent overruled in Garfield County v. Leonard, supra, which states a rule in harmony with that here announced.

Petition for rehearing denied.

ALBI MERCANTILE CO. v. CITY AND COUNTY OF DENVER et al.

(Supreme Court of Colorado. April 7, 1913.)

1. EMINENT DOMAIN (§ 119*) — MUNICIPAL CORPORATIONS (§ 657*)—VACATING STREETS FOR PUBLIC IMPROVEMENTS—EFFECT.

The act of the city and county of Denver, authorized under its charter to construct viaducts and approaches thereto or cause the same to be constructed, in vacating a part of a street over which an approach of the viaduct shall be constructed, does not vest the fee of the street in abutting owners, but the fee remains in the city, and the use of the street for the work is not a taking of the property of the abutting owners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119; * Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

2. EMINENT DOMAIN (§ 274*)—CONSTRUCTION OF PUBLIC IMPROVEMENTS—INJUNCTION.

Where the fee of an abutting lot owner is not sought to be taken, he may not under the Constitution or under the statute of eminent domain enjoin the authorized construction of a viaduct or its approach on the street merely because the damages to his premises are not compensated in advance, provided the structure is erected under legislative and municipal authority.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by the Albi Mercantile Company against the City and County of Denver and others. There was a judgment of dismissal rendered on sustaining a demurrer to the complaint, and plaintiff brings error. Affirmed.

The city and county of Denver entered into a contract with its codefendants in error to construct what is commonly known as the Twentieth Street Viaduct, with an approach on Delgany street, which runs at right angles to Twentieth street. Plaintiff in error owns a lot abutting on Delgany street in front of which the approach on the latter street is constructed. On this lot a two-story building was located, in which plaintiff in error conducted a wholesale and retail mercantile business. Prior to the construction of the approach the plaintiff in error brought suit the purpose of which was to enjoin the defendants from constructing it. To the complaint the defendants demurred, on the ground that it did not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to equitable relief, or to any such relief as was sought and prayed for. This demurrer was sustained and, plaintiff having elected to abide by its complaint, its action was dismissed. To review the ruling on the demurrer and the judgment rendered, plaintiff has brought the case here on error.

The complaint, so far as material to consider, in addition to the facts above narrated, alleges that the charter of the city and county of Denver provides that a viaduct shall not be constructed unless the council shall have first provided for the vacation of such portion of the street upon the completion of the viaduct over and along which the viaduct is proposed to be constructed. The charter provisions upon which this allegation is based is section 297 of the charter, which is set out *hæc verba* in the complaint, and provides that the article of which it is a part shall not affect the power of the council to require railroad companies to construct viaducts and approaches over their tracks at their expense, and may direct such construction by ordinance. It also contains the following: "Provided, that no viaduct, bridge or tunnel shall be constructed under this section unless the council shall have provided for the vacation of the street upon the completion of such viaduct, bridge, or tunnel, throughout that portion thereof over, along or under which said public improvement is proposed to be constructed, the fee of the street to remain, nevertheless, in the city and county." The complaint then alleges that the city and county of Denver entered into the contract mentioned without having first provided for the vacation of Delgany street; that since entering into this contract with its codefendants it has vacated that portion of Delgany street in front of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff's premises by placing a fence across the street at Twentieth, and also at Twenty-First street, whereby the public and plaintiff are prevented from the use of that portion of Delgany street between such fences. Facts are then alleged from which it appears that the portion of Delgany street involved had been dedicated for use as a public street about 1873. It is then charged that by reason of the acts of the city and county of Denver, in fencing the portion of Delgany street mentioned, it has vacated that portion thereof, and that the title to that portion of the street to its center in front of plaintiff's premises has reverted to it, and that it now owns the fee thereof. It is alleged that defendants are engaged in constructing the approach on Delgany street; that thereby they have unlawfully entered upon the property of plaintiff; that if the construction of the approach is permitted, it will be impossible for any one to reach and enter plaintiff's place of business; that the light for its building will thus be obstructed; and (quoting from the complaint) "that the acts and contemplated acts on the part of the defendants and each of them constitutes a taking and damaging of private property for public and private use without just compensation, and without any attempt upon the part of the defendants, or any of them, to make any compensation whatever therefor; that no condemnation proceeding has been instituted, nor any steps taken for the purpose of ascertaining and paying to plaintiff the damages which it will sustain; that unless defendants are restrained from this unlawful taking and damaging of plaintiff's property and business, in violation of its rights under the Constitution of this state, this plaintiff will suffer great and irreparable loss, damage, and injury; and that it has no adequate and complete remedy at law."

The complaint concludes with a prayer that a temporary writ of injunction issue, restraining defendants from taking possession of plaintiff's property, or in any wise interfering with the possession thereof; "and from building or constructing or attempting to construct and build said viaduct and approach over and upon plaintiff's property, and that upon final hearing such injunction be made permanent; and for such other and further orders and relief as plaintiff may show itself entitled to, and for costs of suit."

Stark & Martin, of Denver, for plaintiff in error. Hughes & Dorsey and E. I. Thayer, all of Denver, for defendants in error Union Pac. R. Co. and Denver, N. W. & Pac. Ry. Co. E. E. Whitted and Robert H. Widdicombe, both of Denver, for defendants in error Chicago, B. & Q. R. Co. and Colorado & S. Ry. Co.

GABBERT, J. (after stating the facts as above). [1] The complaint appears to be

framed entirely upon the theory that the portion of the street in front of plaintiff's premises was vacated or abandoned; that for this reason the fee of the ground in front of its premises to the center of the street reverted to it, and the approach is therefore being constructed upon its land without provision having been made for compensating it for the value of the land taken, and resulting damages. This theory is not tenable. If the street was vacated as claimed, the purpose of so doing was to comply with the charter provision requiring the city authorities to provide for the vacation of the portion of the street over and along which the approach would be constructed. This, however, did not vest plaintiff with the fee of the street, as claimed, for the reason that, according to the express provision of the charter, the fee of the street, nevertheless, remained in the city; so that it is evident property belonging to the plaintiff would not be taken by the construction of the approach.

[2] The erection of this structure may have so impaired its ingress and egress as to entitle it to compensation for the injuries thus occasioned, but this right does not entitle it to an injunction under the averments of its complaint restraining the construction of the approach until such compensation has been paid. This proposition is so well settled in this jurisdiction that further discussion of it is unnecessary. In brief, where the fee of an abutting lot owner is not sought to be taken, he cannot, under the Constitution or under the statute of eminent domain, enjoin the construction of a viaduct or its approach on a street in front of his lot merely because the damages to his premises thus occasioned are not compensated in advance, provided the structure is being erected under proper legislative and municipal authority. *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *Denver, U. & P. Ry. Co. v. Bardsaloux*, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89; *Haskell v. Denver Tramway Co.*, 23 Colo. 60, 46 Pac. 121.

As was said in the case last cited, the plaintiff has mistaken its remedy. The above cases, it is true, relate to the construction of railroad and street car tracks; but the principal upon which they were decided is identical with the one applicable to the case at bar. The city has the unquestioned right to construct viaducts, or provide for their construction and approaches thereto. This is a lawful exercise of its authority which will not be interfered with by injunction, although property owners abutting a street upon which a viaduct or approach is constructed may have a right of action for damages.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

In re SMITH et al.

(Supreme Court of Colorado. April 7, 1913.)

1. JUDGES (§ 51*) — BIAS — APPLICATION FOR CHANGE—ESSENTIALS.

In presenting an application for calling in another judge on the ground of bias, it is necessary to set out the facts in detail upon which the alleged prejudice is predicated.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

2. CONTEMPT (§ 61*) — APPLICATION FOR CHANGE OF JUDGE—EVIDENCE.

The affidavits supporting an application for a change of judge were not of a character which could be regarded as contemptuous. An affidavit in contempt proceedings charged that the statements in the affidavit for change of judge were false and an attack on the character of the judge, and the answer in the contempt proceeding merely stated more in detail the facts relied on for a change and denied that the charges were false or maliciously made. *Held*, that the judge could not pronounce judgment without proof that the charges were made with a reckless disregard of the truth, or with the intention to reflect upon the honor, integrity, and character of the judge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 188-194, 196; Dec. Dig. § 61.*]

Error to District Court, Adams County; Charles McCall, Judge.

In the matter of contempt proceedings against George Allan Smith and others. From a judgment finding them guilty of contempt, they bring error. Reversed.

The purpose of this proceeding is to review a judgment of the district court adjudging Smith, Nordloh, and Morris guilty of contempt. The history of the proceedings which culminated in this judgment is, substantially, as follows:

An action was pending in the district court of Adams county against a former judge of that county to recover a considerable sum which, it was alleged, he had collected and retained in excess of the fees allowed by law. Smith, as attorney for the board of county commissioners of Adams county, who had instituted this action, appeared before the judge of the district in which that county is located, and stated that the commissioners thought he was biased; that they did not want to file a formal application; that the friendly relations between the bench and bar required that a matter of this kind should first be suggested to the court, and the court, if possible, induced to act without a formal showing; that he (Smith), as attorney for the board, hoped he would be relieved of the necessity of making a formal showing, and that the request for another judge to try the case to which reference has been made would be granted on the oral statement, that the board felt the judge was biased; that he understood that if the court required a motion to be filed, it would be necessary to set forth in detail the matters which gave rise in the minds of the commissioners to a be-

lief of bias, which they did not want to do, unless required to make a formal showing. The judge declined to entertain the matter on suggestion, and stated that a formal showing would have to be made. Thereupon Smith, as counsel for the board of county commissioners, presented to the judge a motion for a change of venue in the case, which was verified by Nordloh and Morris, members of the board of county commissioners of Adams county. Smith had not disclosed the contents of this motion, nor the affidavit supporting it, to the attorneys for the defendant, and stated that if the judge would read the same, he believed it would recall to his mind a number of matters that, possibly, he had forgotten, and the court would grant the application for another judge, without counsel formally filing it. The judge declined to read the application, and ordered that a copy be served on the attorneys for defendant in the action mentioned, and stated that he would hear the application on a date then fixed. On this date the judge asked respondent Smith if he had any matters to present, when Smith stated he desired to urge the application for the calling in of another judge to try the case; that he supposed his honor had read the motion, to which the judge stated, in substance, that he had not, and that if Smith had anything to present, he would have to present it in a formal way. The respondent then asked the judge to give him the motion, which had been in his possession since it was first presented, and thereupon read the application to the court, in a respectful manner. When he had finished reading the motion, the court promptly denied the application, and thereupon appointed Mr. Hilliard, an attorney, to prepare and file an affidavit, setting out all the facts in relation to the application for another judge, so that the court might, upon examination, determine if the application were contemptuous. Mr. Hilliard did so, and later filed an information and affidavit against the respondents for contempt. This information and affidavit contained a copy *hæc verba* of the motion and affidavit, setting out in detail the matters upon which the board relied in support of its application for some judge other than the judge of the district to try the case against the county judge. We do not deem it necessary to set out this motion and affidavit in detail; it being sufficient to say that, in our opinion, it did not contain any matters, statements, or charges which were contemptuous *per se*. The information filed by Mr. Hilliard stated that the affidavit of the respondents to which we have referred was designed, intended, and calculated to incite public contempt for the court and the judge thereof, and for the purpose of leading the people to distrust the fairness and impartiality of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

decisions of the court, and that, save and except certain matters, it was false, unwarranted, unfounded, and wickedly and maliciously intended to, and did, constitute an attack upon the honor, integrity, and purity of the court and judge thereof. Upon the filing of this information a citation was issued, requiring respondents to show cause why they should not be adjudged guilty of contempt.

At the time fixed in the citation the respondents appeared and filed two motions, one to quash the information and affidavit, and the other to quash the citation, both of which were overruled. Respondents then answered, wherein they set out, more in detail, the matters relied upon and stated in their affidavit in support of the application for another judge to try the case in which it was filed. This answer is quite long, and contains nothing which, in our opinion, would constitute contempt *per se*. In this answer the following appears: "Your respondents respectfully show to the court further, in answer to the statement contained in the alleged affidavit and information filed by Benjamin C. Hilliard, that said motion was not filed for any unworthy purpose whatever, nor for the purpose of intimidating or coercing the court or the judge thereof, in the decision of the suit wherein said motion was filed, nor was the same wickedly or maliciously filed, nor was it made, sworn to, or filed for the purpose of reflecting upon said court or judge, or to bring it or him into contempt or disrepute, nor for any purpose other than your respondents allege properly and in accordance with the law and practice of the court, presenting honestly and in good faith facts necessary to be detailed in order to support their showing that, in their opinion, the judge of this court was biased in said cause." They further stated that they believed the facts stated in their motion to be true, and believed the conclusion they drew therefrom, that the court was biased, was true, and justified by the facts within their knowledge. It further contained a recitation of the steps taken by Mr. Smith in applying to the judge for another judge to try the case, as above set out. This answer was duly verified. Thereupon Mr. Hilliard, on the information filed by him, and the answer of respondents, moved that they be adjudged guilty of contempt and punished accordingly. This motion was sustained, and judgment rendered finding respondents guilty of contempt, and as a punishment, assessed a fine against each of them, and also that they be confined in the county jail at hard labor for periods ranging from 5 to 15 days.

N. Walter Dixon, of Denver, for plaintiffs in error.

GABBERT, J. (after stating the facts as above). [1] It will be observed that the

judgment of which plaintiffs in error complain is based entirely upon the pleadings. To properly present the application for another judge to try the case in which the application was filed, it was necessary, in order to comply with the decisions of this court, for counsel representing the members of the board of county commissioners to set out the facts in detail upon which the alleged prejudice and bias of the judge of the district was predicated. *Thomas v. People*, 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569.

[2] Doing so did not constitute a contempt *per se* when it appears, as we have stated, that the statements made in the affidavit supporting the application were not of a character which could be regarded as contemptuous (*Mullin v. People*, 15 Colo. 437, 24 Pac. 880, 9 L. R. A. 566, 22 Am. St. Rep. 414), so that these statements would not constitute a contempt unless it was established by evidence that they were made with a reckless disregard of the truth, or with the intention to reflect upon the honor, integrity, and character of the judge. It was therefore necessary to inquire and ascertain the meaning and intention of the respondents in making the statements in the application upon which the proceedings were based. *Thomas v. People*, *supra*; *Mullin v. People*, *supra*.

As preliminary to this procedure, the affidavit of Mr. Hilliard appended to the information charged that these statements in particulars were false, unwarranted, and wickedly and maliciously intended to constitute an attack upon the honor and integrity of the court. Had evidence been presented establishing these allegations, the respondents might properly have been adjudged guilty. This procedure was not followed, as the judgment was based entirely upon the pleadings, consisting of the information, containing a copy of the statements made in the application, and the answer; the latter merely stating more in detail the facts related in the application filed by the respondents. This answer, in effect, denied that these statements were false, or wickedly or maliciously made, or intended as an attack upon the honor and integrity of the court. It appears, then, that there was no proof of the charge upon which the proceedings were based. Without such proof, the pleadings not containing any statements which were contemptuous *per se*, the court, in pronouncing judgment, acted without and beyond its jurisdiction.

The judgment of the district court is reversed and the cause remanded, with directions to overrule the motion for a judgment on the pleadings, and for further proceedings according to law.

Reversed and remanded.

MUSSER, C. J., and HILL, J., concur.

PARK et al. v. McKEE et al. †

(Court of Appeals of Colorado. Feb. 10, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 45*) — PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the reformation of an agreement transferring water shares, *held* to sustain a decree reforming the agreement so as to read "five water rights," instead of five "shares of water."

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. FRAUD (§ 58*) — ACTION FOR DAMAGES — SUFFICIENCY OF EVIDENCE.

Evidence upon a cross-complaint seeking damages for misrepresentations as to the value of a stock of goods *held* sufficient to sustain a judgment against the cross-complainant.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

3. JUDGMENT (§ 256*)—GENERAL FINDINGS—SUFFICIENCY TO SUPPORT JUDGMENT.

General findings in a suit to reform an agreement for the transfer of water rights, with a cross-action for damages for plaintiff's misrepresentations as to the value of a stock of goods taken in exchange, were sufficient to support a decree for plaintiff, although they were silent as to any affirmative finding on the cross-complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

4. PLEADING (§ 280*) — SUPPLEMENTARY PLEADING—DELAY.

In a suit for reformation of an agreement transferring water rights, with cross-action for damages for misrepresentation as to the value of a stock of goods, the overruling of defendant's supplemental plea, filed more than a year after the original answer and setting up matters in bar which must have been known then, was not error.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 842-846; Dec. Dig. § 280.*]

Appeal from District Court, Larimer County; James E. Garrigues, Judge.

Action by Mary J. McKee and others against George R. Park and others, with cross-complaint by defendant Park. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lee & Aylesworth, of Ft. Collins, for appellants. John H. Simpson, of Loveland, for appellees.

CUNNINGHAM, P. J. The appellees here, as plaintiffs below, brought their action to have a certain contract or agreement, hereinafter referred to, reformed, and as reformed specifically performed, and for damages.

The allegations of the complaint were, in substance, that Park and Bell, on December 31, 1904, entered into a contract or agreement wherein and whereby it was provided that Park should transfer to Bell a tract of land situate in Morgan county, together with certain water rights, in exchange for a stock of merchandise which Bell was to transfer by bill of sale to Park. Pursuant to this agreement Park deeded the land to Bell, Bell transferred the stock of merchandise to Park,

and the latter took possession of the same. Later Bell transferred the real estate and the water rights, whatever they may be, to James M. McKee and Ed. F. Rose. McKee having died, his widow, Mary J., was appointed administratrix of his estate. The other McKees are heirs of James. Shortly before this suit was instituted, Bell also transferred or assigned the original agreement between himself and Park, which provided for the exchange of the land and water rights for the stock of merchandise, to the administratrix and Rose. This agreement contains the following clause pertaining to the water rights that were to be transferred by Park to Bell, "Whereas the first party [Park] has this day agreed and does hereby trade and sell to the second party [Bell] * * * five shares of water in the Weldon Valley Ditch Company for the irrigation of the same," meaning for the irrigation of the land which Park was trading to Bell. It was developed on the trial, and was not disputed, that by some method of computation not necessary here to explain eight *shares* of water in the Weldon Ditch Company constituted one water *right* in that company. (The italics, wherever used throughout the opinion, are ours.) This distinction between water shares and water rights was well understood by those interested in the ditch. It was alleged by the plaintiffs that the original understanding between Park and Bell, at the time of the preparation of the written agreement from which we have quoted, was that Park was to transfer to Bell as a part of the agreement five water *rights*, and that the word "*shares*," as the same appeared in the agreement, was used inadvertently, and did not express the intention of the parties. Park transferred four water *rights*, or thirty-two shares of water in the ditch company, which is the equivalent of four water rights, but refused to transfer the additional eight shares or the additional one water right, which the plaintiffs insisted it was his duty, under the agreement as it was intended by both parties to have been drawn, to do. The Ditch Company being but a nominal defendant, its answer and part in the trial need not be considered. After various pleadings Park filed an answer containing a cross-complaint, denying that it was intended or that the agreement should have read "five water rights," instead of "five water shares," but alleged, on the contrary, that the agreement expressed the true intention and purpose of the parties at the time it was made. In his cross-complaint Park charged that Bell represented and guaranteed the stock of goods to be worth at least \$6,000, whereas it was worth not to exceed \$4,550. He therefore prayed, in his cross-complaint, for damages against the plaintiffs in the sum of \$1,450. He also asked to have the one water right quieted in him; that is, the one water

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 14, 1913.

right or eight shares which by their complaint the plaintiffs were seeking to recover. The decree of the court was in favor of plaintiffs, and was based upon general findings. The agreement between Park and Bell was reformed so as to read "five water rights," instead of "five shares of water," and the decree further required "that defendant George R. Park do deliver to the clerk of this court the certificate of stock, standing for and representing said one water right, duly assigned to the plaintiffs herein, and that the clerk of this court thereupon deliver the same to the said plaintiffs."

[1] 1. The evidence offered by the defendant Park is amply sufficient, in itself, to sustain the decree of the trial court reforming the contract. After McKee became interested in the land, he appears to have written Park concerning the one water right which the latter had not yet transferred, and which is the bone of contention in this case. Replying to McKee, under date February 12, 1906, Park wrote as follows: "I do not think I will transfer all of the rights until George C. Bell settles with me for what he owes. I hold his note, and also a small account amounting to somewhere about \$70, and I do not know of any other way to collect same but by holding some of the water rights."

* * * Of course I don't know anything about who bought the land, but will immediately turn what water belongs to the place over upon the payment of what the party owes to me whom I sold the place to"—meaning, of course, Bell, as it was Bell to whom he sold the place. Park further testified, while being examined by the plaintiffs under the statute, as follows: "Q. When this contract was sent you, and you found the words in there 'five shares,' did you intend to deliver to Mr. Bell simply five shares or five rights? A. I intended nothing that I can remember; I proposed to sign up the contract my son Robert made, whatever it was. You have the documents before you, the deed and the contract. Make all you can of them." Robert Park, the son of the defendant, represented his father in the trade, and the defendant George Park testified: "I told him [meaning Bell] that whatever my son Robert did there I would stand behind him." The son testified: "As far as I am concerned, five shares in the contract means five water rights. I reached the conclusion to turn over the five water rights after we had come to Hill's office. Mr. Hill got his information from me in drawing the contract [meaning the original agreement here in dispute], and it was an error on the part of the stenographer in getting 'water rights' and 'water shares' twisted. There is no doubt but what Mr. Hill gave it to the stenographer right, but there was some mistake in taking it down." (Judge Hill was the attorney who drew the original agree-

ment between the parties.) Appellee Bell also testified unequivocally that water rights, instead of water shares were what was in the contemplation of both parties, and ought to have been included in the agreement.

[2] 2. The best that can be said for the defendant Park's contention, made in his cross-complaint, that Bell had misrepresented the value of the goods is that the evidence on that point was conflicting. Moreover, it is not consistent with the statements contained in his letter to McKee, written some 14 months after he had taken possession of the stock of goods, from which we have already quoted. It will be observed by reading this quotation that his only claim against Bell at that time was based upon a note and a small account, and that he was holding the water shares or water right to secure the payment of these two items. According to his testimony, if there was any discrepancy in the value of the goods as represented by Bell, and as found by invoice, this fact was known to Park long before the time when he wrote the letter to McKee.

[3] 3. Complaint is made in the brief filed on behalf of appellant Park that the trial court's decree is silent as to any affirmative finding on the defendant's cross-complaint, and for this reason, it is insisted, the case must be reversed. This contention has been disposed of by us in *Pace v. Cline*, 22 Colo. App. 254, 125 Pac. 128, contrary to the contention of the appellant.

[4] 4. We have not overlooked the further objection of appellant, based on his plea in abatement, or in bar, which was injected into the case in the form of a supplemental answer, filed more than a year after the filing of the original answer. The matters set up in the supplemental plea in bar must have been quite as well known in August, 1907, when the original answer was filed, as in September, 1908, when the supplemental plea was filed. The trial judge aptly remarked on the trial that the 'record is so muddled up that I can't tell anything about it,' meaning the contention that there had been a previous adjudication between the parties involving the same matter, which purported adjudication formed the basis for the plea in bar. We cannot say that the trial court committed error in overruling the plea in bar.

The judgment of the trial court is affirmed.

ABERNATHY et al. v. WRIGHT.

(Court of Appeals of Colorado. Jan. 21, 1913.
On Motion to Re-Enter as Pending on
Error, March 10, 1913.)

APPEAL AND ERROR (§ 14*)—DISMISSAL OF
ERROR—WRIT OF ERROR—STATUTES.

Where an appeal was dismissed by the Court of Appeals after the taking effect of *Sess. Laws 1911, c. 6*, regulating appeals and repealing the provision of the Code of Civil Pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cedure, which permitted a cause to be entered as pending on error, when an appeal has been dismissed for lack of jurisdiction, such appeal, though dismissed without prejudice to a writ of error, could not be entered as pending on error in the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.*]

Appeal from District Court, Boulder County; Harry P. Gamble, Judge.

Action between Tom Abernathy, Jr., and another and Robert B. Wright. From a judgment in favor of the latter, the former appeal. Dismissed. Application for a writ of error and supersedeas denied.

For former decision denying motion to dismiss, see 127 Pac. 450.

Miller, Barnd & Williams, of Lafayette, for appellants. Samuel H. Thompson, of Denver, for appellee.

PER CURIAM. Appeal dismissed, without prejudice, at cost of appellants to be taxed on motion of appellee.

Motion to Re-enter as Pending on Error, and for Supersedeas.

On motion of appellee, the appeal herein was dismissed, without prejudice to the rights of appellants, if any they had, to sue out a writ of error. Appellants now ask to have the cause re-entered on error, and for a supersedeas. An attempt was made to perfect the appeal herein by filing an appeal bond in the district court October 10, 1911. At that time, chapter 6, Session Laws of 1911, by which the right to take an appeal to the Supreme Court in any case was repealed, and which also repealed the provision of the Code of Civil Procedure which permitted a cause to be re-entered as pending on error, when dismissed, as an appeal for lack of jurisdiction, was, and for a long time prior thereto had been, in full force and effect. In our opinion, no appeal taken, perfected, or attempted to be perfected after that act took effect, can be re-entered as pending on error in this court or in the Supreme Court. When we dismissed the former appeal, without prejudice to a writ of error, we did not contemplate the suing out of a writ of error from this court, but from the Supreme Court.

For the reason given, the motion is denied.

PELTON v. MUNTZING.

(Court of Appeals of Colorado. March 10, 1913. Rehearing Denied April 14, 1913.)

1. TAXATION (§ 662*)—TAX DEEDS—NOTICE—PROOF. Under Mills' Ann. St. §§ 3883-3885, requiring notice of publication of sale for delinquent taxes and the posting of notice for not less than four weeks before sale, and that the printer publishing the notice shall make affidavit of publication and the treasurer an affidavit of posting of notice, a certificate of the county treasurer reciting that lands were advertised in a newspaper on designated dates

is an extrajudicial statement and must be disregarded in a suit to try title against a claimant under a tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1342; Dec. Dig. § 662.*]

2. TAXATION (§ 810*)—ACTION TO TRY TITLE—EVIDENCE—NOTICE—SUFFICIENCY.

In a suit to try title against a claimant under a tax deed, evidence held to support a finding that the notice and lists were advertised in the manner and for the length of time prescribed by law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS OF FACT—CONCLUSIVENESS.

In an action to quiet title against a tax deed, a finding of fact, supported by evidence, that the notice of the tax sale and the list of property to be sold were advertised in the manner, and for the time, stated in the publisher's affidavit, and as required by law, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

4. TAXATION (§ 662*)—ACTION TO TRY TITLE—NOTICE OF SALE—PUBLICATION—PROOF.

The affidavit of a newspaper publisher that the notice and list were published in the newspaper once each week for four successive weeks, the last of which publication was made prior to a designated date, the date of sale for delinquent taxes conforms to Mills' Ann. St. § 3883, and is not defective for not stating the date of the first publication.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1342; Dec. Dig. § 662.*]

5. TIME (§ 9*)—COMPUTATION—EXCLUDING FIRST OR LAST DAY—NOTICE OF TAX SALE—PROOF.

The affidavit of a county treasurer averring that on or before September 6, 1891, he posted a notice of sale of real estate for delinquent taxes, and that the notice of sale and delinquent tax list remained posted for four consecutive weeks next preceding the commencement of sale on October 5th, shows the posting of notice and list for not less than four weeks before sale, as required by Mills' Ann. St. § 3883, though September 6th was on Sunday, so that the following day would be the first day of posting, since, if September 7th is included and October 5th excluded, there would remain 28 full days, or, if September 7th be excluded and October 5th included, the statutory notice would be given.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

6. TIME (§ 9*)—COMPUTATION OF TIME—EXCLUDING FIRST OR LAST DAY.

In making the computation of time, it is proper to include the first day and exclude the last, or exclude the first and include the last.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

7. SUNDAY (§ 30*)—OFFICIAL ACTS—POSTING NOTICE OF TAX SALE.

The fact that a notice of sale of real estate for delinquent taxes was posted on Sunday will not render the notice ineffective, where, excluding Sunday and either the following day or the day of sale, the notice remained posted for full 28 days before the sale.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 73-85; Dec. Dig. § 30.*]

8. TAXATION (§ 788*)—ACTION TO TRY TITLE—TAX DEED—BURDEN OF PROOF.

A plaintiff in a suit to quiet title against a tax deed, valid on its face and admitted in evidence without objection, has the burden of establishing a failure of the revenue officers to follow the statutes in proceedings culminating in the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.*]

9. TAXATION (§ 810*)—TAX SALES—TITLE.

Where plaintiff in a suit to quiet title against a tax deed, under which defendant claimed, did not offer in evidence as a muniment of title a subsequent tax deed, and it appeared that two other subsequent tax sales had been redeemed by plaintiff's predecessor and had not ripened into deeds, plaintiff could not recover on the theory that three sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sequent sales for delinquent taxes extinguished defendant's title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1606-1608; Dec. Dig. § 810.*]

10. TAXATION (§ 749*)—TAX DEEDS—RIGHT TO APPLY. Under Rev. St. 1906, § 5726, providing that the purchaser at a tax sale at any time after three years may demand a deed, a purchaser or his assignee is vested with the right to demand a deed at any time after three years from sale, at least within the period of prescription, and a delay of 15 years in taking out a deed will not invalidate it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1496; Dec. Dig. § 749.*]

11. APPEAL AND ERROR (§ 1073*)—DECREE—CONFORMITY TO ISSUES—PREJUDICIAL ERROR.

Where, in a suit to quiet title against a tax deed, defendant prayed for general relief, and at the trial the issue was squarely presented as to who was the owner and entitled to the property in dispute, a decree that defendant was the owner and quieting title in him as against plaintiff was not prejudicial to plaintiff because it recited "that the action be dismissed."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Isaac Pelton against August Muntzing. From a judgment for defendant, plaintiff appeals. Affirmed.

Isaac Pelton, of Akron, for appellant. Egbert More, of Akron, for appellee.

HURLBUT, J. December 30, 1906, in the county court of Washington county, appellant, as plaintiff, instituted suit against appellee, defendant, to quiet title to land in said county. Plaintiff was successful, and the case was appealed to the district court. The cause was tried in the district court and resulted in a decree for defendant. The decree recites that defendant was the sole and absolute owner of the land in controversy by virtue of the tax deed of May 17, 1906. At the trial said deed of May 17th was admitted in evidence without objection. Plaintiff in his complaint pleaded that defendant claimed to be the owner of the premises by virtue of said tax deed, but alleged the same was void and conveyed no title, for the reason that there was not published in any newspaper a notice of the delinquent tax sale, nor any list of such delinquent taxes for the time and in the manner required by law; that no publisher's affidavit of printing notice and list was made and filed with the treasurer; that the treasurer did not make and deposit with the county clerk a sufficient affidavit showing the posting of notice of sale; and that no copies of a newspaper containing such list and notice were delivered by carriers or mail to the subscribers of such paper. The pleadings formed an issue upon these objections to the tax deed. By a careful reading of the record, we are satisfied the trial court did not err in finding against plaintiff upon these issues, as sufficient proof is wanting. Section 3883, Mills' Annotated Statutes, provides that the treasurer shall give notice of contemplated sale of real property for delinquent taxes by publishing the same once a week for not less than four weeks in a newspaper of his county, and shall also post a printed or written notice in a conspicuous place on or near the outer door of his office for not less than four weeks before the sale; section 3884 that the printer who published such notice shall transmit to the treasurer an affidavit of such publication; and section 3885 that the treasurer shall make or

cause to be made an affidavit of the posting of such list and notice at his office as aforesaid, and he shall deposit such affidavit, together with the said affidavit of the publisher, in the office of the county clerk of the county, to be there preserved. The record shows that the affidavit of the publisher, sworn to October 3, 1907, and the affidavit of the treasurer, sworn to September 12, 1907, both in substantial conformity with the statute above mentioned, were filed with the county clerk and recorded on October 8, 1907. Section 3883 reads in part as follows: "The treasurer shall give notice of the sale of real property by the publication thereof once a week for not less than four weeks, in a newspaper in his county, * * * the first of which publications shall be at least four weeks before the day of sale."

[1] The affidavit of the publisher does not purport to state the date of the first publication of the notice of sale, nor does the statute require it; but there appears in evidence a certificate of H. S. George, county treasurer, made December 3, 1891, which contains this clause: "Said lands and lots were advertised in the Pioneer Press, a newspaper published in the town of Akron, Washington county, and state aforesaid. Said tax list appeared in the issue of the Pioneer Press on September 11, 18, 25, and October 2, 1891." Counsel says that this conclusively shows the first publication of the notice of tax sale to have been on September 11th. It is not necessary to consider this contention. The certificate is not evidence. The statute did not require any such certificate from the treasurer. It is an extrajudicial statement on his part and should be disregarded.

[2] The publisher's affidavit recites that the "notice and list were published in said newspaper once in each week for four successive weeks, the last of which publications was made prior to the 5th day of October, A. D. 1891." This averment is supported by the oath of the treasurer, as required by statute. Its absence from the affidavit would render the tax deed wholly void. At the trial, plaintiff's own witness, who had formerly been connected with the paper, would not testify that September 11th was the first day on which the list and notice of sale were published. We also observe that the affidavit of H. S. George, treasurer, filed with the clerk, stated that "on or before the 6th day of September, A. D. 1891," he posted "a true, full, and complete printed notice of sale of lands in said county of Washington, * * * in and for the year 1891, * * * in the office commonly used as the office of treasurer of said county." If any presumption is permissible from these recitals, it would be that the first publication of the notice was on or before September 6th, otherwise no printed notice thereof would have been available for posting.

[3] The tax deed confirming title in defendant having been admitted in evidence without objection, if valid on its face, under section 3902, Mills' Annotated Statutes, was prima facie evidence in all courts "that the property was advertised for sale in the manner and for the length of time required by law." As to whether or not the notice and list were advertised in the manner and for the time stated in the publisher's affidavit, and as required by law, was an issue before the court which was resolved in favor of defendant; and, sufficient evi-

dence appearing from the record to sustain such finding, it will not be disturbed on appeal.

[4] Appellant says, however, that the evidence shows the first publication of the notice of tax sale did not occur four weeks before the day of sale as required by statute, and that the treasurer did not post the notice and tax list for not less than four weeks before the sale. As to these contentions, the affidavit of the publisher strictly conforms to the statute and closely follows the form of affidavit prescribed therein. The form does not require the affiant to state the date of the first publication of the notice and list. That part of the form material to notice (section 3884, Id.) reads as follows: "I, A—— B——, publisher (or printer) of the ——, a —— newspaper, printed and published in the county of ——, and state of Colorado, do hereby certify that the foregoing notice and list were published in said newspaper, once in each week for —— successive weeks, the last of which publications was made prior to the —— day of ——, A. D. ——." Although the form does not require a statement that the first publication of the list and notice was at least four weeks before the day of sale, section 3883, Id., requires such publication to be so made. After the tax deed had been admitted in evidence without objection, being good on its face, defendant was entitled to the full benefit of the statutory prima facie presumption that "the property was advertised for sale in the manner and for the length of time required by law." This question was one of the issues and was decided in favor of defendant, and there is no evidence that we can find showing that the first publication was not made at least four weeks before sale.

[5] It is also asserted that the evidence shows no sufficient affidavit of posting was made and filed with the treasurer, and that, as a matter of fact, no sufficient posting of the list and printed notice was made by him. The treasurer's affidavit of posting recites that "on or before the 6th day of September, A. D. 1891," he "posted a true, full, and complete printed notice of sale," etc., and "that the said notice of sale and delinquent tax list remained so posting could be legally made on that day, then the commencement of the sale," etc. Now if it be true, as asserted by appellant, that the 6th day of September was on Sunday, and no posted for four consecutive weeks next preceded it should be excluded from the computation concerning the length of time the notice was posted. If the physical act of the treasurer in posting the notice on Sunday was of no validity, as contended for by counsel, then the 7th day of September should be taken as the first day of such posting. The affidavit shows that it remained posted that day and every day thereafter until the day of sale, October 5th. If we include the 7th of September and exclude the 5th of October, there remain 28 full days, or four weeks of time, before midnight of October 4th, at which time the day of sale began. If we exclude the 7th of September and include the 5th of October, the day of sale, we still are within the statute and the required four weeks' notice had been given, as held by the Supreme Court (post). For many years it has been a vexed question and much mooted in the courts as to what is the proper rule in determining the time necessary to constitute notice in cases of this kind.

[6] Our own Supreme Court, in *Stebbins v.*

Anthony, 5 Colo. 348, and *In re Tyson*, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472, has adopted the rule that, in making the computation of time, it is proper to include the first day and exclude the last, or exclude the first day and include the last.

[7] Appellant's counsel further says that, if the notice referred to by the treasurer in his affidavit was posted on Sunday, it was without the least efficacy, and cites *Schwed v. Hartwitz*, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221. The question in that case arose as to whether or not a notice of tax sale published only in the Sunday edition of a daily paper was a sufficient publication to satisfy the statute. The court held it was not. No such situation arises here. The statute we are considering contemplates a single act of posting a notice by the treasurer in a certain place within a prescribed time, and imposes on him the further duty to see that it remains so posted until the day of sale. The purpose of the statute is to give the fullest publicity to the notice of tax sale and list of delinquent taxes. As appears from the affidavit, any citizen or taxpayer could have seen this notice posted at the treasurer's office on the 7th day of September and every day thereafter until the day of sale, and, if four weeks intervened from the 7th day of September to the day of sale, the statute was fully conformed to in that respect.

[8] Appellant appears to have entirely overlooked the fact that the burden of proof was on him to establish the failure and omission of the revenue officers to follow the statute in the proceedings which culminated in the tax deed in question. The tax deed was admitted in evidence without objection and was good on its face and not subject to attack on any grounds other than those pleaded by plaintiff as vitiating the same. The only publication in evidence containing a description of the land in issue was a printed sheet which appellant's attorney designated as the "Akron Pioneer Press Supplement." It was admitted without objection. Not a scintilla of evidence, however, can be found in the record showing when it was published, or whether it was published separately or at the time and in connection with the regular edition. The record is silent as to whether it was published more than once or once a week for four successive weeks prior to date of sale, or whether or not the first publication thereof was at least four weeks before the day of sale. The affidavit of publication states that the notice and list were published in the "Akron Pioneer Press" once a week, etc. Not a word of testimony shows the contrary. Not a single copy of the "Akron Pioneer Press," published within four weeks of the sale, was offered in evidence. If such had been offered, an inspection of the same would have disclosed the presence of the notice and list in its columns, or their absence therefrom. In fact, no evidence is discoverable from the record which sustains any of the averments of the complaint which challenge the validity of the tax deed by reason of failure to properly advertise the sale, or failure to make and file affidavits required by statute. Taken as a whole, plaintiff's evidence tends to support defendant's case.

Mr. Pickett, plaintiff's chief witness, testified as follows: "Q. What paper were you either the editor or publisher of at that time? A. Akron Pioneer Press. Q. Mr. Pickett, in the year 1891, how many times was the delinquent list published in the Akron Pioneer

Press? A. My recollection is it was four times."

[9] The record here shows that one Emerson was the purchaser of the property at the tax sale on October 5, 1891, for the delinquent taxes of 1890. The certificate of purchase was issued that day, and some 15 years afterwards, viz., May 15, 1906, Emerson assigned said certificate to appellee, who secured the tax deed and recorded the same May 17, 1906. It seems that, subsequent to the date of sale, the property was sold at two different times for delinquent taxes, but redemption was made in each case by appellant's predecessor. The land was also sold in 1895 for the delinquent taxes of 1894. Upon this sale a tax deed was afterwards issued to one Lindbeck. At the trial no effort was made whatever to put this deed in evidence as supporting title in Lindbeck, appellant's grantor. Appellant contends that, under this state of the record, the three subsequent sales for delinquent taxes extinguished Emerson's lien upon the property. There might be something in this contention if appellant were here relying upon the Lindbeck tax deed and had the same in evidence showing on its face a good title. Such, however, is not the case. The Lindbeck deed is not set out in the abstract; nor was it offered in evidence as a muniment of title. It is not entitled to any consideration as against appellee's title. The two other tax sales, having been redeemed from and not having ripened into deeds, in no way weaken appellee's title under his tax deed.

[10] Appellant also asserts that appellee abandoned his right to procure the tax deed by reason of the long period of time intervening between the sale and execution of the deed. We are not referred to any statute or decision of this state supporting his contention in that behalf. Section 5726, Revised Statutes 1908, provides, among other things, that: "At any time after the expiration of the term of three years from the date of the sale of any land (or interest in land or improvements thereon) for taxes, under the provisions of this act on demand of the purchaser * * * the treasurer then in office shall make out a deed for each such lot, parcel, interest or improvement so sold and remaining unredeemed, and deliver the same to such purchaser (or lawful holder of such certificate or order). * * * Under this provision of the statute, the purchaser or his assignee is vested with the right to demand his deed any time after three years from sale, at least within the period of prescription.

[11] It is further asserted by appellant that the decree in terms dismissed the action and at the same time decreed the defendant to be the owner of the premises in dispute, and further quieted the title to the same in defendant as against plaintiff. This, it is claimed, renders the decree void. We see no merit in this contention. The answer pleaded title in defendant and in its prayer asked for general relief. At the trial the issue was squarely presented as to who was the owner and entitled to the property in dispute. Each party in his prayer asked that the title to the same be quieted in him. The court, having found in favor of defendant, decreed to him full relief, which the evidence and proof showed him to be entitled to. The decree was right and administered substantial justice under the issues, and the mere recital therein "that the action be dismissed" was in no way prejudicial to appel-

lant's rights. Plaintiff, having challenged the validity of the tax deed by reason of the defects pleaded by him, assumed the burden of sustaining his contention by sufficient proof. In this we think he failed.

Finding no error in the record, the judgment will be affirmed.

JOHNSON v. FIRST NAT. BANK OF DENVER.

(Court of Appeals of Colorado. March 10, 1913.)

1. BANKS AND BANKING (§ 152*)—INJUNCTION (§ 5*)—CERTIFICATES OF DEPOSIT—MISTAKE—EVIDENCE.

Evidence held to warrant a finding that a bank receiving a deposit of \$35 issued by mistake to the depositor a certificate of deposit for \$315, authorizing an injunction to compel the surrender of the certificate on the bank offering to deliver a certificate for the amount of the deposit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 336, 465-482; Dec. Dig. § 152;* Injunction, Cent. Dig. § 4; Dec. Dig. § 5.*]

2. JURY (§ 12*)—ACTION AT LAW—RIGHT TO JURY.

A defendant in an action at law is entitled, as a matter of right, to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 27-34, 82, 99, 101, 103; Dec. Dig. § 12.*]

3. TRIAL (§ 374*)—TRIAL BY COURT—SUBMISSION TO JURY—VERDICT.

Where a jury is had in a suit in equity the verdict is merely advisory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 884; Dec. Dig. § 374.*]

4. JURY (§ 14*)—LEGAL OR EQUITABLE ACTION.

A complaint in an action by a bank alleging the issuance by it of a certificate of deposit for \$315 to defendant depositing only \$35, its inability to induce him to surrender the certificate or to permit its correction, the insolvency of defendant, and his threatening to negotiate the certificate, and offering to deliver to the depositor a certificate for \$35 and praying for a mandatory injunction requiring the depositor to deliver the certificate, and for a temporary injunction restraining the transfer of the certificate, states a cause of action in equity, and the bank, to recover, must establish the mistake alleged and procure the correction of the outstanding certificate if remaining the property of the depositor.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by the First National Bank of Denver against Nels Johnson. There was a judgment for plaintiff, and defendant brings error. Affirmed.

O. N. Hilton and Caesar A. Roberts, both of Denver, for plaintiff in error. Hughes & Dorsey and Barnwell S. Stuart, all of Denver, for defendant in error.

CUNNINGHAM, P. J. Johnson, plaintiff in error, to whom we shall hereafter refer as defendant, on March 30, 1907, entered the banking house of the defendant in error, to whom we shall refer as plaintiff, where and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

when he paid a certain sum of money to one of plaintiff's tellers and received therefor a certificate of deposit in the sum of \$315. The controversy out of which this action grows arises over the contention as to the amount of money actually paid to the teller by defendant. Plaintiff contends that it received but \$35, while the defendant insists that he paid \$315, the full amount of the certificate of deposit issued to him. When defendant delivered his money to the teller, that official filled in a partly printed slip or ticket by writing certain figures thereon and placing an initial letter indicating that a certificate of deposit was desired, and passed the same to a clerk of the bank. Thereupon the clerk wrote out a certificate of deposit to W. J. Johnson for \$315, and, after having the same signed by a third official of the bank, handed it, together with the ticket which he had received from the teller, back to the teller, who, looking at the ticket, called out the name N. J. Johnson, whereupon the defendant stepped up and received from the teller the certificate of deposit for \$315, and left the bank. At the close of the day the teller made up his books, which corresponded with his cash. The clerk likewise made up his account of the day's business, and, by comparing the same with the teller's account, it was at once discovered that the clerk's account showed that he had issued drafts to the amount of \$280 in excess of what the book or account of the teller indicated, whereas they ought to have corresponded. Thereupon the teller, in checking over the clerk's account with the tickets which he had handed to and received back from the clerk, discovered, as he says, that the Johnson ticket was meant by him for \$35 only, and the clerk had read it \$315. Thus the discrepancy, on the theory of the plaintiff, was explained. Promptly the bank wrote two letters, addressed to parties by the name N. J. Johnson, who the directory showed lived in different parts of the city. One letter was returned to the bank with the notation that the party had moved. The other letter, addressed to the street number where the defendant had lived for many years, was never returned to the bank, although the return card of the bank was upon the envelope so addressed. This letter the defendant denies ever having received. A few days later a representative of the bank called upon the defendant and advised him that an error had been made in his certificate of deposit, and asked him to come to the bank. This the defendant declined to do, and disputed the statement that there had been any error, or, if so, that the error "was not on him," to use his language. Still later two representatives of the bank called on the defendant, with the same result. On June 13, 1907, the bank filed its complaint in the district court, alleging its error or mistake in the issuance of the certificate of

deposit substantially as we have stated; its inability to induce the defendant to surrender the certificate, or to permit its correction; the insolvency of the defendant; its want of a speedy or adequate remedy; that the defendant threatened and was about to negotiate the certificate; and the irreparable damage that such negotiation would entail upon it. Plaintiff further offered in its complaint to deliver to defendant a certificate of deposit for \$35, and prayed for a mandatory writ of injunction requiring defendant to deliver the certificate to it or to the clerk of the court, for a temporary writ restraining the transfer of the certificate, and for other equitable relief.

In due time a temporary restraining order was issued, and after certain proceedings the defendant answered, admitting the receipt of the certificate for \$315, and alleging that he had paid \$315 in money to the bank therefor. The insolvency of the defendant was not denied in the answer, and, in an affidavit filed by him during the proceedings, his insolvency was admitted. The summons was served personally on the defendant on June 14th. On the same day the defendant negotiated the certificate of deposit by purchasing from a clothing house a suit of clothes for \$15, and receiving the difference between that amount and the face of the certificate, \$300, in cash. The court found that the defendant had transferred the certificate of deposit to an innocent third party, for value, after the commencement of the suit, and the service of summons upon him. Other general findings were in favor of the bank, and the defendant was ordered by the court to pay in to the clerk of the court, for the use of the bank, \$280, together with interest. After various citations, and after the defendant had been committed, he paid a portion of the judgment, and thereupon sued out the writ of error upon which this hearing proceeds.

[1] 1. On the trial of the cause on its merits, the defendant testified unequivocally to the payment of \$315 to the bank, describing with great accuracy the denomination of the bills, their appearance, and even the numbers thereof; that is, as to 14 of them which he said were \$20 gold certificates, numbered consecutively. These bills the defendant contended were new. It seemed to be his theory that the bank had treated them as bills that had never been emitted, and that its discrepancy in cash could be accounted for in this way. One witness introduced by defendant testified that he had cashed a check for defendant a few days before the transaction in question in which he had paid him 12 or 14 new gold certificates such as defendant described. His wife and son also testified to having seen him in the possession of such bills at or about the date of the deposit. In many respects defendant's testimony, and that given by members of his

family, was far from satisfactory, particularly on the question of the source from whence he had acquired the funds which he deposited. In other respects the testimony of the defendant was in hopeless conflict with the two representatives of the bank who called upon him prior to the bringing of the suit. We think, from a reading of the record, that the testimony of the teller who received the money does not fairly show that he had any distinct recollection as to the amount of money he received, but relied for his information, upon this point, on what he claims the ticket made out by him at the time he received the money, and which he passed to the clerk as hereinabove detailed, discloses. The original ticket is brought up by bill of exceptions and is before us. It must be admitted that the figures on the same might well be taken for \$315 instead of \$35. Indeed, we believe they would be so understood and read, in the absence of all other evidence, by an ordinary person. An expert witness was called by plaintiff, who, after examining many similar tickets made by the bank's teller, gave it as his opinion that it was intended by the teller to represent \$35, rather than \$315. We think it very questionable whether this is a subject for expert testimony, and would be inclined to rule that its admission was erroneous and prejudicial, had the case been tried to a jury; but the case was tried to the court without a jury—a feature to which we shall presently direct our attention.

It seems probable that the teller intended the figures, when he made them, to represent \$35, and, in making up his book from these tickets, he must have so read them. Otherwise his account and his cash would not have balanced. The clerk who wrote the certificate, it will be remembered, was intrusted with no cash and handled none; his duty being to write the certificates, drafts, and instruments of that sort from the memoranda furnished him by the teller. Had the conduct of the defendant throughout been characterized by open frankness and honesty, the correctness of the trial court's judgment might well be questioned. But he admits having twice had notice of the bank's claim of error, and it seems probable that he received the letter written by the bank, which did not purport to state what the error consisted of, but simply that an error had been made, and asked him to call that the same might be corrected. There had been an error made by the clerk in writing the defendant's name in the certificate of deposit, which, as we have stated, showed the name as W. J. Johnson instead of N. J. Johnson, and is written with unusual legibility. Moreover, the circumstance and time of the negotiation of the certificate by the defendant, as detailed above, is suspicious, to say the least, and tends to indicate a disposition on his part to so shape conditions as to prevent the bank from profiting by any judgment that it might obtain

against him. We are satisfied that the evidence is sufficient to sustain the judgment which the trial court rendered in favor of the bank.

[2-4] 2. The principal contention urged in the brief filed on behalf of Johnson is predicated upon the refusal of the trial court to grant his request for a jury. The correctness of the trial court's ruling in this behalf turns entirely upon whether the action was one at law or equitable in its nature. If a law case, then the defendant was entitled to a jury trial. If the action was equitable, the defendant was not entitled, as a matter of right, to a trial by jury, and, if a jury had been called, its verdict would have been merely advisory and could have been disregarded by the court. The authorities on this question have been collated by Mr. Justice Bailey in *McClelland v. Bullis*, 84 Colo. 79, 81 Pac. 771. It is true that there was a sharp issue of fact involved in the case, but this is not sufficient or necessarily important in determining whether the action was legal or equitable. "Issues of law, as well as of fact, are triable by the court without a jury, subject, of course, to the discretion of the court to submit issues of fact to a jury, whose findings, however, would not be binding upon the conscience of the chancellor." *Koch v. Story*, 47 Colo. 339, 107 Pac. 1095. In *Cree v. Lewis*, 49 Colo. 190, 112 Pac. 327, it is said: "The fact that plaintiff asked for a money judgment is by no means decisive that the action was one at law." And at page 191 of 49 Colo., at page 328 of 112 Pac., same case: "Wrongfully converting funds which belong to another does not create the relation of debtor and creditor, and nothing more. The owner of such funds may resort to a suit in equity to recover them if the facts justify that character of action." Again, page 192 of 49 Colo., at page 328 of 112 Pac.: "The fact that plaintiff might have contented himself with an action in assumpsit to establish and enforce his rights did not destroy his right to resort to a court of equity in order to do so. In the circumstances of this case, the choice of remedies rested with him." See, also, *Zobel v. Fannie Rawlings Co.*, 49 Colo. 134, 141, 111 Pac. 843, 845, wherein it is ruled that: "The court, having obtained jurisdiction of a cause, administers both equitable and legal relief in order to effect complete determination of the controversy and to settle the respective rights and liabilities of all the parties." *Kyle v. Shore*, 18 Colo. App. 358, 71 Pac. 895.

In the case at bar only equitable relief was asked. It was an action brought solely for the purpose of correcting a written instrument so that the same might speak the truth or express the intent of the parties and to preserve the status quo pending the action. The instrument upon which the suit was based was negotiable; the defend-

ant was threatening to negotiate the same; and he was insolvent. These facts are undisputed. "The correction of mistakes in written instruments, occurring by accident, fraud, or otherwise, has been one of the acknowledged branches of equity jurisprudence from the earliest history of the court. This jurisdiction exists: First, where there is a mutual mistake; second, where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties." *Graham v. Guinn* (Tenn. Ch. App.) 43 S. W. 751.

As a condition precedent to the plaintiff's right to recover in this case, it was obliged to establish the error or mistake alleged and procure the correction of the outstanding certificate of deposit, if the same still remained the property of defendant. This, by all the authorities, required the interposition of a court of equity or a tribunal possessing and exercising equitable jurisdiction. Indeed, no other relief was sought. "The right to have an issue of fact tried by a jury is not determined by the nature of the issue, but by the character of the action in which such issue is joined." *Cree v. Lewis*, supra. "That a court of equity has power to compel the surrender of a worthless or invalid bond, or other instrument, which is negotiable and unmaturred, and consequently in a condition to be used to the prejudice of the person who executed it, is a doctrine too familiar to need the citation of authorities in its support." *City v. Baker*, 51 N. J. Eq. 59, 26 Atl. 327.

For other authorities supporting the conclusion that we have reached that this is an equitable action and triable to the court without a jury, see *Ellsworth v. Holcomb*, 28 Ohio St. 66; *Rowland v. Entrekin*, 27 Ohio St. 47; *Lyle v. Williamson*, 6 T. B. Mon. (Ky.) 142; *Goodloe v. McLanathan*, 6 T. B. Mon. (Ky.) 310; *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328; *Wyche v. Greene*, 11 Ga. 159; *English & Co. v. Thorn*, 96 Ga. 557, 23 S. E. 843; *Iverson v. Hutton*, 98 U. S. 79, 25 L. Ed. 66; *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501.

The judgment of the district court is affirmed.

NATHAN v. CROUSE

(Court of Appeals of Colorado. March 10, 1913.)

1. USE AND OCCUPATION (§ 1*)—RIGHT OF RECOVERY—DEMAND.

Where plaintiff had the title and right of possession to premises occupied by defendant and under circumstances showing that a demand for rent would have been useless, he was entitled to recover the reasonable value of the use and occupation, though he made no demand for payment.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. §§ 1-11; Dec. Dig. § 1.*]

2. PLEADING (§ 402*)—CURE OF ERRORS—SUBSEQUENT PLEADINGS.

Error in that a declaration was inartificially drawn and more nearly stated a cause of action for use and occupation by consent than a cause of action founded upon trespass predicated upon wrongful possession was cured where the subsequent pleadings and the testimony, admitted without objection, supported the latter theory of the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1843; Dec. Dig. § 402.*]

Error to District Court, La Plata County; Charles A. Pike, Judge.

Action by L. J. Nathan against Minnie R. Crouse. Decree for defendant, and plaintiff brings error. Reversed and remanded.

Perkins & Main, of Durango, for plaintiff in error. Reese McCloskey, of Durango, for defendant in error.

KING, J. Plaintiff in error filed his complaint stating two causes of action. The first alleged his ownership of certain real estate in the city of Durango and his right to the rents and profits thereof, and that defendant used and occupied the same for the period of one year, for which she was indebted to plaintiff, and demanded judgment for the reasonable value of such use and occupation. The second cause of action was for waste committed upon said premises during defendant's occupancy thereof. To both causes of action defendant pleaded a general denial, and as to the first alleged that the real estate had been the property and in possession of defendant's mother; that plaintiff, through fraud and misrepresentation, procured a deed to said premises from defendant's mother, and that suit to set aside said deed had been commenced by her and was undetermined at the time of her death, and was, by the administrator of her estate, continued and still pending during the time of defendant's alleged occupancy; that she had occupied the premises as a representative of said estate, and in no other capacity; and that plaintiff's claim, if any, was against said estate. For reply to the affirmative defense, plaintiff alleged a judgment in the suit mentioned in said defense against defendant's mother and administrator and in favor of the plaintiff, adjudging the plaintiff herein to be the owner and entitled to the possession of said premises, and alleged that the possession and occupancy of both defendant and her mother had been wrongful and against the will and consent of plaintiff. The cause was tried to a jury and a general verdict returned in favor of the defendant, upon which judgment was rendered, from which plaintiff took said cause to the Supreme Court for review upon writ of error. Plaintiff established legal title to the premises by certain deeds, including a quitclaim deed from defendant's mother, and by a decree of the district court adjudging the title to said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

premises and the right of possession to be in plaintiff.

[1] The court refused an instruction requested by the plaintiff directing a verdict in favor of plaintiff upon the first cause of action, and, among other things, instructed the jury that if it should find from the evidence that the defendant and her mother had occupied the premises for a number of years, during which it was understood and agreed that no rent was to be paid, or was paid, for said premises, and that, upon the death of said mother, defendant continued to use and occupy the premises without any changed relationship in regard thereto, or any agreement to pay rent, or demand upon her for rent, until she voluntarily quit the premises, then she would have the right to presume that she was to continue to occupy the premises in the same manner and under the same conditions as existed prior to the death of her mother, and would not be liable to the plaintiff for the use and occupation of the premises. This instruction was clearly erroneous. The legal title was in the plaintiff, and both the title and right of possession, as against the defendant's ancestor, were established by decree of the district court and were res judicata as to the ancestor and as well to the defendant claiming under her. The allegations of fraud and the right of possession were settled by the decree of the district court. Defendant's occupancy of the premises, without the consent of the plaintiff, was admitted. Demand for payment of rent, under the facts disclosed, was not required; it would have been nugatory. There was no evidence supporting the allegation that she occupied the premises as a representative of the estate. Plaintiff was entitled to a peremptory instruction directing a verdict in his behalf for the reasonable value of the use and occupation of the premises for the time so occupied by the defendant, as shown by the evidence, and the court erred in refusing to give such instruction.

[2] Defendant in error contends that plaintiff cannot recover upon his complaint for use and occupation because no contractual relation existed between plaintiff and defendant, and urges his contention in an able argument supported by a strong array of authorities. Upon trial no objection was made by the defendant to the admission of testimony in support of plaintiff's complaint upon the ground that it did not state a cause of action, or that the evidence was inadmissible under the pleadings. While in form the first cause of action was more nearly allied to the common-law declaration for use and occupation of the premises by consent of the plaintiff, nevertheless both causes of action were founded upon trespass predicated upon the wrongful possession of the defendant, and waste while so in possession. McClellan

v. Hurd, 21 Colo. 197, 203, 40 Pac. 445. The first was in effect an action of trespass for meane profits brought after regaining possession of the realty. 38 Cyc. 1073; Western Book & Stationery Co. v. Jevne, 78 Ill. App. 668; Winkley v. Hill, 6 N. H. 391; Scheffel v. Weiler, 41 Ill. App. 85. And, wherein that cause of action was inartificially or insufficiently stated, the defect was cured by subsequent pleadings of defendant and plaintiff, and by the admission of testimony without objection, which supported that theory of the cause of action. Limberg v. Higenbotham, 11 Colo. 156, 17 Pac. 481. No errors are assigned nor objections urged as to the verdict or judgment upon the second cause of action.

There is no dispute as to the value of the premises, which was shown to be at least \$30 per month for 10 months and 17 days of such occupation. For the reasons given, the judgment upon the first cause of action is reversed, and the cause remanded, with direction to the district court to enter a judgment in favor of the plaintiff and against the defendant for the sum of \$317 as of the 14th day of June, 1909.

Reversed and remanded.

SANKEY v. CRAMER.

(Court of Appeals of Colorado. March 10, 1913.)

1. APPEAL AND ERROR (§ 916*)—REVIEW—SUFFICIENCY OF COMPLAINT.

Where the complaint relied on an express contract, and also attempted to state a cause of action on quantum meruit, and the court gave an instruction signed by the attorneys for both parties that plaintiff had elected to stand on the cause of action for quantum meruit, and no exception was taken to the instruction, the court on writ of error to review a judgment for plaintiff would assume that the election was made, and that the complaint stated a good cause of action on quantum meruit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3699-3705; Dec. Dig. § 916.*]

2. BROKERS (§ 65*)—COMMISSIONS—WHEN EARNED.

A broker employed to use his best endeavors to sell property for not less than \$20,000 for a commission of \$2,000 sought to induce a corporation to take the property for \$45,000 or \$50,000, of which he was to receive about \$11,000, and the balance of the excess of \$20,000 to go to two stockholders of the corporation to pay for assistance in inducing the corporation to purchase. *Held*, that the misconduct deprived him of any commission on such a sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. § 65.*]

3. BROKERS (§ 86*)—COMMISSIONS—WHEN EARNED—EVIDENCE.

In an action for commissions by a broker employed to procure a purchaser of property, evidence *held* not to support a finding that the broker rendered services essential to entitle him to a commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

Error to District Court, Summit County; Charles D. Cavender, Judge.

Action by Fred C. Cramer against R. A. Sankey. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to enter judgment for defendant.

Valle, McAllister & Valle, of Denver, for plaintiff in error. James T. Hogan, of Leadville, for defendant in error.

CUNNINGHAM, P. J. The appeal originally taken in this case was by the Supreme Court re-entered, on stipulation, as pending on error, before transfer to this court. The action was brought to recover a commission which plaintiff claimed on the sale of certain mining property. The complaint was filed August 5, 1904. The first paragraph of the complaint alleges that the amount involved is not over \$2,000. The second, that plaintiff was a broker engaged in selling mining property. The third avers that on or about August, 1900, the plaintiff and defendant entered into an oral agreement whereby plaintiff was to act as broker for defendant, and *use his best endeavors to sell certain mining property for defendant*. In the fourth paragraph it is alleged that the terms of the agreement required plaintiff to procure a purchaser for the property at a sum *not less than \$20,000*, for which plaintiff was to receive as a commission the sum of \$2,000. The fifth charged that plaintiff faithfully performed his part of the agreement, and *procured a purchaser*, giving the name thereof. This paragraph further avers that prior to July 1, 1901, the defendant, ascertaining from the plaintiff who the prospective purchasers were, communicated with plaintiff's prospective purchasers, and thereafter sold the premises to one Edward Kent, trustee for them, for \$25,000. So far the complaint is based entirely upon a specific agreement. The sixth and seventh paragraphs apparently attempt to state a cause of action based on quantum meruit, and read as follows:

"Sixth. That for the purpose of completing said sale the said defendant requested this plaintiff to go from his home in Breckenridge, Colo., to meet the said defendant in Denver on or about the 18th day of July, A. D. 1901, which said plaintiff did, and where and when said plaintiff further assisted defendant in making said sale, whereupon defendant promised and agreed in consideration of plaintiff's labor in behalf of making and consummating said sale to pay him, the said plaintiff, therefor.

"Seventh. That the said commission agreed upon, to wit, the sum of \$2,000, which plaintiff was to have and receive, is a reasonable compensation for such labor and service performed by plaintiff for defendant."

[1] Whether these two paragraphs, which

are the last in the complaint, state a cause of action on quantum meruit, we need not determine, for the reason that in his first instruction to the jury the trial judge advises them that: "The plaintiff has elected to stand upon this latter cause of action and it is in law what is known as quantum meruit." This instruction was signed by the attorneys for both the plaintiff and defendant, and no exception was taken to it. We have been unable to find when in the record such an election was made, but, in the circumstances just stated, shall assume that such election was made, and consider the case as though plaintiff had stated a good cause of action on quantum meruit.

[2] 1. The record, which consists largely of correspondence between the parties, discloses that for almost a year the plaintiff, acting under his specific contract, unsuccessfully attempted to effect a sale of the property, and during all this time he represented to the defendant that he was selling it at \$20,000 or thereabouts. At times he was very positive that he had found a purchaser, and that the sale would be consummated if more time was given him, and the defendant, from time to time, at the solicitation of the plaintiff, granted an extension of time in which to complete the sale. Finally, on May 30, 1901, Sankey wrote Cramer that it was his intention to take the property off of the market if it was not sold by July 1st, and again on June 22d, in a letter, he assured the plaintiff that it was his fixed purpose to take the property off of the market by the 1st of July, if he, Cramer, had not found a buyer by that time.

During all this period of time, from August, 1900, to July, 1901, the plaintiff was attempting to sell the property to the Mecca Gold Mining Company for from \$45,000 to \$50,000. By his own testimony it appears that Cramer was to receive, if he could induce the Mecca Company to take the property at that price, something like \$11,000 over and above his commission of \$2,000, provided for in the agreement; the balance of the excess was to go to two other stockholders in the Mecca Company, presumably as a recompense for assistance they were to render Cramer, who was also a stockholder in the Mecca Company, in inducing that company to purchase the property at the price Cramer was holding it. The record also clearly shows that Sankey had no knowledge whatever, prior to the time he canceled the sale agreement, that Cramer was attempting to get anything out of the property more than his commission, or that he was attempting to sell it at more than \$20,000. It is true that Cramer was permitted to testify, over objections made on behalf of the defendant, that he had complained at the time of the agreement to Sankey that \$2,000 was not a sufficient commission, and that Sankey then told him that he might add a reasonable

amount to the price, but this testimony was improper, and its admission constituted reversible error, since there was no allegation in the complaint whatever to warrant its admission. On the contrary, it will be seen from the unequivocal allegations of the complaint that he was to receive but \$2,000. Further, it can scarcely be contended seriously that to add \$30,000 to a \$20,000 property is a reasonable raise. We have, therefore, this situation, which prevailed down to July 1, 1901, when Sankey took the property off the market: Cramer was co-operating with two other stockholders of the Mecca Company to sell the property to his own company for more than twice the minimum price at which it had been listed with him, and for his own unlawful gain. This notwithstanding he himself alleges in his complaint that he was to use his "best endeavors to sell for said defendant" the mining property in question "at a sum not less than \$20,000, for which said services the plaintiff was to have and receive the sum of \$2000." This was such a palpable violation of every rule of law governing the relation of principal and agent as to make comment inadequate and the citation of authorities entirely unnecessary. Had Cramer succeeded in selling the property for \$50,000, Sankey could have in a proper action recovered not only the excess, but the commission of \$2,000, had the plaintiff retained that sum. A similar situation is discussed at length in *Collins v. McClurg*, 1 Colo. App. 349, 29 Pac. 299. We adopt the views therein expressed as our own, and approve the authorities there cited.

[3] 2. Looking upon the testimony of the plaintiff in its most favorable light, and disregarding entirely the very satisfying testimony given on behalf of defendant, which squarely contradicts that offered by the plaintiff, the only services that plaintiff rendered to defendant, after the defendant took the property from his hands, consisted of a trip from Breckenridge to Denver, made by the plaintiff at the suggestion of the defendant, which covered a day's time. On that day the defendant sold the mine for \$25,000 to one Kent, trustee, who, it developed afterwards, was purchasing it for the Mecca Company. The plaintiff testified that he urged the defendant not to accept \$20,000 for it, as he was about to do, and says that he told the defendant then that he was presenting it to the Mecca Company for \$45,000. By much persuasion (so plaintiff testified) he induced the defendant to raise the price of the property from \$20,000 to \$25,000, and thereby the defendant received \$5,000 more for the property than he otherwise would have done. For his services in this behalf he has been allowed a judgment of \$2,000. There is no testimony whatever to show what such services are worth, and the only evidence in the entire case on the value of services was

that offered by the plaintiff, who said that 10 per cent. was a very reasonable commission. This testimony was given without any reference to the particular property, the amount at which it was being sold, the labor rendered, the going rate of commissions, or anything of that sort. The plaintiff did not sell the property at all, but for nearly a year, by his own wrong, he prevented a sale satisfactory to the defendant being made. The testimony shows that during the day that plaintiff was in Denver he did not say a word to the prospective purchaser, or even see him. There is nothing in the letter of Sankey to Cramer inviting him to come to Denver indicating that he desired him to come to assist in making a sale, and there is not a word in the record to show that he ever asked him to assist in closing the deal on the day it was made. But the letter from Sankey to Cramer, wherein the former invited the latter to come to Denver, does clearly show that Sankey desired to give Cramer an opportunity to buy the property at whatever price he, Sankey, might decide to sell it. While on the stand Sankey testified that, when he met Cramer in Denver, he told him that he had been offered \$25,000 for the property, and pursuant to his previous assurances he now offered Cramer the refusal of the property at the same price and upon the same terms as to payments; that Cramer declined to accept the property, or to take it at that price. Although he was on the stand thereafter, Cramer does not dispute this testimony. We think it fair to assume that Sankey's only purpose in inviting Cramer to come to Denver was prompted by motives of good faith, and a desire to keep his word with Cramer and to give him an opportunity to purchase the property if he was then in a position to do so. The testimony of Cramer as to the new promise or agreement of Sankey to pay him for his services rendered in Denver on the date of the sale is as follows: "Q. Did he [meaning Sankey] tell you what he sold it [meaning the mining property] to those people for? A. He said he sold it for \$25,000 when he came back [meaning when he came back from an interview after having left witness Cramer]. I told him I had earned my commission and was entitled to it and should have it. *I do not remember his exact words, but I think he said, 'You shall have it; you have worked hard on this and have earned your commission.'* I do not recall any further conversation with Mr. Sankey, * * * and I think he went home from Denver on the next day." It is upon testimony of this character that this judgment, if upheld, must rest. We think it is quite insufficient. Furthermore, it appears that Cramer never made any demands upon Sankey for, or mention of, his commission until the complaint was filed, more than three years thereafter, and this notwith-

standing much correspondence passed between the two men. During the time intervening between the date of the sale of the property and the bringing of this action the record discloses that Cramer remitted money to Sankey for rents which the former had collected for the latter. It further appears that Cramer's attorney, under his instructions, wrote to the officers of the Meca Mining Company on July 18, 1901, demanding from these officers pay for Cramer's services in making the sale of defendant's property to them, and his attorney advised them that he had been retained by Cramer to collect by due process of law from these officers the amount of plaintiff's demand.

3. The trial court committed other prejudicial error in the admission and rejection of testimony, the giving and refusing of instructions, and in remarks made to counsel during the trial in the presence of the jury, which, because of the conclusion at which we have arrived as to the disposition to be made of the case, it will not be necessary to consider.

In view of the conduct of the plaintiff in this case, as established by his own testimony, and by letters introduced on behalf of defendant, which were received without objection, and which could not be altered or explained away on a subsequent trial, the ends of justice require that the judgment in this case should be reversed and the case remanded with direction to the trial court to enter a judgment in favor of defendant, which is accordingly done.

Reversed and remanded, with directions.

FARMERS' HIGH LINE CANAL & RESERVOIR CO. et al. v. WOLFF et al.
(Court of Appeals of Colorado. March 10, 1913.)

1. WATERS AND WATER COURSES (§ 145*)—IRRIGATION—CHANGE IN POINT OF DIVERSION.

Where, in proceedings to secure permission to change the point of diversion of water rights, it appeared that such change would decrease the amount of return or seepage water to the injury of junior water rights, the petition should have been denied; the junior appropriators having a vested right in the continuance of the conditions existing when they made their appropriations, unless the change can be made without injury to such right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—EVIDENCE—WATERS AND WATER COURSES.

While the findings of the trial court on conflicting evidence are conclusive on appeal in proceedings to secure permission to change the point of diversion of water rights, this rule does not apply to findings in respect to questions upon which there is no substantial conflict in the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. WATERS AND WATER COURSES (§ 145*)—IRRIGATION—CHANGE IN POINT OF DIVERSION.

The right to change the point of diversion of water for irrigation purposes, when it exists, is a property right, but it does not exist unless it can be exercised without injury to other vested rights, nor can it be exercised until permission has been obtained in a special statutory proceeding of the character authorized by Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; Mills' Ann. St. [1912 Ed.] § 3812).

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.*]

4. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—CHANGE OF POINT OF DIVERSION—BURDEN OF PROOF.

The holder of a water right, who asserts the right to change the place of diversion, has the burden of proving that such change will not injuriously affect the vested rights of others, although this may involve the proof of a negative.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

5. WATERS AND WATER COURSES (§ 145*)—IRRIGATION—CHANGE IN POINT OF DIVERSION—INJURY TO SUBSTANTIAL RIGHT.

For an injury to the holder of junior water rights to deprive the holders of senior water rights of any right to change the point of diversion, it is sufficient that the injury be substantial and not necessary that it be in proportion to the right sought to be changed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.*]

6. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—CHANGE IN POINT OF DIVERSION—ADMISSIBILITY OF EVIDENCE.

In a statutory proceeding to secure permission to change the point of diversion of water rights, evidence of nonuser of the water by plaintiffs was inadmissible to show that they had abandoned their water rights; abandonment not being properly an issue in such proceeding.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

7. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—CHANGE IN POINT OF DIVERSION—ADMISSIBILITY OF EVIDENCE.

Such evidence was admissible, however, on the question of the injurious effect that a change might have on the water rights of a junior appropriator.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

8. CONSTITUTIONAL LAW (§ 309*)—STATUTES (§ 85*)—WATERS AND WATER COURSES (§ 128*)—UNIFORMITY OF PROCEDURE—DUE PROCESS OF LAW.

Act of 1903 entitled "An act in relation to the procedure in changing the point of diversion of the rights to use water from the streams of the state" (Laws 1903, p. 278), as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; Mills' Ann. St. [1912 Ed.] § 3812), relative to service of process, is not violative of the constitutional requirements as to uniformity of proceedings and due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.* Statutes, Cent. Dig. §§ 84, 95; Dec. Dig. § 85.* Waters and Water Courses, Cent. Dig. § 143; Dec. Dig. § 128.*]

9. WATERS AND WATER COURSES (§ 152*)—IRRIGATION — PROCEEDINGS TO DETERMINE PRIORITY.

The proceedings under the irrigation acts of 1879, p. 94, and 1881, p. 142, to determine priority of water rights, are purely statutory and are in the nature of police regulations to secure the orderly distribution of water, and the rules covering ordinary civil actions are not always applicable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

10. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—CHANGE IN POINT OF DIVERSION —SERVICE OF PROCESS.

In a special statutory proceeding under Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289, Mills' Ann. St. [1912 Ed.] § 3812), to secure permission to change the point of diversion of water rights, persons whose water rights would be directly affected by the change were entitled to personal service and a published notice was not sufficient as to them.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

11. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—CHANGE IN POINT OF DIVERSION —PROCESS.

That two copies of the notice in proceedings under Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; Mills' Ann. St. [1912 Ed.] § 3812), were posted outside the irrigation district was immaterial, where the notice was duly posted within the district; the posting of the two notices outside being in excess of the requirements of the statute.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

Appeal from District Court, City and County of Denver.

Petition by John Wolff and another for a decree permitting a change in the point of diversion of certain water rights, and the Farmers' High Line Canal & Reservoir Company and others protest. Judgment for petitioners and protestants appeal. Reversed and remanded.

See, also, 125 Pac. 576.

C. B. Whitford and Henry E. May, both of Denver, for appellants. Thomas & Thomas and John R. Smith, all of Denver, for appellees.

KING, J. John Wolff and Miers Fisher presented their joint petition under the provisions of the statute (Sess. Laws 1903, p. 278 et seq.; Rev. St. 1908, § 3226 et seq.) praying for a decree permitting a change in the point of diversion of certain adjudicated water rights in water district No. 7, to wit: Seven second-feet of decreed priority No. 11, from the headgate of the Kershaw ditch, and five second-feet of decreed priority No. 16, from the headgate of the Fisher ditch to the headgate of the Rocky Mountain ditch. It was alleged that the Kershaw Ditch Company, a corporation, was the owner of the Kershaw ditch which was awarded 16 second-feet of water by decree entered in 1884, and that petitioners were the own-

ers, in severalty, of certain shares of the capital stock of said company, by reason of which the petitioner Wolff was entitled to the use of $2\frac{1}{4}$, and the petitioner Fisher to $4\frac{1}{4}$ second-feet of water so awarded; that Fisher was the owner of the Fisher ditch, which, under said adjudication, was awarded 35 cubic feet of water per second, out of which he asked to change 5 second-feet. The Kershaw ditch had its headgate and was used to water lands on the north side of Clear creek, and the Fisher ditch on the south side. The headgate of the Rocky Mountain ditch was on the south side of Clear creek about 10 miles further up the stream than the headgates of the ditches from which the water was to be removed, and distributed its water, generally, to another water shed. Of the protestants, the Farmers' High Line Canal & Reservoir Company, a corporation, is the owner of the Farmers' High Line Canal, having its headgate still further up the stream than the Rocky Mountain ditch, and the owner of priority No. 9 for 39.80 and priority No. 57 for 154 second-feet; the Colorado Agricultural Ditch Company, a corporation, is the owner of the Colorado Agricultural ditch; and the Lower Clear Creek Ditch Company, a corporation, the owner of the Clear creek and Platte river ditch, both having large priorities junior to petitioners', and taking their water from the north side of Clear creek below the ditches of petitioners.

Protestants claim that all the waters of Clear creek have been appropriated and decrees rendered for many times the normal flow of the stream at ordinary stages, making it necessary to enforce the decrees each season to supply the ditches in the order of seniority; that by reason of the location of petitioners' headgates near the mouth of the stream, and the large area of irrigated lands further up the stream the drainage of which is toward and into the natural stream above such headgates, the waters of said stream have been and constantly are augmented between the points at which the waters used by petitioners have been diverted, and the headgate of the Rocky Mountain ditch, at which they wish to divert 12 second-feet, to such an extent that much of the time the entire amount, and at all times a substantial part, of the water used by petitioners has been supplied by such return waters, without requiring a demand for much, if any, of the natural flow as distinguished from said return waters; and further that the ditches of petitioners and all the lands irrigated thereby lie near and sloping to the creek, so that all waste, seepage, and surplus from irrigation return quickly to the stream above the headgates of certain of the protestants' ditches; that those conditions have existed for 40 years, and so existed at the times protestants made their appropriations junior

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to petitioners'; and that a change of the point of diversion of 12 second-feet of water to a place 10 miles further up the stream and above these sources of supply by return waters will require the withdrawal of that entire quantity a part of the time from the natural flow above the headgate of the Rocky Mountain ditch, which must necessarily be taken from the junior decree of the Farmers' High Line Ditch and other ditches similarly situated, and will also detract, in a substantial measure, from the quantity which other ditches between the two places of diversion and below petitioners' present diversion and use have used and are entitled to receive. Other claims are made, such as loss of seepage from the amount sought to be changed, nonuser, abandonment, enlarged use at the new point of use, that the former decree is void or excessive from which injury is asserted; some of which will be considered. The petition was granted.

The testimony is voluminous, the taking thereof extending, intermittently, over a period of one year, and this, together with the law applicable thereto, was carefully considered by the trial court and its findings of fact and conclusions of law made a part of the record. The court ruled that, inasmuch as the right to change the point of diversion of water rights is a vested property right, it was not incumbent upon the petitioners to prove that injury would not result to others by the change prayed for in order to establish a *prima facie* case, but that the burden was on respondents to prove injury to their vested rights; and further that respondents were bound to show not only that the injury claimed was to a vested right held by them, but that the vested right so injured was equivalent in proportions, as well as character, to that of petitioners, and of a fixed or determinate quantity, so that the court could impose terms to prevent the injury, as provided by statute, or, if impossible to fix terms and conditions by which the injurious effect could be prevented, or the parties affected be protected, deny the application in toto, and also held that the vested rights presented by respondents for the consideration of the court as injuriously affected were seepage rights, pure and simple.

The process of reasoning by which a court reaches its conclusion is of slight consequence if the correct conclusion is reached. But, as we do not agree with the conclusion of the trial court, we deem it proper to note the foregoing statements and conclusions, because we think they are responsible for the court's ultimate finding that injury would not result from the change granted.

[1] The only issue raised and supported by the evidence necessary to consider here is as to the quantity of return waters and its effect upon the conditions that will be dis-

turbed by the change. The evidence as to the augmentation of the stream by return waters is conflicting as to quantity only. Nearly all the testimony on that subject was from the witnesses offered by respondents, and, being decisive of the case, will be noticed somewhat in detail. Ralston creek is a tributary of Clear creek and enters that stream between the old point and the new point of diversion; but there is no evidence that it increases the supply of the stream, except as it gathers return or flood waters. Several engineers, whose qualifications were admitted, testified. Thomas Grieve, civil engineer and hydrographer in the office of the state engineer, took observations and measurements from the head of the stream to a point below petitioners' ditches, from which he found a total gain of 11.9 second-feet, which he designated as seepage. Charles W. Beach, deputy state engineer, took observations and measurements for several days for the purpose of ascertaining the amount of the return waters, from which he computed a gain from seepage between the Rocky Mountain ditch and a point just below petitioners' ditches of 13.72 second-feet. The difference between the estimates of these two engineers may be accounted for by the different times in the year when the observations were made. This witness made an excellent statement of the reason why injury will result from the proposed change, when he said: "The change would move the point of diversion above some of the sources of supply. The removal up the stream would be a tax on the junior decrees further up." C. C. Schrontz, a civil engineer, an employé in that capacity of a reservoir company, took observations extending over a long period of time for the purpose of ascertaining and advising his company whether surplus waters from this stream could be found in sufficient quantity to justify the construction of reservoirs for storage for irrigation purposes. His computations and estimates were made from his own observations and measurements, coupled with reports of the state engineer and measurements of the stream covering a period of years made by employes of the government. His testimony is that, while, during the time of his examination, but 73,000 acre-feet of water came into the district, 96,000 acre-feet were actually distributed by the ditches and used, from which he concludes that the difference, approximating 23,000 acre-feet, arises from seepage waters, practically all of which would come into the stream or ditches below the headgate of the Rocky Mountain ditch. Two acre-feet are shown to be sufficient, generally, to irrigate one acre of land. Consequently the return waters, which this engineer found, would, with economical use, irrigate 11,000 acres of land. It is equivalent to one billion cubic feet of water.

Certain water commissioners and others, whose observations and experience qualified

them to testify intelligently as to the facts, estimated the seepage (which word is used by all the witnesses to include all return waters) at from 10 to 50 second-feet during the irrigation season, the higher amount being in flood season, the estimates being an average of 20 or more second-feet during the entire irrigation season. One of these witnesses testified that, when but 40 second-feet of the natural flow was passing the headgate of the Rocky Mountain ditch, all the ditches below that point were fully supplied; the quantity used being many times 40 second-feet.

If the testimony of the foregoing witnesses be accepted as substantially correct, there can be no other conclusion than that, at practically all times during the irrigation season, not only the petitioners' ditches, but all ditches between the two points of diversion, can be and have been supplied in a large measure by return waters which there make up the body of the stream; and therefore the change in point of diversion must necessarily injure the ditches further up the stream to the full extent of the amount changed during a considerable portion of the irrigation season. The clear preponderance of the evidence sustains this view.

[2] Counsel for appellees contend that there is a conflict in the evidence, and therefore the findings of the trial court should be regarded as conclusive upon this court. That such rule applies to this proceeding is settled in *Wadsworth D. Co. v. Brown*, 39 Colo. 57, 88 Pac. 1060. And upon a number of matters that were litigated, upon which extended evidence was taken, the rule is applicable and accepted as conclusive in this case. But, upon the question of augmentation of the stream by return waters between the two points of diversion, there is no substantial conflict in the evidence. This case comes within and is controlled by the reasoning as well as the ruling of the Supreme Court in *Bates v. Hall*, 44 Colo. 360, 98 Pac. 3, and *Vogel et al. v. Minnesota Canal Co.*, 47 Colo. 534, 107 Pac. 1108, in which it was said that, from the conditions there existing, injury to junior appropriators would necessarily result.

As against the change sought by petitioners, the junior appropriators had a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time they made their appropriations, unless the change can be made without injury to such right. *Vogel et al. v. Minnesota Canal Co.*, supra. That right is a "vested right" which respondents contend will, by the change, be disturbed to their injury. As applied to the Farmers' High Line Canal Company, the right affected is in no sense a seepage right, as held by the court. Its junior decreed right, which is supplied by natural flow only, will be depleted to supply the loss caused by moving the point of diversion.

[3] Where the right to change the point of diversion exists, it is a property right, incident to the water right itself; but it is a conditional right (therefore doubtful and questionable) and does not exist at all, as an incident or otherwise, unless it can be exercised without injury to other vested rights; nor can it be exercised until permission has been obtained in a proceeding of this character. *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 402, 81 Pac. 37.

[4] Therefore one who asserts the right to a change in the place of diversion has the burden of proving that the change will not injuriously affect the vested rights of others, although this may involve the proof of a negative. *Irrigation Co. v. Water Supply & Storage Co.*, 49 Colo. 1, 111 Pac. 610; *Vogel et al. v. Minnesota Canal Co.*, supra.

[5] If the trial court had correctly placed the burden of proving injury upon the respondents, nevertheless it was not necessary that injury to their vested rights, equal in proportion to the right sought to be changed, be shown. It is sufficient if the injury be substantial. The maxim, "*De minimis non curat lex*," is applicable, but, beyond proof of substantial injury, the quantum or character thereof appear to be material only for the purpose of ascertaining whether, and in what manner, the injury may be prevented or the injured party protected. See *Hallet v. Carpenter et al.*, 37 Colo. 30, 86 Pac. 317, and *Wadsworth D. Co. v. Brown*, supra.

[6] A large volume of the evidence introduced by respondents was offered for the purpose of showing nonuser of the water by plaintiffs, resulting in abandonment of alleged water rights evidenced by the decree of 1884, and much of the argument of counsel is addressed to the question of abandonment. For such purpose the evidence was not admissible. *Lower Latham D. Co. v. Bijou Irr. Co.*, 41 Colo. 213, 93 Pac. 483; *Wadsworth D. Co. v. Brown*, supra. In our opinion it was an unfortunate day for the public welfare and for the owners of legitimate water rights, based upon actual appropriation, when the Supreme Court felt compelled to rule that abandonment could not be made an issue in this special statutory proceeding for a change in the point of diversion. There is no time so opportune, and no other proceeding so appropriate, for trying that issue as when, under a petition of this nature, all the ditches, owners, and claimants of water rights are in court; and the decrees, the use of water, the conditions on the stream, the quantity of return waters, the quantity of an entire decreed appropriation to a ditch, whether owned in severalty or as tenants in common by individuals, or by a corporation, to which the person seeking the change is entitled, are before the court for consideration and determination. That rule has become the excuse for many actions ostensibly to change the point of diversion of waters ap-

propriated, while the real purpose and effect is to revive or give life to and make effective a mere paper appropriation of water that has never been applied to a beneficial use by the claimants, and to encourage speculation in such excess decrees masquerading under the name of "water rights," and resulting in serious and irreparable loss to bona fide appropriators. It puts a premium on "watered stock" in the irrigation system that deals with and controls the most important element in the growth of agricultural and horticultural products in this arid region, viz., water. However justifiable, or even necessary, the ruling may have been, its effect has been vicious. When once the change has been granted, there is no proceeding yet discovered that affords appropriate relief within the reach of a claimant with limited means. It has not been explained, and we do not know how abandonment can be predicated of a water right that, although having lain dormant for many years, has been given life and strength and value by decree granting its use at a new point of diversion. We give reluctant obedience to the rule, but suggest that the law be amended by appropriate legislation to admit this and other issues, such as enlarged use, now excluded. The danger of loss to junior appropriators arising from the law so established has been lessened by the beneficent, flexible, and far-reaching rule announced in *Vogel et al. v. Minnesota Canal Co.*, supra, that a junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions prevailing on the stream, surrounding the general method of the use of water therefrom, as they existed at the time he made his appropriation, without substantial change, unless it appear that a proposed change will not work harm to his vested rights. It may be further mitigated by a strict adherence to the rule that the burden of showing that injury will not result is upon the person seeking judicial authority for the change. It is a matter of common knowledge that, except on streams in which the appropriations have not exceeded the constant supply, few instances arise in which the change of place of diversion of large quantities of water, for a long distance, can be made without substantial injury to juniors, and the utmost care and scrutiny is required to guard against such injury.

[7] But in the instant case the trial court admitted such evidence, not for the purpose of showing abandonment, but for what it might be worth as tending to prove other material issues. We think the size and capacity of the ditches, the quantity of water used, as measured by time as well as by volume, the place where and the acreage upon which the same was used, the periods of nonuser between successive irrigations of the land and excessive use, and the place and conditions of contemplated use after change

is made, all have a direct and important bearing on the question of injurious effect that may follow a change in the conditions existing at the time of the junior appropriation; and therefore, while inadmissible for some purposes, such evidence was admissible for others.

[8] Appellants contend that the provisions of this special statute, relative to service of process, are unconstitutional in this: That they violate the constitutional requirement that all proceedings in courts of justice shall be uniform, and that they deprive interested parties of their property without due process of law. We think this contention is not tenable. The act of 1903, under which this proceeding was brought, is entitled: "An act in relation to the procedure in changing the point of diversion of the right to use water from the streams of the state." By the Session Laws of 1905, p. 244 (Rev. Stats. 1903, § 3289; Mills' Ann. Stats. [1912 Ed.] § 3812), the provisions of the act of 1903, relative to service of process, were amended. These two acts in themselves, and by reference to the general irrigation statutes, provide a complete code of procedure for obtaining jurisdiction in this class of cases.

[9] The irrigation acts of 1879 (Laws 1879, p. 94) and 1881 (Laws 1881, p. 142) were intended as a system of procedure for determining the priority of rights to the use of water for irrigation. The proceedings under said acts are purely statutory. *Platte Water Co. v. Northern Colo. Irr. Co.*, 12 Colo. 525, 529, 21 Pac. 711. In *Louden Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 111, 43 Pac. 535, 539, it is said of these statutes: "The two together constitute a complete system of procedure that in operation has been found so salutary and free from unnecessary expense as to command the tacit indorsement of all subsequent Legislatures." This statutory proceeding is not an ordinary civil action or proceeding, but a proceeding *sui generis*, to which the rules covering ordinary civil actions are not always applicable. *Irrigation Co. v. Downer*, 19 Colo. 595, 36 Pac. 787. They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes. *F. H. L. C. & R. Co. v. Southworth*, 13 Colo. 111, 134, 21 Pac. 1028, 4 L. R. A. 767; *Combs v. Farmers' H. L. C. & R. Co.*, 38 Colo. 420, 428, 88 Pac. 396; *Broad Run Co. v. Deuel Co.*, 47 Colo. 573, 579, 108 Pac. 755; *Irrigation Co. v. Water Supply & Storage Co.*, 29 Colo. 469, 475, 68 Pac. 781. These proceedings are also said to be analogous to actions to quiet title (*Crippen v. X. Y. Irrigating D. Co.*, 32 Colo. 447, 457, 76 Pac. 794), and in the nature of actions in rem. *Broad Run Co. v. Deuel Co.*, supra. In the *Louden Canal Company Case*, supra, the Supreme Court, by Mr. Justice Hayt, said: "Early in the history of the state, the Legislature, finding the ordinary processes of the law and the actions then

known to the courts too expensive and also inadequate to meet the novel conditions incident to the appropriation of water for the purposes of irrigation, enacted what is known as the 'Irrigation Statute of 1879.' * * * The main features of this act have withstood the test of experience and criticism, and are still the law of this state."

From the foregoing it will appear that the general adjudication statutes, of which the act providing proceedings for change of the point of diversion has become a part, have been upheld by the highest court of this state against every attack. The first statutory provision providing a procedure for changing the point of diversion was the act of 1899. Session Laws 1899, p. 235. This was held valid as a remedial statute, and as a rightful exercise of the police power of the state, and as providing an exclusive remedy in *Irrigation Co. v. Water Supply & Storage Co.*, supra. And later, in *Ft. Lyon Canal Co. v. Chew*, supra, it was said that the right to change the point of diversion cannot be exercised at all until after a decree therefor has been obtained under the statutory proceeding.

The acts of 1903 and 1905, hereinbefore referred to, amendatory of or supplementary to the act of 1899, as to the practice and procedure, including method of service, are sustained for the reasons hereinbefore given for sustaining the general irrigation statutes and the said act of 1899 as a valid exercise of legislative powers.

Counsel for appellants contend that under the act of 1905 no one is required to be served at all unless the court so orders upon good cause shown. This contention is not sustained by the language of the act. It is provided that no further publication or posting of the notice required in original adjudication proceedings, or any notice of individual subsequent proceedings, shall be required, unless by order of court upon good cause shown. But as we read the statute, in case of a hearing upon petition for transfer of a water right, the notice of such hearing must be served not less than 15 days prior to the date of the hearing in the manner provided by law for service of summons in other civil actions; and in addition thereto the court, upon good cause shown, may require publication or posting of the notice as in original adjudications, unless the petitioner shall elect to proceed under the statute in force at and prior to the time of the passage of the act of 1905, in case of which election service of notice, in order to be good, must in all respects comply with the provisions of such statute. The case of *Bear Lake Co. v. Budge*, District Judge, 9 Idaho, 703, 75 Pac. 614, 617, 618, 108 Am. St. Rep. 179, upon which appellants rely to support their contention that the foregoing provisions are unconstitutional, although strong and conclusive in its reasoning upon

the statute of the state of Idaho, is not in point, and therefore not conclusive nor particularly persuasive under the statute now being considered. The Idaho statute provided for an adjudication instituted in the name of a water commissioner and for constructive service of summons by publication only, under which the Supreme Court of that state, in the case cited, held that the law violated the provisions of the federal Constitution and the state Constitution prohibiting the taking of property without due process of law, and also the provisions of the state Constitution which require all laws relating to courts to be general and of uniform application, and the proceedings and practices of courts to be uniform. Our statute provides for personal service, where such service can be made, and constructive service, as in other civil cases, such as suits to quiet title or proceedings in rem, where personal service cannot be made.

[18] It is also objected that proper service and proof of service were not made. Upon the petition's being filed, the court ordered notice to be published for four successive weeks in three newspapers, one in each county into which water district No. 7 extended, and that service of said notice and proof thereof be furnished to the court as required by law in such cases. Publication of the notice was made and due proof submitted, in addition to which copies of the order and notice were personally served upon a large number of individuals and corporations, and proof thereof made by the affidavit of a person certified by the clerk of the court to be a credible and reliable person; and, in addition to giving the persons named as served, the affidavit stated generally that the notice was served "on the owners and claimants of all the ditches taking water out of the public streams" in water district No. 7 for irrigation, as shown by the statement on file and the decree entered in this cause in October, 1884, and also that 10 copies of said notice were posted in 10 public places in said water district, stating the places at which said notices were posted, including one copy at the post office and one at the courthouse in the city and county of Denver. The court, in its findings and decree, recited that due service of said notice had been made on all persons who may be affected by the change. During the progress of the hearing, it was shown that the Kershaw Ditch Company had not been made a party to, nor notified of, the proceedings, and that certain persons residing in the water district, having interests in the Kershaw ditch and its water rights adverse to the petitioners' and to the Kershaw Ditch Company, had not been served with notice. Thereupon counsel for petitioners entered appearance for the Kershaw Ditch Company, and on behalf of said company consented to the change prayed for. The evidence showed that prior

thereto these parties had secured a decree adjudging such parties to be the owners of several interests in the Kershaw ditch and in its water rights, amounting in all to about 110 statutory inches, from which judgment an appeal had been taken at that time, but which has since been affirmed by the Supreme Court. *Wolff v. Pomponia*, 52 Colo. 109, 120 Pac. 142. It is contended by appellees that the Kershaw Ditch Company, a corporation, represented all the consumers of water under said ditch, and therefore that its appearance constituted an appearance for these other parties. But it is clear that the ditch company did not, as alleged in its petition, own the entire ditch nor represent the interests of these claimants, but such parties were adverse in interest. And it is equally clear that they were not only proper but indispensable parties to this proceeding, and that no judgment binding upon them could be entered herein in the absence of notice or appearance, or waiver of such notice, or consent to the decree. They were entitled to personal service, and the published notice was not, as to them, sufficient.

[11] It is contended that two copies of the notice posted by appellees were posted outside the irrigation district, and that therefore such service was void. In this respect we agree with appellants; but such posting was in excess of the requirements of the provisions of the act of 1905, was unnecessary, and void service in that respect is immaterial. In *Irrigation Co. v. Water Supply & Storage Co.*, supra, it is held that the interests of the state are involved in this proceeding, and its rights should be protected, and that the courts must enforce the statute and "sua sponte require all persons who may be affected by the desired change to be notified of the proceeding and given an opportunity to be heard." For want of proper service the judgment cannot be sustained.

Upon the views expressed, it is apparent that the judgment appealed from must be reversed, and the cause remanded, with directions to deny the petition, unless it be shown that terms may be imposed upon which the change in point of diversion may be granted. As to whether such terms may be ascertained and imposed, we express no opinion. If further hearing upon the petition is had, after due notice to the parties not heretofore brought into court in this proceeding, the evidence heretofore taken may be considered together with such other evidence as may be offered.

Reversed and remanded.

HOBSON v. DAVID et al.

(Supreme Court of Oregon. April 8, 1913.)

BROKERS (§ 49*)—CONTRACT—CONSTRUCTION—ACCOUNTING.

The owner of certain land, desiring to market it, executed a written contract by which

plaintiff and defendants, other than the owner's administrator, agreed to sell the land, and, after the owner had been paid its value, interest, and expenses, all the proceeds of sales of remaining land should be equally divided between the owner and the brokers. After enough land had been sold to repay the owner, he conveyed the remaining land to one of the brokers; the conveyance having no relation to the original agreement and made for the sole benefit of such owner. *Held*, that the contract did not give the brokers any interest in the land, and hence plaintiff could not maintain a suit against the owner's administrator nor against his fellow brokers for an accounting without showing a performance of his part of the contract, to wit, that he had used his best endeavors to find purchasers and had aided in making sales.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Jesse Hobson against M. H. David, administrator of John B. David, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

On July 8, 1889, John B. David entered into an agreement with the plaintiff and defendants Oliver and Colcord for the platting and sale of certain lands owned by the said John B. David. So far as involved here, the agreement is as follows: "This agreement, made this 8th day of July, A. D. 1889, by and between John B. David and Juliette David, his wife, the parties of the first part, and A. P. Oliver, J. C. Colcord, and Jesse Hobson of the second part, witnesseth: That whereas the said John B. David is the owner in fee simple of the following described tract of land, situated in the county of Yamhill, in the state of Oregon [here follows the description]. And whereas the purchase price of said tracts of land is five thousand four hundred (\$5,400) dollars. And whereas the said parties of the second part have contracted and agreed to superintend and manage the laying off and sale of said tracts as an addition to the said town of Newberg. Now, therefore, it is hereby contracted and agreed by and between the said parties of the second part as follows: (1) The said parties of the second part shall cause all of said tract not already surveyed and platted as a part of the town of Newberg to be surveyed and laid off as an addition to the said town of Newberg. (2) They shall use their best endeavors to find purchasers for all of said lots and blocks at and for such price as shall have been mutually agreed upon between the parties hereto. As fast as said lots and blocks shall be sold the said parties of the first part shall make and execute deeds to the purchasers, and shall collect and receive the purchase money for the same until it shall amount to such sum as shall pay the expenses of said survey and sale and to the parties of the first part said purchase price of five thousand and four hundred (\$5,400) dollars, with interest on the same from June

25, 1889, at the rate of 8 per cent. per annum, and thereafter all the proceeds of such sales shall be equally divided between the said John B. David, A. P. Oliver, J. C. Colcord, and Jesse Hobson, share and share alike. [Signed] Jno. B. David, Juliette S. David, A. P. Oliver, Jesse Hobson, J. C. Colcord." Hobson, Oliver, and Colcord platted and surveyed said tract as an addition to the town of Newberg, and proceeded to make sales; but, on account of the financial stringency commencing with the years 1892 and 1893, few sales were made for many years, and about 1892 or 1893 the plaintiff removed from Newberg and ceased any effort to further the agreement. Oliver and Colcord continued to care for the property, making improvements, paying the taxes, and making such sales as they could, until, in 1908, much of the property had been sold, and David was paid the \$5,400 and interest. In December, 1908, John B. David died, and defendant M. H. David was appointed administrator of his estate. About the time of the death of John B. David, plaintiff called on the defendants for an accounting of the proceeds from the sales of the said land, and in May, 1910, brought this suit to compel such accounting. On April 13, 1896, John B. David and wife conveyed the part of said land remaining unsold to defendant Oliver. Plaintiff alleges it was so conveyed in trust for all of the parties to the agreement, which allegation is denied by the answer. The answer admits the contract, and alleges that between 1891 and 1893 plaintiff abandoned the said enterprise and deserted Colcord and Oliver, leaving them to carry out the contract and to handle and look after the said property as best they could. Through the growth of the town of Newberg, that part of said land now unsold is of the value of about \$20,000. Upon the trial, the court made findings in favor of defendants, and rendered a decree dismissing the suit for want of equity. Plaintiff appeals.

D. P. Price, of Portland (C. M. Idleman, of Portland, on the brief), for appellant. J. M. Gearin and O. A. Neal, both of Portland (Dolph, Mallory, Simon & Gearin and Willson & Neal, all of Portland, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). The theory upon which the plaintiff asks to recover is that the agreement

vested in each of the parties thereto an equal interest in the land. Unless that is the effect of the agreement, plaintiff has no standing in the court. The land was the property of David, and the other parties had no money invested in it, nor claim upon it, other than as disclosed by this agreement. David entered into an agreement with them by which they were to put the land on the market and sell it; and after David was paid the value of the land, and the interest and expenses of putting it on the market and selling it were satisfied, all the proceeds of such sales should be divided equally between David, Hobson, Oliver, and Colcord. The conveyance of the unsold land by David to Oliver had no relation to the agreement of July 8, 1889, but was made for the sole benefit of David. That agreement does not transfer to Hobson, Oliver, and Colcord any title or interest in the land, but merely entitled them to a share of the proceeds from sales after certain claims were paid. Any land not sold remains the property of David, and Hobson, Oliver, and Colcord have no claim upon it, nor interest in it; and, before plaintiff can be entitled to an accounting against Oliver and Colcord, he must show that he has fulfilled his part of the agreement, namely, that he has used his best endeavors to find purchasers for the property, and that he aided in making the sales. As against David, his estate, or the land, plaintiff can have no claim; and he shows by his own testimony that he left the labor, expense, and burden of the sales and care of the property exclusively to Oliver, when he said: "It was not expected that Mr. Colcord or myself would not be deeply interested in the sale of the property, because we had the utmost confidence in Mr. Oliver to carry on the business, and he did it about as well as it could be done." He further testified that he most certainly did rely entirely upon Mr. Oliver taking care of that end of the business; that he knew that Oliver was able to handle that better than the three of them; and that from about the year 1892 or 1893 until this time he has not done anything to further the sale, but, in fact, abandoned the contract about that time. He has done nothing to aid in the disposition of the land, nor has he aided in making the sales, and therefore has no claim for an accounting against Oliver and Colcord; and, having no equity in the land, there is no equity in his favor.

The decree is affirmed.

BREESSE v. WILDWOOD LUMBER CO.

(Supreme Court of Oregon. April 1, 1913.)

1. NEGLIGENCE (§ 43*)—USE OF PROPERTY.

While a landowner may do whatever he will with his property, he cannot use it so as to imperil the rights of others, and, if he undertakes to do an act by which the conduct of others may be affected, he is bound to act in such a manner that those who are led to a course of action shall not suffer loss by his negligence, consequently a landowner who has a spur track upon his property is liable for his negligence in piling lumber so close to the track that a servant of the railroad company in switching cars thereon was injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 58; Dec. Dig. § 43.*]

2. NEGLIGENCE (§ 136*)—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In a personal injury action, when the defense of contributory negligence is urged, it must be submitted to the jury, unless from all the evidence it appears that reasonable men acting as the triers of fact would necessarily find, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under the same circumstances would have acquired such knowledge and appreciation.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. NEGLIGENCE (§ 136*)—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Where a lumber corporation which had a spur track upon its property piled the lumber so close to the track that, when it leaned over, it would naturally strike a brakeman riding on the steps of a car switched on the track, the question of the brakeman's contributory negligence in failing to notice the danger is for the jury, since contributory negligence will not be imputed as a matter of law to a person who receives an injury from a danger simply from the fact that it might have been seen, and the nature of the brakeman's duties being such as to necessarily distract his attention.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Appeal from Circuit Court, Lane County; Lawrence T. Harris, Judge.

Action by Herman E. Breesse against the Wildwood Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for damages. Plaintiff had a verdict and judgment for \$1,200, and defendant appeals.

The defendant is the owner of a mill and lumber yard, with a dock, at Wildwood, Lane county, Or., and procured the construction by the Oregon & Southeastern Railroad Company of a spur track extending from the main line into the millyard for the purpose of transporting lumber therefrom. At the time of the injury complained of, June 13, 1910, plaintiff was a brakeman in the employ of the railroad company. He had been at work as a regular brakeman since May 28, 1910, and as an extra hand for a portion of the time since December, 1909. With the engineer and fireman, he was engaged in backing an engine and one car in on the spur track for the purpose of taking out a car of lumber. He turned the switch, and as the

car passed him he caught hold of the ladder on the side, intending to go to the top of the car. Just as he jumped on his switch keys which were attached to his clothing caught in his gloves, and he stopped to adjust the keys, hanging on with his left hand. When not far from the top of the car, he noticed that the pile of lumber was so near the car that he would come in contact with it. He endeavored to get down from the ladder, but before he could do so, and just as he made the second step, he was caught between the car and the pile of lumber, and injured. The lumber was piled by the defendant company about 12 or 14 feet high, 4 feet from the rails, and 18 inches from the box car at the bottom, and leaned 1 foot towards the track from a vertical line. One rail of the track, which was on a curve, had an elevation of 2 inches, so that a car would be tilted about 6 inches from the lumber, and the top of a passing car would be about 12 inches from the same. The rounds of the ladder were $2\frac{1}{2}$ or 3 inches from the side of the car leaving a space at the top of about 9 inches between the ladder and the lumber. The car was moving at the rate of about 6 or 8 miles an hour.

Plaintiff alleges as the gist of the negligence on the part of defendant that in piling the lumber defendant carelessly and negligently erected the same with the base thereof within 4 feet of the rails of the track, and built the same to such a height that the top of the pile of lumber leaned over towards the rails of the spur track and was within 8 inches of the top of the car on the switch, that it was plaintiff's duty as a brakeman to attend to the switching and coupling of cars, and to climb over and upon the same. The defendant denies any negligence, and pleads that in erecting the pile of lumber the same was done in a careful manner, so that the pile was at least 2 feet from the sides of the cars used by the railway company; that the plaintiff was an experienced brakeman and familiar with the work, and the switch beside which the lumber was piled; that the location of the lumber was well known to him, and that, if there were any danger therefrom, it was open and visible; that plaintiff should have taken a position upon the other side of the car; that he could have seen the danger, but that he negligently and carelessly remained on the side of the car upon which the lumber was piled; that he had ample time in which to climb to the top; that as the car approached the pile of lumber he leaned and swung out from the side in a careless manner, and was guilty of contributory negligence. There were no contractual relations between plaintiff and defendant. It does not appear that the plaintiff was at any time warned of the proximity of the pile of lumber to the track. The evidence shows that the lumber was about 250

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

feet from the switch; that plaintiff had ridden in on the top of the car a few times while making flying switches, but, as he states that he had never noticed the distance between the pile of lumber and the track before the date of the injury. It is in evidence that in getting on a moving train at switches it is the proper place for a brakeman to get on the ladder on the side of the car to perform his duties. It appears that plaintiff got on the side of the car that was most convenient.

J. S. Medley, of Cottage Grove, and A. O. Woodcock, of Eugene (Woodcock & Smith, of Eugene, on the brief), for appellant. John M. Williams, of Eugene (Williams & Bean, of Eugene, on the brief), for respondent.

BEAN, J. (after stating the facts as above). At the close of the plaintiff's case, defendant's counsel moved for a nonsuit, and assigns the refusal to grant the same as error. It is the contention of defendant that the plaintiff knew that the pile of lumber was there, and that he could have seen the same if he had made any effort to observe it, or had used reasonable care on his part.

[1] This is the only question raised and relied upon in this case. In Wharton's Law of Negligence (2d Ed.) § 782, we find this familiar statement: "I can undoubtedly, in exercise of my rightful liberty, do generally with my property, within its own orbit, what I will; but, if I so wield it as to impinge upon the rights of others, then I am liable for the damage so produced. * * * Thus I may dig pits at my pleasure on my land; but I will nevertheless be liable if any person having a right or even permission to enter the land falls into one of these pits and is hurt." In *Id.* § 437, it is said: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence."

[2, 3] The main contention of the defendant is that the risk was an open, visible one, and that plaintiff knew, or ought to have known, of the proximity of the pile of lumber to the spur track. Contributory negligence will not in all cases be imputed as a matter of law to a person who receives an injury from a danger simply from the fact alone that it might have been seen, for the reason that the nature of his duties, or the surrounding circumstances, may be such as to detract his attention from the danger. 1 *Thomp. on Negligence* (2d Ed.) § 189; *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 124, 102 Pac. 614, 135 Am. St. Rep. 821; *Webb v. Helms*, 52 Or. 444, 97 Pac. 753. In discussing a similar question in the case of *Johnston v. O. S. L. Co.*, 23 Or. 94, at page

105, 31 Pac. 283, at page 286, in the opinion, Justice Moore said: "An open, visible risk is such an one as would in an instant appeal to the senses of an intelligent person. Wood, *Mas. & Ser.* 763. It is one so patent that it would be instantly recognized by a person familiar with the business. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service. It is not expected that the servant will make close scrutiny into all the details of the instrumentalities with which he deals. His employment forbids that he should thus spend his time. If the rule were otherwise, the management of a great railway system would be needlessly slow. The servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger. It is not expected of a switchman that he should carefully measure the distance between a switch target and the rail." When a defense of contributory negligence is claimed as a ground for a nonsuit, as in this case, it must appear that reasonable men, acting as the triers of the fact, would find, without any reasonable likelihood of differing in their views, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under the same circumstances would readily acquire such knowledge and appreciation. The fact that the plaintiff had actual or constructive knowledge must appear either directly or by necessary inference from the evidence and the uniform experience of men, before the court can order a nonsuit on this ground; and this result must follow after the evidence has received a construction most favorable to the plaintiff. *Gentzkow v. Portland Railway Co.*, 54 Or. 114, 126, 102 Pac. 614, 135 Am. St. Rep. 821.

The plaintiff was performing a service for the defendant in going after the loaded car. The engine was being run in on the spur track for the purpose of taking out a car of lumber from defendant's mill; therefore plaintiff was rightfully upon the premises and engaged in performing his duty. He had a right to expect that the yard was reasonably free from snares or unseen and dangerous traps, so that a car could pass safely over the track in accomplishing the purposes for which the spur was designed. The evidence is to the purport that Breese was discharging his duties in the customary manner; that, while he had switched cars on the spur before, this was the first occasion that he had had to go in for the purpose of taking out a car, as he did on the day of the accident. He states that he knew that the pile of lumber was there, but that he had not noticed its proximity to the track. It does not appear that plaintiff had any reason for thinking that there was any less danger on the opposite side of the car than there was on the side upon which he climbed. It cannot be said as a matter of law that

the plaintiff, acting as a brakeman in switching a car, was careless in climbing or riding upon the side of the car (Sou. Kana. Ry. Co. v. Michaels, 57 Kan. 474, 46 Pac. 938), nor that in the exercise of ordinary care he should have noticed the nearness of the pile of lumber to the track which curved toward the lumber, nor that he knew of and appreciated the danger, and was therefore guilty of contributory negligence. These questions were properly for the determination of the jury from all the facts and circumstances as disclosed by the evidence in the case. *Johnston v. O. S. L. Ry. Co.*, supra; *Millen v. Pac. Bridge Co.*, 51 Or. 538, 554, 95 Pac. 196; *Galvin v. Brown & McCabe*, 53 Or. 598, 612, 101 Pac. 671. The jury may have reasonably believed that the plaintiff did not know of the dangerous location of the lumber before the accident, and that on account of his duties, and his position when climbing up the side of the car with his face towards the same, and arranging his switch keys, he did not see that the lumber was so near the rails as to prevent his passing in that manner until it was too late to avert the danger, and that plaintiff, as an ordinarily prudent man acting under such circumstances, would not readily know and appreciate the danger. 1 *Thomp. on Negligence* (2d Ed.) § 446; *Gentzkow v. Portland Ry. Co.*, supra.

There was no error in submitting the case to the jury. The judgment of the lower court will therefore be affirmed.

FIRST NAT. BANK OF ARVADA, COLO., v. BRADBURN et al.

(Supreme Court of Oregon. April 8, 1913.)
FRAUDULENT CONVEYANCES (§ 95*)—CONVEYANCE BY HUSBAND TO WIFE—VACATION.

Where a wife, having inherited certain funds from her father's estate, invested the same with others in certain land, but the deed by mistake of the scrivener was executed in the name of her husband and the three other co-owners, and, after the mistake was discovered, the husband executed a deed to the property to his wife to correct the mistake, such deed was not fraudulent, and the wife's interest was exempt from the claims of the husband's creditors, under Const. art. 15, § 5, providing that the property of a married woman shall not be subject to the debts or contracts of her husband.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 243-288; Dec. Dig. § 95.*]

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Suit by the First National Bank of Arvada, Colo., against Zella M. Bradburn and another. Judgment for defendants, and plaintiff appeals. Affirmed.

George Jones and John T. Long, both of Roseburg, for appellant. W. W. Cardwell, of Roseburg (Cardwell & Watson, of Roseburg, on the brief), for respondents.

BEAN, J. The facts disclosed by the record are as follows: In 1906 defendant George A. Bradburn gave a promissory note to one H. H. Winchell, while the defendants were residents of the state of Colorado. The note finally passed into the hands of plaintiff, a corporation of the state of Colorado. The defendants having moved to Douglas county, Or., the plaintiff instituted an action on the note against George A. Bradburn in that county, and on the 26th day of November, 1910, obtained a judgment against him for the sum of \$1,049.20, and costs. Being unable to collect the judgment upon execution, plaintiff brings this suit to set aside the deed, alleging that it was fraudulently executed, without consideration, and for the purpose of defrauding plaintiff.

Defendants answered, admitting the judgment against George A. Bradburn, and denying the allegations of fraud. They aver that on the 28th day of February, 1910, Zella M. Bradburn purchased an undivided one-fourth interest in the Sheridan and Agee tract for the sum of \$7,500, and that at the time the purchase was made, by a mistake of the scrivener who prepared the deed, and without the knowledge or consent of defendant Zella M. Bradburn, the deed was made in the name of George A. Bradburn. On the 16th day of April, 1910, after the mistake was discovered, George A. Bradburn executed a deed to the property to Zella M. Bradburn, his wife, to correct the mistake. Article 15, § 5, of the Constitution, provides that the property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband. Section 7044, L. O. L. (Act of 1878), makes provisions of a like effect.

In *Gladstone Lumber Co. v. Kelly et ux.*, 129 Pac. 763, it was held that where a husband purchased property with his wife's money, taking title in himself contrary to her instructions, the property could not be subjected to his debts in a suit to set aside a conveyance from the husband to the wife. Upon the hearing, for a prima facie case plaintiff introduced the judgment roll in the case of *Bank v. George A. Bradburn*, and also the deed made by defendant George A. Bradburn to his wife, Zella M. Bradburn.

The evidence of defendant Zella M. Bradburn, and that of her husband, together with that of her brother-in-law, Mr. L. B. Wallace, and her mother, Mrs. S. E. Collier, showed the transaction as follows: After the defendants were married in the state of Colorado, Mrs. Bradburn inherited a considerable sum of money from her father's estate. This she invested, together with funds belonging to her mother, in land in that state. Soon after the defendants came to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Oregon, the land in Colorado, upon which there was a small indebtedness, was sold for \$19,000; Mrs. Bradburn receiving \$7,500 as a part of her share. This was about the time of the purchase of the Sheridan and Agee land. This tract was bought by Mrs. Bradburn, in company with three others, for the sum of \$30,000, she buying a one-fourth interest therein and paying therefor \$5,000 out of the money received from the property sold in Colorado; her portion of the remaining indebtedness being \$2,500. The deed was executed to George A. Bradburn and the three other parties. It appears that about that time Mrs. Bradburn purchased other tracts with the money belonging to her. No testimony was introduced by plaintiff in rebuttal. The testimony of the Bradburns and their witnesses, which appears reasonable and fair, stands uncontradicted.

The vital question in the case is whether or not the property in question was owned by Mrs. Bradburn in her own right. If so, she had a perfect right to take a conveyance thereof to herself. The facts detailed by the defendants and their witnesses, which occurred in the state of Colorado where the plaintiff is, if not true, were susceptible of being disproved. The testimony of Mrs. Bradburn and her witnesses is clear and convincing to the effect that the property in question in this suit belonged to Mrs. Bradburn in her own right; that the deed in controversy was not fraudulently obtained; that she originally inherited money from her father which she invested and increased in amount, and with which she purchased the property in question, as well as other valuable tracts of land in that county; and that, while her husband assisted her in the management of the business pertaining to her property, he had no real interest in the same.

The decree of the lower court will therefore be affirmed.

CHENOWETH v. SPENCER et al.

(Supreme Court of Oregon. April 1, 1913.)

MECHANICS' LIENS (§ 231*)—PROPERTY SUBJECT—LAND.

L. O. L. § 7416, provides that every mechanic or person furnishing material in the construction of a building shall have a lien thereon. Section 7417 provides that the land upon which any building shall be constructed, together with the convenient space about the same, or so much as may be required for the convenient use and occupation thereof, shall be subject to the liens created by this act, if, when the work is commenced, the land belongs to the person who caused the building to be constructed, but, if he owns less than a fee, then only his interest therein shall be subject to a lien. Section 7419 provides that every building constructed upon any land with the knowledge of the owner shall be held to have been constructed at his instance, and his in-

terest shall be subject to any mechanic's lien, unless he shall, within three days after having obtained knowledge of the construction, give notice that he will not be responsible for the same. *Held*, that as section 7419 did not change the lien given by section 7417, and the lien upon the land was a mere incident to the lien upon the building, and for the convenient use and occupation thereof, a mechanic takes no lien upon land owned by one who did not cause the building to be erected, even though the owner did not give the required notice, where the building was destroyed before completion.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 413; Dec. Dig. § 231.*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by A. E. Chenoweth against F. W. Spencer, J. W. Meredith, and others. From a judgment for plaintiff, defendant Meredith appeals. Reversed, and cause dismissed.

Defendant Meredith, being the owner of lots 1, 3, and 4, block 3, Depot addition to the city of Salem, on June 14, 1910, entered into a contract with Emig and Yates, by which he sold to them the said lots for the price of \$4,800, to be paid in installments. Upon said lots there were situated a building and certain machinery. By the terms of said contract the purchasers were to have possession, and were to keep the building and machinery insured for the benefit of Meredith. The purchasers paid upon the said purchase price \$250 at the date of the purchase, \$1,100 on August 1, 1910, and \$1,500 on August 17, 1910. On or about the 1st day of July, 1910, the building and machinery were destroyed by fire. Thereafter, during the year 1911, certain buildings were erected on said lots, and on lot 2 of said block, said lot 2 being owned by Voget, by the Perfection Sewing Cabinet Company, a corporation, organized by Emig and Yates and successors to them in the right to the possession of said lots 1, 3, and 4; and it is for material furnished by the plaintiff and the defendants Spencer and Hansen, respectively, for which materialmen's liens are claimed, and are herein sought to be foreclosed. The plaintiff on June 24, 1911, filed a notice of lien under the statute with the clerk of Marion county, Or., setting forth a statement of his demand and of a lien upon the said building and lots in the sum of \$77.60. Thereafter, prior to the completion of the said building, and prior to the commencement of this case, said building was destroyed by fire, and plaintiff brings this suit to establish and foreclose his lien against said lots 1, 3, and 4. Defendant F. W. Spencer answered, setting up a lien in the sum of \$209, notice of which was filed on June 17th. Defendant Otto Hansen in his answer set up a lien in the sum of \$240.76, having filed his notice of claim July 6th. Defendant Meredith answered, denying the allegations of the complaint, and alleg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing his ownership of lots 1, 3, and 4, his contract of sale thereof to Emig and Yates, the destruction of the building on the property after he sold the same, and that the liens do not extend to the lots; the buildings which were the basis of the liens having been destroyed. The construction of the buildings was commenced about January, 1911, but they were not completed, having been destroyed by fire on the 12th day of August, 1911. This suit was commenced on August 19, 1911. Upon the trial of the case in the circuit court, findings and decree were made and rendered in favor of plaintiff, Spencer, and Hansen, as prayed for, and Meredith appeals.

Geo. G. Bingham, of Salem, for appellant. W. C. Winslow and J. D. Turner, both of Salem (Carson & Brown, of Salem, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). The principal question raised by this appeal is whether the lien of mechanics and materialmen for material and labor furnished in the construction of the building exists upon the lot after the destruction of the building by fire; the owner of the building being in possession of the lots under a contract of purchase, the title remaining in the vendor, and a large part of the purchase price of the lots being unpaid. We must look, first, to the terms of our statute as to how and when the lien will also include the land. Section 7416, L. O. L., provides: "Every mechanic * * * and other person * * * furnishing material * * * in the construction * * * of any building * * * shall have a lien upon the same (the building) for the work or labor done * * * or material furnished at the instance of the owner of the building * * *; and every contractor * * * shall be held to be the agent of the owner (of the building) for the purposes of this act." Section 7417, L. O. L., provides: "The land upon which any building * * * shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof * * * shall also be subject to the liens created by this act, if, at the time the work was commenced * * * the said land belonged to the person who caused said building * * * to be constructed; * * * but, if such person owned less than a fee simple estate in such land, then only his interest therein shall be subject to such lien," etc. By these two sections it is plain the intentment is that the lien shall extend only to the building erected or repaired and to the land upon which it is situated and a convenient space about the same to the extent of the interest therein of the person who caused the building to be constructed. However, section 7419, L. O. L., which was a part of the same act, namely, a part of

the act of 1885, provides: "Every building * * * constructed upon any lands with the knowledge of the owner [of the lands] * * * shall be held to have been constructed at the instance of such owner [of the land]; * * * and the interest owned * * * shall be subject to any lien filed in accordance with the provisions of this act, unless such owner [of the land] * * * shall, within three days after he shall have obtained knowledge of the construction * * * give notice that he will not be responsible for the same, by posting," etc. The plain purpose of this section is to make the interest of the owner of the land subject to the lien, as provided in section 7417, supra, unless the notice provided for is given, but not to impose upon him all the liabilities of the person who caused the building to be constructed. It does not modify nor in any manner affect the extent or character of the lien upon the land as provided by section 7417, supra. That is an incident to the lien on the building for the convenient use and occupation thereof.

There is some apparent conflict in the authorities as to whether the lien attaches to the land at all events. In *Wigton & Brooks' Appeal*, 28 Pa. 161, *Schukraft et al. v. Ruck et al.*, 6 Daly (N. Y.) 1, *Wood & Co. v. Wilmington Conference Academy*, 1 Marvel (Del.) 416, 41 Atl. 89, and *Humboldt Lbr. Mill Co. v. Crisp*, 146 Cal. 686, 81 Pac. 80, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, the lien includes the land only as an incident to the lien on the building, and, when the building is destroyed by fire or other accident, the lien ceases. In other states, such as Illinois, Indiana, Massachusetts, Minnesota, Mississippi, and Texas, it is held that the lien attaches to the land originally, and not alone as an incident to the lien on the building. By an examination of the decisions in the states mentioned and the statutes thereof, it is disclosed that the apparent conflict in the decisions depends entirely upon the difference in statutes. In Pennsylvania and California the statutes are identical with the Oregon statute, while in Mississippi the "lien shall extend to and cover the entire lot of the land," etc. In Minnesota the lien is upon the building and upon the interest of the owner of the building in the land on which it is situated. In Illinois the statute provides: "Shall have a lien upon the whole of such lot * * * shall extend to the estate of the owner of the building (where he is the owner of the lot)." In Texas the lien is on the building and on the lot necessarily covered thereby. It appears in most of those statutes that the lien is on the building and ground only to the extent of the interest of the person constructing the building, while in a case such as the one involved here the theory of the lien against the lot is that the lot gets the benefit of the expenditure. If, however, the

lien attaches to the lot of a stranger to the contract for the building, and the building is destroyed, the lot owner would get nothing. He was not a party to nor a beneficiary of the improvement, yet his lot would be sold to pay a large debt not incurred for anything that was ever to come to him or by which he was to benefit, which would be very inequitable, a result not contemplated by our lien law, and a condition not coming within its terms. Meredith holds the title to these lots, but had no part or interest in the construction of the building by contract or otherwise. The lienors may have a right to be subrogated to the rights of Emig and Yates or of the Perfection Sewing Cabinet Company in the lots, but there is no theory upon which Meredith should be held liable for the debt of the Perfection Sewing Cabinet Company when he has received no part of the consideration, and is not a party to the debt by contract. Such liability was not contemplated by the statutes of Minnesota, Illinois, and other states in which it is held that the lot is subject to the lien, even if the building be destroyed, as in those states the lien extends only to the lot to the extent of the interest of the owner of the building, and they do not contemplate such a case as the present one, but only a lien on the lot of the person constructing the building and on the interest he may have in the lot at the time of making the contract. But the title of Meredith to the land, who was a stranger to the contract for the building, is not involved. Illinois Revised Stat. 1911, § 15, p. 1477. In Minnesota the laborer has a lien upon the building and on the right, title, and interest of the owner thereof in the land upon which the same is situated, and therefore, under the decisions in that state, the lien does not extend to the interest of a stranger to the contract who may own the fee. The holding in those states would not make the interest of Meredith in these lots liable to the lien. The case of Humboldt Lbr. Co. v. Crisp, supra, was a case like the one before us. The California statute providing for the lien on the building also provides: "The land upon which any building * * * is constructed, together with a convenient space about the same * * * is also subject to the lien." And it is held: "If there is no building it will be impossible for the court to determine that any land 'may be required for its convenient use.' * * * In these provisions [referring to the statute] we see an intention of the Legislature to make the lien on the building the principal thing, and the lien on the land on which it is situated an incident of the completion of the building, and that when the building is destroyed before completion, there can be no lien against the land on which it was being created. * * * There is a note to this case in 2 Ann. Cas. 811, which

makes the distinction between the doctrine of this case and that of the Illinois, Indiana, and other like cases. We think the reasoning in the California case cited is sound, that it is applicable to the Oregon lien statute, and that it should control in the case before us.

The decree will be reversed, and the suit dismissed.

DEVROE v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. April 1, 1913.)

1. CARRIERS (§ 318*)—CARRIAGE OF PASSENGERS.

In view of Const. art. 7, § 3, as amended in 1910 (see Laws 1911, p. 7), providing that no fact tried by a jury shall be re-examined in any court, unless the court can affirmatively say there is no evidence to support the verdict, evidence held, in an action against a street railway company for wrongful death of a passenger, sufficient to support the verdict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

2. TRIAL (§ 142*)—QUESTIONS FOR JURY.

Where more than one inference may be legitimately drawn from the evidence, one favorable and the other unfavorable to the defendant, there is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 837; Dec. Dig. § 142.*]

3. CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS—QUESTIONS FOR JURY.

In view of L. O. L. § 868, subd. 2, providing that on all proper occasions the jury shall be instructed that they are not bound to find their verdict in accordance with the greater number of witnesses, evidence in an action against a street railway company for the wrongful death of a passenger held to present a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

4. TRIAL (§ 256*)—INSTRUCTIONS—REQUEST.

In an action against a street railway company for the wrongful death of a passenger, where the court, at request of defendant, instructed the jury not to find for plaintiff unless the accident happened as alleged in the complaint, that instruction is sufficient, in the absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

5. CARRIERS (§ 287*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS.

While the relation between carrier and passenger can only be created by contract, express or implied, one may become a passenger by boarding a street car at a point other than at a regular stopping place, where it was customary for persons to board the car at that point when it came to a full stop, and the servants in charge of the car are bound to exercise care in protecting one so boarding the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1159, 1161-1166; Dec. Dig. § 287.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTIONS COVERED BY THOSE GIVEN.

In an action against a street car company for the wrongful death of a passenger,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

where the court charged that the particular negligence averred was that, while the car upon which the decedent desired to embark was standing still, he attempted to board it, and was in the act of getting on the car, when it suddenly started, throwing him to the ground and causing his death, and that there could be no verdict in favor of plaintiff unless the accident happened in the manner alleged, the refusal of an instruction to find for defendant, unless deceased was killed by reason of the particular negligence charged in the complaint, was proper, being covered by the instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Circuit Court, Multnomah County; William N. Gatens, Judge.

Action by Louise Devroe, as administratrix of Clement Devroe, deceased, against the Portland Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for personal injuries. The jury returned a verdict in favor of plaintiff. From a judgment thereon, defendant appeals.

On the afternoon of December 9, 1910, plaintiff's intestate, Clement Devroe, met his death by being crushed under the wheels of the trailer of a St. Johns electric train operated by defendant. The accident occurred at a point between Beech and Falling streets, on Union avenue, in the city of Portland. The plaintiff's complaint charged, as the cause of the accident: That defendant's train, consisting of two of its street cars, was proceeding in a southerly direction upon the westerly track on Union avenue, and came to a stop between Beech and Falling streets. There Clement Devroe offered himself as a passenger, and while in the act of "stepping and drawing himself into said car, and had taken hold of the handhold upon said car, the defendant, its agents, servants, and employes, in a careless and negligent manner, and without giving any care or attention as to whether said Clement Devroe would be injured thereby or not, suddenly, and without any warning to the said deceased, started said train with a jerk and with such force that said deceased was thereby thrown off his feet, and thrown and caused to fall between the first and second cars of said train, in such a manner that the last car of said train struck said deceased and dragged him under said car, the wheels thereof cutting, mangling, tearing, and lacerating said deceased, and causing and permitting the wheels of said car to run upon and over said deceased, thereby injuring him so severely that he died immediately. That said defendant's said employes then and there knew, or, in the exercise of reasonable care, ought to have known, that said deceased was attempting to board said car when the said train was so started as aforesaid; and said deceased was so thrown under

the wheels of said car and injured and killed as aforesaid without any carelessness or negligence on his part, and solely * * * on account of the negligence and carelessness of the defendant, its agents, servants, and employes."

Defendant answered, and pleaded, among other things, that at the time of the accident, and while the cars were in motion and proceeding at too fast a speed to permit one to board the same in safety, the decedent carelessly, recklessly, and negligently, and without exercising proper care or precaution for his own safety, attempted to board or swing upon the rear platform of the head motor car, and while so doing missed his footing, fell between the cars, and was killed; that at the time of the accident the decedent well knew, and in the exercise of ordinary and reasonable care should have known, that the cars were in motion and moving at too fast a speed to permit him to board the same in safety, but nevertheless he recklessly, negligently, and carelessly attempted to board the car while in motion, by reason whereof he was killed.

At the trial the following facts appeared: Defendant's railway track, on which the accident happened, was one on which Woodlawn, St. Johns, and Alberta trains were operated. The decedent had boarded a Woodlawn car bound for Portland. Before the accident, and about midway between Beech and Falling streets, this car switched to the east track on Union avenue in order to let a following St. Johns train go by. The decedent got off from the Woodlawn car while it was switching and undertook to board the St. Johns train. The block in which the accident occurred is about 400 feet in length. The St. Johns train is a through train; that is, it does not stop to pick up passengers at all points, but it does stop to let persons off at any street, as the evidence shows. A through car always stops at intersecting tracks, and often at the switch between Beech and Falling streets, at which points it is customary to take on passengers. It is necessary for the local cars to switch at certain points in order to permit the through cars to pass, as the latter have the right of way.

The controversy is whether or not the St. Johns train was in motion when the decedent undertook to board it. Defendant contends that the St. Johns train did not stop at the switch, and the plaintiff asserts that it did on this occasion, as it very frequently stopped there to take on passengers while the other cars were switching out of its way.

The testimony on behalf of plaintiff upon this point was confined to two witnesses. Thomas Litzer, who was in the railway mail service, and who resided in Portland at the time of the accident, deposed in substance that the decedent, Clement Devroe, got on a

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Woodlawn car upon which he was riding, at Shaver street, north of where the accident occurred; that after Mr. Devroe got on the car, the St. Johns car was close behind them, and that when they passed Failing street it was right at their heels; that from there on they left the St. Johns car just a little ways behind, and crossed the switch between Failing and Beech streets; that about the time the conductor threw the trolley over to switch the car back over the east track, the St. Johns car caught up with them and was standing dead still, waiting for the Woodlawn car to switch out of the way; that when they started to switch back Devroe passed out of the front door as the car was halfway over the "cross-over"; that the Woodlawn car backed north onto the east track halfway past the rear car of the St. Johns train, and stopped opposite to it, so that his (Litzer's) position was about the middle of the St. Johns rear car, facing the same; that, when the Woodlawn car stopped, the St. Johns car was still standing, and that it must have stopped at least three or four seconds; that it started with repeated little sharp starts.

W. G. Holcomb, a salesman, of Portland, who was called by plaintiff, testified to the effect that the St. Johns train stopped at Failing street; that he got on the front platform of the rear car and stood there as the train pulled out; that it ran for some distance and came to another stop of possibly two seconds; that as he stood there he noticed a man come out from the curbstone and take hold of the rear handle bar of the motor car as it started, about 8 or 9 feet from where he was standing; that the man got one foot on the step, and his left hand hold of the rear handle bar; that, just as he did so, the car started up suddenly, and his foot slipped off; that he hung there for a minute, and dropped off under the trucks of the rear car; that the conductor of the rear car was standing at the front end until after the accident happened, and that just as the man dropped under the car he reached up for the bell cord. To the following questions Holcomb replied thus: "Q. Would you say whether or not he was looking at you at the time he attempted to get on? A. I would say he did. Q. Was he in a position where he could see him? A. Yes, sir. Q. What would you say as to whether or not he was looking at the man when the man came up and took hold of the car? A. I should say he was looking at him."

G. W. Dodge, motorman on the St. Johns train, witness for defendant, testified in substance as follows: That they made their last stop of half a second at Failing street; that they did not pick up passengers, unless they happened to get on where the car made stops; that, in coming into town, he made it a rule to lay about a block behind the other car; that the Woodlawn car, at the time he

stopped, was 200 feet ahead of him, which would place it at the switch; that, while they were unloading passengers, the Woodlawn car was crossing over to the other track, so that they could go ahead; that by the time they got fairly started the Woodlawn car had crossed over to the other track, and that it was not necessary for him to make a stop at that point; that his speed kept increasing to 10 miles an hour, he judged, until he got the emergency bell to stop; that he did not know of any one getting on between Beech and Failing streets until after the accident; that the car stopped within 50 or 60 feet. On cross-examination this witness testified that frequently persons got on at the switch, provided that they had to make a stop there. To the following question, "Did you see anybody at the switch when you got there?" he answered, "I saw a man standing off towards the sidewalk;" and to the question, "Waiting to get on?" he replied, "I suppose so."

W. H. Baldwin, a witness for defendant, testified in effect that he saw them make the switch; that he saw the St. Johns car coming down with three or four or five men scrambling to get on; that they were in the habit of getting on these cars every morning.

L. W. Edwards, conductor on the Woodlawn car at the time of the accident, testified for defendant in part as follows: "Well, the best I remember the St. Johns car stopped at Failing street, and by the time—I suppose by the time he stopped we were almost down to the switch. Of course, there being no overhead wires for the trolley to follow back, we stopped and I went around my car; kicked the switch over with my foot. I think I had to get on the bumper of my car, on the back end of the car, and take hold of the rope and pull the trolley off after we got started back. Then I pulled the trolley off and threw it across to the other wire. * * * You see I had to put my pole on first, and by the time I got my pole on and looked for the St. Johns car, I judge it was from 20 to 30 feet behind, still back of my car; that is, the front end of the St. Johns car. * * * I judge it was moving 4 or 5 miles an hour anyway, 6 probably. * * * I know he didn't stop any more."

Zera Snow and Geo. B. Guthrie, both of Portland (Snow & McCamant, of Portland, on the brief, for appellant. W. E. Farrell and M. L. Pipes, both of Portland (Davis & Farrell and Wilbur Henderson, all of Portland, on the brief, for respondent.

BEAN, J. (after stating the facts as above). [1] We have set out sufficient evidence to show that it is exceedingly contradictory. There were several other witnesses for defendant, who testified much to the same effect as those above named. In the brief of defendant the evidence is discussed at length, and we are urged to set aside the verdict

on the ground of the insufficiency of the evidence. The pivotal question is tersely stated thus: "Was the car in motion and traveling so rapidly that it was the height of folly to attempt to board it, either at a stop point or at a nonstop point, it makes no difference which in the discussion of this question?" Counsel for defendant requested the court to direct the jury to return a verdict in favor of defendant.

Section 3, art. 7, of the Constitution, as amended in 1910 (Laws of 1911, p. 7), provides that no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict. There was evidence to the effect that the car stopped at the switch mentioned, and, to sustain plaintiff's case, sufficient to be submitted to the jury. In *Moore on Carriers*, 541-543, it is stated thus: "The relation between carrier and passenger can only be created by contract, express or implied. * * * The general rule is that any person whom a common carrier has contracted, expressly or impliedly, to convey from one place to another, in consideration of the payment of fare, or its equivalent, and who, in the course of the performance of such contract has been received by the carrier under its care, either upon the means of conveyance, or at the point of departure of that conveyance, is a passenger." In a case where there is substantial evidence sustaining a verdict, although there be other strong contradictory evidence, we are prohibited from disturbing the verdict. *Wills v. Palmer Lumber Co.*, 58 Or. 536, 115 Pac. 417; *Purdy v. Van Keuren*, 60 Or. 263, 110 Pac. 149; *Atherton v. Walling*, 61 Or. 384, 121 Pac. 796; *State v. Michellod*, 124 Pac. 263; *Hofer v. Smith*, 129 Pac. 761, 763.

[2] The rule is that, if two inferences may be fairly and legitimately deduced from the evidence, one favorable and the other unfavorable to the defendant, a question is presented which calls for the opinion of the jury. Where the proof of the accident is accompanied by proof of facts and circumstances, from which an inference of negligence may or may not be drawn, the case cannot be determined by the court as a matter of law, but must be submitted to the jury. *Anderson v. North Pac. Lbr. Co.*, 21 Or. 281, 28 Pac. 5; *Manning v. Portland Shipbuilding Co.*, 52 Or. 101, 96 Pac. 545; *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330; *Miller v. Inman*, 40 Or. 161, 166, 66 Pac. 713.

[3] Regarding conflicting evidence, section 868, subd. 2, L. O. L., directs that on all proper occasions the jury shall be instructed that they are not bound to find a verdict in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other

evidence that does satisfy their minds. It was especially the province of the jury to pass upon the conflicting evidence in this case. It was for them to find, from all the facts and circumstances in evidence, what the truth of the matter was. It being in evidence that the Woodlawn car and the following St. Johns train were close together at Falling street, 200 feet north of where the casualty occurred, the jury should determine whether or not there was time for the Woodlawn car to stop, to have the trolley changed, and to switch back onto the east track, while the St. Johns train was stopping at Falling street (half a second, as testified by Mr. Dodge), without causing the latter train to wait at the switch for that to be done.

[4] It is argued by defendant's counsel that the court erred in not instructing the jury as to defendant's knowledge or means of knowledge of plaintiff's intestate attempting to board the car. As to this matter the complaint alleged: "That said defendant's said employes then and there knew, or in the exercise of reasonable care ought to have known, that said deceased was attempting to board said car when the said train was so started as aforesaid." The court, at the request of the defendant in the charge above quoted, informed the jury that they could not find for plaintiff unless they found that the accident happened as alleged in the complaint. This instruction was correct as far as it went. Had defendant desired it to be more specific, its counsel should have called the attention of the court to the point, and should have requested an additional instruction; otherwise, it would be assumed that the party assented to the charge as given. We find no such request. *Kincart v. Shambrook*, 128 Pac. 1003; *McClung v. McPherson*, 47 Or. 73, 76, 81 Pac. 567, 82 Pac. 13.

[5] The evidence tended to show, and the jury evidently believed, that it was the custom to receive passengers, when the cars stopped, at the point where the accident occurred; that the motorman and conductor of the St. Johns train saw the decedent at the time he attempted to board the car; and that the car came to a full stop, and other passengers got on at this point at the time of the accident. The case at bar differs from the case of *McCarty v. St. Louis & S. Ry. Co.*, 105 Mo. App. 596, 80 S. W. 7, 8, cited with other cases and relied upon by defendant, where plaintiff attempted to board a street car, on the wrong side of a street crossing, at a switch. There was no testimony that either the conductor or motorman saw the plaintiff before or at the time he attempted to get aboard, or knew that he desired or was trying to become a passenger. The conductor was not shown to be looking toward the plaintiff. In that

case defendant had a verdict, and there was a reversal. The court said: "If the testimony had shown it was usual to receive passengers there, the plaintiff's position would be well taken. * * * If there was a usage to take passengers at the switch, the carmen would have been bound to watch and be as careful about starting there as at far crossings—the common and appropriate localities for taking passage—for then persons would have a right to board cars, and the operatives good reason to expect them to do so. Washington, etc., R. R. Co. v. Grant, 11 App. D. C. 107; McNulta v. Ensich, 134 Ill. 46, 24 N. E. 631; West Chicago St. Ry. v. Manning, 170 Ill. 417, 48 N. E. 958; Id., 70 Ill. App. 239." Applying this rule, it brings us back to the main question settled by the verdict, to wit: Did the car stop at this switch?

[8] No exceptions were taken to the instructions given to the jury. Defendant's counsel duly saved exceptions to the refusal of the court to give certain requested instructions, and assigns such refusal as error. The second assignment of error is based upon the refusal of the court to give the following instruction: "In this action you should return a verdict in favor of the defendant, unless you are satisfied by a preponderance of evidence that the deceased was killed by reason of the particular negligence charged against the defendant in the complaint, and that said accident happened without any negligence on the part of the deceased." The defendant also requested the court to instruct the jury that, if they believed that the accident could not have been prevented by proper care and was an unavoidable one, plaintiff could not recover. The requested instructions were fully covered by those given by the court, one of which was given at defendant's request, as follows: "The particular negligence with which the defendant in this case is charged is that, while the said car upon which he desired to embark as a passenger was standing still on Union avenue, between Beech and Failing streets, the deceased attempted to board said car, and while he was in the act of getting on said car that it suddenly started forward with a jerk, throwing him to the ground and causing the injury complained of. This is the only negligence charged in the complaint, and I instruct you that you cannot return a verdict in favor of the plaintiff in this case unless you find that the accident happened in the manner alleged in the complaint." The court also instructed the jury to the effect that plaintiff must prove the alleged negligence by a fair preponderance of the evidence, and that if plaintiff's intestate attempted to board the car after the same had started and was in motion, or was guilty of any negligence contributing to the injury,

plaintiff could not recover. The cause was fairly submitted to the jury.

Finding no error in the record, the judgment of the lower court is affirmed.

MILLER v. MILLER.

(Supreme Court of Oregon. April 8, 1913.)

1. DIVORCE (§ 285*) — ALIMONY — APPEAL — TRANSCRIPT—CONTENTS.

On appeal from an order denying a motion to modify a divorce decree so as to relieve the husband from the payment of alimony, the original complaint, answer, and reply were proper parts of the transcript.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 768; Dec. Dig. § 285.*]

2. DIVORCE (§ 152*)—HEARING—DECREE.

The court has no jurisdiction to grant a divorce on the pleadings without hearing evidence, and a decree so granted is absolutely void.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 514; Dec. Dig. § 152.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Ernest M. Miller against Daisy E. Miller. Application for modification of a divorce decree. From an order denying the motion, plaintiff appeals. Reversed.

Ernest brought suit against Daisy, alleging various acts of cruel and inhuman treatment, including such matters as threatening to kill him, throwing dishes and glassware at him, striking him with dishes and other articles of household furniture, kicking him on delicate parts of his anatomy, and thereby permanently injuring him, and other desecrations of his manly person, whereby he was permanently injured and his life rendered miserable and unbearable. Daisy answered, denying the soft impeachments of plaintiff, and alleging that plaintiff had been accustomed to beat, kick, curse, and abuse defendant; that he had spit tobacco juice on her clothing, cursed, and abused her; that he had associated with dissolute women, and had thereby contracted a loathsome disease, had become affected with lice and other creeping insects of the louse family, had called defendant all kinds of vile names, and had made a brute of himself generally. Plaintiff replied, denying all the allegations of the answer. The circuit judge, taking the matter in his own hands, and without hearing any testimony, made a decree upon the complaint, answer, and reply, granting plaintiff a divorce and decreeing the property held in the name of defendant to belong to plaintiff, granting plaintiff the custody of the two children of the marriage, and giving defendant alimony at the rate of \$50 per month. After paying alimony for a few months, plaintiff refused to pay longer, and applied for a modification of the decree on the ground that section 513, L. O. L., provides only for the recovery of alimony off of the party in fault,

and that, the decree being in his favor, he is not in fault, and that the part of the decree granting alimony is void.

Flegel & Reynolds, of Portland, for appellant. John C. Shillock, of Portland, for respondent.

MCBRIDE, C. J. (after stating the facts as above). [1] There is some question raised as to the relevancy of the original complaint, answer, and reply as a part of the transcript. They are necessary and proper to the determination of this case.

[2] The circuit court has no jurisdiction to grant a divorce without hearing testimony, and the whole decree is absolutely void.

The cause will be remanded to the circuit court with instructions to vacate the original decree, to hear the testimony, and to make a decree in accordance therewith. Neither party will recover costs in this court.

BURNETT, J. I concur with some reluctance in the result of vacating the original decree and remanding the cause to the circuit court, with directions to take testimony at a regular hearing and by that procedure to decide the issues involved. The parts of the decree attacked by plaintiff's motion in the circuit court were the ones giving the defendant alimony at \$50 per month until further order of court, although the divorce was granted to the plaintiff, and the other making this allowance a lien upon the latter's real property. It would seem, primarily, that a court having jurisdiction of the parties and of the subject as in this case has the power to decide the whole issue, and that the decision, right or wrong, must be respected and obeyed until set aside upon appeal or by other direct attack. That an appeal will lie even from a void judgment is taught in *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Trullinger v. Todd*, 5 Or. 36, *Askren v. Squire*, 29 Or. 228, 45 Pac. 779, and *O. R. & N. Co. v. Eastlack*, 54 Or. 196, 102 Pac. 1011, 20 Ann. Cas. 692.

It is also stated in the chapter of our Code on appeals that "a judgment or decree may be reviewed as prescribed in this chapter and not otherwise." L. O. L. § 548. If the matter were *res nova*, it would logically result that, having allowed his time for appeal to elapse, the plaintiff must abide the consequences of the decree, and cannot "otherwise" review it by his motion in the court below. Such a proceeding is really in effect a motion for new trial, or, rather, an appeal from the circuit court to the same circuit court, since motions for new trial are not made applicable to suits in equity under our Code. We have already decided in *Macartney v. Shipherd*, 60 Or. 133, 117 Pac. 814, and *Gearin v. P. Ry., L. & P. Co.*, 124 Pac. 256, both actions at law, that a motion to set aside a judgment and to grant a new trial, although undetermined, does not operate to

piece out or extend the period of six months after the rendition of judgment within which an appeal may be taken. The same doctrine is applied to suits in equity in *Hahn v. Astoria Nat. Bank*, 125 Pac. 294, as against an undetermined motion in the trial court to modify a decree. This court entertained an order denying a motion to vacate that part of a decree in a suit for a divorce granting to one of the litigants in lieu of alimony the exclusive possession of public land upon which the parties had settled with a view of acquiring title, and held that part of the decree to be void. The motion to vacate was not filed until some years after the entry of the original decree. No motion to dismiss the appeal was made in that case, and it can be distinguished from the three other decisions above cited only on the ground that in the latter the determination attacked in each was merely erroneous, and not void on its face. If, on the other hand, the part of the decree assailed in *Huffman v. Huffman*, 47 Or. 610, 86 Pac. 593, 114 Am. St. Rep. 943, was manifestly void, the court in which it was made could strike it from its records at any time by virtue of its inherent power over its proceedings, independent of statutory provisions about new trial and appeal. See precedents cited in *Huffman v. Huffman*, supra, and *Multnomah County v. Portland Cracker Co.*, 49 Or. 345, 90 Pac. 155. *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007, decides, also, that periodical payments of alimony, decreed to be made for an indefinite period, do not constitute a lien upon real property of the party required to pay them. Section 513, L. O. L., empowers the trial court to make a decree in a divorce suit "for the recovery of the party in fault such an amount of money, in gross or in installments, as may be just and proper for such party to contribute to the maintenance of the other." If on this appeal we could impute absolute verity to the part of the decree favoring the plaintiff and unquestioned nullity to the portions of which he complains then on the ground of *stare decisis* alone, *Hill v. Mansfield* and *Huffman v. Huffman*, supra, would be authority for granting his motion according to its own terms, vacating only the specified parts of the decree.

Granting a divorce with an award of real property to the plaintiff and allowing alimony to the defendant are incompatible with each other in point of law, for, if the plaintiff is in fault, he would not be entitled to a decree at all, and it is only against a party in fault that alimony may be decreed. As there is no testimony or even a finding of fact reported to us, there is nothing in the record by which that incompatibility can be solved. On the data before us it cannot be determined whether it was just to award the divorce to the plaintiff or right to allow alimony to the defendant. It cannot be said on the record here that one part of the de-

cree is void because the other part is in existence.

Under the conditions disclosed, it would be contrary to natural justice and equity for the plaintiff to avail himself of that part of the decree taking from the defendant a large amount of property, without complying with the other part requiring him to pay her alimony; and hence the whole decree ought to fall on his application to be relieved of part of it. I therefore concur in the result.

GUILD v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. April 8, 1913.)

1. TRIAL (§ 200*)—INSTRUCTIONS—REQUEST TO CHARGE—REFUSAL.

Where, in an action for injuries to a street car passenger while alighting, the court, after stating the issues, charged that the burden of establishing the allegations of the complaint was on plaintiff, that she must prove them by a preponderance of the testimony, showing how the accident occurred, the way she was injured, and the amount of damages, and that if the scales preponderated plaintiff's way, even though slightly, she was entitled to recover, but if not defendant was entitled to a verdict, it was not error to refuse to charge that, before the jury could allow plaintiff any damages for injuries to her person, they must be satisfied by a preponderance of the evidence, not only that plaintiff was injured, but that the injuries resulted from and were caused by the accident, and that the jury could not allow plaintiff any sum for permanent injuries, unless they were reasonably certain from a preponderance of the evidence that she had sustained a permanent disability.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. APPEAL AND ERROR (§ 695*)—INSTRUCTIONS—REVIEW—EVIDENCE.

The court may refuse to review the denial of a request to charge that the evidence failed to show that plaintiff had sustained a permanent injury, where all of the testimony had not been reported in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.*]

3. DAMAGES (§ 208*)—PERSONAL INJURIES—PERMANENT INJURY—SURGICAL OPERATION.

Where plaintiff suffered a hernia as the result of a fall from one of defendant's street cars while alighting, the fact that the condition might be cured by a surgical operation, and that plaintiff had not submitted thereto, did not warrant an instruction that the injury was not permanent, and that plaintiff could not recover as for a permanent injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 206, 220, 533, 534; Dec. Dig. § 208.*]

4. DAMAGES (§ 158*)—PERSONAL INJURY—AGGRAVATION OF PREVIOUS INJURY—PLEADING.

Plaintiff had suffered a surgical operation, but the incision had healed, and had given no trouble for six years, at the time she fell from defendant's street car and sustained a hernia at the point where the incision had been previously made. *Held*, that such facts did not necessarily lead to the conclusion that the hernia was a mere aggravation of a previous injury, and hence defendant was not entitled to an instruc-

tion that she could not recover therefor, because the injury was not so pleaded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-444; Dec. Dig. § 158.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Rosa B. Guild against the Portland Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The substance of the complaint in this action is that the plaintiff was a passenger on one of defendant's cars, and while she was in the act of alighting at her destination, after the car had stopped, the defendant's servants negligently started it with a sudden jerk, without giving her any warning or reasonable opportunity to get off, whereby she was thrown to the ground and injured. She is said to have suffered lacerations and bruises and serious disarrangement both of her uterus and spinal column, together with an abdominal hernia, so that her intestines protruded. Aside from the corporate character and business of the defendant, and the fact that plaintiff met with an accident in connection with one of its street cars, the answer denies the entire complaint, and charges upon the plaintiff contributory negligence, in that she undertook to get off the car while it was still in motion. The reply traversed the answer. The trial resulted in a judgment for the plaintiff, from which the defendant appeals.

R. A. Leiter, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. W. E. Farrell and Thos. J. Cleeton, both of Portland (Graham, Davis & Young, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). It is disclosed by the testimony that about six years prior to the accident upon which this action is based the plaintiff underwent an operation designed to adjust her womb, which had become displaced on account of troubles experienced at childbirth. To effect the rectification of that organ, it was necessary to make an incision about the median line of the abdomen just above the pubic bone. The cut was sewed up, and healed successfully, giving no trouble to the plaintiff until after the accident complained of. The principal injury described in the testimony was the hernia already mentioned, which came through the inner fasciæ of the abdomen, and made its external appearance under the skin at the cicatrix resulting from the wound of operation. One element of plaintiff's claim against the defendant was for permanent injury. It is contended by the defendant that, because the plaintiff had not taken surgical measures as she might have to reduce and cure the hernia, the injury was not permanent, and hence she could

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not recover for it under an allegation of that kind. The general trend of the medical testimony at the trial was to the effect that the hernia could be cured by replacing the intestines and sewing up the aperture through which they had escaped.

[1] The defendant assigns but four errors, all predicated upon the refusal of the trial court to give certain instructions asked for by the defendant, three of which will be here considered and quoted:

"It is alleged in plaintiff's complaint that by reason of this accident she has been permanently injured and disabled in various parts of her body and person. In this connection I instruct you that, before you would be warranted in allowing the plaintiff any damages for any alleged injuries to her person, you must be satisfied from a preponderance of the evidence not only that the plaintiff is injured in the respects charged, but also that the injuries claimed by her resulted from and were caused by this accident."

"It is alleged in plaintiff's complaint that she has been permanently injured by reason of this accident. In this connection I instruct you that, if you should come to the question of damages, you cannot allow the plaintiff any sum by way of compensation for any alleged permanent injury, unless you are reasonably certain from a preponderance of the evidence that she has sustained permanent injury and disability. It is not enough that you may believe from the evidence that a permanent injury is possible."

"It is alleged in plaintiff's complaint that she has been permanently injured by reason of this accident, but I instruct you that the evidence fails to show that she has sustained any permanent injury, and I therefore instruct you that, if you come to the question of damages, you cannot allow any sum by way of compensation for permanent injury."

No objections were urged against the charge of the court as given. Turning to the instructions given to the jury by the court as reported in the record, we find that the judge stated the issues in substantially the verbiage of the pleadings, and then used this language: "Now the burden of establishing all these things that the plaintiff has alleged in her complaint is upon her, and she must so establish them to your satisfaction by a preponderance or outweighing of the testimony—that is, she must prove by a preponderance of the testimony all of the material things she alleges in her complaint, namely, the way the accident occurred, the way the injury came to her and the amount of damage she has sustained thereby—all of these things are solely for your determination and you alone." After likening the estimation of the effect of testimony to the weighing of the same upon scales, he said: "So, then, as to the allegations in the com-

plaint here, the material ones of which I have spoken, if the scales preponderate the plaintiff's way even though slight, she has established by a preponderance of the evidence the things which she has alleged, and is entitled to a recovery. If she has not, then the defendant is entitled to a verdict in this case." Taken in connection with his recitation of the pleadings, these utterances of the judge state fairly the conditions upon which alone the plaintiff can recover, together with the alternative that she must fail if she does not meet those conditions.

[2] As to the third request above quoted, we might well affirm the circuit court in refusing it because it does not appear by the bill of exceptions that all the testimony has been reported to us; but, in addition to that, the fact that the plaintiff experienced a hernia to the extent that her bowels protruded through the inner layers of the abdominal wall is sufficient to go to the jury as tending to show a permanent injury, although she had not yet undertaken the experiment of an operation to cure the same.

[3] All will agree that if she had actually experienced a hernia, and it were left to itself, the injury would be permanent; and we cannot say as a matter of law that the trial judge should have so far discounted the effect of a yet unperformed operation as to say to the jury that the evidence did not show any indication of permanent injury.

[4] The remaining error complained of was the refusal of the defendant's following request to instruct the jury: "I instruct you that, if you should come to the question of damages, you can only allow the plaintiff compensation for such injury as you believe from a preponderance of the evidence she has sustained by reason of this accident, and, if you find and believe from the evidence that the accident merely aggravated or rendered worse plaintiff's former injuries as a result of certain operations performed upon her prior to the accident, then you cannot allow the plaintiff any sum by way of compensation for any aggravation of her previous condition, for the reason that it is not alleged in plaintiff's complaint that any former infirmity has been aggravated or rendered worse by reason of this accident." In support of this instruction the defendant cites *Maynard v. Oregon R. R. Co.*, 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477, holding, in effect, that in an action for personal injuries plaintiff cannot recover for a mere aggravation of a previously received injury without alleging such aggravation in the complaint. With the doctrine of that decision when applied to a proper case we have no dispute. We may concede that the wound of operation made by the surgeon was such an injury which if it was in existence at the time of the street car accident complained of might be aggravated by that casualty, but there is no evidence that the trauma of

the surgeon's knife persisted to the time of the accident. All the evidence was that the healing process of nature had put an end to that injury, so that it was no longer in being to be aggravated. It may be, too, that the incision, although healed up, predisposed the plaintiff to hernia in that region of her person; but one having such a physical idiosyncrasy is as much entitled to travel upon the trains of a carrier as one who is sound of body. The negligent injury of one who is weak and incapacitated in person is as culpable as any other ill usage. In brief, the evidence does not disclose the present continuance of any former injury which could be aggravated so as to bring the case within the rule announced in the Maynard Case.

If, notwithstanding the surgical incision had healed, and had given no trouble for six years, it is to be taken into account as an abiding injury of which the plaintiff's fall from the car was an aggravation, so as to exclude her present hurt from our consideration because not pleaded as such aggravation instead of an original damage, then by a parity of reasoning, we must consider the present hernia a permanent injury, although it possibly might be cured by a surgical operation. In other words, if successful surgery will not in fact obliterate an injury in one case, we cannot hold as a matter of law that a possibly successful operation would destroy its permanency in another case.

The judgment of the circuit court is affirmed.

BREDEMEIER et al. v. PACIFIC SUPPLY CO.

(Supreme Court of Oregon. April 8, 1913.)

1. DAMAGES (§ 40*)—BREACH OF CONTRACT—PROFITS.

In general, lost profits cannot be recovered as damages for breach of contract, unless they entered into the contract itself, and were within the contemplation of the parties at the time the contract was executed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

2. DAMAGES (§ 24*)—BREACH OF CONTRACT—SPECULATIVE AND CONTINGENT DAMAGES.

Damages for breach of contract, which are speculative and so dependent on numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty, cannot be recovered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 65-67; Dec. Dig. § 24.*]

3. DAMAGES (§ 24*)—UNCERTAIN AND CONTINGENT LOSSES—AMOUNT OF BENEFIT.

The rule that damages which are uncertain or contingent cannot be recovered for breach of contract does not apply to an uncertainty as to the amount of benefit or gain to be derived from their performance, but only to an uncertainty or contingency as to whether any such gain or benefit would be derived.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 65-67; Dec. Dig. § 24.*]

4. PRINCIPAL AND AGENT (§ 41*)—SALES AGENCY CONTRACT—BREACH—LOSS OF PROFITS.

Where a contract gave plaintiffs the exclusive right or agency to sell a washing powder for a given time within a specified district, loss of profits would be held to have been within the contemplation of the parties as an element of damage following from defendant's breach thereof, and hence defendant could not escape liability because the losses sustained and the gains prevented were to some extent uncertain and problematical.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.*]

5. DAMAGES (§ 40*)—BREACH OF CONTRACT—PROFITS—ASCERTAINMENT.

Where plaintiff, in an action for breach of contract, is entitled to recover for loss of profits, the amount of such loss is to be determined by the jury from the nature of the contract, the circumstances surrounding and flowing from its breach, and the consequences naturally and plainly traceable thereto.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

6. DAMAGES (§ 117*)—BREACH.

Where a contract is repudiated, the compensation of the complaining party should be the value of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 285, 286, 288; Dec. Dig. § 117.*]

7. PRINCIPAL AND AGENT (§ 41*)—CONTRACT—BREACH—PROFITS—EVIDENCE.

Where plaintiffs were entitled to recover for loss of profits for breach of an exclusive agency contract for the sale of a washing compound in a specified district, and had pleaded and proved the expenses incurred in advertising the compound and establishing a market therefor, evidence as to the cost of performing such contract after the market was established, as compared with the expenses during the early part of the business, was admissible.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.*]

8. PRINCIPAL AND AGENT (§ 41*)—AGENCY CONTRACT—BREACH—EVIDENCE.

In an action for the breach of an exclusive agency contract for the sale of a washing compound, evidence of the quantity of the goods sold in the contract territory by defendant's successor, after repudiation of the contract and before the trial, was admissible.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Fred A. Bredemeier and another against the Pacific Supply Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action for damages for the breach of a contract. The cause was tried before a jury, and a verdict rendered in favor of plaintiff for the sum of \$2,655. From a resulting judgment, defendant appeals.

The facts, so far as deemed material to determine the controversy, are as follows: On the 12th day of October, 1910, plaintiffs and defendant entered into a contract, by the terms of which the plaintiffs were to have the exclusive right within the state of Oregon, for the period of 10 years, to sell a certain washing compound which was a patented article manufactured solely by the defend-

ant in the city of Portland, Or. The defendant agreed to furnish plaintiffs any quantity of the compound, in 15 and 25 cent packages, at a stipulated price. The plaintiffs, in turn, promised to purchase from the defendant an average of 100 cases per month for the first year, 150 cases per month for the second year, and 200 cases per month for each of the remaining years of the contract. It was expressly stipulated that, if the plaintiffs failed to buy the amount they agreed to purchase each year, the defendant should have the option of canceling the contract.

It appears that the plaintiffs began to carry out their part of the contract soon after it was executed; that they had demonstrators in the stores in Portland exhibiting the article to the public, and salesmen on the road advertising and selling the same; that the defendant was unable to furnish plaintiffs with packages of the size ordered, and that they were compelled to wait for goods sometimes for a month or so; that plaintiffs obtained several orders for goods, and arranged to place the same with the wholesale houses to supply to retailers at a profit of 94 cents per case; that, on account of the fact that defendant did not supply plaintiffs with the goods, they lost the sale of such orders as they had taken, and also lost new business; that the plaintiffs expended the sum of \$2,154.19 in advertising, demonstrating, and establishing a market for the compound, and selling 413 cases.

On February 1, 1911, or about that time, the Pacific Specialty Company was organized to take over the business of the Pacific Supply Company. On March 1, 1911, the defendant sent letters to the wholesale houses which were handling the compound for the plaintiffs, informing them that the contract was canceled, and that the defendant would sell the goods direct from the factory. On March 4, 1911, defendant notified the plaintiffs that the contract was annulled for the reason that they had failed to comply with the conditions of the same. During 1911 the Pacific Specialty Company sold 768 cases of the compound in that market.

Leroy Lomax, of Portland (Johnson & Stout, of Portland, on the brief), for appellant. R. F. Peters, of Portland (A. E. Clark and J. H. Middleton, both of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). At the close of plaintiffs' evidence, defendant moved the court for a nonsuit, which was refused, and the defendant assigns such refusal as error. Counsel for defendant also objected and excepted to certain evidence introduced, for the reason that the same tended to show merely speculative, remote, and conjectural damages, and assigns the introduction of such evidence as error.

[1] The general rule is that, in order to

recover profits in case of a breach of contract, such profits must have been within the contemplation of the parties at the time of the execution of the contract; and, where such profits do not enter into the contract itself, they will be denied. Anticipated damages, different from those which would ordinarily be sustained, are not always recoverable, but will only be awarded when, in view of special circumstances, they may be regarded as the natural and direct result of the breach, and are not problematical, but are capable of being foreseen and of being estimated with reasonable accuracy.

[2] Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty, no recovery can be had. 13 Cyc. 36; Wisner v. Barber, 10 Or. 342; Hoskins v. Scott, 52 Or. 271, 276, 96 Pac. 1112; Hichhorn v. Bradley, 117 Iowa, 130, 90 N. W. 592.

[3] The rule that damages which are uncertain or contingent cannot be recovered does not apply to an uncertainty as to the amount of the benefit or gain to be derived from performance, but to an uncertainty or contingency as to whether any such gain or benefit would be derived at all. Blagen v. Thompson, 23 Or. 239, 240, 31 Pac. 647, 18 L. R. A. 315; Wakeman v. Wheeler & Wilson Company, 101 N. Y. 205, 4 N. E. 284, 54 Am. Rep. 676.

[4] When a contract for the exclusive right or agency to sell a certain article for a given time within a limited district is broken, one of the elements of damage is lost profits. Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N. W. 319; Hichhorn v. Bradley, supra.

In the case at bar, the damages sustained by plaintiffs as to the profits are such as may reasonably be supposed to have been within the contemplation of the parties to the agreement at the time of the execution thereof, and the proximate and natural consequences of a breach by defendant. This follows, in view of the facts surrounding the execution of the contract, as shown by the evidence, and from the very nature of the contract itself. Such profits are the direct and legitimate fruits of the contract. It clearly appears that the agreement was made with the intention that the plaintiffs should sell the goods for a profit. They were not to be kept for ornament, nor even in stock. The profit from sales which were prevented by the annulling of the contract by defendant, and which can be ascertained with reasonable certainty, are proper elements for the consideration of the jury in determining the value of a contract pertaining to the sale of a commodity of the kind mentioned. A person violating his contract should not be permitted to entirely escape liability for the reason that the amount of damages which he has caused is uncertain. Losses sustain-

ed and gains prevented are proper elements of damage. As they are prospective, they must, to some extent, be uncertain and problematical.

[5] They should be determined by the jury from the nature of the contract, and the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to such breach, under proper instructions.

[6] When a contract is repudiated, the compensation of the party complaining of the breach should be the value of the contract. *Wakeman v. Wheeler & Wilson Mfg. Co.*, supra.

In the case of *Mueller v. Bethesda Mineral Spring Co.*, supra, the company entered into a contract with Mueller by which it made him the exclusive agent for its mineral waters in the city of Detroit and vicinity, for the period of one year, and, before the year expired, the company breached the contract. Mueller sued for damages, alleging loss of profits. The Supreme Court, in passing upon the measure of damages (88 Mich. at page 395, 50 N. W. at page 321 of the opinion), said: "The measure of plaintiff's damages was the profits which Mueller might have realized if defendant had performed its contract." The motion for a nonsuit was properly overruled.

[7] The expenses incurred by plaintiffs in advertising the compound, and in establishing a market for the same, were specially pleaded in the complaint. The evidence of plaintiffs tended to sustain the allegation. Defendant objected and excepted to evidence tending to show what the expenses would be for performing the contract after a market was established, as compared to the expenses during the first part of the business. This evidence was properly admitted to be considered by the jury, with the other facts, in estimating the value of the contract or the reasonable amount of damage. *Wells v. National Life Association of Hartford*, 99 Fed. 222, 236, 39 C. C. A. 476, 53 L. R. A. 33.

[8] It is claimed that there was error in allowing plaintiff to show the number of cases of the goods sold in Oregon by the defendant's successor, after the repudiation of the contract and before the trial. This evidence was admissible. When a contract for the exclusive right or agency to sell an article within a given territory for a given time is broken by the principal, evidence of later sales by other agents or by the principal, within the life of the contract, in the same territory, in an action by the agent, is properly admitted to enable the jury to determine the value of the contract or loss of profits. *Emerson v. Pac. Coast & N. Co.*, 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 450, 113 Am. St. Rep. 603, 6 Ann. Cas. 973; *Pittsburg Gauge Co. v. Ashton Valve Co.*, 184 Pa. 36, 39 Atl. 223, 224; *Wakeman v. Wheeler & Wilson Mfg. Co.*, supra.

From the amount of the verdict, the jury evidently found in favor of plaintiffs for a portion of the extra expenses incurred in creating a market for the goods, and for a loss of profits which plaintiffs could have obtained up to the time of trial.

Finding no error in the record, the judgment of the lower court is affirmed.

LAWTON v. MORGAN, FLIEDNER & BOYCE et al.

(Supreme Court of Oregon. April 15, 1913.)

MASTER AND SERVANT (§ 318*)—INDEPENDENT CONTRACTORS—PERSONAL INJURIES—"AND."

A general contractor is not liable to a servant of an independent contractor for personal injuries caused by the negligence of such independent contractor in possession of the premises, under Laws 1911, p. 16, relating to the duties of owners, contractors, subcontractors, or corporations, or persons whatsoever, "engaged" in the construction of any buildings, etc., and requiring "all owners * * * and other persons having charge of any work involving danger to employes or the public to use every device and precaution to obviate the danger"; the word "and" before the words "other persons" in such statute meaning "or."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 385-394; vol. 8, p. 7575.]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by John Lawton against Morgan, Fliedner & Boyce and others. Judgment for plaintiff, and defendant named appeals. Reversed.

This is an action by John Lawton against Morgan, Fliedner & Boyce, a corporation, Thomas Davidson, W. A. Leith, and B. J. Hecker to recover damages for a personal injury alleged to have been caused by the defendants' negligence. The summons herein was not served upon Davidson, Leith, or Hecker, and as to them the action was dismissed. The corporation answering denied the material averments of the complaint and set up affirmative defenses as follows: (1) That the injury complained of was caused by an independent contractor; (2) that the hurt resulted from the plaintiff's contributory negligence; (3) that the accident arose from the negligence of a fellow servant; and (4) that the plaintiff assumed the risk. The allegations of new matter in the answer having, by stipulation, been deemed denied, the cause was tried, and it was agreed by the parties that the testimony received substantiated the facts in substance as follows: That on March 30, 1911, the time of the accident, Leith and Hecker were the owners of a tract of land at the northeast corner of Grand avenue and East Stark street, Portland, Ore., and prior thereto they had entered into a contract with the corporation, whereby it engaged to erect for them a building on the premises. In

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order to secure an adequate foundation for the structure, it became necessary to drive in the earth piling, upon the top of which the foundation might rest; whereupon the corporation made a contract with Davidson, by the terms of which it agreed to supply the piling, and he stipulated to furnish the machinery and labor necessary to perform that part of the work. The piles were to be driven according to the plans and specifications, but such drawings and detailed statements were deviated from by the corporation's foreman, who changed the location of some of the supporting timbers, directed in a few instances that one pile should be driven on top of another, specified the number to be used, and indicated the depth to which they should be forced. The plaintiff was employed by Davidson, who directed where and how he should work, and had the right to discharge him, though he and the other employes engaged in driving piling were paid by the corporation's checks, which orders on the bank were charged on account of the contract price against Davidson, who was without funds to pay his laborers. The steam engine furnished by Davidson as a motive power to operate the pile driver was old and defective, the appliances for raising and holding the hammer were inadequate, and no provision was made for an efficient or prompt system of communication by means of signals between the man who operated the engine and the employes about the pile driver. The engine was Davidson's property, and the corporation did not exercise any supervision, direction, or control over the machinery, the men employed by Davidson, the signals, the apparatus, or appliances used in performing such work, and as between the corporation and Davidson he was an independent contractor. The plaintiff, on March 30, 1911, was engaged as "top man" on the pile driver, and while he was endeavoring to place a piling between the upright leads the hammer, without his signal and in the absence of any warning, fell, crushing his left hand and causing the injury complained of.

Based on this testimony, the corporation's counsel moved the court for a directed verdict. It was then admitted that the defense of independent contractor had been established, but the trial court, concluding that chapter 3 of Laws Or. 1911, initiated by petition and ratified by a majority of the votes cast in favor of the measure at an election held November 8, 1910, eliminated such defense, denied the motion. The cause was then submitted to the jury, which returned a verdict in plaintiff's favor in the sum of \$4,650, and judgment having been rendered thereon the corporation appeals.

R. A. Lelter, of Portland (Griffith, Lelter & Allen and F. J. Lonergan, all of Portland, on the brief), for appellant. W. E. Farrell, of Portland (Davis & Farrell and G. D. Young, all of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). It is conceded that by the principles of the common law an action of this kind could not have been maintained against Morgan, Fliedner & Boyce. The question therefore to be considered is whether or not the enactment referred to permits a recovery under the facts stipulated. The act, as far as deemed necessary herein, reads as follows:

"All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction * * * of any buildings * * * or operation of any machinery * * * shall see that all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power, * * * and generally, all owners, contractors, or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices." Section 1.

"The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe." Section 2.

"In all actions brought to recover from an employer for injuries suffered by an employe the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act." Section 5.

It will be kept in mind that the first part

of section 1 of the act embraces "all owners, contractors, subcontractors, corporations or persons whatsoever." The use of the word "or," as last quoted, would seem to indicate that for the recovery of damages sustained by a personal injury a several and not a joint liability was contemplated. *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913. In the latter part of the section adverted to it will be remembered that "all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb." It will be observed that, while the word "or" is understood to be used and employed between the phrase and words "all owners, contractors or subcontractors," the word "and" immediately follows the latter word, preceding the phrase "other persons." The individuals thus referred to are the persons "having charge of, or responsible for, any work involving a risk or danger to the employes or the public." From an examination of the entire act it is believed that the connective used between the word "subcontractors" and the phrase "other persons" should be "or," thereby manifesting a legislative purpose to create a several and not a joint liability resulting from an injury to an employe, caused by the negligence of either of the persons designated, when engaged in the construction of any building.

In section 2 of the act it is the manager, superintendent, foreman, or other person in charge or control of the construction or works or operation, or any part thereof, who shall be held to be the agent of the "employer" in all actions for damages for death or injury suffered by an employe. It is evident that an employer, whether owner, contractor, or subcontractor, who is engaged in the construction of a building is the only party defendant in an action to recover damages for a personal injury suffered by an employe while engaged in the same branch of the service. This determination is obvious from the language of section 5 of the act, to wit, "In all actions brought to recover from an employer for injuries suffered by an employe," etc.

In *Gibbons v. Chapin*, 147 Ill. App. 575, an action was brought against the owners of a building being constructed by an independent contractor for a personal injury alleged to have been caused by a violation of an ordinance of the city of Chicago, which municipal enactment was as follows: "It shall be the duty of all owners, contractors, builders or persons having control or supervision of all buildings in course of erection which shall be more than thirty feet high, to see that all stairways, elevator openings, flues, and all other openings in the floors shall be covered

or properly protected." The plaintiff in that action having recovered a judgment, it was reversed on appeal; the court holding that if a person were injured upon premises in course of erection or repair the owner was not liable for the hurt, notwithstanding it was occasioned by negligence, if it appeared that such premises were in the possession of independent contractors, who were so constructing the same, and that the owner did not and was not exercising supervisory care or direction over such premises at the time of the accident.

In the case at bar the corporation was not Lawton's employer. It had no power to engage or discharge him, and though it issued checks in payment of the labor performed in driving the piling the method adopted to liquidate these obligations was tantamount to accepting Davidson's orders, given to his employes, for the wages due them.

While the corporation's foreman directed where the piles should be driven and indicated where it was necessary to place one pile on the top of another, in order to force them to the proper depths so as to furnish adequate support for the foundation, Davidson's mode and manner of doing the work was not interfered with in any way; nor was any supervision or control thereof exercised by the corporation. Though it was the general contractor which sublet a part of the work, it necessarily occupied the same relation to the plaintiff as the owners of the building, and since the latter took no part in superintending the performance of the pile driving they are not liable for the hurt, and for the same reason the corporation is not accountable to the plaintiff for an injury he suffered in consequence of Davidson's negligence. We consider, therefore, that this action cannot be maintained against the corporation as the general contractor, and that in refusing to instruct the jury as requested an error was committed.

The judgment of the circuit court should be reversed and the action dismissed; and it is so ordered.

CRUSON v. CITY OF LEBANON.

(Supreme Court of Oregon. April 15, 1913.)

DEDICATION (§ 39*)—EQUITABLE ESTOPPEL—MUNICIPAL CORPORATIONS—OPENING ALLEYS.

The public is not estopped by laches to claim an alley as against one who purchased lots according to a recorded plat, showing the alley through them; the improvements placed on it not being of such a lasting and valuable character that the opening of the alley will entail any great pecuniary loss and sacrifice, but being merely lawn, lilac and rose bushes, three cherry trees, and a large shade tree.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 77; Dec. Dig. § 39.*]

Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Suit by Hattie A. Cruson against the City of Lebanon. Decree for defendant. Plaintiff appeals. Affirmed.

Plaintiff is the owner of lots 3, 4, 7, and 8, block 10, in the town of Lebanon, which are the south half of the block, and she and her grantors have been in the exclusive possession of the said south half of the block, including the alley through the same, since about the year 1861. The residence thereon is situated on lot 8, west of the alley, and fronts east, and the ground east of the house extending to Second street, including the alley, is set to lawn, fruit trees, berries, flowers, shrubbery, ornamental trees, and a garden. There are three cherry trees, flowers, shrubbery, and a large maple tree on the line of the alley. The city is proceeding to lay a sewer system, which it desires to locate through the alley in said lot; and it threatens to open said alley and lay the sewer therein. This suit is brought to enjoin the city from so doing on the ground that it should be estopped from opening said alley because of the private rights of the plaintiff that have grown up in consequence of the laches of the city in permitting it to be claimed, occupied, and improved by the plaintiff and her grantors for a period of more than 40 years. The case was put at issue, findings were made in favor of the defendant, and the suit dismissed. The plaintiff appeals.

J. K. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for appellant. N. M. Newport, of Lebanon (S. M. Garland, of Lebanon, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). Plaintiff relies upon the decisions in *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605, and in *Oliver v. Synhorst*, 48 Or. 292, 86 Pac. 376, 7 L. R. A. (N. S.) 243. In the former case it is said, following Judge Dillon's statement of the law in his textbook on Municipal Corporations: "It will, perhaps, be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments." And in the case of *Oliver v. Synhorst*, supra, the court, following the first-mentioned case, says: "But, while the rule may be that the ordinary statute of limitations as such cannot be set up to defeat the right of the public to the use of a street or highway, there may grow up, in consequence of the laches of the public authorities, private rights of more persuasive force in the particular case than that of the public, and if acts are done by an adjoining proprietor which indicate that he is in good faith claiming as his own that which is, in

fact, a part of the highway, and is expending money on the faith of his claim, by adjusting his property to the highway as he supposes or claims it to be, the public will be estopped." When the *Oliver v. Synhorst* Case was here on the second appeal (58 Or. 582, 109 Pac. 762, 115 Pac. 594), it was decided upon the evidence, and Mr. Justice McBride, in delivering the opinion, says: "As was intimated by Mr. Chief Justice Bean in his previous opinion in this case, the principle of an estoppel in pais will only apply in exceptional cases, and in our judgment this is not a case of that character." There is a note to the case of *Oliver v. Synhorst*, 48 Or. 292, 86 Pac. 376, in 7 L. R. A. (N. S.) 243, in which many cases are collated and reviewed. The annotator recognizes that the cases on this point are irreconcilable, many of which follow Judge Dillon's statement of the law quoted in *Oliver v. Synhorst*, supra; and he finds the most consistent statement of the law in the Illinois cases, which recognize the equitable estoppel stated by Dillon, but draw a close line by which to determine the conditions which will justify the estoppel, namely, where the public have long withheld the assertion of control over streets, and private parties have been induced thereby to believe the street abandoned, and have made improvements and structures in a situation where they must suffer great pecuniary loss if the street is opened. "But," says the note, "this doctrine is of no avail where no valuable or lasting improvements have been made by the abutting owner upon the portion of the street claimed by him"—citing *Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561, which holds that a city was not estopped from building a sidewalk on the true line of a public street by the mere fact that a portion of it was fenced in, and along that fence a sidewalk was constructed by others than the municipal authorities. The line of distinction as to what conditions will justify an estoppel is well stated in *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036, in which the court refused to hold the city estopped where it appeared that the only improvements placed upon the disputed land by the abutting owner were an inexpensive wooden picket fence, a maple tree about ten years old, a lilac bush, a creeping vine, and growing grass; deeming that the loss of these things would not present such a case of hardship and sacrifice that right and justice demanded an estoppel against the public.

It is said that to grant such an estoppel, there must be more than the inclosure of the street with the acquiescence of the city authorities and belief in good faith on the part of the claimant that the street has been abandoned by the public; but also on the faith of that belief, and with the acquiescence of those representing the public, such private party has erected structures on the

street and made improvements thereon of such a lasting and valuable character that to permit the public to assert the right to repossess itself of the premises would entail such great pecuniary loss and sacrifice upon the private property holder that justice and right would demand that the public be estopped. See, also, *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752. Plaintiff purchased the property described in the deed by lots, as designated upon the plat of the town of Lebanon recorded in the office of the clerk of Linn county; and that plat shows the alley. Therefore plaintiff is not brought within the language of the *Oliver v. Synhorst* Case, namely, that the acts done do not indicate that plaintiff and her grantors in good faith claimed to own the alley and expended money on the faith of their claim. Furthermore, the improvements on the alley are not of such a lasting and valuable character that the opening of the alley would entail any great pecuniary loss and sacrifice upon plaintiff. The improvements consist of lawn, lilac and rose bushes, three cherry trees, and a large and symmetrical maple tree. We think the facts here are not within the exceptional cases to which the estoppel in pais should apply.

The decree is affirmed.

HAWXHURST v. MEADOW LAKE LUMBER CO.

(Supreme Court of Oregon. April 15, 1913.)

APPEAL AND ERROR (§ 690*)—REVIEW—SUFFICIENCY OF BILLS OF EXCEPTION.

In an action against the Meadow Lake Lumber Company to recover the price of meat sold, a bill of exceptions complaining of the exclusion of evidence to show that such meat was charged to the K. Logging Company by direction of defendant's representative, but not showing whether plaintiff was trying to prove that he delivered the meat to defendant and charged it to the K. Company, or that he delivered and charged it to the K. Company by direction of defendant's representative, or that he offered to prove that he sold or delivered any meat to either corporation, was insufficient under L. O. L. § 171, requiring bills of exceptions to state so much of the evidence as is necessary to explain the objection, since it could not be determined whether or not the proposed testimony was relevant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.*]

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by J. W. Hawxhurst against the Meadow Lake Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover for the price of certain meat alleged to have been sold to defendant. The complaint is in the usual form for goods sold and delivered. The answer denied the sale and delivery of the

meat, and pleaded a counterclaim of \$41.95 for lumber sold and delivered to plaintiff. The reply admitted that the defendant had furnished lumber of the value of \$30, and no more, and alleged that such sum had been credited on defendant's account. The following is substantially the whole bill of exceptions, except as to the charge of the court, to which no exception was taken on the trial:

"Q. You may state when, if at any time, he came in there, and said to make a different charge or anything of that kind, and how that came about? To which question the defendant, by its counsel, objected to as incompetent, and not responsive to any issue in the pleadings, and on the further ground unless it appears it was in writing, and further that there is not an allegation in the pleadings that this meat was sold to anybody.

* * * Thereafter, the plaintiff, by his counsel, asked the witness the following question: Q. When was it, Mr. Hawxhurst, that Mr. Higgins came to your place of business, or into your place of business, at which time he stated to you for you in the future to make the charges to the logging company? To which question defendant by its counsel objected to as incompetent, irrelevant, and immaterial on the grounds urged in the previous objection, unless it appears that any authority of this nature was made in writing on behalf of the defendant corporation, which objection was sustained by the court, to which ruling the plaintiff's counsel excepted. And thereafter in the progress of said trial was asked the following: Q. I will ask you whether or not you sold any meat on and after this time through the instructions of Mr. Higgins or not? A. Yes. By Mr. Stone: Objected to as incompetent, and moved to strike his answer out. By the Court: That question goes to sales that were charged other than to the Long Lake Lumber Company. By Mr. Irwin: Yes, sir; that appears upon their books. By the Court: The objection will be sustained. To which an objection (exception) was taken by the plaintiff's counsel. Thereafter the plaintiff, by his counsel, asked the same witness the following question: Q. I will ask you to state whether or not you made a sale or sales of any beef which upon your books were charged to any one other than the Meadow Lake Lumber Company? A. Yes, sir. To which question and answer the defendant, by its counsel, objected and moved to strike the answer out on the ground that it was incompetent and immaterial; which objection was sustained, and to which ruling plaintiff's counsel took an exception, which was allowed by the court. Thereafter plaintiff, by his counsel, asked the plaintiff the following question: Q. I will ask you to state to the court and jury such amounts as were charged to other than the Meadow Lake Lumber Company, or the aggregate of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sales, if you know? To which the defendant, by its attorney, objected for the reason that the question was immaterial, incompetent, and irrelevant, which objection was sustained by the court, to which ruling plaintiff, by his attorney, excepted, which was allowed by the court.

"Offer of Proof. And thereafter in the progress of the trial, plaintiff, J. W. Hawxhurst, by his attorney, made the following offer of proof: 'That the witness J. W. Hawxhurst, who is the plaintiff in this case, will testify, if permitted by the court, that on or about May 7, 1910, that Mr. Higgins, who at that time was representing the Meadow Lake Lumber Company, came into Mr. Hawxhurst's place of business and stated to Mr. Hawxhurst that he should charge the rest of the meat to the Klamath Falls Timber & Logging Company, and immediately withdrew; that he did not make any explanation to Mr. Hawxhurst any further than made in that statement; that Mr. Hawxhurst did not know anything in regard to such company as the Klamath Falls Timber & Logging Company; that he presumed the Klamath Falls Timber & Logging Company was an adjunct of the Meadow Lake Lumber Company; that so far as the question of his charges in the matter was concerned, it was simply a matter of convenience to the Meadow Lake Lumber Company; and that it was not his intention at any time to waive the credit which was extended to the Meadow Lake Lumber Company, and thereby accept in lieu thereof—extend credit to the logging company. That at a date at some later time, on or about July 12, 1910, the witness Higgins, who at that time was acting in a representative capacity, representing the Meadow Lake Lumber Company, came into his place of business, and in the presence of J. W. Hawxhurst and his son George, says: 'They have attached the pump; keep your hands off, and you will get your money.' That the said J. W. Hawxhurst, relying upon the representations of Mr. Higgins, and relying upon the fact that they would get their money, understanding that the attachment was against the Meadow Lake Lumber Company, and the Meadow Lake Lumber Company being the only person to whom credit was extended, forbore to proceed in the matter, and did not attach, or take any further proceedings in regard to the recovery of the amount that he claimed due at that time.'

"And thereafter, on redirect examination, plaintiff, by his counsel, was asked the following question: Q. Now, Mr. Hawxhurst, how does it come that you have the sum of \$332.83 charged to the Klamath Falls Timber & Logging Company, under what circumstances was that done? A. That was done at the instance of Mr. Higgins requesting me to change the account on our books. By Mr.

Stone: Objected to as incompetent. Counsel comes in and asks why he did that, and unless he can show there was some obligation on the part of the Meadow Lake Company to become responsible, you cannot bind them; therefore it is incompetent. Which objection was sustained by the court, and to which ruling plaintiff, by his counsel, took an exception. And thereafter plaintiff, by his counsel, was asked the following question: Q. In other words, you were looking to the Meadow Lake Lumber Company for that pay right along, were you not? To which question defendant, by its counsel, objected to as incompetent, irrelevant, and immaterial, with reference to the account as charged to the Klamath Falls Timber & Logging Company, which objection was sustained by the court, to which ruling plaintiff, by his counsel, took an exception."

John Irwin, of Klamath Falls, for appellant. C. F. Stone, of Klamath Falls (Stone & Barrett, of Klamath Falls, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). Section 171, L. O. L., relating to the preparation of a bill of exceptions, requires that the objection shall be stated with so much of the evidence as is necessary to explain it. That has not been done in this case. Whether plaintiff was trying to show that he had delivered the meat to defendant, and had charged it to the Klamath Falls Timber & Logging Company, or whether his claim was that he had delivered to the Klamath Falls Timber & Logging Company and charged it to them on the suggestion of defendant's representative, does not appear. His offer of proof, which is not preceded by any question to which it applies, is equally indefinite. There is no offer to prove that at any time he sold or delivered any meat at any price to either corporation. Neither the questions asked nor the offer made shows the relevancy of the proposed testimony.

In the absence of the whole testimony taken at the trial we are unable to say that the testimony offered was relevant, and therefore the judgment is affirmed.

TEMPLETON v. MORRISON et al.

(Supreme Court of Oregon. April 15, 1913.)

1. APPEAL AND ERROR (§ 414*)—"ADVERSE PARTY"—NOTICE OF APPEAL.

The "adverse party" entitled to notice of appeal under L. O. L. § 550, is every party whose interest in relation to the judgment appealed from is in conflict with the modification or reversal sought by the appeal; that is, every party interested in sustaining the judgment (citing 1 Words and Phrases, p. 224).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. JUDGMENT (§ 237*)—PARTIES—JOINT DEBTORS.

In an action against joint debtors, where only common defenses are maintained, the judgment should be rendered against all or none.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 415, 418-421, 429; Dec. Dig. § 237.*]

3. APPEAL AND ERROR (§ 797*)—PARTIES ON APPEAL.

A judgment was rendered against L. C., and M., on a joint redelivery bond, L. defaulting. M. appealed from the judgment without serving notice of appeal on C. Subsequently, in another suit, a decree was rendered adjudging that C. was primarily liable on the bond, and that M. was a surety, and C. and wife took an appeal therefrom, which was undetermined. *Held*, that a motion to dismiss the appeal for want of notice on the adverse parties must be denied, with the privilege of renewal at final hearing, since the issues between M. and C. should not be determined, on motion to dismiss, while the other appeal was pending, in which the issues were directly raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3149-3154; Dec. Dig. § 797.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by C. R. Templeton against Finley Morrison and others. From a judgment for plaintiff, defendant named appeals. Motion to dismiss appeal denied.

Stapleton & Sleight, of Portland, for appellant. Ralph R. Duniway and C. L. Wheldon, both of Portland, for respondent.

BEAN, J. This is a motion to dismiss. Plaintiff moves to dismiss the appeal in this action, for the reason that the notice of appeal has not been served on all the adverse parties who appeared in the action; that is, for the reason that it has not been served on defendant W. E. Cook.

It appears from the record that the judgment from which this appeal is taken was against defendants Cecil B. Lloyd, W. E. Cook, and Finley Morrison upon a joint redelivery bond. The judgment was rendered against C. B. Lloyd by default. W. E. Cook appeared and contested the action, but did not appeal. Plaintiff contends that W. E. Cook is an adverse party to this appeal, and that it is necessary to serve notice of appeal and undertaking on him, for the reason that he is vitally interested in having this judgment stand as a legal judgment against Finley Morrison, so that there will be the right of contribution between W. E. Cook

and Finley Morrison upon the payment of the judgment.

[1] An "adverse party" entitled to notice of appeal under the provisions of section 550, L. O. L., is every party whose interest in relation to the judgment and decree appealed from is in conflict with the modification or reversal sought by the appeal. Every party interested in sustaining the judgment or decree is an adverse party. Words and Phrases, p. 224; *Moody v. Miller*, 24 Or. 179, 33 Pac. 402; *The Victorian*, 24 Or. 121, 32 Pac. 1040, 41 Am. St. Rep. 838; *Cooper Mfg. Co. v. Delahunt*, 36 Or. 402, 51 Pac. 649; *Lillienthal v. Caravita*, 15 Or. 339, 15 Pac. 280; *Stuller v. Baker County*, 30 Or. 294, 47 Pac. 705; *Osborn v. Logus*, 28 Or. 302, 38 Pac. 190; *Hafer v. Medford & C. L. R. Co.*, 60 Or. 354, 117 Pac. 1122.

[2] In an action against joint debtors, where only common defenses are maintained, a judgment should be rendered against all or none. *Fisk v. Henarie*, 14 Or. 29, 13 Pac. 193; *Wilson v. Blakeslee*, 16 Or. 43, 47, 16 Pac. 872; *Thomas v. Barnes*, 34 Or. 416, 56 Pac. 73.

[3] Defendant Morrison, in resistance of the motion to dismiss, answers that in a certain suit in the circuit court of the state of Oregon for Multnomah county, in which he and defendant Cook were parties, after the judgment appealed from in the case at bar was rendered, it was determined by that court that, as between defendant Cook and himself, the former was primarily liable on the bond upon which this action is based, he being a surety thereon for Cook; that an appeal from such decree was taken by W. E. Cook and Martha E. Cook, which has not yet been perfected; that the present appeal was taken September 7, 1912, while the equities between Cook and himself, in respect to this bond, were being litigated, which were afterwards judicially determined.

An appeal having been taken from the decree against Cook and wife, the same has not become final, and the question therein has not yet been settled. To determine what real interest Cook has in the judgment appealed from, upon the consideration of this motion to dismiss, would be to decide the equity suit between Morrison and Cook, prior to the hearing thereof, which this court should not do. In view of this condition of the record, the motion to dismiss should be denied for the present, with the privilege of renewing the same at the final hearing of this case.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HALL v. SUPERIOR COURT IN AND FOR ORANGE COUNTY. (Civ. 1,306.)

(District Court of Appeal, Second District, California. Feb. 18, 1913. Rehearing Denied by Supreme Court April 19, 1913.)

INSANE PERSONS (§ 12*)—ARREST FOR EXAMINATION—COMPLAINT.

The affidavit or complaint for arrest of a person for examination as to his sanity sets forth, not a mere conclusion, but, even if imperfectly, some description of his acts, conduct, or condition, as required by Pol. Code, § 2168, so as to give the court jurisdiction to issue the warrant of arrest; it alleging that at a certain time and place he was "laboring under the delusion that persons were whispering and talking to him, * * * and that there were parties who desired to drive him from" the country.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 20; Dec. Dig. § 12.*]

Certiorari by W. E. Hall to review proceedings of the superior court for the county of Orange. Order affirmed.

Shepard & Alm, for petitioner.

JAMES, J. This proceeding in certiorari is prosecuted for the purpose of securing a review of the proceedings had in the superior court of Orange county wherein petitioner was adjudged to be an insane person, and ordered committed to the state hospital at Patton. The proceedings complained of were had on the 30th day of January, 1912. Petitioner on the 13th day of July, 1912, was discharged from the state hospital by the superintendent thereof, for the reason that in the opinion of that official his condition was such that he would not while at large be injurious to himself or others. The particular ground upon which it is sought to have annulled the order of commitment is that the affidavit or complaint upon which the warrant of arrest was issued was insufficient to give the court jurisdiction to proceed and examine petitioner on the charge made. It is argued that there was no statement of facts contained in the complaint descriptive of the acts and conduct of the alleged insane person, as is required by section 2168 of the Political Code. The complaint in its material parts was as follows: "F. W. Heard, being duly sworn, deposes and says that there is now in said county in the city or town of Santa Ana a person named W. E. Hall, who is insane, and is so far disordered in mind as to endanger the health, person, or the property of himself or of others, and that he, at Santa Ana, in said county, on the 27th day of January, 1912, acted in a strange and incoherent manner, and was laboring under the delusion that persons were whispering and talking to him, and that he was afflicted with what he called a 'whisperer' and by buzzes, and was laboring under the delusion that there were parties who desired to drive him from Southern California; that by reason of said insanity said person is dangerous to be at large." It has been held by the Supreme

Court (Henley v. Superior Court, 162 Cal. 239, 121 Pac. 921) that it is essential to set forth in the complaint some description of the acts, conduct, or condition of persons subject to examination as being insane or inebriate. In the decision referred to the complaint contained nothing more than a bare statement of the conclusion of the complainant that the person therein referred to was so addicted to the intemperate use of stimulants as to have lost his power of self-control, and that he was a fit subject for commitment to the state hospital, and ought to be confined therein as an inebriate. The complaint as filed in the case of the petitioner here did attempt to set forth a statement of the facts as to petitioner's then condition and conduct. If it may be said that any facts were stated, however imperfect may have been their expression, then the court acquired jurisdiction to issue the warrant of arrest. We think that this case can be readily distinguished from that considered in Henley v. Superior Court, supra. In our opinion it was not a statement of a conclusion merely for the complainant to say that petitioner was "laboring under the delusion that persons were whispering and talking to him, * * * and was laboring under the delusion that there were parties who desired to drive him from Southern California." We think that by these expressions there was denoted the equivalent to saying that petitioner at the time complaint was made against him asserted that persons were whispering and talking to him, and were trying to drive him from Southern California, when in fact no such persons were whispering or talking to him or were trying to drive him from the country.

The order as made by the superior court is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

PEOPLE v. FLAVIN et al. (Cr. 196.)

(District Court of Appeal, Third District, California. Feb. 19, 1913. Rehearing Denied by Supreme Court April 19, 1913.)

1. JURY (§ 103*)—COMPETENCY OF JURORS—PREJUDICE.

A person called as a juror in a grand larceny prosecution was not rendered incompetent by stating on his voir dire that defendants' failure to testify, and the fact of their being accused would create a suspicion of guilt where he afterwards stated that he would be governed by the law, and would require the prosecution to prove defendants' guilt beyond a reasonable doubt before he would vote to convict, etc.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460, 461—479, 497; Dec. Dig. § 103.*]

2. JURY (§ 103*)—COMPETENCY OF JURORS—EXPRESSION OF OPINION.

A person called as a juror in a grand larceny prosecution was not rendered incompetent

because he had talked and read about the case, and had formed an opinion as to defendants' guilt, where it appeared that he had not talked with any of the witnesses, and that his discussion had been in a casual way with people who knew no more about the case than he did, and where he stated that he would be governed solely by the evidence and the instructions.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460, 461-479, 497; Dec. Dig. § 103.*]

3. CRIMINAL LAW (§ 977*)—JUDGMENT—TIME FOR PRONOUNCEMENT.

Under Pen. Code, § 1191, which provides that, after a plea or verdict of guilty, the court must appoint a time for pronouncing the judgment not less than two nor more than five days thereafter, but that the time may be extended to not more than 10 days for the purpose of hearing a motion for a new trial, or in arrest of judgment, judgment was properly pronounced May 31st on a verdict rendered May 16th, though the time for pronouncing judgment was originally fixed for May 20th, especially where both dates were appointed at defendants' request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. § 977.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Walter Flavin and another were convicted of grand larceny, and they appeal. Affirmed.

Carroll Cook, of San Francisco, and A. L. Levinsky, of Stockton, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

BURNETT, J. The appellants, with one John C. Carroll, were jointly charged with grand larceny. Carroll was tried separately, and appellants, by consent, together. A full statement of the facts is found in *People v. Carroll*, 128 Pac. 4, and also a complete answer to the contention of appellants that the evidence was insufficient to support a conviction for grand larceny, as the evidence for the people at the two trials was substantially the same.

[1] Appellants complain of the ruling of the court in denying their challenge for cause of certain persons examined to serve as jurors.

One of these was John O. Derr, and the point is that he declared that he would hold it against defendants if they did not testify, and also that the circumstance of their having been charged with a crime and of being prosecuted by the district attorney excited in his mind some suspicion of their guilt. His answers, however, were such as might be expected from any layman. When his attention was called to the law on the subject, he asserted that he would be governed by it, and that he would start in with the presumption of innocence, and require the prosecution to prove the guilt of defendants beyond a reasonable doubt before he would vote for conviction. The fact is that the venireman appears to have been unusually intelligent, and to have answered the ques-

tions more frankly than is customary, and the whole examination creates the impression that he would have been a fair and impartial juror.

The answers of D. A. Aldrich to questions propounded by counsel for appellants would rather indicate a condition of mind militating against a fair trial, but, after an explanation of the law bearing upon the matter, his responses to the inquiries of the court and of the district attorney justified the ruling in denying the challenge. He declared: "I would be willing to follow the rules of the law and the instructions of the court," and that he would and could "look at the testimony the prosecution presents here and judge the guilt or innocence of the defendant entirely upon the evidence admitted by the court." Of course, the trial judge was in a much better position than this court to determine the condition of the mind of Mr. Aldrich, and we cannot say that his decision was unwarranted.

These two were afterward excused on peremptory challenge.

[2] The objection to the juror, J. H. Owens, as we view it, is without merit. In reference to the case he stated: "I think I have talked something about it; read it in the papers and I have discussed it," and that he had formed an opinion as to the guilt of the defendants, but upon further examination it appeared that he did not talk with any of the witnesses in the case; that the discussions had been in a casual way, "merely of public rumor," with people who knew no more about the case than he did; that he would not consider the circumstance at all if sworn as a juror, but would "go solely by the evidence and the instructions of the court." His answers justified the court in making application of the saving clause in section 1075 of the Penal Code.

[3] It is also claimed that by reason of delay the court lost jurisdiction to pronounce judgment, and that, under the statute, appellants were entitled to a new trial.

As to this reliance is had upon *Rankin v. Superior Court*, 157 Cal. 191, 106 Pac. 719, wherein, referring to section 1191 of the Penal Code, it is said: "The effect of this section is that the court has no authority to fix the time for pronouncing judgment for a day later than five days after the verdict; that, if a motion for new trial or in arrest of judgment is made, the court may, for the purpose of deciding the same, extend the time for ten days." Herein there was a motion for a new trial, hence the court was authorized to extend the time for pronouncing judgment 15 days after verdict. That seems to be just what the court did. The verdict was rendered May 16, 1912, and 15 days thereafter, to wit, on May 31st, the judgment was pronounced. The record shows that "on request of counsel for the defendants the court fixed Monday, May 20, 1912, at 2

o'clock p. m. as the time for pronouncing judgment on said defendants"; that at said time the defendants moved for a new trial, and "at the request of counsel for the defendants and by consent of the district attorney the court fixed Friday May 31, 1912, at 9:30 o'clock a. m., for the defendants to prepare and file affidavits in support of their motion for a new trial and for the argument of the same, and for pronouncing judgment on said defendants." It is true that the first order set the time for pronouncing the judgment 4 days after the verdict was rendered, and the second order continued it till 11 days thereafter, yet we think this was in substantial compliance with the requirement of said section 1191. The section provides that, after a plea or verdict of guilty, "the court must appoint a time for pronouncing judgment which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial or in arrest of judgment." The maximum limit is therefore 15 days, and it does not seem to be a matter of jurisdiction whether it is divided into two periods of 5 and 10 days or two periods of 4 and 11 days, respectively. Both of said dates, it is to be observed, were appointed on request of appellants; and while this circumstance could not, of course, confer jurisdiction if otherwise none existed, it is not to be ignored, where appellants have suffered no injury, and they are insisting upon a mere technical construction of the statute in order that they may reap an advantage from the supposed error into which they enticed the court.

We think there is no prejudicial error in the record, and the order and judgment are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

CLARE v. NORTHWESTERN PAC. R. CO. (Civ. 1,043.)

(District Court of Appeal, Third District, California. Feb. 14, 1913. Rehearing Denied by Supreme Court April 14, 1913.)

1. CARRIERS (§ 256*)—PASSENGERS—NONPAYMENT OF FARE—ADDITIONAL CHARGES.

Act April 1, 1878 (St. 1877-78, p. 969), authorizing a carrier to collect from a passenger, not paying his fare before entering the train, the fare and 10 cents additional, where the fare is less than \$1, and at the rate of 10 per cent. on all fares in excess of \$1, though construed as repealing Civ. Code, § 2189, providing that a passenger afforded an opportunity to pay fare before entering a train must on demand pay 10 per cent. in addition to such fare, is expressly repealed by St. 1909, p. 515, § 43, providing for a railroad commission, and a carrier has no authority to demand any excess over the regular fare from a passenger un-

able to procure a ticket, because of the absence of the station agent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1005, 1006; Dec. Dig. § 256.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action by a passenger for a wrongful ejection from a train, the passenger claimed that he should not be required to pay any excess, and that he refused to pay any excess, while the carrier showed that no excess was demanded and no issue was raised as to whether the carrier could demand 10 cents or 10 per cent. extra charge, and the carrier admitted that the station agent was absent, the error, if any, in an instruction that a passenger, who has not paid fare before entering the train, if he has been afforded an opportunity to do so, must on demand pay 10 per cent. in addition to the regular fare, was not prejudicial to the carrier.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

3. CARRIERS (§ 380*)—PASSENGERS—EJECTION—ACTIONS—ISSUES, PROOF, AND VARIANCE.

The variance between the complaint in an action for the wrongful ejection of a passenger, which alleges that the carrier's servants wrongfully ejected the passenger, and the evidence of an ejection following the refusal of the conductor relative to a single trip ticket, while the passenger insisted in his demand for a round-trip ticket, and of his ejection because the conductor refused to sell a round-trip ticket, is immaterial, especially where there was evidence that the passenger conceded to the carrier the privilege of selling a single or round-trip ticket, but that the offer was rejected and the ejection followed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1464-1466, 1469, 1470, 1472; Dec. Dig. § 380.*]

4. CARRIERS (§ 382*)—PASSENGERS—EJECTION OF PASSENGERS—DAMAGES.

Where a passenger, who had recently submitted to a surgical operation for tonsillitis, was ejected from a train, and he was rendered ill as a result of his walking back to a station through the hot sun so that he was incapacitated from performing his ordinary work for seven months, a verdict for \$1,000 was not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

5. CARRIERS (§ 382*)—DUTY TO REDUCE DAMAGES—PASSENGERS—EJECTION.

A passenger wrongfully ejected from a train must minimize, as far as he can, the effect of the expulsion, and he may not recover for any injuries he knowingly brought on himself.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

6. CARRIERS (§ 384*)—EJECTION OF PASSENGER—INSTRUCTIONS.

An instruction, in an action for the wrongful ejection of a passenger, that if the passenger after the ejection so conducted himself as to expose himself to overexcitement, overexertion, or heat or dust, notwithstanding a prior warning, there could be no recovery was properly refused for ignoring the proper standard of conduct of a reasonably prudent man under the circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1497-1500; Dec. Dig. § 384.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

7. CARRIERS (§ 883*)—WRONGFUL EJECTION OF PASSENGERS—DAMAGES.

Whether a passenger, wrongfully ejected from a train, acted as a reasonably cautious person in going back to the station *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1492-1496; Dec. Dig. § 883.*]

8. CARRIERS (§ 370*)—WRONGFUL EJECTION OF PASSENGERS—LIABILITY.

A passenger may obstinately insist on his legal rights and demands, and he need not yield in what may seem of trifling importance and thereby save himself from being ejected from a train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1459; Dec. Dig. § 370.*]

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by P. R. Clare against the Northwestern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jesse W. Lillenthal, Albert Raymond, and Lillenthal, McKinstry & Raymond, all of San Francisco, for appellant. J. J. Mazza and F. L. Dreher, both of San Francisco, for respondent.

BURNETT, J. From a judgment based upon a verdict by a jury in favor of plaintiff for damages in the sum of \$1,000 and from an order denying its motion for a new trial, defendant has appealed.

It appears from the complaint that on the 30th day of May, 1909, plaintiff applied at defendant's ticket office in Corte Madera, a station in Marin county, for the purchase of a ticket to San Francisco, but the office was closed and the agent could not be found. Plaintiff was compelled, therefore, to board the train without a ticket. Shortly thereafter defendant's trainman demanded of plaintiff his fare, and he thereupon paid the sum of 35 cents, which was the regular charge between the two points. The trainman, however, demanded the further sum of 10 cents as an additional charge for the omission to purchase a ticket before entering the train. Plaintiff refused to pay any additional sum, stating to defendant's agent the reason, as before indicated, why he failed to secure a ticket. Thereupon he was ejected from the train. Although no violence was used, it is claimed that, from the illegal expulsion he sustained serious injury, the elements of which are set out in the complaint.

[1] Appellant finds fault with the action of the court in giving the following instruction: "A passenger upon a railroad train who has not paid his fare before entering the train, if he has been afforded an opportunity to do so, must, upon demand, pay 10 per cent. in addition to the regular fare." It is not disputed that this is the language of section 2189 of the Civil Code, but the contention is that, as to the fare under \$1, it was repealed by section 15 of "An act to

create the office of Commissioner of Transportation," etc., approved April 1, 1878 (St. 1877-78, p. 969), authorizing the company to collect "the sum of ten cents in all cases where such fare is less than one dollar, and at the rate of ten per cent. on all fares in excess of one dollar." But, conceding this point to be well taken, it can be of no avail, since the said act of 1878 was expressly repealed by section 43 of the act of March 19, 1909 (Stats. 1909, p. 499), entitled "An act providing for the organization of the Railroad Commission of the state of California," etc. The result is, apparently, that no authority existed at the time in question for any excess charge. The instruction, therefore, was favorable to appellant.

[2] Aside from this, however, appellant could have suffered no prejudice, since there was no controversy between the parties as to the amount of the excess charge. Respondent's contention was that he should not be required, and according to his testimony he refused, to pay any excess, while appellant's showing was to the effect that none was demanded. No issue was raised as to whether appellant had a right to demand 10 cents or 10 per cent. extra charge. Indeed, under the admission of appellant that "the station agent was away, and that the station was closed between 12 and half past 12, and that the agent was away until after 12:18, when that train left," it is clear that appellant had no legal right to demand any excess fare, and the instruction, if erroneous, constituted mere abstract error.

[3] There seems to be no substantial merit in the contention of a variance between the pleadings and the proof. Appellant's statement is: "While the complaint is based alone on an ejection following an alleged refusal of the conductor relative to a single-trip ticket, the testimony shows that this demand by plaintiff was never pressed or insisted upon; that all his insistence was for a round-trip ticket and that he was expelled because the conductor refused to sell him a round-trip ticket." As to this appellant is in error. The cause of action was grounded upon the allegation that "defendant's servants and agents wrongfully * * * expelled and ejected the plaintiff from said train." That was the ultimate fact to which said testimony was addressed, and it was a favor to appellant that respondent offered to purchase a round-trip ticket. Neither is it fair to say that he abandoned his purpose to purchase a single ticket. Viewing the testimony, as the law requires of us, we must conclude that respondent conceded to appellant the privilege of selling him either a single or a round-trip ticket, but that the offer was rejected and his expulsion followed.

[4] Ordinarily, a verdict for \$1,000 as damages for expulsion from a train, without the use of any violence, would be considered excessive, although, admittedly, in many cases,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the question as to the amount justified by the evidence is open to a contrariety of judicial opinion.

In *Elser v. Southern Pacific Co.*, 7 Cal. App. 493, 94 Pac. 852, it was held that a verdict for \$4,000 in favor of plaintiff who had been ejected from a train was excessive, and it was the opinion of the District Court of Appeal of the First district that it should be reduced to \$800, as plaintiff suffered no direct physical injury, except some slight and temporary nervous disturbance. The case manifestly called for this reduction by the appellate court.

In *Turner v. N. B. & M. R. Co.*, 34 Cal. 594, a verdict for \$750 was held not warranted for the reason that "there was no proof in the cause that the plaintiff had suffered any appreciable damage in her person or estate."

In *Gorman v. South Pacific Co.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157, it was held that a verdict for \$500 was not excessive where it appeared that the conductor used unnecessary violence and insult which caused mental suffering and humiliation upon the part of the passenger.

In *Cox v. Los Angeles Terminal Ry.*, 109 Cal. 100, 41 Pac. 794, a verdict for \$500 was held excessive on the ground that there was no appreciable damage and the evidence showed that "the conductor was civil and gentle in his intercourse with plaintiff."

The Supreme Court's action in reducing the verdict from \$1,400 to \$400, in *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 82 L. R. A. 193, is not so easily justified, but there is force in the contention that, since plaintiff there suffered no direct physical injury and the effect upon her nervous condition was only of brief duration, the jury, in arriving at the amount of their verdict, must have been influenced by other considerations than the testimony before them. Each case, of course, is characterized by its own peculiar facts.

Here the plaintiff had recently submitted to a surgical operation for tonsillitis and was in a somewhat enfeebled condition, and, as a result of the walk back to Corte Madera through the hot sun, the jury were justified in concluding that he was rendered ill and confined to his bed for several weeks and incapacitated from performing his ordinary work for a period of seven months. According to plaintiff's testimony, his business was sacrificed in consequence of his enforced inattention to it, and he is corroborated as to his subsequent physical condition by his physician who was called to attend him in the evening after his expulsion from the train. We see no necessity for quoting the testimony, but, giving it full credit, it seems idle to contend that a verdict for \$1,000 is excessive.

[5] The fourth point made by appellant is, we think, also without substantial merit. There is no doubt of the soundness of the

declared proposition that it was the duty of plaintiff to minimize, as far as he could, the effect of the expulsion, and that he was not entitled to recover "for the result of any injuries he knowingly brought upon himself." It is therefore claimed that the court erred in refusing certain instructions proposed by appellant in line with these principles.

[6] One of these proposed instructions was as follows: "If you shall find that plaintiff had been informed of the probable consequences of overexcitement or overexertion, or heat, or dust, or had been warned against any of these, but nevertheless so conducted himself after his leaving the train as to expose himself to these or any of them, and that any consequent damage was the direct result of such exposure, your verdict must be for the defendant." It is clear that therein the law was not correctly stated. The instruction ignored the established standard of conduct; that is, what would a reasonably prudent man do under the circumstances? There is no doubt that the plaintiff, after leaving the train, "exposed himself" in the manner implied in said instruction, and that the consequent damage was in a sense the result of such exposure; but it was for the jury to determine whether legally the proximate cause of the injury was the act of defendant in expelling plaintiff from the train or any unreasonable conduct of plaintiff himself. If the instruction has been based upon the hypothesis that the plaintiff unreasonably exposed himself, a different question would be presented. A similar criticism may be made of most of the other proposed instructions that were refused. One required a verdict for the defendant if the jury should find that it "was possible for plaintiff to have avoided any of the consequences" of his conduct after leaving the car. Another imposed upon plaintiff the duty "to use every effort to lessen the effects of his being expelled from the train." The propriety of the ruling as to these cannot be questioned.

[7] One other, however, seems to invite specific attention. It is this: "Even though a railroad improperly eject a passenger, the ejected passenger must wait at the station nearest his ejection, if he again intends to board a train, and must do no other acts that are likely in the mind of a reasonable man to increase any injury resulting from such expulsion or cause any injury that would not otherwise occur. And, if the passenger does not take all such reasonable precautions, the railroad is not liable for any resulting injury." The latter portion of the instruction, beginning "and must do no other acts," embodies a correct statement of the law, and, if it had been proposed alone, no doubt the court would have given it. We do not understand, however, that it was the absolute duty of plaintiff to wait at the nearest station for another train. That station was about 300 feet from the point where he was

ejected, but he walked back to Corte Madera, about 1,700 feet further.

Plaintiff's explanation was as follows: "Well, I was in a predicament that day that I did not know where I was at. I had just been put off your train for not having a ticket. My mind was not cleared up. I thought I knew something about railroading, but, when they put me off, I was up in the air. I did not know but that if I got on at Chapman station they would again refuse to take me, or not." It may be remarked that Chapman was simply a flag station, and therefore he could not secure a ticket there. Under the circumstances, we think it was a question for the jury whether he acted as a reasonably cautious person in going back to Corte Madera. "The very highest degree of care and caution is not required of the expelled traveler. It is sufficient if he use such prudent care as is reasonable under the circumstances." *Bland v. S. P. R. R. Co.*, 65 Cal. 626, 4 Pac. 672. In this respect the case is not unlike that feature of the *Sloane Case*, supra, considered as follows: "The court properly left to the jury to determine whether Mrs. Sloane exercised reasonable prudence in undertaking the walk from East Riverside to Colton, and, if so, that the injury sustained by her was a proper element of damage to be recovered. It could not say as matter of law, or instruct the jury, that under the evidence before them such walk was or was not necessary, or whether the route selected by her was the most feasible; nor could it have been justified in directing them not to allow compensation for any injury sustained by the walk upon the ground that, if she had waited a few hours, she would have gone upon the cars."

While the attention of the jury was not specifically directed to the question whether the plaintiff acted as a reasonable person in going as he did to Corte Madera, this is chargeable to appellant in not requesting such an instruction. Besides, this phase of the case was sufficiently covered by the instructions given which emphasized the duty of plaintiff to show that his injuries resulted from the expulsion from the train and were not occasioned by his own fault. The cases cited by appellant in this connection are so unlike this as not to require specific notice.

[8] Appellant charges respondent's misfortune to his own obstinacy. Obstinate he was, no doubt, and he would have saved himself a lot of trouble if he had paid the extra 10 cents and reported the matter to the higher officials of the company. But the law recognizes the right of the citizen to obstinately insist upon his legal demands and does not require him to yield in what may seem of trifling importance, although he might thereby save himself and others great discomfort and annoyance.

Some other questions are incidentally discussed, but we find no prejudicial error, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

STEVENSON BROS. CO. v. ROBERTSON et al. (Civ. 1,198.)

(District Court of Appeal, Second District, California. Feb. 14, 1913. Rehearing Denied March 15, 1913.)

1. LANDLORD AND TENANT (§ 76*)—SUBLETTING—CONSENT OF LESSOR.

Where the contrary was not shown, it would be presumed that a subletting by a lessee, who had covenanted not to sublet without the lessor's consent, was with the consent of the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 225-230; Dec. Dig. § 76.*]

2. SHERIFFS AND CONSTABLES (§ 116*)—ATTACHMENT—RENT—PERSONS LIABLE.

Where a constable attached property on leased premises and thereafter for five months used such premises as a storeroom for the property, and the tenant shortly after the attachment left the vicinity and did not return, but the lessor gave no notice to quit until about the time the constable vacated the premises, he was not liable to the lessor for the rent; there being no surrender of the premises by the tenant, or termination of the lease by operation of law.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 185; Dec. Dig. § 116.*]

3. LANDLORD AND TENANT (§ 277*)—RE-ENTRY—NOTICE—NECESSITY.

A landlord's right of entry for nonpayment of rent reserved in the lease can be exercised before the termination of the lease by lapse of time only after notice.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1169-1178; Dec. Dig. § 277.*]

4. SHERIFFS AND CONSTABLES (§ 88*)—ATTACHMENT—DUTY TO REMOVE PROPERTY.

It is the duty of the constable to remove property attached from the attachment debtor's premises within such time as is reasonably necessary to prepare the goods for removal, and he has no right to exclude the debtor from the use of the premises by permitting the property to remain thereon.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 120-125, 195; Dec. Dig. § 88.*]

5. SHERIFFS AND CONSTABLES (§ 116*)—RENT—PERSONS LIABLE.

While the failure of a constable to remove attached property of a tenant from the leased premises within a reasonable time was an invasion of the rights of the tenant, it did not render the constable liable to the lessor for the rent, where the tenant did not abandon the lease or surrender the premises.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 185; Dec. Dig. § 116.*]

6. SHERIFFS AND CONSTABLES (§ 116*)—RENT—PERSONS LIABLE.

Where a tenant, after an attachment of his property, did not abandon the lease or surrender the premises, a promise by the constable to the lessor to look after the rent, if considered as an agreement to pay rent to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lessor, was unenforceable, since the lessor had no right or authority to release the property to the constable.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 185; Dec. Dig. § 116.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Stevenson Bros. Company against J. J. Robertson and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and remanded.

McPherrin & Nichols, of Los Angeles, for appellants. George H. P. Shaw and Shaw, Ross & Dyke, all of El Centro, for respondent.

ALLEN, P. J. 'The action was one by plaintiff corporation against defendant Robertson, as constable, and his codefendants, as sureties upon his official bond, to recover the rent of certain premises from the 22d day of July, 1910, to and including the 22d day of December, 1910, at the rate of \$75 per month. Judgment went for plaintiff, from which, and an order denying a new trial, defendants appeal.

There is evidence in the record tending to show these facts: Plaintiff corporation, on May 28, 1909, leased to D. M. Bowman a certain storeroom in the city of Imperial for the term of five years next ensuing after June 1, 1909; the rental stipulated being \$75 a month for 21 months after September 1, 1909, and \$90 a month for the three years next ensuing. The premises were let for a bakery and delicatessen store, with the right to maintain a soda fountain. The usual stipulations are found in the lease giving the right of re-entry for default in the payment of rent, and a covenant not to sublet without the written consent of the first party. Bowman took possession of the leased premises, and was conducting a restaurant therein on the 22d of July, 1910, at which time a writ of attachment was issued in an action instituted by one Long against Bowman, and defendant Robertson, as constable, levied the same upon all of the property contained in said storeroom, other than the soda fountain. Prior to the 22d of July, Bowman, by an instrument in writing, sublet a portion of the premises to one Morgan, who operated the soda fountain and who owned the glasses and fixtures connected therewith. Morgan occupied this portion of the premises for 60 days after levy of the attachment, during which time the constable appointed him as keeper to look after the attached property. After the attachment was levied, Long purchased from the Soda Fountain Company the fountain, and Long agreed with Morgan that he might use the fountain, paying to Long rent for the part of the premises occupied. Morgan never paid Long anything for the use of the fountain. Defendant Robert-

son continued to occupy the remainder of the storeroom as a place to keep the attached property. About two weeks after the levy of the attachment, the secretary of the corporation, in a conversation with Robertson, asked him if he would look after the rent and he said he would take care of that, but in the conversation the secretary did not tell Robertson that he had any connection with the property or that the corporation was in possession of it. Robertson did not say he would be responsible for the rent. The president of the corporation, several weeks afterwards, talked with defendant Robertson about the rent, the substance of which was that Robertson was to hold the money he derived from the sale of the attached property until the rent was paid. It is further disclosed that plaintiff's attorneys had erroneously advised defendant Robertson that he was allowed \$3 a day for caring for the property, which might be utilized in the payment of rent. It is not a fact that any such allowance was due the constable; the only compensation for keeper's fees being such as the court may allow, and, as to constables in no event exceeding \$2 per day. Section 4300d, Laws 1907, p. 551. There is no evidence tending to show any surrender of the premises by Bowman or any agreement as to a surrender, and no notice to quit other than one posted upon the premises in December, 1910, about the time defendant Robertson moved out of the storeroom. After this notice to quit had been posted for a period of three days or more, plaintiff re-leased the premises to one Strong, who took possession, at which time Robertson moved out the attached property. The evidence further tends to show that Bowman left Imperial a couple of weeks before the attachment suit was brought and had not returned at the time of the trial. Further that, while the premises were being occupied by Robertson as a place of deposit for the attached property, Long, the attaching creditor, permitted certain societies to hold meetings or bazaars in the room; each of them occupying the premises for one evening, and on account of which they paid Robertson \$5 rent for each evening the room was so occupied. This rental money Robertson accounted for to the attaching creditor in connection with the sale of the attached property. It does not appear for what amount the attached property was sold. From this evidence the trial court found that Bowman had abandoned the property prior to July 22, 1910, and that defendant Robertson had hired of plaintiff the storeroom for the period of its occupancy by him; that Bowman was not in possession of the premises upon the date of the levy of the attachment. And as conclusions of law the court found that plaintiff was entitled to recover \$375, the rental, together with its costs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] Insufficiency of the evidence to support the finding of the abandonment of the premises is urged by appellants, and we think properly so urged, for it affirmatively appears that Bowman was in possession, through his servants and agents, occupying and using the premises as a restaurant at the date of the attachment and thereafter, and that his subtenant occupied the same for 60 days after levy of the attachment. Nothing to the contrary appearing, it will be presumed that the subletting to Morgan was with the consent of plaintiff. There is nothing to show a surrender of the premises by Bowman. "This can be done only by express consent of the parties in writing, or by operation of law, when the parties do something which implies that both have consented. * * * If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger." *Welcome v. Hess*, 90 Cal. 512, 513, 27 Pac. 370, 371, 25 Am. St. Rep. 145.

[3] The lease not having been terminated by lapse of time, the right of entry reserved on account of failure to perform other covenants could only be exercised after notice. Plaintiff's notice was not given until about the time defendant vacated the premises, and therefore it cannot be said that there was a termination of the lease by operation of law. *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073.

[4, 5] It may be assumed that Robertson's duty, when levying the attachment, was to remove, within a reasonable time, the goods from the store; that he had no right to exclude Bowman from the use of the store-room. *Harlow on Sheriffs and Constables*, § 262, and authorities cited. The officer must not linger longer than reasonably necessary to carefully pack up and prepare the goods for removal. *Waples on Attachment*, § 298. To make this removal, however, he has a reasonable time. *Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711. It does not follow, however, that because Robertson invaded the rights of Bowman, the tenant, in an unnecessary retention of the premises, he thereby became liable to plaintiff, the owner of the premises.

[6] The lease not having been abandoned, and we find no testimony in support of such finding, and there being no surrender, and we find nothing in the record indicating a surrender, the estate for the term of the lease was vested in Bowman; and were the conversation between the officers of plaintiff corporation and Robertson even to be considered as an agreement to pay rent to the corporation, the plaintiff having leased the premises to another, and the lease still being in existence, plaintiff had no right or author-

ity to re-lease the same. We think the motion for a new trial should have been granted and that the court erred in denying such motion.

The judgment and order denying a new trial are therefore reversed and cause remanded.

We concur: JAMES, J.; SHAW, J.

LEITCH v. MARX. (Civ. 1,033.)

(District Court of Appeal, Third District, California. Feb. 14, 1913.)

1. TRIAL (§ 165*)—NONSUIT—CONSIDERATION OF EVIDENCE.

On motion for nonsuit in an action brought by the assignee of a claim due a corporation, the assignment having been admitted in evidence, subject to be stricken out later as incompetent, it must be considered by the court and assumed to be true, where no motion to strike out was made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. TRIAL (§ 165*)—NONSUIT—CONFLICTING EVIDENCE.

On motion for nonsuit the question of the credibility of witnesses does not arise, but the testimony in favor of plaintiff is assumed as true; consequently testimony by a plaintiff, who was the assignee of a claim due a corporation, as to the validity of the assignment must be accepted as true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

3. CORPORATIONS (§§ 403, 404*)—ASSIGNMENTS—VALIDITY.

It is not essential to the validity of an assignment by a corporation that it should be authenticated by the corporate seal, nor that it should have been authorized by resolution of the board of directors, and an assignment by the secretary of the corporation, who was also a director, is valid, where it is authorized by the president and managing official; this being particularly true where the assignment of the claim is only for collection, in which case the defendant's only interest is to know that the assignment will bind the assignor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1626-1628, 1633-1639, 1676; Dec. Dig. §§ 403, 404.*]

4. CORPORATIONS (§ 432*)—ASSIGNMENTS—VALIDITY—EVIDENCE.

In an action by an employé of a corporation to whom had been assigned a claim for collection, he should, where the assignment is questioned, be allowed to show the circumstances and purpose for which the assignment was made to him, and that it was authorized by the president or manager and directors, or that the assignment was ratified by those in charge of the corporate affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Edwin Leitch against A. W. Marx. From a judgment on a nonsuit and an order refusing him a new trial, plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Stanislaus A. Riley, of San Francisco, and Tuttle & Tuttle, of Auburn, for appellant. L. L. Chamberlain, of Auburn, and John J. Bauer, of Sacramento, for respondent.

HART, J. This is an appeal from the judgment entered upon an order granting the defendant's motion for a nonsuit upon the close of the plaintiff's case, and from an order refusing to accord to the plaintiff a new trial.

The complaint alleges that on or about the 30th day of June, 1911, Eccles & Smith Company, a corporation, regularly organized and existing under and by virtue of the laws of the state of California, and whose principal place of business is in the city and county of San Francisco, entered into a written contract of lease with the defendant, whereby the former leased to the latter certain machinery, which was to be used by the defendant at Rocklin, in Placer county. For the use of said machinery the defendant agreed to pay to said corporation, at the city of San Francisco, the sum of \$454 in installments, as follows: July 27, 1911, \$152; August 27, 1911, \$152; September 27, 1911, \$150. Said lease provided that "time is of the essence of this agreement," and that a failure by the defendant strictly to keep and perform any of the covenants or provisions thereof to which he thereby obligated himself should work a cancellation of said lease, and that thereupon "all rights and interests of the lessee in or to said property shall cease, and all rent by lessee theretofore paid shall belong to the lessor as full payment for the prior use of said property." It was agreed that a "strict" compliance by the lessee with all the covenants and provisions of the lease would entitle him to the right to purchase said property upon the payment to the lessor of the sum of \$1.

The complaint alleges that upon the execution of said agreement the corporation delivered to the defendant the machinery therein referred to; that the defendant defaulted in the first and second payments provided for by said instrument, and that the defendant refused to pay the same on demand of payment; that on the 26th day of September, 1911, and prior to the commencement of this action, said corporation assigned to the plaintiff all its right, title, and interest in and to the above-mentioned claim against the defendant, for the recovery of which this action was instituted by the plaintiff.

The record discloses this situation: That the plaintiff was an employé of the corporation, the assignor of the claim sued for, and that, upon the failure of the defendant to make the payments as stipulated in the written instrument above mentioned, said corporation, through its secretary, by a writing, assigned the claim to the plaintiff. The assignment did not bear the official seal of the corporation, and when the contract of

lease, with said assignment thereon, was offered in evidence by the plaintiff, an objection was made to the admissibility of said writings, on the ground that "no authority or power was shown to have been conferred upon the secretary, by resolution or otherwise, to assign the lease and contract." The court, in reply to this objection, said: "I am constrained to hold with the defendant upon this point, but will formally overrule the objection in order to hear the whole case."

The contract and assignment having been under the indicated circumstances admitted in evidence, the plaintiff rested his case, and thereupon counsel for the defendant made a motion for a nonsuit, on the ground that "no authority, either by by-law or resolution of the board of directors of Eccles & Smith Company, was shown in C. F. Bulotti, the secretary, to make the assignment." The motion was granted.

[1] We think the granting of the nonsuit was erroneous. Although the court admitted the assignment in evidence, subject to be stricken out later upon the ground of its incompetency to prove the fact of the alleged assignment, there is nothing in the record disclosing that the evidence was stricken out, and, so far as we are advised to the contrary by the record, it is there as evidence in the case, and, conceding it to have been improperly admitted, it nevertheless constituted evidence which it was not only the duty of the court to consider, but to assume to be true, in passing upon the motion for a nonsuit. *Zilmer v. Gerichten*, 111 Cal. 73, 77, 43 Pac. 408; *In re Daly*, 15 Cal. App. 329, 114 Pac. 787; *Goldstone v. Merchants' Ice Co.*, 123 Cal. 625, 56 Pac. 776; *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; *Estate of Welch*, 6 Cal. App. 45, 91 Pac. 336; *Mitchell v. Brown*, 18 Cal. App. 117, 121, 122 Pac. 426, and cases therein cited.

[2] The question of the credibility of the witnesses or the weight or competency of the evidence cannot, on such a motion, arise. *Mitchell v. Brown*, *supra*; *Bush v. Wood*, 8 Cal. App. 650, 97 Pac. 709. The plaintiff testified that "the fact of this assignment to me was known to the president of the corporation. I had a meeting with the president, assistant manager, and secretary of the corporation in San Francisco shortly before suit was commenced, and they authorized me to come to Auburn and file the complaint, and I did so. These men were directors of the corporation." It was the duty of the court, in considering the motion, to give this testimony the benefit of its full probative force, and thus viewing it the inference is clearly deducible therefrom that the assignment was duly and regularly executed by the corporation. Thus a *prima facie* showing was made by the plaintiff upon that question, and this is all that was required to justify the submission of the plaintiff's case upon its merits, so far as the ground upon

which the motion was granted is concerned.

[3] It was not necessary to the validity of the assignment that it should have been authenticated by the corporate seal of the corporation. Nor was it absolutely necessary to its legality that its execution should have been authorized by a resolution of the board of directors previously adopted. *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913. In that case it is said: "There was a period in the history of corporations when the most ordinary transactions were required to be authorized by solemn resolution of the board of trustees, duly entered in their records, and authenticated by the corporate seal. With the multiplication of corporations having for their object nearly every business pursuit known to modern times, the formalities previously regarded as necessary, and which were illy adapted to pursuits requiring prompt action, have been greatly abridged." In the same opinion the following, by Bronson, J., in *Gillett v. Campbell*, 1 Denio (N. Y.) 522, is approvingly quoted: "Corporations, like individuals, may appoint agents and make most of the contracts which fall within the scope of their general powers without the use of a seal; the rule was once otherwise, but that day has gone by." The foregoing language was used in a case where the president and cashier of a bank, for the purpose of securing a debt owed by the bank, had assigned a debt due to the bank, and it was contended that the assignment was invalid, because the right to make it had not been shown by the by-laws of the corporation or a resolution of the board of directors, but the validity of the assignment was sustained.

In *Waterman on Corporations* (section 30) it is said: "As a general managing agent and superintendent is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation could do within the scope of its authority, he may assign the chose in action of the corporation to its creditors in payment of or as security for the payment of a precedent debt of the corporation without express authority of the board of directors." See *Newhall v. Joseph Levy Bag Co.*, 124 Pac. 875; *Preston v. Central Cal. Irr. Co.*, 11 Cal. App. 190, 104 Pac. 462.

But a distinction between the above authorities and the present case lies in the fact, it is claimed, that here the secretary, and not the manager or president, of the corporation executed the assignment. The reply to this proposition is, as before stated: (1) That on this motion it was the duty of the court from the assignment itself to infer that it was duly and regularly made; (2) that from the testimony of the plaintiff it is reasonably inferable that the assignment was made by the direct authority of the president and assistant manager of the corporation, who, with the secretary himself,

were also directors thereof, and who directed the plaintiff to go to Auburn and institute this action against the defendant. Under all the authorities, the president or manager or other officer having direct superintendence of the affairs of a corporation may transact for and bind it in all matters coming within its ordinary course of business, and the transaction here manifestly comes within that category. The plaintiff was an employé of the corporation, and it is clearly apparent from his testimony that the assignment to him of the claim against the defendant was merely for the purposes of collection. Assignments for such purposes are of frequent occurrence, and the defendant in an action by an assignee of a claim against him is only concerned to know that the assignment is of such a character as to bind the assignor. That the assignor in this case will be bound by the assignment is a fact, as before stated, clearly inferable from the testimony.

As stated in the outset, the order granting the nonsuit was erroneous, and the judgment thereupon entered and from which one of these appeals is prosecuted must be reversed.

[4] The court should have allowed the plaintiff to show the circumstances under which and the purpose for which the assignment was made to him, and the disallowance of the testimony proposed by him to that effect was erroneous and prejudicial. The rulings referred to were made upon the attempt by the plaintiff to prove that the assignment was made by authority of the officers of the corporation having the right to execute such a transaction for it, and to show that the money to be collected on the claim was to be paid by the plaintiff to the corporation, and that therefore the latter had an equitable interest therein.

The court should have permitted the plaintiff to show that the assignment was made by authority of the president, or the manager or directors, or under such circumstances as to disclose that it was acquiesced in and ratified by those in authority over the affairs of the corporation. For these errors in the rulings on the evidence, the court should have granted the plaintiff's motion for a new trial.

For the foregoing reasons, the judgment of nonsuit and the order denying the plaintiff a new trial are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

AISBETT et al. v. PARADISE MOUNTAIN MIN. & MILL CO. et al. (Civ. 1,032.)
(District Court of Appeal, Second District, California. Feb. 20, 1913.)

1. APPEAL AND ERROR (§ 912*)—PRESUMPTIONS.

Where the complaint and record are silent on the question, it is presumed that defendants

are residents of the county wherein the action is commenced; the burden being upon them to show that they were residents of another county if they seek a change of venue to such other county.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3689; Dec. Dig. § 912.*]

2. VENUE (§ 22*)—RESIDENCE OF DEFENDANTS.

Under Code Civ. Proc. § 395, requiring actions to be brought in the county in which defendants or "some of them" reside at the commencement of the action, an action against a corporation and others to declare invalid an assessment upon corporate stock was properly brought in the county in which the defendants other than the corporation resided.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.*]

3. VENUE (§ 41*)—CHANGE—UNANIMOUS REQUEST BY DEFENDANTS.

The fact that the defendants resident in the county where suit was brought joined the nonresident defendants in a written demand for removal of the cause to another county would not entitle them to a change of venue under Code Civ. Proc. § 395, requiring such an action to be brought in the county in which "some of" defendants resided at the commencement of the action.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Thomas W. Aisbett and others against the Paradise Mountain Mining & Milling Company and others. From an order denying defendants' motion for a change of place of trial, they appeal. Affirmed.

John L. Campbell, of San Bernardino, for appellants. C. W. Pendleton and Hickcox & Crenshaw, all of Los Angeles, for respondents.

SHAW, J. This is an appeal from an order denying a motion made by defendants for a change of the place of trial from the county of Los Angeles to the county of San Bernardino. The action (one other than those described in sections 392, 393, and 394 of the Code of Civil Procedure) is brought by stockholders of the Paradise Mountain Mining & Milling Company, a corporation, against said corporation and members of its board of directors, joined therewith as defendants, to have declared null and void certain proceedings wherein an assessment was levied upon the corporate stock of the corporation, and to enjoin a sale of plaintiffs' stock for failure to pay said assessment, as well as for other relief.

Section 397 of the Code of Civil Procedure provides that the court may, on motion, change the place of trial when the county designated in the complaint is not the proper county. The proper county for the trial, as appears from section 395 of the Code of Civil Procedure, is "the county in which the defendants, or *some of them*, reside at the commencement of the action." If the county wherein the action is brought is not the

proper county, "the action may, notwithstanding, be tried therein" (section 396, Code Civ. Proc.), unless the defendants avail themselves of their right to secure a removal in the mode prescribed by the statute. All of the defendants herein, other than Y. P. Preciado, joined in a written demand for the removal of the place of trial to San Bernardino county, and appellants concede that defendants other than Preciado were necessary parties. The ground therefor, as stated in the notice of motion, was that they were all residents of said county.

[1] Where the complaint and record, *as here*, are silent upon the subject, the presumption is that the defendants are residents of the county wherein the action is commenced, and the burden of proof is cast upon them to show that they were at the commencement of the action residents of another county or counties of the state than that wherein the suit is brought, and to which they ask that the place of trial be removed. *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Greenleaf v. Jacks*, 133 Cal. 506, 65 Pac. 1039; *Greenleaf v. Jack*, 135 Cal. 154, 67 Pac. 17; *Quint v. Dimond*, 135 Cal. 572, 67 Pac. 1034; *County of Modoc v. Madden*, 136 Cal. 184, 68 Pac. 491.

[2] While all the necessary parties defendant joined in the demand for the change, they offered no evidence whatever touching the residence of any defendant other than the corporation, whose principal place of business it is contended was shown by affidavit to have been removed from Los Angeles county to San Bernardino county by an order of the board of directors made, prior to the commencement of the action, pursuant to the provisions of section 321a of the Civil Code. Conceding this to be true, it appears that defendants other than the corporation were residents of the county wherein the suit was brought, and it being the right of plaintiff to have the case tried in the county wherein *some of the defendants* reside at the commencement thereof, it must follow that the court did not err in making the order denying the motion.

[3] Appellants insist, however, they are entitled to a change of venue by reason of the fact that the resident defendants joined the nonresident defendant in the written demand for the removal. In support of which they cite *Hannon v. Nuevo Land Co.*, 14 Cal. App. 700, 112 Pac. 1103, decided by this court, in which the following language was used in the opinion: "Where it appears that both resident and nonresident defendants are necessary parties, an order granting a change of place of trial will not be made upon demand of the nonresident defendant, unless the former joins in the demand." In making this statement the court followed *McKenzie v. Barling*, 101 Cal. 460, 36 Pac. 8, also cited by appellant, where it is said: "And it has

been settled that where, in a case coming under section 395 of the Code, any of the defendants reside in the county in which the suit is brought, a motion to change the place of trial to a county in which others of the defendants reside will not be granted unless all of the defendants join in the motion." In support of which the court there cited *Pieper v. Centinela Land Co.*, 56 Cal. 173; *Remington S. M. Co. v. Cole*, 62 Cal. 311; *Fickens v. Jones*, Parker's Cal. Dig. p. 83—together with several cases from the courts of the state of New York. Both statements are dicta. In neither case was the statement made pertinent nor applicable to the facts under consideration. Nor in either case does it constitute a correct statement of the law applicable to the right of removal in cases where there are defendants, some of whom are residents of the county wherein the action is brought, and others nonresidents thereof but residing in the county of the state to which all join in a demand to have the place of trial removed. See cases first herein cited. Where there are several necessary parties defendant, one or more of whom reside in the county where an action other than one of those described in sections 392, 393, and 394 of the Code of Civil Procedure is commenced, and others who are nonresidents of such county, the county where the suit is commenced is the proper place for its trial. To hold otherwise, and that in such case all of the defendants, having joined in a demand therefor, could secure a change of venue, would not only deprive plaintiff of his right accorded by section 395, but nullify a plain provision of the statute.

The order is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

STOVER v. STEVENS et al. (Civ. 1,072.)

(District Court of Appeal, Third District, California. Feb. 19, 1913.)

1. APPEAL AND ERROR (§ 197*)—PROOF—VARIANCE—FAILURE TO OBJECT.

Defendant should have pointed out any variance between the averments of the complaint and the proof, so that plaintiff might have had an opportunity to amend, and not having done so cannot complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.*]

2. PARTNERSHIP (§ 217*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action against a partnership, held to sustain a finding that the assumption of the debts of one of the partners was a part of the consideration of the partnership agreement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419-425; Dec. Dig. § 217.*]

3. FRAUDS, STATUTE OF (§ 18*)—CONTRACTS WITHIN STATUTE—ASSUMPTION OF OBLIGATION.

An agreement made in forming a partnership, as a part of the consideration thereof,

to assume the debts of one of the partners was an original obligation, and hence not required to be in writing by the statute of frauds (Civ. Code, § 2794).

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 27-31; Dec. Dig. § 18.*]

4. APPEAL AND ERROR (§ 1071*) — HARMLESS ERROR.

Any error, in an action against a partnership, in finding that the partnership existed before the date on which it was formed was not prejudicial to defendant, where the evidence showed that plaintiff's claim was for a debt assumed by the partnership and accruing within two years from the commencement of the action, or was a debt of the firm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

5. PARTNERSHIP (§ 165*) — LIABILITY FOR DEBTS—LIABILITY OF PARTNERS.

Partners are jointly liable for the debts of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 301; Dec. Dig. § 165.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Charles F. Stover against L. C. Stevens and S. F. Brown, copartners as Stevens & Brown. From a judgment for plaintiff, defendant last named appeals. Affirmed.

Grover C. Julian, of Woodland, and R. M. Rankin, of Susanville, for appellant. L. N. Peter and M. Kerr, both of Quincy, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover for certain cattle sold to defendants by plaintiff, and also, as assignee, to recover for merchandise sold and delivered, for work and labor performed, for rentals and for pasture, on 29 different claims of like number of persons and for various sums, in all amounting to \$3,521.75. The cause was tried by the court without a jury, and plaintiff had judgment for \$3,372.27, from which defendant Brown appeals.

Defendant Stevens failed to answer, and his default was entered. Defendant Brown answered, and denied the existence of the alleged copartnership prior to June 27, 1910, and denied the alleged indebtedness in each instance. The complaint was filed September 28, 1910, and alleged that defendants "are now, and at all times hereinafter mentioned have been, copartners under the firm name and style of Stevens & Brown, at the county of Plumas." The court made its findings as to the partnership in the language following: "That defendants are now, and at all times in said complaint mentioned have been, copartners under the firm name and style of Stevens & Brown." This finding is, in effect, the same as the averment of the complaint, with the further fact that the partnership was existing at the time the findings were filed, to wit, March 17, 1911.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The evidence was that the partnership was formed June 27, 1910, as the result of a conference between the parties a few days prior thereto, and was orally entered into. In its findings upon the several claims or counts the court follows the averments of the complaint. For example: "That on the 24th day of September, 1910, defendants were indebted to one Antone Vrisimo in the sum of \$92 for and on account of work and labor performed by said Antone Vrisimo for defendants, at the county of Plumas, state of California, within two years last past, and prior to said 24th day of September, 1910." The dates stated in the counts are all in September, 1910, none earlier than the 20th and none later than the 27th.

Appellant addresses himself first to the personal claim of plaintiff, claiming that there is no evidence of any indebtedness of the firm of Stevens & Brown to plaintiff, and that the finding can only be sustained on the theory that Brown assumed the personal indebtedness of Stevens; that there is neither pleading, evidence, nor finding that defendant Brown agreed to pay or assumed the indebtedness of Stevens existing prior to the partnership. Cases are cited as holding that an incoming partner is not liable for the debts of the old firm, unless he agrees to become so. It is also contended "that, in order to recover the debts of the old firm from an incoming partner, there must be some allegation in the complaint connecting him with the liability." And that the court erred in overruling defendant's objection to evidence tending to prove an indebtedness existing prior to the formation of the partnership. In nearly all the claims the evidence related to the prior indebtedness of Stevens, as well as to the firm indebtedness. In plaintiff's personal claim the evidence offered related to the balance due Stevens at the time the partnership began and also to the amount due at the commencement of the action, and the objection and ruling will illustrate the point made.

Defendant L. C. Stevens was called as a witness for plaintiff: "Q. What, if any, understanding was had between you and the defendant Brown as to the assumption by you and the defendant Brown, or the partnership, of the indebtedness existing at that time [the date of the formation of the partnership, June 27, 1910]? Mr. Rankin: Objected to as irrelevant, immaterial, and incompetent, unless first shown whether or not in writing. Q. At the time of the commencement of this action, what was the balance, if any, due to plaintiff? Mr. Rankin: Objected to as immaterial, irrelevant, and incompetent; evidence of the balance due the plaintiff Stover at any time prior to June 27, 1910, is barred by provision 1624, Civil Code, unless it is first shown the assumption of the debt by the firm is in writing. * * * Mr. Peter: We expect to connect this plaintiff by evi-

dence to bring it within the terms of the statute."

[1] There was a general demurrer, but no special demurrer, to the complaint. The averment of the complaint, in the several counts, is that the person named was, on the date named, indebted to the plaintiff 'n the sum named for merchandise sold, or other consideration specifically named, at defendants' request, within two years last past and prior to the date mentioned, followed by an averment of the assignment of the claim to plaintiff. The evidence of indebtedness was in support of the complaint, and if, as is claimed, there was a variance between the averments and the proof offered, or that the evidence was not within the issues, defendants should have pointed it out then and there, so that, if well taken, opportunity might have been given to amend the complaint. *Knox v. Higby*, 76 Cal. 264, 18 Pac. 881; *Henry v. S. P. R. Co.*, 50 Cal. 176. The point raised as to the statute of frauds must be decided in view of the circumstances attending the transaction or formation of the partnership.

There was evidence that some time prior to the formation of the partnership Stevens had been carrying on the butcher's business, selling meats and some other articles at the towns of Prattville and Greenville. A few days prior to June 27, 1910, he took defendant Brown over his delivery route and explained the business to him. He explained in a general way how the business stood, what his liabilities were, and what the book accounts receivable and other assets amounted to. Upon this showing Brown agreed to enter into partnership, which began June 27, 1910. Upon the terms of the agreement there is some conflict between the testimony of Stevens and Brown. Stevens testified: "Q. What, if any, understanding was had between you and the defendant Brown as to the assumption by you and the defendant Brown or the partnership of the indebtedness existing at that time? A. Well, the only thing that was said about that, I figured up my indebtedness and my resources, and Mr. Brown agreed to put in as much money in the business as I had invested, over and above my liabilities, assuming a portion of the debt and also assuming the resources, his portion of the resources, and I took credit for the amount of the resources over and above my liabilities. * * * Q. What was Brown to get for his in consideration of that agreement? What— Just state the whole agreement again. A. He was to get—he was to have one-half interest in my butcher business, personal property, and my book accounts, and he was to assume his one-half interest of the liabilities. Q. What liabilities? A. That I owed at the time of the commencement of the partnership; debts that I owed to my creditors. Q. What was he to get out of the produce of the business

from that time on? A. He was to have half of the profits—I supposed he was a full partner—a half interest. * * * Q. What was the consideration he was to pay you for that arrangement? A. I was to have credit for the difference between the resources and liabilities of the business and what I put into it. Q. Was that arrangement made on a trip down to the river? A. I couldn't state what day that arrangement was made; it was made prior to the 26th day of June. Q. You say you stated— What did he say about the agreement? A. He was satisfied with it; he didn't make any objection to me; went into the business and put his money into it. Q. Was anything said about these old debts of yours should be paid? A. I told him at the time that I wouldn't take him in unless he would assume part of the debts and take his chances on the book accounts the same as I had to; I couldn't close the business out and start in new, carrying on the business as it was if he would. Q. Wasn't there an arrangement made by which the debts were to be paid off out of the business as it went along? A. I told him the debts would have to be paid out of the business; I couldn't close the business and take him into it; I would have to carry it along that way."

[2] It appeared that the list of accounts was made up shortly after June 27, 1910, showing the liabilities and assets, which was shown to Brown. At the beginning of the copartnership the firm commenced to deal with its said creditors, paying off their indebtedness in money or supplying them with meat, and in some instances making purchases from them. The evidence tends to show that Brown entered upon and continued the relation upon the terms testified to by Stevens, although he denied, on the witness stand, that he agreed to pay the liabilities of Stevens otherwise than from the earnings of the business. The trial court resolved the conflict in the evidence in favor of plaintiff, and we are not at liberty to disregard its decision on the facts. Appellant contends that Brown's assumption of Stevens' debts was after the formation of the partnership, and that this subsequent agreement would be an agreement to pay the debts of another, and must be established in compliance with the statute of frauds, citing *Freeman v. Badgley*, 105 Cal. 373, 38 Pac. 955. The evidence is that the assumption of Stevens' debts was part of the agreement and consideration in forming the partnership. It is true that the assets and liabilities or the names and amount due each creditor were not then definitely known, but the facts were to be made known by a statement being prepared, and was soon after made out and shown to Brown and acted upon by the firm

as correct. It was said in the case cited: "But proof that the new firm recognized the debts of the old firm as its debts does not tend to prove an assumption of the old debts subsequently to the formation of the new copartnership, but that at the time of the formation of the last copartnership the new firm assumed the old debts; that the liability of the new partnership for these was a part of the consideration paid by him for his interest in the partnership."

[3] The facts here do not bring the case within the provisions of section 1624 of the Civil Code (the statute of frauds), but within the exception mentioned in subdivision 2 of that section, to wit, the provisions of section 2794 of the same Code: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: 1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise. * * * 3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; * * * or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." In a case somewhat similar in its facts it was held that "the contract between plaintiff and defendants was not one to answer for the debt or default of another, but was a contract of sale accompanied by delivery of the property sold; it was not, therefore, within the statute of frauds." *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216.

[4] The court found, in effect, that the partnership existed at all times mentioned in the complaint, which would reach back of June 27, 1910, when the partnership was formed. This finding, though unsupported in part, was without prejudice to appellant. The evidence showed that each claim was either for the debt of Stevens accruing within two years from the commencement of the action, or of the firm during its existence.

[5] Appellant relies on the objections generally made as hereinabove stated. There is no attack upon the several claims as unsupported by evidence otherwise than as these general objections are urged to all of the claims. It hardly need be added that partners are jointly liable for the debts of the partnership. *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.

We discover no prejudicial error in the record, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

**ZIERATH COMBINATION DRILL CO. et al.
v. CROAKE.** (Civ. 1,811.)

(District Court of Appeal, Second District, California. Feb. 14, 1913.)

CORPORATIONS (§ 196*)—ELECTION OF DIRECTORS—CORRECTION OF BALLOTS.

Where stockholders at a meeting for the election of a board of directors discovered before all the ballots were cast and before any canvass or result of the election was announced that their ballots as cast had not expressed their intention, it was not an irregularity to return the ballots to them, and to permit a correction so as to express their true intention.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 745, 746; Dec. Dig. § 196.*]

Mandamus by the Zierath Combination Drill Company and T. E. Amlin against P. W. Croake. Alternative writ made peremptory.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for petitioners. H. H. Appel and Edward J. Dennison, both of Los Angeles, for respondent.

PER CURIAM. At the annual meeting of the stockholders, held for the purpose of electing a board of five directors which should manage the corporate business of petitioner, it was developed that two factions among the stockholders were represented, each seeking supremacy in such board. The election was, of course, by ballot, and one faction delivered to the tellers their ballots upon which appeared only three names without any suggestion thereon that such votes should be cumulated. The other faction through their ballots cumulated their votes. Before all of the ballots were delivered and before any were canvassed or an election declared, the teller called attention to the failure of one faction to mark their ballots cumulative, and thereupon those stockholders who had theretofore deposited their ballots with the teller asked to have the same considered as cumulative, or that the same be returned to them for correction. The teller, against the objections of the other faction, returned such ballots to the stockholders who had cast the same, and they were so corrected as to show a cumulation of votes for the three names written thereon, and such ballots were returned so corrected to the teller. By reason of such corrected ballots, the election resulted in the selection of three persons as directors whose names appeared on the corrected ballots. After such election, the board organized and a new secretary was elected, who duly demanded of respondent, the former secretary, the surrender of the books, seal, etc., of the corporation, which was refused; hence this proceeding to compel such surrender.

The sole question presented relates to the regularity of the proceedings with reference to the permission to correct the ballots. We are of opinion that the same being discovered

before the final vote was cast, and before any canvass or result of election was announced, it was proper to permit the correction of the ballots that they might express the true intention of the stockholders. Corporation elections are business affairs, not controlled by the laws affecting general elections, and should be conducted in a business way and in a manner affording all stockholders the fullest liberty in expressing their wishes, disregarding technical matters which enter into general elections controlled and restricted by special statutes. The result obtained, in the absence of any acts constituting fraud as to the minority, is clearly one which was in harmony with the wishes of the majority of the stockholders.

The alternative writ should be made peremptory, and it is so ordered.

GOODMAN v. DAILEY. (Civ. 1,001.)

(District Court of Appeal, Second District, California. Feb. 17, 1913.)

1. JUDGMENT (§ 253*)—PLEADING—NECESSITY.

In general, a judgment cannot award damages in excess of the amount claimed in the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.*]

2. TRIAL (§ 398*)—FINDINGS—PROBATIVE FACTS.

Defendant owning a hotel and lodging house sold the same with the good will to plaintiff, agreeing not to engage in a like business in that city as long as plaintiff continued in the hotel business. On May 1st defendant, in violation of his agreement, opened a hotel, and on June 22d plaintiff filed his complaint, claiming damages in the sum of \$2,000 for the breach of contract. Held, that a finding by the court that plaintiff was damaged to the amount of \$1,300 and that his business was ruined was not invalidated by a further finding that plaintiff made a net profit of \$240 a month, on the ground that plaintiff's damages could not at the time of filing the complaint, which was not amended so as to include damages up to the date of judgment, have amounted to over two months' loss of profits, since all intendants are in favor of the judgment and the ultimate fact found cannot be overcome by a probative fact, the finding as to the monthly profit being only evidentiary, especially in view of the finding that plaintiff's business was wholly ruined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Jacob Goodman against D. V. Dailey. From a judgment for plaintiff, defendant appeals. Affirmed.

W. P. Butcher, of Santa Barbara, and Preisker & Preisker, of Santa Maria, for appellant. Richards & Carrier, of Santa Barbara, for respondent.

SHAW, J. Action for damages resulting from a breach of contract. Judgment went for plaintiff, and defendant prosecutes this appeal upon the judgment roll.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

As appears from the findings, defendant, who was conducting a hotel and lodging house in the town of Los Alamos, sold the same, together with the good will thereof, to plaintiff, and at the same time, in consideration of the purchase by plaintiff, agreed that he would not engage in a like business in said town so long as plaintiff conducted a hotel therein. Notwithstanding this agreement, defendant did on May 1, 1910, while plaintiff was engaged in said business, violate his agreement by engaging in the hotel business in Los Alamos, as a result of which plaintiff was damaged in the sum of \$1,319. In addition to these ultimate facts, which clearly support the judgment, the court made a further finding as follows: "That prior to the opening of the said hotel by the defendant on May 1, 1910, the plaintiff was making and made a net profit of \$242 a month from the hotel and lodging house business so conducted by him in said town of Los Alamos; that since the 1st day of May, 1910, and by reason of the wrongful acts of defendant, the plaintiff's business has been entirely destroyed, and he has made no profits whatsoever." It is by reason of this finding, taken in connection with the time of the filing of the complaint and allegations thereof, that appellant claims the judgment should be reversed. Defendant, in violation of his agreement, opened his hotel on May 1, 1910. The complaint, filed June 22, 1910, alleged that by reason of defendant's wrongful acts plaintiff was damaged in the sum of \$2,000. Upon these facts appellant insists that, as plaintiff's profits prior to May 1st were \$242 per month, his right to recover damages was limited to the loss of profits computed upon the basis of \$242 per month for the period extending from May 1st to the filing of the complaint on June 22d, which, according to his figures, would be \$403; that it is thus apparent that the court in fixing the damage sustained by plaintiff at \$1,319 based its action upon the loss of profits computed, not to the commencement of the suit, but to the date of the rendition of judgment, and that, as no supplemental complaint was filed, the damage found was in excess of that alleged in the complaint.

[1,2] The general rule is that a judgment cannot be properly rendered for damage in a sum greater than that claimed by plaintiff in his complaint. *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; *Morenhout v. Barron*, 42 Cal. 591; 23 Cyc. 795. Conceding the application of the rule to the case at bar, and leaving out the question as to whether or not the facts of the case bring it within the provisions of section 3283 of the Civil Code that "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future," we are of the opinion that appellant's contention is

without merit. The complaint properly alleged the making of the contract, its breach by defendant, and damages sustained by reason thereof in the sum of \$2,000, all of which allegations the court finds to be true, except that the damage was fixed at \$1,319. While the loss of profits was an element of the damage sustained, it was not necessarily the only element thereof. At most, it was evidentiary, and the profits per month made by plaintiff prior to defendant's breach of the contract, as found by the court, was not an ultimate fact, but a probative fact, and must, since the ultimate facts found support the judgment, be deemed immaterial. "The rule has been long settled that, when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact." *Commercial Bank v. Redfield*, 122 Cal. 408, 55 Pac. 160, 162. Every intendment is in support of the judgment. It cannot be said that the loss of profits prior to the filing of the complaint was the only element of damages, particularly since the court found that "by reason of the wrongful acts of defendant the plaintiff's business has been entirely destroyed." Certainly no complaint should be found with the amount of a judgment awarding damages in the sum of \$1,319 on account of defendant's wrongful total destruction of a plant which yielded a profit of \$242 per month.

The judgment is affirmed.

We concur: ALLEN, P. J.; James, J.

GUZZI et al. v. McALISTER, Mayor, et al.
(Civ. 1,233.)

(District Court of Appeal, Second District,
California. Feb. 21, 1913.)

1. INTOXICATING LIQUORS (§ 10*)—LICENSES
TO SELL—MUNICIPAL CONTROL.

Under Const. art. 11, § 11, empowering a city to make and enforce police regulations, and under ordinances requiring persons desiring to retail intoxicating liquors to procure a license and providing that no license shall issue until a petition therefor, setting forth the names of the applicants, location of the business, etc., is presented to the city council, and that the petition shall be denied if the council finds that applicants are not persons of good moral character, etc., the question whether a license shall issue is entirely under the control of the city council.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

2. INTOXICATING LIQUORS (§ 1*)—SALE—
POWER TO REGULATE.

The sale of spirituous liquors is subject to regulation under the police power; there being no vested right in any one to engage in that business.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 1; Dec. Dig. § 1.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

8. INTOXICATING LIQUORS (§ 64*)—LICENSES TO SELL—APPLICATION—SUFFICIENCY.

Under an ordinance requiring an applicant for a license to retail intoxicating liquors to present to the city council a petition stating the names of applicants, etc., an application signed "Guzzi Bros., by C. Guzzi," is insufficient.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 64; Dec. Dig. § 64.*]

4. INTOXICATING LIQUORS (§ 74*)—LICENSES TO SELL—MANDAMUS TO COMPEL ISSUE—PREREQUISITES.

Writ of mandate will not issue to compel city officers to issue a license to sell intoxicating liquors where payment or tender of the license fee prescribed by ordinance, a condition precedent to the license, is not alleged.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

5. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—TITLE—SUFFICIENCY.

An ordinance entitled "Relating to regulating and licensing the business of selling and furnishing of spirituous, vinous and malt liquors in the City of San Luis Obispo," and another ordinance entitled "An ordinance to amend sections 12, 13 and 15 of Ordinance No. 128, relating," etc., sufficiently expressed their subject-matter in the title as required by San Luis Obispo Charter, art. 6, subsec. 4.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Application by Clemente Guzzi and another, partners as Guzzi Bros., against A. McAlister and others, for writ of mandate. From a judgment denying the writ, plaintiffs appeal. Affirmed.

Thomas Rhodes, of San Luis Obispo, for appellants. T. A. Norton, of San Luis Obispo, for respondents.

ALLEN, P. J. This is an appeal from the judgment of the superior court of San Luis Obispo county denying a writ of mandate. Petitioners on March 15, 1912, made application to the mayor and councilmen of San Luis Obispo for a license to sell spirituous liquors in said city, signing such application "Guzzi Bros., by C. Guzzi." On the 29th of March following the city council, by a resolution duly passed, determined that petitioners were not suitable persons to keep and conduct a saloon, and their application was denied. It appears from the record that a firm known as Guzzi Bros. had for several years immediately preceding March, 1912, been engaged in the retail liquor business in said city. This proceeding was instituted to compel said council, under the ordinances of said city, to issue the license applied for. The city of San Luis Obispo, under the provisions of section 11, art. 11, of the state Constitution, possesses the power to make and enforce all local, police, and other regulations not in conflict with general laws. Pursuant thereto, the council enacted an ordinance, No. 128, entitled: "Relating to

regulating and licensing the business of selling and furnishing of spirituous, vinous and malt liquors in the City of San Luis Obispo," and subsequently, on the 15th day of December, 1911, amended said ordinance by Ordinance No. 15 (N. S.), which was entitled "An ordinance to amend sections 12, 13 and 15 of Ordinance No. 128, relating," etc. These ordinances, in effect, provided that any person desiring to enter into the business of retailing intoxicating liquors must procure a license, and that no licenses shall be issued until a petition is presented to the city council, setting forth the names of the applicants, character and location of business, etc. They further provide that if the board finds that the applicants are not persons of good moral character, and are not sober and suitable persons to conduct the place, or that the proposed place for carrying on such business is not a suitable place therefor, it shall deny the petition. Section 15 restricts the number of retail licenses to 15, providing, however, that all persons holding retail liquor licenses at the time the ordinance goes into effect shall be entitled to a preference in the issuance of licenses, and shall be entitled to have their licenses renewed, but the holders of such licenses shall petition the council for a license under the ordinance, and the council may grant or refuse the same, as in section 13 provided.

[1-4] We are of opinion that under the Constitution and the ordinance the question as to whether or not a license should be issued for the purpose of retailing spirituous liquors in the city is one entirely under the control of the city council. The sale of spirituous liquors is a traffic and business to be regulated under the police power conferred by the Constitution. There is no vested right in any one to engage in such traffic and business. This has been so repeatedly held that it is unnecessary to cite authorities in support thereof. If, in the opinion of the city council, the public welfare demanded that no license for the sale of liquor be granted, for a good and sufficient reason, at the particular place, or to these particular persons, it is not within the province of the courts to determine otherwise. The application here, or petition, as it may be termed, for the issuance of a license, is not in conformity with the ordinance; the individuals composing the firm making the application not being disclosed. This of itself, under the ordinance, would have been a sufficient reason for denying the application; in addition to which the ordinance requires the payment of a license fee. There is no allegation of any payment or tender of such fee, a condition precedent to the issuance of a license, and without which payment a court would not make any order in the premises.

[5] We see no merit in the various contentions with reference to irregularity in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—22

ordinances. They seem to have been properly enacted and the subject clearly expressed in the title, as by subdivision 4 of article 6 of the charter of the city of San Luis Obispo required.

We are of opinion that the superior court properly sustained the demurrer to the petition, and that its judgment in denying the writ should be affirmed; and it is so ordered.

We concur: JAMES, J.; SHAW, J.

TUSTIN PACKING CO. v. PACIFIC COAST FRUIT AUCTION CO. (Civ. 1,241.)

(District Court of Appeal, Second District, California. Feb. 20, 1913. On Petition for Rehearing, March 19, 1913.)

1. PLEADING (§ 93*)—DEFENSES—INCONSISTENCY.

The effect of denials contained in a defense and constituting a complete answer to the cause of action sued on is not destroyed through any inconsistency between such denials and the allegations of a second and separate defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.*]

2. PLEADING (§ 377*)—AFFIRMATIVE DEFENSES—JOINDER OF ISSUE.

Affirmative matter pleaded by way of defense is deemed to be denied, and, in the absence of proof, must be deemed untrue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1228-1231; Dec. Dig. § 377.*]

Appeal from Superior Court, Los Angeles County; A. J. Buckles, Judge.

Action by the Tustin Packing Company against the Pacific Coast Fruit Auction Company. From a judgment claimed to be insufficient and from an order denying a new trial, plaintiff appeals. Affirmed.

Wilbur Bassett, of Los Angeles, for appellant. McFarland & Irving and Hickcox & Crenshaw, both of Los Angeles, for respondent.

SHAW, J. Action in assumpsit; it being alleged that defendant became indebted to plaintiff in the sum of \$417.87 for money had and received to the use and benefit of plaintiff. This allegation, except to the extent of \$122.97, which defendant admitted having received for plaintiff's use, was denied by the answer; it being affirmatively alleged therein that defendant had, prior to the commencement of the suit, tendered the same to plaintiff and at all times since the making of such tender had been ready, able, and willing to pay the same. No evidence whatever was offered by plaintiff in support of the allegation of its complaint so specifically denied by defendant; nor did defendant offer any evidence other than in support of the alleged fact that it had tendered to plaintiff the \$122.97, admitted to have been received by it, and which issue the court found

in favor of plaintiff. The court gave judgment for plaintiff in the sum of \$232, from which, and an order denying its motion for a new trial, plaintiff appeals, claiming that judgment should have been for the full amount sued for.

[1, 2] As stated, notwithstanding the fact that the allegation of the complaint as to the indebtedness was, except as to the \$122.97, specifically denied, plaintiff offered no evidence to sustain the same. Defendant, however, as a separate and affirmative defense and by way of counterclaim, alleged certain matters with reference to transactions had between the parties, which appellant insists should be construed as admissions in support of the allegations of the complaint, and hence, as claimed by its counsel, no evidence was required on its part. We do not so understand the law. The denials of the first defense constituted a perfect answer to the cause of action, and allegations in the second and separate defense, assuming that they were inconsistent with such denials, cannot be regarded as destroying the effect thereof and thus relieve plaintiff of the burden of proving its case. *Snipsic Co. v. Smith*, 7 Cal. App. 150, 93 Pac. 1035; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 206, 35 Pac. 643, 646. "The effect of a denial in one defense is not waived by the setting up of affirmative matter in another defense." *Light v. Stevens*, 8 Cal. App. 74, 103 Pac. 361. Moreover, the affirmative matter pleaded by way of defense is, under our system of pleading, deemed to be denied, and hence, in the absence of proof, must be deemed untrue. It devolved upon plaintiff to prove its alleged cause of action, and this without regard to the affirmative matter set up as the separate defense. The appeal is without merit.

Order and judgment affirmed.

We concur: ALLEN, P. J.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing herein is denied. To our minds, the letter referred to in appellant's brief, and asserted by its counsel "without fear of question, doubt, or correction" to be an admission of plaintiff's claim, constitutes no evidence of an admission on the part of defendant of other than an indebtedness of \$122.97.

BURNHAM v. ABRAHAMSON et al. (Civ. 1,058.)

(District Court of Appeal, Third District, California. Feb. 19, 1913.)

1. MUNICIPAL CORPORATIONS (§ 282*)—PUBLIC IMPROVEMENTS—SIDEWALKS—SPECIFICATIONS—ADOPTION—RESOLUTION.

That a city council had previously prescribed general specifications for cement side-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

walks, which were invalid because adopted by a resolution instead of ordinance, did not prevent the city's board of trustees from thereafter adopting such specifications as the special plans and specifications for a particular improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 750-752; Dec. Dig. § 282.*]

2. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENTS—SIDEWALKS—PERFORMANCE OF WORK—SUPERINTENDENT OF STREETS.

Where the construction of certain city sidewalks was done under the direction of the superintendent of streets, as required by Vrooman Act (St. 1885, p. 151) § 6, it was immaterial that the specifications contained an invalid provision requiring the work to be done under the supervision of an inspector appointed by the superintendent of streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1064, 1069; Dec. Dig. § 444.*]

3. APPEAL AND ERROR (§§ 931, 934*)—APPEAL ON JUDGMENT ROLL—PRESUMPTIONS.

On appeal from a judgment on the judgment roll alone, every fact essential to support the court's findings and the judgment must be presumed to have been proved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3728, 3762-3771, 3777-3781, 3782; Dec. Dig. §§ 931, 934.*]

4. PLEADING (§ 403*)—COMPLAINT—DEFECTS—CURE BY ANSWER.

Where a complaint to foreclose a lien, based on an assessment for the construction of city sidewalks, did not allege that the sidewalk grades had been established, such defect was cured by an answer filed without demurrer, to which the specifications for the work were attached, and from which it could be inferred that the grades had been established.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

5. MUNICIPAL CORPORATIONS (§ 284*)—STREET IMPROVEMENTS—CEMENT SIDEWALKS—SPECIFICATIONS—VALIDITY.

Certain specifications for the construction of cement sidewalks provided that all the concrete for the foundation or base should be composed of one part Portland cement, two parts coarse, clean sand, four parts of clean, hard sandstone, granite, basalt, porphyry, or "other close grained rock," free from loam, clay, shale, or other soft material, and that the finishing material should contain a sufficient quantity of lamp black "or other coloring material to give the finished work a dark slate or brick red color." *Held*, that the clauses quoted did not render the specifications invalid as delegating to the superintendent of streets or contractor authority to determine the material out of which the improvement should be constructed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 756; Dec. Dig. § 284.*]

6. MUNICIPAL CORPORATIONS (§ 444*)—IMPROVEMENTS—STATUTES—CONSTRUCTION.

While statutes authorizing the making of public improvements at the expense of the adjoining property provide for the taking of property of the citizen in invitum, and hence their requirements must be strictly followed, yet courts are not now disposed to sustain defenses to the enforcement of assessments for such improvements, based on technicalities having no substance behind them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1064, 1069; Dec. Dig. § 444.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by C. D. Burnham against H. R. Abrahamson and others. Judgment for plaintiff, and defendant Abrahamson appeals. Affirmed.

Albert H. Elliott and R. M. F. Soto, both of San Francisco, for appellant. Franklin P. Nutting, of San Francisco, for respondent.

HART, J. This is an action for the foreclosure of a lien following an assessment for the construction of a cement sidewalk upon which abuts the real property of the appellant, situated in the town of Berkeley. Judgment for the sum of \$160.05, together with interest thereon at the rate of 10 per cent per annum from the 30th day of July, 1909, * * * and decreeing that said sums shall be a valid lien upon the real estate described in the complaint and that said real property shall be sold to satisfy said lien, was rendered and entered. This appeal is from the judgment so rendered and entered on the judgment roll alone.

The appellant urges a number of objections to the validity of the assessment, the most important of which is that plans and specifications for the work were not legally adopted by the board of trustees of said town of Berkeley.

The complaint sets forth in detail the proceedings, as required by the general street law, culminating in the construction of the sidewalk, the assessment and the subsequent proceedings authorizing and finally resulting in the institution of this action. Paragraph 7 of said complaint reads: "That, before passing the resolution for the construction of said work or improvement, plans and specifications and careful estimates of the costs and expenses thereof had been required by it to be furnished to said board of trustees by the town engineer of said town, and special specifications therefor had been furnished by him." It is alleged that, after the specifications referred to in paragraph 7 were furnished the board of trustees by the town engineer, said board passed a resolution "declaring that it deemed the work to be required by the public interest and convenience, and ordering and providing for said street work to be done, and, by directing its clerk so to do, caused said order to be published for two days, and also in like manner caused notice thereof, with specifications, to be posted and kept posted conspicuously for five days near the chamber door of said board of trustees, inviting sealed proposals or bids for doing the work ordered, and also in like manner caused notice of said work inviting said proposals and referring to the specifications posted or on file describing the work so ordered to be done, to be published for two days," etc. It is then shown that sealed proposals for said work were received by the

board; that among the proposals so received was one from the plaintiff in which he agreed to do the work "fully in all respects as required by the specifications at the following prices, viz., cement sidewalks, per square foot, 18½ cents;" that the plaintiff's said bid was duly accepted by said board, and that thereafter, the owners of three-fourths of the frontage of lots and lands upon the street whereon said work was to be done not having within the prescribed time after the notice of the award of the contract to the plaintiff elected to take or do the work at the price at which the same had been awarded, the street superintendent entered into a written contract for said work with the plaintiff in accordance with the terms of his proposal or bid; that the plaintiff, by said contract, agreed to begin said work on the 4th day of June, 1907, and to complete the same within 60 days thereafter, and that he would do and perform all said work "according to the specifications therein and hereinbefore mentioned, and under the direction and to the satisfaction of said street superintendent, and that the materials used should comply with the specifications," etc.; that "the plaintiff did and caused to be done all the work in said contract and specifications mentioned, and duly performed on his part in every respect the said work according to the specifications and the terms of the contract, and with materials complying with the specifications, and under the direction and to the satisfaction of said superintendent of streets," etc.

The answer, by specific averments, controverts many of the material allegations of the complaint, denying that, before passing the resolution therein mentioned for the construction of the work or improvements stated, the town engineer was ever required by the board of trustees to furnish plans and specifications or any estimates of the costs or expenses of said work, or, at any time during the course of the proceedings set forth in the complaint, did said town engineer furnish to said board of trustees any plans or specifications for, or any estimate of the cost or expenses of, said work or improvements, etc. The answer then expressly admits that the board of trustees passed the resolution of intention and the resolution ordering the work to be done, mentioned in paragraphs 4 and 8, respectively, of the complaint, but alleges "that, in addition to the substance thereof set forth in said complaint, each of said resolutions provided that said work, or the improvements in said complaint mentioned, should be done in accordance with the specifications contained in resolution 1805A"; that "the clerk of said board did post and publish, respectively, notices inviting sealed proposals or bids for doing said work, as alleged in paragraph 8 of said complaint, but that said notices, so posted and published, respectively, each required that said work

should be done in accordance with the specifications contained in said resolution 1805A; that the only specifications referred to in such published notice, and the only specifications posted with said notice inviting said proposals or bids, were those contained in said resolution 1805A, which said resolution was posted as and for such specifications with said notice;" that the only specifications referred to or mentioned in the contract entered into between the street superintendent and the contractor and in accordance with which said work was to be done were the specifications contained in said resolution 1805A; and that "in said contract it was agreed by the plaintiff herein that said work would be done in accordance with said specifications." It is alleged that said resolution 1805A was passed and adopted by the said board of trustees on the 26th day of February, 1906, some months prior to the time at which proceedings were initiated by the board of trustees for the work herein involved. Said resolution is made a part of the answer and is annexed thereto.

The court found that "all the allegations of the plaintiff's complaint, excepting those contained in paragraph 7 thereof, are true," and that "all the allegations of paragraphs A, B, C, and D of defendant, H. R. Abrahamson's, answer are true"; said paragraphs of said answer referring to resolution 1805A, as above indicated. The court further found that, prior to the adoption of the resolution of intention, an estimate had been furnished to the board of trustees by the town engineer showing the number of square feet of the sidewalk proposed to be constructed, and that "said estimate ever since has been and now is on file in the office of the clerk of said board and said town"; that "by the adoption of resolution 1805A, the board of trustees of the town of Berkeley did, in accordance with law, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used and the mode of executing the work on all contracts for sidewalks after the date of the adoption of said resolution, to wit, February 26, 1906; that said plans and specifications contained in resolution 1805A were at all times, during the proceedings mentioned in plaintiff's complaint herein, on file in the office of the clerk of the said board of trustees, and by the reference to said plans and specifications in the resolution of intention, and in each of the other resolutions, and notices, contracts, and other documents referred to in said complaint, said board adopted the said plans and specifications upon file in said office as and for special plans and specifications for the particular work and improvements involved in this action."

[1] As stated, the most important contention of the appellant is that the assessment is void because specifications were not adopted and annexed to the resolution ordering the work to be done. The argument is that,

the court having found that the only allegations of the complaint (paragraph 7) pretending to disclose that specifications were adopted were untrue, there is nothing left, so far as that essential is concerned, to support the judgment. But the obvious answer to this argument is that the answer in effect alleges that the board of trustees adopted for the work involved here certain specifications which, by a resolution, had been previously adopted by said board as those according to which work of the character of that concerned here was generally to be done; and, assuming that the board legally adopted said specifications for the work in the present case, then it must be held that the answer supplies the defects of the complaint in that respect and upholds the findings of the court that specifications were duly adopted by the board for the work. The answer, it will be recalled, alleges that, "in addition to the substance thereof set forth in said complaint, each of said resolutions (referring to the resolution of intention and the resolution ordering the work to be done) provided that said work, or the improvement in the said complaint mentioned, should be done in accordance with the specifications contained in resolution 1805A." This was, of course, sufficient to tender an issue upon the matter of the specifications, and, if found to be true, justified the findings of the court in that regard. But it is insisted that the board of trustees was without legal authority to adopt the specifications contained in resolution 1805A as the special specifications for the work. This contention is inspired by a provision in section 6 of the general street law and some language referring to said provision used in the case of *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162, 38 Pac. 693.

The provision referred to as contained in said section of the street law reads: "The city council may by ordinance prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work under all contracts thereafter made." The Supreme Court, in the case just mentioned, holding against the contention that said provision was mandatory or that it was an imperative duty of the city council to prescribe the general rules therein provided for, declared that, when exercising its discretion under said provision and prescribing general rules, the board must do so by ordinance; the implication being that the adoption of such rules by resolution would not constitute a compliance with the terms of said provision. It is therefore the position of the appellant that the board of trustees in this case, having adopted as the specifications in conformity to which the work or improvements here were to be made those general specifications prescribed by resolution 1805A, failed to prescribe and adopt legally any specifications whatsoever herein. Of course, if this position were sound, under

the authorities the assessment, to foreclose which this action was brought, would be invalid and the action would fail. *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065; *Diggins v. Mahon*, 110 Cal. xvii, 42 Pac. 1066; *Gray v. Richardson*, 124 Cal. 461, 57 Pac. 385.

But we are of the opinion that the contention cannot be sustained. The board, as we have seen, adopted for the work concerned in this case plans and specifications which it appears the board had previously attempted to adopt as general plans and specifications by which all work of the character of that involved in this case was to be done in the town of Berkeley. Conceding that the previous or original adoption of said plans and specifications by a resolution was a void act or one which possessed no binding legal effect, still we can perceive no legal objection to the action of the board in adopting them as the special plans and specifications for a particular work or improvement. In other words, and to make the proposition clearer, where the board of trustees has adopted special specifications for a particular work or improvement, we cannot see that it makes any difference, in a legal aspect, where or from what particular source the board might have obtained the plans and specifications so adopted, where as here, it is evident that the specifications had been prepared by the engineer engaged by the town to perform such duty. When the board adopted the plans and specifications contained in resolution 1805A for the particular work involved in this action, such plans and specifications then became the special plans and specifications for said work in as true a sense as though they had been prepared specially for that particular work and for no other. General specifications, as counsel for the appellant declare, could operate in such a case only where they had been adopted by means of or through the agency of an ordinance regularly passed by the governing board, and in such case the specifications prescribed would not be special as to any particular work to which they applied, but the improvement would be carried on under the general rules thus laid down. And in such case, as counsel for the appellant concede, it is probable that no reference to such ordinance in the resolution of intention, the resolution ordering the work to be done, or in the contract, would have been necessary, since any bidder and owners of property would be conclusively presumed to have knowledge of such ordinance and its provisions (*Williams v. Bisagno*, 34 Pac. 640, 641);¹ and, in the absence of special specifications, would be presumed to know that the work was to be done according to the general specifications prescribed by the ordinance. As stated, the court found that the plans and specifications which were found in a document, called reso-

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 100 Cal. xix.

lution 1805A, on file in the office of the board, were adopted by the board as the special plans and specifications for the work described in the complaint, and this is sufficient to fully meet the demands of the statute in that particular; the sole purpose of requiring specifications to be adopted being to enable all interested parties to secure knowledge of the character and cost of the work proposed to be done.

[2] It is further objected that the specifications are void, because the provision therein requiring the work to be done under the supervision of an inspector, appointed by the superintendent of streets, "was unauthorized by the Vrooman Act (St. 1885, p. 147) at the time of these proceedings." But the court found that the work was done under the direction of the superintendent of streets, as section 6 of said act required, and it is to be presumed; in the absence of any record of the evidence, that that finding found sufficient support in the evidence. Such being the case, it is immaterial whether the specifications contained a provision with regard to that matter which could have no legal effect and which was manifestly disregarded in the prosecution of the work.

The invalidity of the specifications is next claimed because they "assume" that the sidewalk grades have been established, whereas the complaint contains no allegation with respect to that proposition. It cannot be conceived how the assumption by the specifications of the establishment of the sidewalk grades can have the effect of invalidating said specifications. They no doubt thus assumed what was true or what must be presumed to have been shown to be true by the evidence.

[3] On an appeal from the judgment on the judgment roll alone, every fact essential to the support of the court's findings and the judgment must be presumed to have been proved. Or, as the rule is stated in all the cases: "All intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken; and only matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented, if the record shows nothing to the contrary." *Von Schmidt v. Von Schmidt*, 104 Cal. 550, 38 Pac. 361; *Johnston v. Callaghan*, 146 Cal. 214, 79 Pac. 870; *Galvin v. Palmer*, 134 Cal. 427, 66 Pac. 572; *Butler v. Soule*, 124 Cal. 73, 56 Pac. 601; *Segerstrom v. Scott*, 16 Cal. App. 256, 118 Pac. 690; *Erving v. Napa Valley Brewing Co.*, 18 Cal. App. 135, 140, 122 Pac. 836; *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; *Ætna Indem. Co. v. Altadena Min., etc., Co.*, 11 Cal. App. 165, 173, 104 Pac. 470.

[4] If the fact that the grades had been established should have been pleaded by the

plaintiff, the deficiency of the complaint in that particular was cured or supplied by the answer, of which the specifications, from which it may be inferred that the grades had been established, were made a part. This defect in the complaint should have been taken advantage of by demurrer thereto. However, on an appeal of this character, the presumption is, as above stated, that at the trial every fact essential to the support of the judgment was considered in issue and supported by evidence.

[5] The specifications are also said to be defective and therefore invalid in that they provide in the alternative for the materials to be used in the work (that is, they provide that either of several different kinds of materials may be used in the construction of the work), thus, as the argument goes, delegating to the superintendent of streets or to the contractor the discretion of determining what particular kind or kinds of materials may be used. *San Jose Imp. Co. v. Anzerals*, 106 Cal. 498, 500, 39 Pac. 859; *Stansbury v. White*, 121 Cal. 433, 434, 53 Pac. 940; *Cal. Imp. Co. v. Reynolds*, 123 Cal. 88, 92, 55 Pac. 802; *Stocking v. Warren Bros.*, 134 Wis. 235, 114 N. W. 789.

The rule laid down in the above cases is stated in *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33, as follows: "The legislative department of the city has no power to delegate to any other officer or body the authority to determine upon the necessity of making such improvement, or the character or extent of any improvement which it may itself direct to be made. * * * 'It is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement.' *Dillon on Municipal Corporations*, § 96. * * * A contract in terms like the present gives to the superintendent of streets the opportunity to make the cost of the improvement greater or less, according to his desire to favor or injure the contractor, vests him with an illegal discretion, tends to prepare the way for an unfair assessment, and opens wide the door to fraud or favoritism." An additional reason given in that case for the rule thus declared is that definite information should be given as to the work to be done and the amount for which the assessment is to be made, in order that the property owners, to whom the statute gives the right of taking the contract at the price at which it was awarded to the contractor, may intelligently determine whether it will be to their advantage to take the contract. The foregoing views are sound and unimpeachable, and, in a case where it can be said without question that such power as that thus animadverted upon has been delegated to the superintendent of streets or to the contractor, the assessment must, of course, be held to be void.

But it is not to be understood that, in all cases where some discretion is conferred upon the superintendent of streets as to the materials to be used, the assessment for that reason must fail. As is said in *Chase v. Trout*, 146 Cal. 365, 80 Pac. 81: "However desirable it would be to have the precise details of the work, even to the smallest fraction, fixed in advance of the bids, so that the exact cost to the contractor, as well as the contract price, may be known at the time the contract is let, it always has been and always will be impossible to do so." Again, in *Haughwout v. Hubbard*, 131 Cal. 878, 63 Pac. 1078, it is said: "To some extent such details must depend on unanticipated contingencies of the actual construction. The specifications must therefore always fail, more or less, in certainty or completeness of detail, and hence the most accurate and detailed specifications must leave unprovided for many questions arising in the course of the work as to the kind and amount of work or materials and other details of construction. The giving of discretion to some person as to all these details, the culverts possibly excepted, is inevitable in every such work. If not vested in and exercised by the street superintendent, it will be exercised by the contractor himself. The statute recognizes this condition and itself provides that the work must be done to the satisfaction of the street superintendent."

The particular portions of the specifications which it is claimed are amenable to the criticism under consideration are contained in sections 9 and 10 thereof. Section 9 provides that: "All concrete for the foundation or base course * * * of cement sidewalks shall be composed of one part Portland cement, two parts of coarse, clean sand, and four parts of clean, hard sandstone, granite, basalt, porphyry or other close grained rock, free from loam, clay, shale or other soft material." That part of section 10 to which objection is made for the reason suggested provides that: "The finishing material shall contain a sufficient quantity of lamp black or other coloring material to give the finished work a dark slate or brick red color."

We are unable to detect in these provisions of the specifications the giving to the superintendent of streets or to the contractor an excess of authority or unauthorized discretion in the matter of the character of the materials to be used in the work. There is nothing in the record before us indicating that there would be any difference in cost or price between the two different kinds of materials from which it is therein provided that the concrete for the foundation of the sidewalk shall be made, and certainly we cannot take judicial notice of the fact, if it be a fact, that the one kind is more expensive than the other. *Burns v. Casey*, 13 Cal. App. 154, 109 Pac. 94. And the same

observation applies to the criticism of the provision with respect to the coloring of the material. Nor can it be said that, conceding that the one kind of material or the one kind of coloring would be more expensive than the other, the contractor was not able to make a just and an intelligent bid for the work or that the property owners were not furnished, by the specifications complained of, sufficient information to enable them to form an approximately satisfactory judgment upon the exact total cost of the work in any event. At any rate, as stated, it cannot be said, as a matter of law, that the parts of the specifications here criticised confer upon either the street superintendent or the contractor an unauthorized discretion as to the matters to which they refer. It might be that one or the other kinds of material may be found, when the work is commenced, not to be as available as the other. Indeed, many contingencies may arise in work of this character which cannot be foreseen, and which could not be met or overcome in the absence of some discretion committed to the superintendent of streets, and in such case the work would either have to be stopped or the contractor proceed with it at the peril of losing the value of his services in the work and the materials used therein.

[8] In considering the points presented in this case, we have kept in mind the rule that proceedings in taxation of the character of those involved here are in invitum, and that in such cases it has always been the rule that the requirements of the laws or statutes prescribing them should be strictly observed. At the same time we have borne in mind the fact that the later decisions of our Supreme Court have disclosed an inclination to frown upon defenses interposed to the enforcement of liens in cases of this nature, based upon technicalities having no substance behind them. The common and well-understood method of enforcing the improvement of streets, sidewalks, and the building of sewers, etc., is through the laws passed by the Legislature for that purpose. These laws are mere police regulations and are absolutely essential to the health, convenience, and comfort of all the inhabitants of a town or city, and the payment for such improvements may very properly be coerced against those owning the property directly benefited thereby. Of this power in the municipality, granted to it by the state, all property owners have full knowledge and purchase and own their property in towns and cities subject thereto. Therefore, while the tax thus authorized to be exacted is not within the ordinary taxing power of the state, and the doctrine of in invitum should be applied to proceedings instituted in the exercise of the right thus to burden the property of persons, still there is no sound reason at the bottom of those propositions which would require such proceedings to be prosecuted with a degree of strictness in the observance of the

law authorizing them that would inevitably lead, in nine cases out of ten, to the invalidation of an assessment made therein. As is so well said by Mr. Justice Henshaw in *Haughwout v. Raymond*, 148 Cal. 312, 83 Pac. 53: "Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and that therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received, and will continue to receive, the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor, even a successful endeavor, upon the part of property owners to defeat the just claims of such a contractor by a resort to the extreme technicalities of the law can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which, after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery."

The defendant in this case has not shown that he has suffered substantial or any wrong by reason of the alleged defects in the proceedings leading to the assessment which the plaintiff by this action seeks to enforce against his property; nor does he complain that he has not received and is not now enjoying benefits accruing to him by reason of the improvements made upon his property by the labor and the materials of the plaintiff. Under such circumstances, and in the absence of a showing of a substantial departure from the provisions of the statute by the authority of which the improvements were made and the assessment levied, it would result in manifest injustice to disturb the judgment appealed from.

For the reasons herein given, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

LILLIS v. SILVER CREEK & PANOCHE
LAND & WATER CO. et al.
(Civ. 1,051.)

(District Court of Appeal, Third District, California. Feb. 19, 1913. Rehearing Denied by Supreme Court April 19, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 36*) — ACTIONS—COMPLAINT.

A complaint, alleging that plaintiff was the owner, and, as such, successor in interest

of one H., deceased, in certain land and water rights appurtenant thereto, that the water right became appurtenant to the land by virtue of an agreement duly executed, acknowledged, and recorded, conveying to H. 75 cubic inches of water per second, and that it was intended that such agreement should convey 75 miner's inches instead of 75 cubic inches, but that through mutual mistake the agreement did not express that intention, and asking a reformation to agree with the alleged intention, alleged by inference, under the rule that the pleader is presumed to have stated his case most strongly in his favor, that plaintiff purchased the property after the agreement was recorded.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

2. REFORMATION OF INSTRUMENTS (§ 43*) — KNOWLEDGE OF MISTAKE—PRESUMPTIONS.

In an action to reform an agreement between defendant and plaintiff's grantor, conveying 75 cubic inches of water per second to plaintiff's grantor, to conform to the alleged intention that 75 miner's inches should be conveyed, where it appeared that plaintiff's grantor had used the amount claimed from the date of the agreement, was using that amount when plaintiff purchased, and that plaintiff thereafter continued to use that amount, it would not be presumed, in order to charge plaintiff with actual knowledge of the mistake at the time of his purchase, that he purchased after a full examination of the title and record, and consequently with full knowledge of the terms of the recorded agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. § 43.*]

3. LIMITATION OF ACTIONS (§ 179*)—PLEADING IN AVOIDANCE OF DEFENSE—DISCOVERY OF FRAUD OR MISTAKE.

Under Code Civ. Proc. § 338, subd. 4, requiring actions for relief on the ground of fraud or mistake to be commenced within three years after the discovery of the facts constituting the fraud or mistake, it is not sufficient to merely allege the discovery of the fact within three years or ignorance of the fact at the time of its occurrence, but the pleader must allege the facts, time, and circumstances, so that the court may determine whether or not the discovery was within the period mentioned.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 663, 669; Dec. Dig. § 179.*]

4. LIMITATION OF ACTIONS (§ 96*)—KNOWLEDGE OF MISTAKE—CONSTRUCTIVE NOTICE.

Where a conveyance of water rights by mistake conveyed only 75 cubic inches per second instead of 75 miner's inches, but the grantee thereafter used 75 miner's inches, was using that quantity when he conveyed to a subsequent grantee, and the subsequent grantee continued to use that quantity, the record of the agreement did not put the subsequent grantee upon inquiry within Civ. Code, § 19, providing that every person who has actual notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact has constructive notice of the fact itself, if, by prosecuting such inquiry, he might have learned such fact, so as to bar an action to reform the conveyance within three years thereafter under Code Civ. Proc. § 338, subd. 4, requiring actions for relief on the ground of mistake to be commenced within three years after the discovery of the facts constituting the mistake.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 475, 476; Dec. Dig. § 96.*]

5. REFORMATION OF INSTRUMENTS (§ 45*) — ACTIONS—COMPLAINT.

In an action to reform an agreement conveying to plaintiff's grantor all of the water flowing in defendant's canal across plaintiff's grantor's land whenever the quantity of water so flowing did not exceed 75 cubic inches per second, so as to convey 75 miner's inches instead of 75 cubic inches, a complaint, alleging that plaintiff and his grantor had ever since such agreement diverted by means of a lateral ditch sufficient to carry 75 miner's inches of water, "said water and said quantity thereof," was sufficient as against a contention that it did not show that either 75 cubic inches or 75 miner's inches had ever flowed in such canal.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 187-193; Dec. Dig. § 45.*]

6. REFORMATION OF INSTRUMENTS (§ 36*) — ACTIONS—COMPLAINT.

In an action to reform a conveyance of 75 cubic inches of water, so as to convey 75 miner's inches, a complaint alleging that there was growing on plaintiff's land to which the water right was appurtenant about 30 acres of alfalfa and other crops which needed and would continue to need water, that water therefor could not be procured from any other source, and that, unless water was allowed to flow through plaintiff's ditch in the quantity and amount claimed, such alfalfa would be destroyed and plaintiff would suffer irreparable damage, sufficiently alleged damage or injury from such mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

7. REFORMATION OF INSTRUMENTS (§ 2*)—DEFENSES—LACK OF INJURY.

Where a conveyance of water rights by mistake conveyed only 75 cubic inches instead of 75 miner's inches, the grantee's right to a reformation of the contract did not necessarily depend upon a showing of actual injury.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 2, 8; Dec. Dig. § 2.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. C. Lillis against the Silver Creek & Panoche Land & Water Company and others. From a judgment sustaining demurrers to the amended complaint, plaintiff appeals. Reversed, with directions to overrule demurrers.

Sutherland & Barbour, of Fresno, for appellant. L. L. Cory, of Fresno, for respondent Silver Creek & P. Land & Water Co. Briggs & Hudner, of Hollister, for other respondents.

CHIPMAN, P. J. This is an action for the reformation of a certain contract for the use of water which, by alleged mutual mistake, was made to read "75 cubic inches flowing per second," whereas it should have read "75 miner's inches"; that the right to take said last-mentioned amount of water be declared to be an appurtenance to land described in the complaint, to wit, lots 1, 2, 6, 7, and 10 in section 15, township 15 S., range 12 E., Mount Diablo base and meridian; that defendants be forever enjoined from interfering with plaintiff's use of said water on his

said land and, pending the action, that defendants be restrained from interfering with plaintiff in removing the obstruction which it is alleged defendants have placed in the ditch conveying said water to plaintiff's land.

The demurrers of the respective defendants to plaintiff's amended complaint were sustained, and plaintiff failing further to amend, judgment passed for defendants, from which plaintiff appeals.

The grounds of the demurrers are: First, that the facts alleged are insufficient to constitute a cause of action; second, that two causes of action are improperly united, to wit, one to reform a contract and one for violation of contract, and are not separately stated; third, that there is a nonjoinder of parties, in that William J. Hayes is a necessary defendant; fourth, that the action is barred by subdivision 4, § 338, of the Code of Civil Procedure, and subdivision 1, § 337, and by section 343 of the Code of Civil Procedure.

It is alleged in the amended complaint:

That plaintiff is the owner in fee and entitled to the possession of certain land in Fresno county, above described, and as such owner is the successor in interest of one William J. Hayes, now deceased, and has succeeded to the entire title and interest of said Hayes in the land and appurtenances; that plaintiff is also the owner and entitled to the use and possession as an appurtenance to said land "of the right to take and use upon said land, the water of Panoche creek flowing in the certain water ditch or canal beginning at Panoche creek in section 16, township 15 S., range 12 E., and running in a northeasterly direction on the land of the plaintiff above described, to the extent of seventy-five (75) miner's inches of said water."

"(4) That the right to use said water became and was an appurtenance to said land by virtue of an agreement entered into on the 3d day of March, 1904, between the defendant Silver Creek & Panoche Land & Water Company, and William J. Hayes, predecessor in title of the plaintiff herein as aforesaid; and that said agreement is in the words and figures following, to wit."

Then follows, in *hæc verba*, a copy of an agreement, dated March 3, 1904, between defendant the Silver Creek & Panoche Land & Water Company (hereinafter referred to as the Panoche Water Company) and W. J. Hayes. It recites that the Panoche Water Company is the owner of a certain water ditch or canal "beginning at Panoche creek" and running as above described "on lands of the second party" (the lands above referred to); that for the purpose of settling certain differences which have arisen between the parties "it is hereby understood and agreed that the second party is entitled to use upon any portion, of said land the water flowing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in first party's canal from said Panoche creek at all times when the quantity of water flowing therein does not exceed 75 cubic inches flowing per second when the same reaches the land of said second party"; second party grants to first party all of his right to the waters of said creek in excess of 75 cubic inches flowing per second and a right of way for said ditch over the land of second party; said 75 cubic inches of water to be used by second party, it is agreed, shall flow in said ditch or canal and "first party is to place a gate or weir in said canal and ditch at a point near the dividing line between said lots 6 and 7 sufficient in dimension and by means of which said 75 cubic inches of water as aforesaid may be diverted from said ditch or canal upon the lands of said party of the second part"; whenever second party is not using said 75 cubic inches of water, the same shall be allowed to flow down said canal of first party.

This agreement was duly executed and acknowledged, and was recorded on November 2, 1905. It is alleged that at and before the execution of said agreement said defendant the Panoche Water Company and said Hayes "intended that said contract or said written memorandum thereof should mean, and that the legal consequence thereof should be, that said Hayes should be entitled to take from said canal or ditch and for use upon said land, water to the amount and quantity of seventy-five (75) miner's inches thereof"; that through the mutual mistake of said parties to said written agreement said agreement does not truly express the intention of said parties or what were intended to be its legal consequences; that said parties intended that said agreement should give to said Hayes the perpetual right to take from said canal and use upon said land, "all the water flowing in said canal from Panoche creek at all times when the quantity of water flowing therein does not exceed seventy-five (75) miner's inches when the same reaches the land then owned by said Hayes and now owned by plaintiff as aforesaid; that it was not the intention of said parties that the expression '75 cubic inches flowing per second' should be used in said agreement in defining the quantity of water to which said Hayes should be entitled to divert; that said words were written in said agreement by mutual mistake of the parties thereto," in lieu of which said words their intention was to use the words "75 miner's inches." It is then alleged that pursuant to said agreement "and in conformity with the real intention of the parties thereto, as hereinbefore set forth and alleged, and ever since the execution of said agreement, and down to the 2d day of January, 1910, the plaintiff and his predecessor in title have taken water from said main ditch or canal for the irrigation of the land of plaintiff above described; that during all of said period said water has

been diverted from said main water ditch or canal through and by means of a lateral ditch sufficient in size to carry seventy-five (75) miner's inches of water; and that said water and said quantity thereof has been diverted through and by means of said lateral ditch and used by plaintiff and his said predecessor in title during the irrigating season in each year since the execution of said contract, and whenever said water has been needed for the irrigation of the land now owned by plaintiff as aforesaid"; that on plaintiff's said land there is now growing about 30 acres of alfalfa, and that there is now needed and will continue to be needed water for the purpose of irrigating said alfalfa and other crops, and that water therefor cannot be procured from any other source and unless water is allowed to flow through said ditch in quantity and amount as aforesaid the said alfalfa will be destroyed and plaintiff suffer irreparable damage; that defendant Belmore Land & Water Company (hereinafter called the Belmore Water Company) has or claims to have succeeded to the rights and interest of defendant, said Panoche Water Company, in and to the ditch or canal above described, and defendant Bank of Hollister has or claims to have, but without right, a lien upon the interest of said Panoche Water Company; that both said defendants, the Belmore Water Company and Bank of Hollister, "acquired and took such interest as they possess in and to the ditch or canal described in paragraph 3 of this second amended complaint and in the agreement set forth in paragraph 4 of said complaint, with full knowledge and notice of the right of plaintiff to take water therefrom as hereinabove alleged and with full knowledge and notice that the true intention of the parties to said agreement between William J. Hayes and the defendant Silver Creek & Panoche Land & Water Company was as set forth in paragraphs 5 and 6 of this second amended complaint."

"(9) That, unless restrained by order of the court, the defendant Belmore Land & Water Company, without any right, and against the will of the plaintiff, erected an obstruction in said lateral ditch at the point where the same diverts water from said main water ditch or canal, by reason of which water was and now is prevented from passing from the said main water ditch or canal to the land of the plaintiff above described, and that by reason of such obstruction to the flow of water plaintiff has been deprived of all water necessary to irrigate said alfalfa. * * *

"(11) That, unless restrained by order of the court, the defendant will continue to prevent the flow of water from said main water ditch or canal and into said lateral ditch, and that the plaintiff has no plain, speedy, or adequate remedy at law in the premises.

"(12) That the facts constituting the said

mistake were not discovered by the plaintiff, nor by any predecessor in title of the plaintiff, more than three years prior to the commencement of this action; that said facts and said mistake were discovered by the plaintiff on or about the 2d day of January, 1910, and said facts and said mistake were unknown to the plaintiff and to his predecessors in title prior to said date."

[1] It is conceded that the action was commenced March 15, 1910. It does not appear from the complaint when plaintiff became the owner of the land and its appurtenances. It is stated in the brief of respondent the Panoche Water Company that at the argument in the lower court, and is not now denied, plaintiff admitted that he purchased the property after said agreement was recorded. This fact, whatever may be its significance, would seem to follow as a just inference from the rule that the pleader is presumed to have stated his case most strongly in his favor.

[2] We do not think, however, as is claimed in the brief of respondents, that it must be presumed that appellant "as a man of ordinary business capacity made his purchase after full examination of title and record thereof and consequently made his purchase with full knowledge of the terms of the agreement" which "gave the right to Hayes of only 75 cubic inches of water per second."

It is by no means unusual for purchases of land to be made without a "full examination," or aided by any examination, of the record title. This agreement was recorded in "Vol. 51 of Covenants" and not the volume of deeds. Plaintiff may have been satisfied with the title as represented by the grantor. So far as the water right is concerned, he alleges that his grantor had used the amount claimed from the date of said agreement and was using that amount of water when plaintiff purchased the land and that plaintiff thereafter continued so to use it until January 2, 1910, when he made his discovery of the alleged mistake. Finding the water in use on the land, which he now claims, he might even "as a man of ordinary business capacity," without necessarily forfeiting his rights to reform his deed for fraud or mistake, assume that the title to the land carried with it the water in use on it.

[3] The objection principally urged is that the action is barred by subdivision 4 of section 338, Code of Civil Procedure, which provides that an action for relief on the ground of fraud or mistake must be commenced within three years after the discovery by the aggrieved party of the facts constituting the fraud or mistake. Contending counsel agree that, for the purposes of the demurrer under said section, "fraud and mistake are in the same category," and that the decisions applicable to the one are ap-

plicable to the other. Appellant also concedes that respondents correctly state the rule as follows: "That it is not sufficient for the pleader to aver the mere discovery of the fact within three years, nor mere ignorance of the fact at the time of its occurrence, but he must allege the facts, time, and circumstances so that the court may determine from the allegations of the complaint whether or not the discovery was within the period mentioned." This concession dispenses with the necessity of quoting from the cases supporting the rule as thus stated. *Castro v. Geil*, 110 Cal. 295, 42 Pac. 804, 52 Am. St. Rep. 84; *People v. Blankenship*, 52 Cal. 619; *People v. Noyo Lumber Co.*, 99 Cal. 459, 34 Pac. 96; *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 45 Pac. 809; *Burling v. Newlands*, 112 Cal. 500, 44 Pac. 810. In the case of *Tarke v. Bingham*, 123 Cal. 163, 55 Pac. 759, it was said: "That it is not sufficient for the plaintiff in such an action merely to plead or prove his ignorance at one time and his discovery or knowledge at another, and that where he is required to plead it is incumbent upon him to show diligence, and that he has not failed to avail himself of sources of information of which he had knowledge, and to investigate which was a duty incumbent upon him. This is but the declaration of the equitable rule enunciated in section 19 of the Civil Code: 'Every person who has actual notice of circumstances sufficient to put a prudent man upon his inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact.'"

[4] The argument of respondents is that the agreement was of record when appellant purchased and was constructive notice of its provisions; that the quantity of water is mentioned therein nine separate times, and could not have escaped notice had appellant examined the instrument which it was his duty to do before purchasing; that having this means of knowledge he was as a prudent man put upon inquiry and had he prosecuted it he would have learned the fact. The equitable rule, as declared in section 19 of the Civil Code, presupposes that the person has "actual notice of circumstances sufficient to put a prudent man upon his inquiry as to a particular fact," in this case the particular fact. The particular fact here was the quantity of water appurtenant to the land. The circumstance relied on by respondents is the recording of the agreement. Obviously that alone is not sufficient; for, if sufficient notice, no contract could be reformed after the lapse of three years from the date of its recordation, no matter what the real intention of the parties was. "The recording of an instrument is not required in order to charge the parties thereto with notice of its contents, but for an entirely different purpose. Having executed it they are

presumed to know its provisions; and, if the mere recording of an instrument is to be considered as notice, then the grantee may always set the statute of limitations in motion by filing the instrument in the proper office. No such rule has been recognized by courts of equity." *American Min. Co. v. Basin, etc., Min. Co.*, 39 Mont. 476, 104 Pac. 525, 24 L. R. A. (N. S.) 305; *Forsyth v. Easterday*, 83 Neb. 887, 89 N. W. 409; *Hart v. Walton*, 9 Cal. App. 502, 99 Pac. 719. "When accompanied by certain circumstances sufficient to put a person of ordinary intelligence or prudence upon inquiry, which if pursued would lead to a discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise." *Jones v. Danforth*, 71 Neb. 722, 99 N. W. 495. Assuming the truth of the averments in the complaint, as we must on demurrer, the circumstances here were calculated to silence all inquiry. Hayes, the grantee of the right, went into the immediate possession and use of the water granted and continued its use until taken up by his grantee, plaintiff, who continued its use until the discovery, and this discovery was brought about by the act of the grantor, for the first time during this period, asserting any right under its literal construction of agreement. In this agreement the grantor was "to place a gate or weir in said canal and ditch at a point near the dividing line between said lots 6 and 7 (plaintiff's land) sufficient in dimensions and by means of which said 75 cubic inches of water as aforesaid may be diverted from said canal and ditch upon the lands of said party of the second part." In keeping this covenant defendant the Panoche Water Company must have either placed a gate of dimensions sufficient to pass 75 miner's inches instead of 75 cubic inches, or have allowed its grantee to do so, otherwise he and his successor in interest could not have done what it is alleged they did, to wit, appropriated and used 75 miner's inches of water. We are clearly of the opinion that the circumstances were not such as to put plaintiff upon inquiry in the sense implied by the rule enunciated in section 19 of the Civil Code.

[§-7] The facts alleged to be lacking in the complaint to make it sufficient are thus stated: (a) That it does not appear when plaintiff claims to have acquired title to the land and water. Plaintiff claims as the successor in interest of Hayes and admits, what may justly be inferred from the complaint, that he acquired title after the agreement was recorded; (b) that it is not expressly averred that there ever has been 75 cubic inches or 75 miner's inches of water flowing in the canal from Panoche creek. Plaintiff avers that, pursuant to said agreement, the plaintiff and his predecessor in title have taken water from said main ditch for the

irrigation of said land through a ditch of capacity sufficient to carry 75 miner's inches of water, "and that said water and said quantity has been diverted through and by means of said lateral ditch and used by plaintiff and his predecessor in title during the irrigating season in each year since the execution of said contract." The contract gives plaintiff the right to use the water flowing through said canal when it does not exceed the quantity named and the excess is reserved to the Panoche Water Company's use. It would thus appear to be no particular concern of plaintiff what the quantity might be; (c) that plaintiff had no knowledge or notice of any mistake in the contract as to the amount of water to which he was entitled as Hayes' successor. Plaintiff states that said mistake was not discovered by him or his predecessor until January 2, 1910. The point has already been considered; (d) nor has he alleged that because of any mistake he has been damaged or injured. It is shown by the complaint that the water was intended to be used on the land for irrigating purposes; that to be deprived of it would work irreparable injury. The quantity mentioned in the contract would hardly be sufficient to find its way through a ditch during the irrigating season and the difference between 75 cubic inches and 75 miner's inches is so great as to import damage. Besides, if the parties intended that the contract should convey the right to 75 miner's inches and by mistake only 75 cubic inches were conveyed, the right to reform the contract would not necessarily depend upon showing actual injury.

Our conclusion is that the complaint is sufficient to withstand the general demurrers, and that the statute of limitations applicable does not bar the action.

The judgment is reversed, with directions to overrule the demurrers.

We concur: HART, J.; BURNETT, J.

FLORES et al. v. STONE et al. (two cases).
(Civ. 1,082, 1,083.)

(District Court of Appeal, Third District, California. Feb. 5, 1913. Rehearing Denied March 6, 1913. Denied by Supreme Court April 5, 1913.)

1. CHATTEL MORTGAGES (§ 120*)—RIGHTS OF MORTGAGEE.

Under Civ. Code, § 2888, providing that a lien or contract for a lien transfers no title, a chattel mortgagee has merely a lien on the mortgaged property as security for the payment of his debt.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 216; Dec. Dig. § 129.*]

2. CHATTEL MORTGAGES (§ 136*)—RIGHTS OF MORTGAGEE—ACTIONS.

Though a chattel mortgagee may maintain only one action as provided in Code Civ. Proc. § 726, for the recovery of the debt secured, he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may attach the property for an unsecured debt without thereby waiving his mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 220-226; Dec. Dig. § 136.*]

3. CHATTEL MORTGAGES (§ 136*)—ASSIGNEE—ACTIONS.

An action by an assignee of a chattel mortgage against the mortgagor for an unsecured debt, and a levy of an attachment on the mortgaged property, do not amount to a waiver of the lien of the mortgage nor deprive the assignee of the right to enforce payment of the secured debt.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 220-226; Dec. Dig. § 136.*]

4. CHATTEL MORTGAGES (§ 249*)—ASSIGNEE—ACTIONS.

Civ. Code, §§ 2968-2970, providing that mortgaged chattels may be taken under attachment, but the officer must pay or tender to the mortgagee the amount of the mortgage debt, and, where the property is sold, the officer must apply the proceeds to the repayment of the sum paid to the mortgagee, and the balance as proceeds of sale under execution are applied, provide an exclusive course for one who would levy an attachment on mortgaged chattels, and a levy may not be legally made unless the mortgagee's debt is paid or tendered, and, where the property is sold, the creditor must be reimbursed for the payment of the debt, but a creditor attaching mortgaged chattels may thereafter take an assignment of the mortgage and the notes secured thereby and foreclose the mortgage; the attachment being abandoned.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 515, 516, 518, 519; Dec. Dig. § 249.*]

5. CHATTEL MORTGAGES (§ 239*) — FORECLOSURE—TENDER—SUFFICIENCY.

A tender by a chattel mortgagor, made after foreclosure suit, is insufficient where he declines to make any allowance for the attorney's fee provided for in the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 502; Dec. Dig. § 239.*]

6. EXECUTORS AND ADMINISTRATORS (§ 224*) — PRESENTATION OF CLAIMS — SECURED CLAIMS.

An assignee of a chattel mortgage, given to secure notes executed by the mortgagor, since deceased, and a third person, may under Code Civ. Proc. § 1500, sue to foreclose the mortgage, waiving the right to a personal judgment against decedent's estate, and he need not present the claim to the executor of decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 568-788; Dec. Dig. § 224.*]

Appeals from Superior Court, Sacramento County; Peter J. Shields, Judge.

Actions by Angelo Flores and another against E. F. Stone, individually, and as executor of Marie M. Wilson, deceased, and others. From a judgment for plaintiffs in each case, defendants appeal. Affirmed.

Rehearings denied by Supreme Court, 131 Pac. 351, 352.

Thomas B. Leeper, of Sacramento, for appellants. Hatfield & Hatfield, of Sacramento, for respondents.

BURNETT, J. Each action is for the foreclosure of a chattel mortgage, and the two

cases involve the same facts, except as to the amount of money involved, and that in the first cause E. F. Stone is joined as a defendant as executor of the last will and testament of Marie M. Wilson, deceased, but no claim is made against said estate, and all right to any personal judgment against said estate is waived.

The cause of action in the two cases grows out of the execution of three notes. The two involved in the first action were executed by defendants E. F. Stone and said Marie M. Wilson, deceased. To secure the payment of such notes, said Wilson executed a chattel mortgage covering a large amount of household furniture constituting the equipment of a lodging house carried on by her. The other note was for \$200, and to secure it a chattel mortgage was given by the said defendant Stone on certain live stock therein described, together with any interest in the property described in the other mortgage which might be necessary for the payment of the note after discharging the first obligation. Appellant Stone admits the execution of all of the notes, and that default was made in the payment of interest, as claimed in the complaint, and that the amount alleged is due and unpaid.

A few days prior to the commencement of the foreclosure suit, and when neither of the respondents had any interest whatever in either of the said notes or mortgages, the plaintiffs here commenced an action against appellant Stone, in the justice court of Sacramento township, to recover the sum of \$200, together with interest and costs of suit, upon a debt entirely independent of anything included in either of the mortgages or the notes secured thereby. When the officer made the levy in the attachment suit upon a portion of the property covered by mortgage, for the first time he ascertained that it was subject to said chattel mortgage. Thereafter plaintiffs purchased the notes and mortgages from the holder thereof, taking a formal assignment of them. After having obtained said title, respondents, as aforesaid, commenced actions to foreclose the mortgages. The action brought in the justice court was continued to judgment in favor of plaintiffs, and an execution was issued thereon and levied upon the property, but the property was not sold and the attachment was released; a large part of the property having been claimed as exempt from execution.

The contention of appellant, in brief, is that, plaintiffs having attached the property subject to the mortgage and afterwards paying to the mortgagee the amount of the mortgage debt and obtaining an assignment of said notes and mortgages, they thereby waived all right to any lien under the respective mortgages, and that they are therefore estopped from foreclosing the same. This claim is based upon sections 2968 to 2970, in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

clusive, of the Civil Code, and certain decisions of the courts, especially of other jurisdictions, hereafter to be noticed.

[1] It is not disputed that in this state the mortgagee does not hold the title to the property, but he merely has a lien thereon as security for the payment of his debt. Section 2888, Civ. Code. This applies to mortgages of personal, as well as of real, property. *Alferitz v. Borgwardt*, 126 Cal. 202, 58 Pac. 460.

[2] While the mortgagee, therefore, can maintain only one action for the recovery of the debt secured by the mortgage, as provided in section 726 of the Code of Civil Procedure, there is nothing to preclude him from attaching the property for an unsecured debt. He would not thereby waive his mortgage, as there is no inconsistency in the assertion of the two claims. If the mortgage conveyed the title, the situation, of course, would be different, as he would be attaching his own property.

[3] The assignee of the mortgage would sustain the same relation to the case, and the institution of an action and the levy of an attachment on the property for an unsecured debt could not of itself be deemed a waiver of the lien of his mortgage, nor should it deprive him of his right to enforce the payment of the secured debt. If practicable, only one action should be brought and a needless burden of expense should not be imposed upon the debtor; but it is not perceived how, on principle, if the attachment suit is instituted first, it destroys the lien of the mortgage. In this instance, manifestly, the attaching creditor was not in a position to foreclose at the time the attachment was issued, as the assignment of the mortgage was made subsequently.

[4] It is contended, however, that the exclusive course of procedure is prescribed by sections 2969 and 2970 of the Civil Code. Section 2968 provides that mortgaged personal property may be taken under attachment or execution. Then follows section 2969: "Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee"—and section 2970: "When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows: (1) To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and (2) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases." Two things are thus definitely prescribed, one as a condition precedent to the levy of an attachment or execution, and the other directing the disposition of the proceeds of a sale of the property.

The levy cannot be legally made unless the mortgagee's debt is paid or tendered. This,

of course, is for the protection of the mortgagee. If the property is sold, the other provision contemplates the reimbursement of the creditor who has been required to pay the mortgage debt. He is not by said law precluded from taking an assignment of the mortgage and mortgage debt, nor does the statute provide that said assignment shall operate as an extinguishment of said debt or mortgage, nor does it necessarily imply that the assignee waives his right to foreclose his mortgage. It does provide an exclusive course for one who would levy an attachment or execution upon the mortgaged personal property and in some cases, no doubt, the statute should be so construed as to prevent an attaching creditor from bringing another action to foreclose the mortgage which may have been assigned to him. It should be given a reasonable construction and so as to work justice rather than injustice.

According to appellant's view of the law, if the creditor should levy an attachment upon property, after paying off a mortgage debt and taking an assignment thereof, and the property before sale should be successfully claimed as exempt from execution, not only is he thereby thwarted in the assertion of his original demand, but he has no redress for the money he has paid for the mortgage debt. Similarly, no matter what his good faith, the result might follow if the attachment should be dissolved.

In the present case, it is well to observe that the attachment suit was abandoned and the foreclosure of the mortgages undertaken, apparently for the reason that a part, at least (how much does not appear), of the property was claimed as exempt from execution. Nothing illegal or inequitable is apparent in the conduct of respondents in the premises.

In *Carstenbrook v. Wedderien*, 7 Cal. App. 466, 94 Pac. 372, cited by appellant, the mortgage had been released and canceled and the action was for the restoration of the mortgage and foreclosure and for subrogation of the attaching creditor to the rights of the mortgagee. It was held that no equitable facts were shown to justify the action, and that it did not appear that the legal remedy was inadequate or inoperative. The expressions found in the opinion, must, of course, be viewed in the light of the peculiar facts of the case.

The following cases, however, are cited by appellant that favor his contention: In *Baumgarnter v. Vollmer*, 5 Idaho, 340, 49 Pac. 729, the Supreme Court of Idaho held that: "When a creditor seeks to subject the property of his debtor to the payment of his claim, upon which property there exists a chattel mortgage, and the creditor, to avail himself of the remedy provided by section 3389, Rev. St., pays to the mortgagee the amount of such mortgage, such payment by the creditor discharges the mortgage and the

lien thereunder and the creditor cannot thereafter enforce the mortgage lien." The said section 3389, it may be stated, is similar to the provisions of our statute hereinbefore quoted. The same view was entertained by the Supreme Court of Oklahoma in the case of *Dix v. Smith*, 9 Okl. 124, 60 Pac. 305, 50 L. R. A. 714, wherein it is declared that: "Where a creditor brings suit against his debtor and sues out a writ of attachment, but before levying the same learns that the debtor's property is covered by a chattel mortgage, and, upon receiving such information, buys the chattel mortgage debt and has the mortgage assigned to himself, and thereafter causes said property to be seized under such attachment, he thereby waives his lien under the chattel mortgage; and in case the attachment is discharged either by the court on the trial or by appealing from the judgment of the trial court and executing an appeal bond, the creditor cannot maintain an action in replevin to secure the possession of the mortgaged property, so that he may foreclose his mortgage for the reason that the mortgage lien is waived by the attachment of the property covered thereby." A similar doctrine is announced in *Evans v. Warren*, 122 Mass. 303. The courts of several other jurisdictions, however, have taken an entirely different view of the question. Some of them are cited in *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687, wherein the Supreme Court of Indiana says that the authorities holding that there is a waiver of the mortgage lien "depend upon a mere legal technicality, and not upon any principle in equity," and, in the opinion, attention is called to the fact that the leading case of *Evans v. Warren*, 122 Mass. 303, is based upon the ground that in that state the mortgagor's equity of redemption is not subject to attachment, and for that reason it was held that the liens created by the attachment and the mortgage, respectively, cannot coexist.

The subject is extensively reviewed in the note to *Dix v. Smith*, reported in 50 L. R. A. 714, wherein the author says that the decision in the *Dix* Case, "while the logical result of the view taken of the nature and effect of a chattel mortgage, and of the construction placed upon the statute governing attachments, rests upon strictly technical grounds. To render applicable the theory of the case that the lien of a chattel mortgage and the lien of an attachment are inconsistent and cannot coexist, since the first imports legal title in the mortgagee and the second legal title in the mortgagor, not only the common-law doctrine that a chattel mortgage operates to transfer the legal title to the mortgagee, but also the common-law rule that a mere equitable right, such as the equity of redemption remaining in the mortgagor, is not subject to levy, must have been left undisturbed, both by statute and judicial decision."

The most recent decision, probably, on the subject is *Stein v. McAuley*, 147 Iowa, 630, 125 N. W. 336, 27 L. R. A. (N. S.) 692, 140 Am. St. Rep. 332, wherein the Supreme Court of Iowa repudiates the doctrine of the *Dix* Case and declares that: "Even in those states which adhere to the doctrine of waiver, it is generally held that if the title be in the mortgagor, and there be an equity of redemption subject to levy, there is no inconsistency between the two liens, and that an attachment of the property does not amount to a waiver of the mortgage lien." We agree with the latter decisions.

[5] The tender of appellant was not made until after suit for a foreclosure was brought, and it was insufficient for the reason that he declined to make any allowance for the attorney fee provided in said mortgage.

[6] It was not necessary to present the claim to the executor of the estate of said Marie Wilson, deceased, as respondents brought themselves within the exception provided in section 1500 of the Code of Civil Procedure.

The judgment in each case is affirmed.

We concur: CHIPMAN, P. J.; HART, J

FLORES et al. v. STONE et al. (Sac. 2,007.) (Supreme Court of California. April 5, 1913.)
APPEAL AND ERROR (§ 832*)—REHEARING—
GROUNDS.

The Supreme Court will not grant a rehearing to consider points not presented in the briefs or arguments on which the case was submitted for decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Angelo Flores and another against E. F. Stone and others. From a judgment for plaintiffs, defendants appeal. Affirmed (131 Pac. 348), and rehearing denied.

Thomas B. Leeper, of Sacramento, for appellants. Hatfield & Hatfield, of Sacramento, for respondents.

PER CURIAM. In this case a rehearing in the Supreme Court is asked on several grounds, some of which are not mentioned in the briefs, but are first raised in the petition to the District Court of Appeal for a rehearing in that court. It is our settled rule not to grant a rehearing to consider points not presented in the briefs or arguments upon which the case was submitted for decision. *Payne v. Treadwell*, 16 Cal. 247; *Kellogg v. Cochran*, 87 Cal. 200, 25 Pac. 677, 12 L. R. A. 104; *San Francisco v. Pacific Bank*, 89 Cal. 25, 26 Pac. 615, 835; *Wilcox v. Luco*, 118 Cal. 643, 45 Pac. 678, 50 Pac. 758, 45 L. R. A. 579, 62 Am. St. Rep. 305.

The petition for rehearing is denied.

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The petition for rehearing is denied.

In re **COBURN.** (S. F. 6,169.)

(Supreme Court of California. March 24, 1913. Rehearing Denied. April 23, 1913.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF THE CASE—OPINION BY SINGLE JUSTICE.

Since under the direct provisions of Const. art. 6, § 4, the concurrence of all three justices is necessary to a judgment by a District Court of Appeal, a question, from the decision of which two of the justices withheld their assent, was not decided by the judgment, though the other justice expressed an opinion thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. APPEAL AND ERROR (§ 1097*)—LAW OF THE CASE—OPINION OF SINGLE JUSTICE.

Where two of the justices of the District Court of Appeal, while concurring in reversal for error in ruling on evidence, expressly withheld assent from an opinion of the presiding justice that a finding of mental incompetency was not sustained by the evidence so as to authorize the appointment of a guardian, the presiding justice's statements in his opinion as to the principles governing the appointment of guardians for incompetents, being merely part of his argument on the question of the sufficiency of the evidence, was not a part of the

decision, so as to be the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

3. INSANE PERSONS (§ 33*)—APPOINTMENT OF GUARDIAN—ALLEGATIONS OF PROOF—MENTAL INCOMPETENCY—"INCOMPETENT, MENTALLY INCOMPETENT, AND INCAPABLE."

Code Civ. Proc. § 1763, provides that when it is represented to the superior court that any person is insane, or from any cause mentally incompetent to manage his property, it must cause notice to be given to the supposed incompetent of the time and place of hearing, and such person, if able to attend, must be produced at the hearing. Section 1764 provides that, if it appear that such person is incapable of taking care of himself and managing his property, the court must appoint a guardian of his person and estate. Section 1767, added in 1891, provides that "the phrases 'incompetent,' 'mentally incompetent,' and 'incapable'" shall mean any person who, by reason of old age, weakness of mind, or any other cause, is unable, unassisted, to properly manage and care for himself or his property. *Held*, that a petition for the appointment of a guardian, which alleged that the alleged incompetent was "mentally incompetent to manage his property," was sufficient to authorize the appointment under sections 1763 and 1764, irrespective of section 1767.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 44-46, 48, 50, 51, 59; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 4, p. 3507.]

4. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR.

No prejudice could have resulted from the refusal to entertain a demurrer to a petition which was not demurrable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

5. CONSTITUTIONAL LAW (§ 53*)—DIVISION OF POWERS—EXERCISE OF JUDICIAL POWER.

Statutes defining terms in existing statutes are upheld except as to past transactions, as an exercise of legislative power to enact a law for the future, and, when so construed, are not unconstitutional as a legislative exercise of judicial power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 51; Dec. Dig. § 53.*]

6. STATUTES (§ 107*)—SUBJECTS.

St. 1891, p. 68 (Code Civ. Proc. § 1767), entitled "An act to another section to the Code of Civil Procedure * * * relating to incompetent persons," which provides that the phrase "incompetent, mentally incompetent, and incapable," as used in the chapter, should be construed to mean any person who, by reason of old age, weakness of mind, etc., was unable, unassisted, to properly manage himself or his property, does not violate Const. art. 4, § 24, requiring every act to embrace but one subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

7. STATUTES (§ 111*)—TITLES AND SUBJECTS.

St. 1891, p. 68, does not contravene the constitutional requirement that the subject of an act shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 140; Dec. Dig. § 111.*]

8. STATUTES (§ 141*)—AMENDMENT—AMENDMENT BY IMPLICATION—NECESSITY OF RE-ENACTMENT.

Const. art. 4, § 24, prohibiting an amendment by reference to the title of the statute,

without re-enacting and publishing at length the amended section, does not apply to amendment by implication, such as St. 1891, p. 68, and Code Civ. Proc. § 1767, defining the phrase "incompetent," etc., as used in the chapter, which relates to the appointment of guardians for incompetents.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.*]

9. STATUTES (§ 200*)—CONSTRUCTION—GRAMMATICAL STATUTES.

Grammatical defects in a statute will not impair its validity, if it may be interpreted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. § 200.*]

10. INSANE PERSONS (§ 30*)—GUARDIANSHIP—APPOINTMENT—SUFFICIENCY OF PETITION.

Code Civ. Proc. § 1763, provides that if it is represented to the superior court that any person is, from any cause, "mentally incompetent to manage his property," it must cause notice to be given to him, etc. Section 1767 (St. 1891, p. 68) provides that the phrase "mentally incompetent," as used in that chapter, shall mean any person, though not insane, who by reason of old age, weakness of mind, or from any other cause, is unable, unassisted, to properly manage and care for himself or his property. *Held*, that the inability defined by section 1767 means a mental rather than a physical inability, however it may have been produced.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 43, 45, 61; Dec. Dig. § 30.*]

11. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A trial court's findings upon disputed issues of fact will not be disturbed, unless wholly lacking the support of substantial evidence, which rule is applicable to findings in proceedings to appoint a guardian for one mentally incompetent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

12. INSANE PERSONS (§ 2*)—APPOINTMENT OF GUARDIAN—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Evidence, in proceedings for the appointment of a guardian for one claimed to be mentally incompetent, *held* to sustain a finding that the alleged incompetent, because of old age and mental weakness, was unable, unassisted, to properly manage himself and property.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 4-10; Dec. Dig. § 2.*]

13. INSANE PERSONS (§ 30*)—APPOINTMENT OF GUARDIAN—NATURE OF INCOMPETENCY.

Code Civ. Proc. § 1763, provides that, when any person is from any cause "mentally incompetent to manage his property," notice of hearing for the appointment of a guardian shall be given. Section 1764 authorizes an appointment if it appears that the person is "incapable of taking care of himself and of managing his property." *Held*, that it is not necessary, in order to appoint a guardian for one alleged to be mentally incompetent, to show that he is also unable to perform the acts necessary to the bodily care of his person.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 43, 45, 61; Dec. Dig. § 30.*]

14. WITNESSES (§ 293½*)—PRIVILEGE—APPOINTMENT OF GUARDIAN—EXAMINATION OF INCOMPETENT.

In view of Code Civ. Proc. § 1763, requiring that a person alleged to be incompetent must be "produced at the hearing" for the appointment of a guardian, the alleged incompetent may be called as a witness, as against the

objection that one cannot be compelled to be a witness against himself, which only applies to a criminal proceeding.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1011; Dec. Dig. § 293½.*]

15. WITNESSES (§ 294*)—PRIVILEGE—ANSWERS TENDING TO INJURE.

That evidence given might be detrimental to witness' interest in another pending litigation is not ground for the refusal of a party to testify in a special proceeding.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1015-1017; Dec. Dig. § 294.*]

16. EVIDENCE (§ 498½*)—OPINION EVIDENCE—SANITY.

The trial court has a wide discretion in determining whether a nonexpert witness testifying to another's sanity is an "intimate acquaintance," as required by Code Civ. Proc. § 1870, subd. 10.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 498½.*]

17. WITNESSES (§ 372*)—INTEREST—CROSS-EXAMINATION—APPOINTMENT OF GUARDIAN.

It was proper, in proceedings for the appointment of a guardian for an alleged incompetent, to ask petitioner on cross-examination how much money he had spent on the proceeding.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

18. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding evidence was harmless where such fact was admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

19. INSANE PERSONS (§ 34*)—APPOINTMENT OF GUARDIAN—QUALIFICATIONS OF GUARDIAN.

The court may select a proper person to act as guardian of an insane or mentally incompetent person, whether he is a stranger to the incompetent or not; it not being necessary to appoint the incompetent's wife.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 49; Dec. Dig. § 34.*]

20. TRIAL (§ 66*)—RECEPTION OF EVIDENCE—REOPENING CASE.

An application to reopen the case for the introduction of further evidence was addressed to the court's discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 156; Dec. Dig. § 66.*]

21. JURY (§ 25*)—RIGHT TO JURY TRIAL—DEMAND.

The constitutional provision securing the right to a jury trial only applies where the right existed at common law, which included only criminal cases and actions at law as distinguished from cases in equity or special proceedings, so that there is no constitutional right to a jury trial in a proceeding to appoint a guardian for one mentally incompetent; a demand therefor being necessary by the direct provisions of Code Civ. Proc. § 1717, if the proceeding be a matter in probate, and the question being in the court's discretion, if it be of an equitable nature.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

Department 1. Appeal from Superior Court, San Mateo County; M. T. Dooling, Judge.

In the matter of the guardianship of Loren Coburn, an incompetent person. From a judgment appointing M. J. Hynes as guard-

lan, on petition of Azro A. Coburn, and an order denying a motion for new trial, Loren Coburn appeals. Affirmed.

See, also, 161 Cal. 685, 120 Pac. 26.

Rehearing denied; Beatty, C. J., dissenting.

A. J. Treat, of San Francisco, and A. Kincaid, of Redwood City, for appellant. Ross & Ross, of San Mateo, and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent. Cullinan & Hickey, of San Francisco, for Hynes.

SLOSS, J. The superior court of the county of San Mateo having entered a judgment or order appointing M. J. Hynes guardian of the person and estate of Loren Coburn on the ground of incompetency, the alleged incompetent appeals from the judgment and from an order denying his motion for a new trial. The proceeding was instituted in February, 1908, when Azro A. Coburn, nephew of Loren, filed a petition averring the incompetency of his uncle and praying for the appointment of a guardian. Upon a trial, the court found in favor of the allegations of the petition, and appointed Carl Coburn, the adopted son of a brother of Loren Coburn, guardian of the latter's person and estate. An appeal prosecuted by the alleged incompetent resulted in a reversal by the District Court of Appeal for the First Appellate District of the order appointing a guardian. In re Coburn, 11 Cal. App. 621, 105 Pac. 924. The present appeals are based upon the result of a second trial of the same issues.

[1] Before proceeding to a discussion of other questions, it may be well to dispose of the appellant's contention that certain views expressed by Cooper, P. J., in his opinion filed on the first appeal, are to be given binding force as the "law of the case" in the consideration of the appeals now before us. It appears, from the report of the former decision, that the presiding justice declared his belief that the evidence was not sufficient to support the finding that Loren Coburn was incompetent. The opinion stated, as an additional ground for reversal, that the court below had erred in admitting certain testimony over the objection of the appellant. The associate justices (Hall and Kerrigan) concurred in the judgment. They expressly withheld their assent to the position that the finding of incompetency was not supported, but agreed that error had been committed in the admission of the testimony above referred to. Since the concurrence of all three justices is necessary to the pronouncement of a judgment by a District Court of Appeal (Const. art. 6, § 4), it is clear that the only matter decided by the court was that the aforesaid rulings on the admission of testimony were erroneous. Whatever Mr. Justice Cooper may have said regarding the sufficiency of the evidence as a whole, or of any part of it, to establish the incompetency of

the appellant, was but the expression of his individual opinion, and could bind neither the court below upon a second trial, nor an appellate court upon a second appeal.

[2] Nor can any further effect be given to the views of the learned justice regarding the general principles of law governing the appointment of guardians for incompetent persons. The statement of these views was introductory to, or, rather, a part of, his argument designed to show the insufficiency of the evidence. His associates having expressly declined to assent to the conclusion that the evidence was insufficient, they cannot be deemed to have concurred in any step of the reasoning by which that conclusion was reached. In what we have just said we are not to be understood as casting doubt upon the correctness of the legal propositions advanced by Mr. Justice Cooper in this connection. Our purpose is simply to point out that, whether they be sound or not, they are not now binding upon us as the law of the case. See Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 141, 83 Pac. 62, 70.

The allegations of the petition, as amended, were as follows: "That said Loren Coburn is unable, unassisted, to properly manage and take care of his said property, and by reason thereof is likely to be deceived and imposed upon by artful or designing persons, and is mentally incompetent to manage his said estate. That he is mentally incompetent to manage his property; and that he is, by reason of old age and physical disability and weakness of mind, unable to take care of himself and manage his property." The court found that all of the allegations of the petition, and the amendment thereto, are true. It further found that at the time of the filing of the original petition "Loren Coburn was, for a long time prior thereto had been, ever since has been, and still is by reason of old age and weakness of mind, unable, unassisted, to properly manage and take care of himself and his property, and by reason thereof likely to be deceived and imposed upon by artful and designing persons"; and that at all the times stated, said Loren Coburn was and is "incapable of taking care of himself and managing his property."

[3] The statutory provisions governing the appointment of guardians of incompetent persons are found in article 2 of chapter 14 of part 3 of the Code of Civil Procedure. Section 1763, the first section of this article, provides that "when it is represented to the superior court, or a judge thereof, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person at the time and place of hearing the case, not less than five days before the time so

appointed, and such person, if able to attend, must be produced at the hearing. * * *

Section 1764 reads: "If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified." Both of these sections, in substantially the same form which they now present, were parts of the Code as originally adopted. In 1891 the Legislature added section 1767, which declares that "the phrases 'incompetent,' 'mentally incompetent,' and 'incapable,' as used in this chapter, shall be construed to mean any person, who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof, would be likely to be deceived or imposed upon by artful or designing persons." The appellant contends that the act adding section 1767 to the Code is, in various respects, in conflict with the Constitution and therefore void. For the purpose of upholding the sufficiency of the petition and findings, both of which papers are assailed by the appellant, it is not necessary to look to section 1767. These papers contain everything necessary to justify the appointment of a guardian under sections 1763 and 1764. The petition alleges that Loren Coburn is "mentally incompetent to manage his property." These are the very words in which section 1763 describes the fact which is to be "represented" to the court in invoking its jurisdiction. And the findings follow the exact phraseology of section 1764, which directs the appointment of a guardian when it appears that the person in question is "incapable of taking care of himself and managing his property." See *In re Daniels*, 140 Cal. 335, 73 Pac. 1053. There can be no question of the power of the Legislature to define the procedure to be followed in seeking and obtaining the appointment of guardians. Here, as we have seen, there was a strict compliance with the procedure thus outlined, so far as it concerned the contents of the petition and the findings upon which the order of appointment is to be made. This consideration affords a complete answer to the assignment of error based on the action of the court in declining to permit the alleged incompetent to file a demurrer to the petition after the disposition of the first appeal.

[4] If such a pleading was proper at that or at any stage of the proceeding, no prejudice could have resulted from the refusal to entertain a demurrer which must necessarily have been overruled.

It is earnestly insisted upon this, as it was upon the former, appeal, that the evidence is insufficient to justify the finding of incompetency. In this connection the learned coun-

sel for the appellant have entered upon an elaborate examination and review of cases decided in England and in various states of the Union, and from the authorities cited have drawn the conclusion that the appointment of a guardian for an adult person can be sustained only upon proof that that person is insane, or that his mental powers are impaired to such an extent as to authorize a finding that he is of unsound mind. With the exception of a few early cases, the authorities do not, we think, go so far as is claimed. We do not, however, feel ourselves called upon to analyze the rulings in other jurisdictions for the reason that, in California, the question must be decided in accordance with the rules enacted by the Legislature. While, in considering the sufficiency of the petition and the findings, it was not necessary to rely upon section 1767, we think a decision upon the validity of that section is proper and useful as a means toward ascertaining what, under the law of this state, constitutes incompetency sufficient to authorize the appointment of a guardian.

Section 1767 is a statute which purports to define certain terms used in existing sections of the Code. The first point made against the validity of section 1767 is that the act adding the section to the Code is an attempted exercise by the legislative branch of the government of a power belonging exclusively to the judiciary; the power, that is to say, of interpreting a pre-existing statute. The appellant quotes, in support of his position, this passage from Cooley's work on Constitutional Limitations: "If the Legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute and cannot be done by a mandate to the courts which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment." *Const. Lim.* (7th Ed.) 137. But the decisions cited in support of this declaration, with one exception (*Gov. v. Porter*, 5 *Humph. [Tenn.]* 165), seem, when the facts are examined, to go no further than to deny the power of the Legislature to alter the construction of a statute in such manner as to affect rights existing when the declaratory statute was passed (*People v. Board of Supervisors*, 16 *N. Y.* 424; *Reiser v. Wm. Tell S. F. Ass'n*, 39 *Pa.* 137; *Lambertson v. Hogan*, 2 *Pa.* 22; *Lincoln, etc., Ass'n v. Graham*, 7 *Neb.* 173; *Union Iron Co. v. Pierce*, *Fed. Cas. No. 14,367*).

[5] The weight of authority supports what we think to be the true rule, i. e., that such declaratory or defining statutes are to be upheld, except with regard to past transactions, as an exercise of the legislative power to enact a law for the future. Immediately following the passage above quoted from Cooley, the learned author says: "But in any case the substance of the legislative action should be followed rather than its form; and if it ap-

pears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted." In *Stebbins v. Board of Co. Com'rs* (C. C.) 4 Fed. 283, Mr. Justice Miller, sitting in circuit, referred to an act similar to the one before us in these terms: "While it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as Congress or any legislative body has a right to pass a law for the future that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future." See, also, *Stockdale v. Ins. Co.*, 20 Wall. 323, 22 L. Ed. 348; *Singer Mfg. Co. v. McCollock* (C. C.) 24 Fed. 667; *State v. Com'rs*, 83 Kan. 190, 110 Pac. 93.

[6] The other objections to the validity of section 1767 are also, we think, untenable. The section was added by an act (Stats. 1891, p. 68), entitled "An act to add another section to the Code of Civil Procedure of the state of California, relating to incompetent persons." We see no force whatever in the claim that this statute fails to comply with the provision of article 4, § 24, of the Constitution, that every act shall embrace but one subject. The term "incompetent persons," which forms the subject of the act, describes one general class of persons, properly selected for legislative control.

[7] Nor is the act obnoxious to the constitutional requirement that the subject of an act must be expressed in its title. In *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369, and in *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, this court upheld acts having titles substantially similar to the title of the act under consideration. In each of these cases the act assailed added sections to one of the Codes. The title did not differ from the one before us except that it stated the numbers of the new Code sections. We are unable to see that this circumstance affects the question. The subject of the proposed legislation is disclosed, not by the number of the section or sections to be added, but by the words describing the nature of the enactment, as, in this case, the words "relating to incompetent persons," or, in the *Deyoe* Case, "relating to actions for divorce," or in *Carpenter v. Furrey*, "relating to liens of mechanics and others." That the title of an act may be general, and need not embrace "an abstract or catalogue of its contents," is, of course, well settled. *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Estate of McPhee*, 154 Cal. 385, 97 Pac. 878.

[8] Finally, the constitutionality of the act is questioned on the ground that it seeks to revise or amend an existing law (i. e., the Code of Civil Procedure) by reference to its

title, instead of re-enacting and publishing at length the act revised or section amended. Const. art. 4, 24. If the adoption of section 1767 amended the existing law as declared in the Code of Civil Procedure, it amended it by implication only, and it is established by our decisions that the constitutional provision relied upon has no application to such implied amendments. *Hellman v. Shoulters*, 114 Cal. 136, 153, 44 Pac. 915, 45 Pac. 1067; *Deyoe v. Superior Court*, 140 Cal. 490, 74 Pac. 28, 98 Am. St. Rep. 73. Such, too, is the prevailing rule in other states which have a similar constitutional restriction. *People v. Mahaney*, 13 Mich. 481; *Cooley, Const. Lim.* (7th Ed.) 216, and cases cited. In enacting section 1767, the Legislature was not undertaking to alter the existing statute, but merely to clarify and make more certain the meaning and effect of those sections. If, in so doing, the construction which would otherwise have been given to sections 1763 and 1764 was, to some extent, changed by the new legislation, the modification of the earlier statutes was not an amendment of them, within the meaning of the Constitution.

Adopting the view, then, that section 1767 is a valid enactment, there can be no occasion to go beyond its terms to learn what conditions will justify the appointment of a guardian.

[9] The grammatical construction of the section is not above criticism, but defects in this respect, while they may enhance the difficulty of interpreting the enactment, do not impair its binding force.

[10] The test established by the section is whether or not the person in question is "unable, unassisted, to properly manage and take care of himself and his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons." This broad language must, we think, be read in the light of the other provisions of the chapter of which section 1767 is a part, and particularly of section 1763, which lays down the initial steps to be followed in seeking the appointment of a guardian. The petition must represent that the person is insane, or from any cause mentally incompetent to manage his property, and we take it that the inability defined in section 1767, although not expressly so limited, must be understood to mean a mental, rather than a physical, inability. It is, under the section, immaterial how such inability has been produced. It may result from "old age, disease, weakness of mind, or from any other cause."

Applying the statutory rule to the record before us, it is not to be doubted that the evidence was such as to warrant the finding of the trial court which, in addition to what we have already commented upon, declared, in the exact words of section 1767, that *Loren Coburn* was, "by reason of old age and weakness of mind, unable, unassisted, to properly manage and take care of himself and his property, and by reason thereof like-

ly to be deceived and imposed upon by artful and designing persons."

[11] It is unnecessary to enlarge upon the rule, so long settled and so well known as to be axiomatic, that the findings of a trial court upon disputed issues of fact are not to be overturned on appeal, unless they totally lack the support of substantial evidence. That rule is as applicable to a case of this character as to any other. It requires us to uphold the assailed finding if there is in the record evidence, which, with the aid of all inferences reasonably to be drawn from it, tends logically to establish the conclusion embodied in the finding.

[12] The record in the case at bar is very voluminous. The bill of exceptions, containing an abstract of the testimony and the rulings of the court, occupies but little less than 3,000 pages of the printed transcript. It would, manifestly, be impracticable to attempt, in an opinion of this court, to even summarize the testimony of each of the witnesses. We must content ourselves with a brief statement of a few of the facts testified to, believing that a recital of these facts will suffice to establish the proposition that the court below was justified, under the statutory provisions in force in this state, in finding the appellant to be incompetent, and in appointing a guardian of his person and estate.

Loren Coburn was, at the time of the hearing, of the age of 84 years or thereabouts. He had, many years before, acquired large tracts of land in San Mateo county, where he resided, and in other counties. His holdings in San Mateo county were in excess of 10,000 acres, and his entire estate was, as is conceded on all sides, worth more than a million dollars. The San Mateo land has been leased, from time to time, in parcels; the tenants paying, in some instances, a cash rental, but more frequently a proportion of the crop grown. The petitioner attempted to show that the appellant had, for a long time, been defrauded of a considerable part of the return that should have come to him from tenants paying a crop rental. And while the showing on this point was not conclusive, we think there was enough testimony to justify the trial court in believing that Loren Coburn had not received his full due under his leases, and that his failure to exact a proper division of the crops was the result of his inability to count the number of sacks of grain harvested by the respective tenants. A great deal of testimony was offered with the purpose of showing that Coburn had been induced by one whom, as a reasonable man, he should have distrusted, to enter into an improvident contract relative to the cutting of timber on the Coburn lands. This transaction, and the resulting litigation, could not be detailed here without unduly extending this opinion. Suffice it to say that the facts shown, as a whole, lend some support to the conclusions embodied in the findings of the court.

Loren Coburn himself was called as a witness by the petitioner, and examined and cross-examined at great length. One-fourth of the long record before us is taken up with the questions asked Mr. Coburn and his answers thereto. The respondents place great reliance upon these questions and answers as going far toward sustaining the finding of incompetency. Their position in this regard seems to us to be well founded. Giving to his testimony the construction which the trial court may reasonably be deemed to have given it, the examination disclosed that the appellant's memory is seriously impaired with respect to many matters directly affecting his personal and his property interests. He was unable to recall, at least when first questioned on these points, the name of his mother, the maiden name of his first wife, the name of his sister and of one of his brothers, the fact that his father had been married twice, the month in which his own second marriage had taken place. He referred to the petitioner, Azro Coburn, his nephew, as Carl Coburn, who was the adopted son of his brother, and who was well known to him. He had but little recollection of the execution of two wills made by him after his second marriage, nor did he recall the attorney who had drawn the later of these documents for him. He had been involved in a great deal of important litigation in the years preceding the trial, but had a very shadowy knowledge of the nature and condition of the various actions which were pending or had been disposed of.

One of the strongest circumstances going to uphold the conclusion of the trial court is found in the appellant's execution of certain conveyances and leases, and his own statements, while on the stand, concerning these instruments. After Azro A. Coburn, who was a resident of Massachusetts, had come to California to look into the matters involved in this proceeding, and before the petition had been filed, Carl Coburn presented to Loren for his signature, a conveyance to one Richards of the property in the city of San Francisco constituting the city hall site, a like conveyance to one Gayety of the New Year's Point ranch, a large portion of Coburn's holdings in San Mateo county, one to Albion Weeks of other valuable property in San Mateo county. There were also presented to him leases of property in the town of Pescadero which Coburn did not own (including the public school lot and that occupied by the Catholic church), of the land in Oakland used as the station of the Southern Pacific Railroad Company, and of a block of land in San Francisco in which, too, Coburn had never claimed any interest. The purpose of seeking the execution of these papers was, as Azro Coburn testified, to ascertain whether the appellant was incompetent, and to secure evidence on the point. Loren Coburn took the various papers on the different occasions when they were handed to him,

looked at them as if he were reading them, and executed them, one and all. In no instance did he receive or demand any consideration, except in the case of one of the Pescadero leases, upon the signing of which \$5 was paid him. When questioned concerning these papers, the appellant denounced some of them as fraudulent, stating, as to others, that he had never signed them. The learned trial judge, in commenting upon this phase of the case, used the following pertinent language: "The fact that before the inauguration of these proceedings he signed various deeds and leases * * * might not be of so much importance if respondent could explain in any way why he did so. But he cannot, and upon this hearing, although they were the real basis of the proceedings against him, he had but a hazy recollection of ever having seen or heard of them before. Counsel urges that he was tricked by a trusted agent, but this is the explanation offered by counsel and not by respondent; and if one trusted agent can procure the signing by respondent of papers of this character, and about which, even when called to his attention, he has no knowledge, and concerning the execution of which he has no recollection, it is not unlikely that another person securing his confidence could do the same."

The foregoing summary is, in our judgment, ample to show that there was evidence justifying the findings assailed. We shall not, therefore, do more than refer to other points brought out by the petitioner, such as the appellant's failure of memory with respect to other matters than those already mentioned, his belief, claimed by the respondents to be a delusion, that the property owned by him in San Mateo county extended for a number of miles to the north of his actual boundary, or the testimony of an expert alienist that, in his opinion, Loren Coburn was of unsound mind.

There was, to be sure, a great deal of testimony lending support to the claim that Loren Coburn had the mental capacity ordinarily found in a man of his years. His own examination disclosed, in many particulars, an understanding grasp of his situation, his relations to those about him, and his affairs. But other parts of his own testimony, and the remaining evidence offered to sustain the allegations of the petition were certainly such as to justify the trial court in its belief that the appellant had, in consequence of old age, suffered an impairment of his mental powers to such an extent as to make him incapable of directing his business and property in a rational manner. This, with the further showing indicating his vulnerability to the efforts of designing persons, clearly filled the measure of the statute.

[13] The testimony may fairly be said to establish that the appellant was, considering his age, of at least normal physical health and vigor. It is argued that, for this reason, the finding that he was "incapable of

taking care of himself" is without support. But we do not think the statute is designed to prevent the appointment of a guardian of a person mentally incapable of taking care of his property, unless he is also shown to be unable to perform the acts necessary to the bodily care of his person. As we have seen, the section (1763) providing for the petition requires only an allegation of incompetency "to manage his property." The following section authorizes an appointment if it appears that the person is incapable of "taking care of himself and managing his property." The phrase is in the conjunctive, and the requirement is fulfilled if inability in either direction is shown. And, finally, section 1767 defines an incompetent as one "unable * * * to properly manage and take care of himself or his property." The main purpose of the statute is the protection of property (*Com. v. Schneider*, 59 Pa. 330), and we think the legislative view was that the inability to take care of himself necessarily results from the determination that the person is "insane, or from any cause incompetent to manage his property." In other words, the care of one's self means, not merely attention to the physical needs of the body, but that control of one's actions and conduct which is exercised by a normal mind.

The appellant assigns a great many rulings as errors of law. We shall, very briefly, notice those that seem to possess any substantial importance.

[14] It is argued that the court should not have permitted the petitioner, over the appellant's objection, to call the latter as a witness and examine him. But we see no reason why this could not be done. The Code (section 1763), in requiring that the person alleged to be incompetent "must be produced at the hearing," seems to contemplate an examination. The point that he is compelled to be a witness against himself is not applicable to any but a criminal proceeding, which this is not.

[15] Some questions were objected to on the ground that they called upon the appellant to give testimony which might be detrimental to his interests in other pending litigation. But we are cited to no authority, and we know of none, authorizing the rejection of testimony, relevant and otherwise competent, for this reason. The same thing may be said of certain questions objected to on the ground that they inquired into the appellant's private affairs.

[16] The opinion of Azro A. Coburn regarding the sanity of Loren was given, over the objection that the witness was not shown to be an "intimate acquaintance." Code Civ. Proc. § 1870, subd. 10. But, in the determination of this preliminary question, the trial court has a wide range of discretion, and no abuse of discretion was shown in this instance.

Much of the documentary evidence object-

ed to was offered and was admissible as a basis for testing the appellant's memory concerning important litigation or other transactions affecting his property interests. While an impaired memory may not, in and of itself, establish incompetency, it is an element to be considered.

[17, 18] The appellant was not permitted to ask Azro A. Coburn, on cross-examination, how much money he had spent in the proceeding to have Loren Coburn declared incompetent. The question was proper as tending to illustrate the interest of the witness, but, in view of the fact that it was admitted that the witness had paid all of the expenses of both trials, as well as of the former appeal, amounting to at least \$15,000, no real prejudice could have been caused to the appellant by the ruling.

Further exceptions to rulings on the admission or rejection of evidence are so numerous that they cannot be here detailed. All have, however, been examined, and we are satisfied that the rulings were either correct or were not substantially prejudicial to the appellant. The record of the trial, as a whole, makes it very clear that the trial court was actuated by the desire to treat the appellant with absolute fairness and to show him every courtesy that his unfortunate situation called for.

[19] The appellant suggested that, if the court should appoint a guardian at all, it appoint his wife guardian of his person, and Union Trust Company of San Francisco, a corporation, guardian of his estate. The court, however, appointed M. J. Hynes, who was a stranger to the appellant, guardian of both person and estate. There was no error in this. The court is authorized to select a proper person to act as guardian (*Halett v. Patrick*, 49 Cal. 590; *Guardianship of Sullivan*, 143 Cal. 462, 77 Pac. 153), and there is no provision similar to that of section 1748 relative to guardians of minors, requiring the court to give any weight to the preference of the ward. The competency and fitness of Mr. Hynes are not questioned, and the court, in appointing him, cannot be said to have abused the discretion committed to it.

[20] Nor did the court err in declining to permit the reopening of the case, several months after its submission, upon the appellant's claim that he could introduce evidence, not theretofore obtainable, affecting the reputation of Carl Coburn for truth, honesty, and integrity, and the bias of said Carl Coburn. Such applications are addressed to the discretion of the court (*Miller v. Sharp*, 49 Cal. 233; *S. F. Breweries v. Schurtz*, 104 Cal. 420, 38 Pac. 92), and no abuse of that discretion is here shown. The court may well have concluded, from the face of the affidavit offered in support of the motion, that all competent evidence tending to show that Carl's reputation was bad, if such were the fact, could have been obtained and pro-

duced before the close of the trial. And, on the question of bias, the interest of the witness was not disputed, and the new testimony proposed to be offered was not of sufficient importance to require the court to reopen the case.

[21] No request was made for a trial by jury, and the case was tried by the court, without a protest or contrary suggestion from any one. It is now contended that the court should, of its own motion, have called a jury to try the issues, and that its failure to do so necessitates a reversal. Irrespective of the question whether a jury trial was or could be waived by the incompetent, a sufficient answer to the point made is that the proceeding is not one of those in which the right of trial by jury is absolutely guaranteed by the Constitution. The constitutional provision secures the right to a jury trial only in cases in which the right existed at common law. *Koppikus v. State Cap. Com'rs*, 18 Cal. 248; *Cassidy v. Sullivan*, 64 Cal. 266, 28 Pac. 234. Generally speaking, it has reference to criminal cases, and to actions at law, as distinguished from cases of equity (*Pac. Ry. Co. v. Wade*, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. Rep. 201), or special proceedings (12 Ency. Plead. & Prac. 239).

As we have already had occasion to say, the present proceeding is not a criminal case. Nor is it an action at law. Whether it be regarded as of an equitable nature, or as a special proceeding in probate, it is not a case in which, at common law, an absolute right of trial by jury existed. 24 Cyc. 132; *Gaston v. Babcock*, 6 Wis. 503; *Shroyer v. Richmond*, 16 Ohio St. 455; *Hagany v. Cohen*, 29 Ohio St. 82. If it be of an equitable nature, the familiar rule is that the calling of a jury rests in the discretion of the court. If, on the other hand, it be viewed as a matter in probate, the only right to a jury trial that can possibly be claimed under the statute is conditioned upon the making of a demand. Code Civ. Proc. § 1717. It follows that, in the absence of a demand, no right of the appellant was infringed by the action of the court in proceeding to a trial of the issues without a jury.

We are not without appreciation of the importance of this proceeding to the appellant. It is a harsh necessity that compels a court to subject to the control of a guardian the person and property of a man who has, during a long life, displayed the capacity and frugality requisite to the acquisition and retention of so large an estate, and who still preserves, to a considerable degree, his native shrewdness. The effort of the appellant, and of his very industrious and zealous counsel, to avoid this result, must appeal to the sympathies of every one. But when it is shown that the appellant's mental powers have deteriorated to such an extent as to unfit him for the management of his properties, and to render him a like-

ly victim to the wiles of designing persons, it becomes the duty of the trial court to put him under guardianship, to the end that he may be protected not only from those who might seek to impose upon him, but from his own incapacity.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELOTTI, J.

**PLUMAS COUNTY BANK v. BANK OF
RIDEOUT, SMITH & CO.**

(Sac. 1,964.)

(Supreme Court of California. March 19, 1913.
Rehearing Denied April 18, 1913.)

**1. BANKS AND BANKING (§ 166*)—INSOLVENT
BANK—RECEIPT OF PAPER FOR COLLECTION
—LIABILITY OF PARTIES.**

Though it is a fraud for an insolvent bank to receive commercial paper for collection, and though it acquires no title whatever the form of indorsement may be, yet, where a check drawn by a depositor on his bank and indorsed in blank is transferred to another bank, which is insolvent, and advances are made thereon in good faith, the depositor must stand the loss.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 574-578, 586; Dec. Dig. § 166.*]

**2. BANKS AND BANKING (§ 156*) — DEPOS-
ITORS—DEBTOR AND CREDITOR.**

Where a depositor of a bank, desiring to open an account with a trust company, drew a check on the bank in a sum less than the deposit, and transmitted it to the trust company, with directions to give credit for the amount thereof, and the trust company received the check and gave credit therefor, and the bank honored the check, the relation between the depositor and the trust company was that of creditor and debtor, and the insolvency of the trust company shortly after the giving of the credit did not authorize the depositor to hold the bank liable for the loss sustained.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 539-546; Dec. Dig. § 156.*]

**3. BANKS AND BANKING (§ 166*)—DELIVERY
OF CHECK FOR COLLECTION—PAYMENT.**

A depositor in a bank, desiring to open an account with a trust company, drew a check on the bank in a sum less than the deposit, and transmitted it to the trust company, with directions to open an account and give credit for the amount thereof. The trust company received the check, and gave credit therefor. The bank had on deposit with the trust company a sum less than the check, but it honored the check and transmitted a draft for the excess before the trust company closed its doors on account of insolvency. The books of the trust company did not give the bank credit, and an officer thereof returned the uncollected draft. The bank acted in good faith, and neither it nor the depositor knew of the insolvency of the trust company. *Held*, that though the check, drawn by the depositor, was sent to the trust company for collection only, the loss resulting from the insolvency must fall on the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 574-578, 586; Dec. Dig. § 166.*]

Department 2. Appeal from Superior Court, Butte County; J. C. Gray, Judge.

Action by the Plumas County Bank against the Bank of Rideout, Smith & Co. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

U. S. Webb, Jesse W. Lillenthal, and Raymond Benjamin, all of San Francisco, for appellant. F. C. Lusk, of Chico, and A. F. Jones, of Oroville, for respondent.

MELVIN, J. Plaintiff sued for the sum of \$15,000 alleged to be a deposit properly to its credit in the bank of defendant corporation. From a judgment against it and from an order denying its motion for a new trial the Plumas County Bank appeals.

Regarding the facts of this case, there is very little dispute. Indeed, the bill of exceptions is made up in part of an agreed statement of facts, those essential to this opinion being as follows: "On October 28, 1907, the plaintiff bank had on deposit, subject to check, in the defendant bank over \$15,000, and the defendant bank had on deposit in California Safe Deposit & Trust Company the sum of \$12,505.29, and for several years prior thereto had kept an account with said California Safe Deposit & Trust Company to the credit of which it from time to time made deposits and from time to time drew checks or drafts on the same." On October 24, 1907, plaintiff desiring to open an account with the California Safe Deposit & Trust Company, drew its check No. 215 on defendant payable to that corporation (which we will hereafter for the sake of brevity call the Trust Company) for the sum of \$15,000, and on the same day deposited the said check in the mail at Quincy directed to the Trust Company. With the check was a letter containing, among other things, the following language: "We have thought the matter over and have concluded to open an account with you for the present at least. Inclosed herewith you will find our draft on the Bank of Rideout Smith & Company of Oroville, in your favor for the sum of \$15,000, which amount you will please place to our credit and send us receipt for the same." This check and letter were received by the Trust Company on October 28, 1907. Shortly after 2 o'clock on October 30, 1907, the Trust Company closed its doors. It is also true that (we quote from the stipulated statement) "for and during 30 days prior to October 30, 1907, the said California Safe Deposit & Trust Company was insolvent, but neither party to this action had any knowledge or notice of such insolvency at that time. That said bank, while in fact insolvent during said 30 days, paid all its obligations as presented, and as payment was demanded from said bank. That each of the parties to this action had notice and knowledge of the suspension of said bank from and after the 31st day of October, 1907, and that it never resumed

business after it suspended on the 30th day of October, 1907. That it has never since resumed business, and has been at all times from that date insolvent." E. J. Le Breton was appointed receiver of the insolvent corporation January 14, 1908. During the following month plaintiff demanded \$15,000 from the defendant corporation, but said demand was refused on the ground that payment had theretofore been made. On October 28, 1907, the manager of the Trust Company wrote to the cashier of the Plumas County Bank. One paragraph of his letter was as follows: "I desire to acknowledge with thanks your esteemed favor of 24th inst., in which you inclose your check on the Bank of Rideout, Smith & Company, Oroville, for \$15,000.00 and instruct us to place same to your credit. This has been done and a formal acknowledgment will be sent you." On November 1, 1907, the cashier of the Plumas County Bank telegraphed the defendant to stop payment on the \$15,000 draft drawn in favor of the Trust Company.

In addition to the stipulated facts the court found: "That upon the receipt by said California Safe Deposit & Trust Company of said check No. 215 in favor of California Safe Deposit & Trust Company and said letter from said Plumas County Bank to said California Safe Deposit & Trust Company the said California Safe Deposit & Trust Company credited the same in its cash book being its book of original entry to the plaintiff bank, and on the same day this credit to the plaintiff bank of said sum in the cash book of the California Safe Deposit & Trust Company was posted from the cash book into individual ledger No. 2 of said California Safe Deposit & Trust Company, said entries showing that the plaintiff bank was upon that day, October 28, 1907, credited with \$15,000 on the books of the California Safe Deposit & Trust Company." That a deposit tag marked "New" and showing a credit of \$15,000 in favor of the Plumas County Bank was filed among the papers of the Trust Company on October 28, 1907, and that said tag contained, among other things, the following: "In receiving checks on deposit, payable elsewhere than in San Francisco, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions, items previously credited may be charged back to the depositor's account. In making this deposit, the depositor hereby assents to the foregoing conditions." That on the same day the said check No. 215 was mailed to the defendant attached to the following memorandum: "California Safe Deposit & Trust Company, San Francisco, October 28, 1907. To Bank of Rideout, Smith & Co., Oroville: Herewith for collection and credit, drawn on you: Amount, \$15,000." That on October 29th the

check and memorandum were received by defendant marked "Paid," and defendant debited plaintiff on its books with check No. 215. "That the plaintiff bank sent the said check No. 215 for \$15,000 to California Safe Deposit & Trust Company for the purpose of transferring that sum of money for which it had credit at the Bank of Rideout, Smith & Co. to California Safe Deposit & Trust Company, and giving the plaintiff bank credit there for said sum. * * * That when said check No. 215 was received by said defendant bank and said transfer had been made upon the books of said defendant bank, and the said sum of \$15,000 credited to the California Safe Deposit & Trust Company, said defendant bank knew that its account with California Safe Deposit & Trust Company would be overdrawn in an approximate sum of \$2,500, and desiring to have no overdraft at the California Safe Deposit & Trust Company's bank, and to keep a balance continually there, it sent to that bank on the 29th day of October, 1907, not only its draft on said California Safe Deposit & Trust Company for the \$15,000 item and \$48.73 additional thereto to cover other small items, but also sent a cash draft for \$5,000 in favor of California Safe Deposit & Trust Company on the Mercantile Trust Company of San Francisco." That on the same day both drafts were placed in the post office at Oroville contained in envelopes properly addressed to the Trust Company in San Francisco, and having the postage thereon prepaid. "That said draft No. 307 for \$15,048.73 was received by the California Safe Deposit & Trust Company at or before the hour of noon on October 30, 1907, and the said draft for \$5,000 was received by the California Safe Deposit & Trust Company about the hour of noon on October 30, 1907, but the exact time of its receipt cannot be ascertained." That the draft on the Mercantile Trust Company was not cashed by the California Safe Deposit & Trust Company, but two days after the suspension of said last-named bank the said draft for \$5,000 was returned uncashed to the defendant bank. That subsequently the receiver of the Trust Company demanded and received from the defendant bank \$2,543.44, being the difference between its draft No. 307 and the amount of its former balance with the Trust Company. "That upon the receipt by said California Safe Deposit & Trust Company of said draft No. 307 at about the hour of noon on said October 30, 1907, said draft was passed into the hands of a clerk of said California Safe Deposit & Trust Company, who upon examining the books of said California Safe Deposit & Trust Company found that said books showed at that time a credit to the account of the defendant bank of the sum of \$12,705.29 only, and thereupon reported to the manager of said California Safe Deposit & Trust Company the amount of balance shown on said books to be due to

the defendant bank, and was then and there instructed by the manager of said California Safe Deposit & Trust Company to hold said draft No. 307 for \$15,048.73 over. That thereupon an entry was made upon the pages of the interior collection book of said California Safe Deposit & Trust Company, which showed a copy of the remittance slip accompanying draft No. 307 of the defendant bank, noted as follows: 'Dft Held Over.' That said draft No. 307 was not before the closing of the doors of the California Safe Deposit & Trust Company canceled, stamped, or in any manner marked, nor was any entry, marking, or notation of any kind or character made thereon until after the doors of the California Safe Deposit & Trust Company were closed, to wit, on the 14th day of March, 1908." That defendant bank was not debited with draft No. 307 on the books of the Trust Company. "That during the entire months of October and November, 1907, and for more than two years prior thereto, it was the custom in the city of San Francisco of the California Safe Deposit & Trust Company and of all other banks in said city by recommendation of their clearing house that in receiving notes, drafts, and checks on points other than said city of San Francisco, either for collection or credit, that the bank at which said check was deposited for collection should transmit the same in the usual manner for collection either to the bank on which it was drawn, or to such banks or persons as it might deem reliable, and that the bank to which it was sent might remit by check, draft, certificate, or cash for the proceeds of any collection, instead of remitting the exact money collected." That the draft for \$5,000 on the Mercantile Trust Company in favor of the California Safe Deposit & Trust Company was good, and would have been paid if presented. That "during more than two years prior to October 30, 1907, the defendant bank maintained a deposit with the California Safe Deposit & Trust Company, but at no time did the California Safe Deposit & Trust Company have a deposit with the defendant bank. That during said two years the California Safe Deposit & Trust Company frequently sent checks and drafts to the defendant bank, and the letters accompanying some of them read 'for collection and credit,' and the letters accompanying others of them read for 'collection and returns,' and the letters accompanying still others did not state whether they were sent for 'collections' or 'returns,' but in every such case the defendant bank immediately remitted the amount of said collections to the California Safe Deposit & Trust Company, and in all such cases the same practice was pursued as was followed in the case of check No. 215."

[1] At the outset it may be well to say that we do not think the insolvency of the Trust Company before the actual closing of its doors was a material factor in this case.

It is highly probable that some of the officers of that corporation knew of its insolvent condition long before the doors were closed to the public; and, if this action were against such officers or some one in privity with them, their fraud would be available to plaintiff if he desired to set aside any transaction with the bank. For example, if the check for \$15,000 sent by the Plumas County Bank had reached San Francisco after the Trust Company had closed its doors, doubtless it could have been recovered from the receiver. But we are considering the respective rights of two equally innocent parties both dealing with an apparently solvent corporation. As between the plaintiff and the Trust Company, the acceptance of the former's deposit by the latter while it was insolvent was a fraud; but it was also a fraud against the defendant. Neither of these innocent parties can gain any advantage over the other by reason of the fraud of a third party practiced upon both of them. The rule is thus stated by a distinguished author: "It is a fraud for an insolvent depository to receive paper for collection, and, no matter what may be the indorsement, the bank acquires no title. But if a check indorsed in blank is transferred to another bank, and advances are made thereon in good faith, it can hold the check. The depositor in such a case must suffer that the great rule, where a bona fide holder of paper is protected in taking it, may be preserved." 2 Bolles, Modern Law of Banking, § 17.

[2] The principal and indeed the crucial question in this case is whether the relation between the Plumas County Bank and the Trust Company was one of principal and agent or creditor and debtor. In this behalf appellant cites certain authorities, which we will proceed to examine.

In *Hazlett v. Commercial Nat. Bank*, 132 Pa. 119, 19 Atl. 55, the plaintiff had deposited his check for \$5,000 to his account with the Commercial National Bank of Philadelphia. This was drawn against the Penn Bank of Pittsburgh. He was credited with \$5,000, and the check was sent to the Penn Bank. It was charged to the account of Mr. Hazlett, and the draft of the Penn Bank on the Bank of the Republic was sent to the Commercial National Bank. This was refused payment on presentation, and Mr. Hazlett was notified of that fact. He then wired the Commercial National Bank that the Penn Bank was "all right" and that its draft, "would be paid in a day or two." He added: "Please hold for a few days and if not honored, return it to me." The court held that the defendant bank was his agent, and that his order to hold the draft excused and condoned the delay which prevented its collection. The court did use this language which plaintiff here cites: "When the plaintiff drew his check for \$5,000 on the

Penn Bank of Pittsburgh, and deposited said check with the Commercial Bank of Philadelphia for collection, he made the latter bank his agent. The mere fact that the collecting bank credited him with the check as cash did not alter that relation. This is done daily—indeed, it is the almost universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit. If the check is unpaid, it is charged off again, and the unpaid check returned to the depositor." The case, however, scarcely solves the problem presented by the one at bar. There the conduct of the parties indicated that the contract was one of agency, and that the deposit of the check with the defendant bank did not create the relationship of debtor and creditor. In the case before us the Plumas County Bank deposited its own check payable to the Trust Company with a request to place the amount to its credit. This was done, and, after the manager of the Trust Company had apprised plaintiff of that fact, both parties treated the transaction as completed. Plaintiff's sworn statement to the bank commissioners contained this language: "On October 29, 1907, the California Safe Deposit & Trust Company received from O'Rourke Eubanks Hat Company check No. 788, drawn by W. J. Miller, on the Plumas County Bank and in favor of the O'Rourke Eubanks Hat Company for \$13.26, and in due course of mail this check was forwarded by the California Safe Deposit & Trust Company to the Plumas County Bank for collection and credit, and the books of the Plumas County Bank show that this check was paid on October 31, 1907, and the amount thereof placed to the credit of the California Safe Deposit & Trust Company, thus reducing the amount of their supposed indebtedness to the Plumas County Bank to the sum of \$14,986.74." That transaction showed as clearly that the plaintiff did not send its check merely for collection, as Hazlett's direction in the cited case from Pennsylvania indicated his understanding that the defendant bank was merely his agent.

Rapp v. National Bank, 136 Pa. 435, 20 Atl. 508, was a case in which the check had been refused except for collection. It was a raised check. The drawee paid it, but when the forgery was discovered the amount paid because of the alteration of the instrument was refunded by the collecting bank, and it was held that said bank should not bear the loss, although the firm that had sent the check by the defendant bank for collection had been credited with the full amount, shown by the face of the forged instrument. The case merely announces the undoubted rule that, where a worthless check left for collection has been credited to a depositor, the amount involved may be charged back to him when the worthlessness of the paper is discovered. Unquestionably,

if the check in the case at bar had been valueless, the Trust Company might have charged it back to the Plumas County Bank; but it was perfectly good, as it was drawn on a solvent bank in which the drawer had a balance more than sufficient for the payment of the amount called for.

Richardson v. Denegre, 93 Fed. 572, 35 O. C. A. 452, contains an admitted obiter dictum that "the checks of depositors in the ordinary course of business with a bank do not become the property of the bank, and the relation of debtor and creditor is not established, but that of principal and agent prevails up to the time the check is collected and money is received by the bank." The case was decided upon entirely different principles, and is of no great authoritative force. In Henderson v. O'Connor, 106 Cal. 388, 39 Pac. 786, the bank had refused to accept the draft in question as a deposit. After the failure of the bank the receiver collected the amount due upon the draft. The court held that the only relation between the plaintiff and the bank was that of principal and agent, and that the latter had no title to the draft nor to the collected funds. National Gold Bank v. McDonald, 51 Cal. 66, 21 Am. Rep. 697, was a case in which a depositor presented a check drawn in his favor upon the plaintiff bank. He was credited in his bank book for the amount of the check; but, when the day's business was reviewed, it was discovered that the drawer had no funds on deposit. Accordingly the bank charged the depositor's account with the amount of the check. It was held that the transaction of itself did not import an agreement by the bank to accept the check as cash. The substance of that decision is that a bank has until the close of business hours for the day to determine whether or not final credit will be given for a check drawn upon and payable by itself. The facts of that case and Ocean Park Bank v. Rogers, 6 Cal. App. 678, 92 Pac. 879, are almost identical. Neither case goes so far as to hold that no agreement is possible whereby the bank in which a check is deposited may receive it as cash.

In the case at bar, not only had the plaintiff been given full credit by the Trust Company for the check, but the check itself was good, and immediately upon its presentation to the solvent drawee was honored. It was never refused payment as were the checks in the cases discussed. The plaintiff bank knew nothing of the condition of defendant's account with the Trust Company. What it wanted was credit with the Trust Company for \$15,000. That is what it received, and the details of the collection of the amount from the drawee of the check are therefore immaterial.

But plaintiff contends that, although the Trust Company opened a deposit account with it, the relation of principal and agent

subsisted between them because of the rule announced upon the deposit slip that items previously credited might be charged back to the depositor's account upon the failure of any of its direct or indirect collecting agents, and that it would only be liable when "proceeds in actual funds or solvent credits" should have come into its possession. Respondent concedes that the rule announced exists without any such written evidence, but that the right to charge off bad checks does not affect the bank's title. While the courts are divided upon this question, it is generally held that this right to return checks if they are unpaid does not affect their ownership. 2 Bolles, *Modern Law of Banking*, § 22; *First Nat. Bank v. Armstrong* (C. C.) 39 Fed. 233.

Respondent contends, and we think correctly, that the contract between the plaintiff and the Trust Company made the latter the owner of check No. 215. We have seen that plaintiff sent it for the purpose of opening a new account, and that it recognized the validity of the deposit by crediting the Trust Company with the Miller check. Defendant received the check with an indorsement indicating that the Trust Company was the owner of the paper. This was as follows: "Pay to the order of yourself, previous indorsement guaranteed. California Safe Deposit and Trust Company, San Francisco, California. J. Dalzell Brown, Manager." The check was also accompanied by the slip announcing that it was sent "for collection and credit." All of these things, as well as the opening of the new account with plaintiff by the Trust Company, evidence a contemporary construction of the relations between plaintiff and the Trust Company totally at variance with plaintiff's assertion that the check was sent merely for collection.

The matter of receiving and crediting checks has recently been considered by the Supreme Court of the United States in *Burton v. United States*, 196 U. S. 233, 25 Sup. Ct. 243, 49 L. Ed. 482. It became important in a criminal case to know whether checks drawn on a St. Louis bank but credited to the defendant by Riggs National Bank of Washington, D. C., should be regarded as having been received and paid in St. Louis. Mr. Justice Peckham, delivering the opinion of the court, said: "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defend-

ant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of Riggs National Bank, as to the custom of the bank when a check was not paid of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent. * * *

The general transactions between the bank and a customer in the way of deposits to a customer's credit and drawing against the account by the customer constitute the relation of creditor and debtor. As is said by Mr. Justice Davis, in delivering the opinion of the court in *Bank of the Republic v. Millard*, 10 Wall. 152, 155 (19 L. Ed. 897), in speaking of this relationship: "It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell in the House of Lords in the case of *Foley v. Hill*, 2 Clark & Finnelly, 28, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect." When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the

relation of creditor and debtor between them subsists, and it is not that of principal and agent. This principle is held in *Thompson v. Riggs*, 5 Wall. 663 [18 L. Ed. 704], and also in *Marine Bank v. Fulton Bank*, 2 Wall. 252 [17 L. Ed. 785]. See also *Scammon v. Kimball*, 92 U. S. 362, 369 [23 L. Ed. 483]; *Davis v. Elmira Savings Bank*, 161 U. S. 275, 288 [16 Sup. Ct. 502, 40 L. Ed. 700]. The case of *Cragie v. Hadley*, 99 N. Y. 131 [1 N. E. 537, 52 Am. Rep. 9], contains a statement of the rule as follows, per Andrews, J.: "The general doctrine that upon a deposit made by a customer in a bank in the ordinary course of business, or of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. *Commercial Bank of Albany v. Hughes*, 17 Wend. (N. Y.) 94; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530. The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business." In *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that: "The title passed to the bank, and they (the checks) were not again subject to his control. See *Scott v. Ocean Bank in City of New York*, 23 N. Y. 289, and other cases cited in the opinion."

The Supreme Court of Oklahoma cited the above-quoted case and other valuable authorities in *Hobart Nat. Bank v. McMurrrough*, 24 Okl. 210, 103 Pac. 601.

We conclude that the judgment of the lower court must be sustained; but, even if we should hold that the check in question was sent to the Trust Company for collection, we would be compelled to decide that it was collected.

[3] The court found upon sufficient evidence that both the check of the defendant bank upon the Trust Company for an amount exceeding \$15,000, and the other draft for \$5,000 (which was a solvent credit), reached the Trust Company before noon on October 30, 1907, before the latter institution closed its doors. That they were not duly passed through the books to defendant's credit at once is no fault of the defendant. It cannot be prejudiced by mere omissions in book-keeping. It had complied with every possible requirement by paying the check in the manner usual to the course of business between banks. It is immaterial that subsequently,

without authority or right, some official of the insolvent bank returned the uncollected draft for \$5,000 to the Bank of Rideout, Smith & Co. Defendant had promptly sent that draft in good faith to meet its overdraft. That was enough. And, since plaintiff must look to the assets of the insolvent corporation for the recovery of its proportion of its deposit, it cannot now complain of the return of the \$5,000 for the very good reason that the overdraft of defendant has since been paid to the receiver.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

OPPENHEIMER v. RADKE & CO. (S. F. 6,286, 6,331.)

(Supreme Court of California. March 25, 1913.)

1. APPEAL AND ERROR (§ 957*) — REVIEW — DISCRETION OF TRIAL COURT.

The appellate courts will not reverse a decision of the trial court refusing or granting relief from a default under Code Civ. Proc. § 473, providing for relief from default, in the discretion of the court, unless it appears there was an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3823; Dec. Dig. § 957.*]

2. EXCEPTIONS, BILL OF (§ 43*)—TIME FOR PRESENTATION—EXCUSES FOR DELAY.

A showing that the managing officer of defendant corporation decided after an adverse judgment to attempt to effect a compromise rather than to appeal, that he did not know a bill of exceptions must be proposed within 10 days, and expecting to be able to effect the compromise he only requested his attorneys to procure short stays of execution, which they did, until the compromise was abandoned, does not establish that defendant is entitled under Code Civ. Proc. § 473, to be relieved of its default in failing to propose a bill of exceptions, so that an order of the trial court denying relief constitutes no abuse of discretion.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. § 72½; Dec. Dig. § 43.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; El P. Mogan, Judge.

Action by Leopold Oppenheimer against Radke & Company. There was a judgment for plaintiff, and from an order denying defendant's motion to relieve it from default in failing to propose its bill of exceptions within time, defendant appeals. Order affirmed, and appeal dismissed.

Henry C. Schaertzer, of San Francisco, for appellant. Lillenthal, McKinstry & Raymond, of San Francisco (Orville C. Pratt, Jr., of San Francisco, of counsel), for respondent.

SHAW, J. Judgment was entered against the defendant in favor of the plaintiff in an action upon a promissory note on April, 26, 1912. Notice thereof was served on the defendant on May 1, 1912. The law allows 10 days, or such further time, not exceeding 30

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

days, as may be allowed by the court, after such notice, within which to serve upon the adverse party a draft of a proposed bill of exceptions, to be used on appeal from the judgment. Code Civ. Proc. §§ 650, 1054. The defendant did not prepare or serve such proposed bill within the 10 days allowed by the Code, and it did not obtain any extension of the time within which to do so. On June 24th it gave notice of motion for relief from the default in failing to propose such bill. The motion came on for hearing and was denied by the court. The appeal here presented is from the order denying such motion.

[1] Under section 473 of the Code of Civil Procedure, a party may, in the discretion of the court, at any time within six months be relieved from a default taken against him "through his mistake, inadvertence, surprise or excusable neglect." The giving of such relief is, by the Code itself, committed to the discretion of the court in which the default occurred. It is thoroughly settled that the appellate courts will not reverse a decision of the trial court refusing or granting such relief, unless it clearly appears that there was an abuse of discretion. *Ingrim v. Epperson*, 137 Cal. 371, 70 Pac. 165; *O'Brien v. Leach*, 139 Cal. 222, 72 Pac. 1004, 96 Am. St. Rep. 105; *Alferitz v. Cahen*, 145 Cal. 399, 78 Pac. 878; *Vinson v. R. R. Co.*, 147 Cal. 483, 82 Pac. 53.

[2] The motion for relief was supported by an affidavit of R. L. Radke, president of the defendant corporation, and apparently its managing officer. We give a statement of the facts set forth in the affidavit. After the judgment was rendered against the defendant, he decided to attempt to procure a compromise, rather than to take an appeal, and thus, if possible, avoid the expense of an appeal, and he informed the defendant's attorneys of this purpose. The negotiations for such settlement continued until June 1, 1912. In the meantime, defendant's attorneys, at his instance and in order to gain time for the negotiations and protect defendant's property from levy, had procured three orders, each for a 10 days' stay of execution; the last expiring on May 31, 1912. On that day the arrangements for settlement were practically complete, but a third person on whom Radke depended for assistance was unexpectedly called away to be absent until June 3d. Radke did not expect that an execution would be issued until after the latter date. One was issued, however, on June 1st, and it was at once levied on the defendant's property. This ended all efforts to compromise and Radke then determined to take an appeal from the judgment, and, for the first time, informed defendant's attorneys that the defendant desired to do so. The reason he did not previously instruct them to appeal, or to prepare a bill of exceptions was that he fully expected to be able

to make a compromise and did not wish to incur expense which would be unnecessary if he succeeded in settling the case. He did not know that the law gave only 10 days' time to serve a draft of the proposed bill of exceptions on appeal and he made no inquiry and asked no advice of his attorneys on that subject. What he did say to them in this interval of 30 days was that he believed he could settle the case, that for that reason there was no necessity for bothering with an appeal, and that all he desired of them was that they should obtain short stays of execution from time to time until he made the arrangements to settle. These facts do not establish a clear case of inadvertence or excusable neglect. They rather tend to show the want of any good excuse for his failure to advise the attorneys that he desired to appeal if his efforts to compromise should fail, or for his neglect to ask their advice as to the things necessary to be done to preserve his right to an effectual appeal. We cannot say, under the circumstances stated, that the refusal of the relief asked for was an abuse of discretion. The order must therefore be affirmed.

The defendant, notwithstanding the lack of a bill of exceptions, took an appeal from the judgment. On August 5, 1912, the respondent moved this court to dismiss said appeal, because of defendant's failure to file a transcript on appeal within time. Upon a showing that this proceeding for relief was pending, the motion to dismiss the appeal was denied without prejudice. The plaintiff now asks that, in the event that the order refusing leave to serve a proposed bill of exceptions be affirmed, the aforesaid appeal from the judgment be dismissed. The defendant consents to such dismissal upon the conditions stated. As we conclude that the order must be affirmed, the dismissal of the appeal from the judgment will accordingly be made.

The order denying the motion to set aside the default in failing to serve and file a draft of the proposed bill of exceptions is affirmed. The motion to dismiss the appeal from the judgment, being the appeal numbered S. F. 6,256, is granted, and it is ordered that said last-mentioned appeal be dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

CITY AND COUNTY OF SAN FRANCISCO
v. LARSEN. (S. F. 5,814.)

(Supreme Court of California. March 22, 1913. Rehearing Denied April 21, 1913.)

LICENSES (§ 6*)—BUSINESS LICENSE—"RESTAURANT."

St. 1899, p. 248, § 1, subsec. 15, authorizes the city and county of San Francisco to impose license taxes but declares that no li-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cense tax shall be imposed on any person who, at any fixed place of business, sells or manufactures goods, wares, or merchandise, except such as requires a permit from the board of police commissioners, etc. *Held* that, since a restaurant is primarily a public eating place, and not a place where the business of manufacturing or selling goods, wares, or merchandise is carried on, the keeper of a restaurant is not engaged in the business of selling goods within the exception, and is subject to the tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 7, pp. 6180, 6181; vol. 8, p. 7789.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the City and County of San Francisco against Carl G. Larsen. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. Percy V. Long, City Atty., and N. J. Manson, Asst. City Atty., both of San Francisco, for respondent.

SHAW, J. This action was begun to recover of the defendant the sum of \$42, claimed to be due from him to the plaintiff for license taxes imposed upon him for keeping a restaurant in the city for the period of six months, ending December 31, 1909. The court below gave judgment for plaintiff. Defendant appeals from the judgment and from an order refusing a new trial.

The ordinance imposing the license tax sued for is numbered 1677. It imposes a license tax upon the owners or keepers of hotels, boarding houses, lodging houses, apartment houses, restaurants, and upon caterers; the amount of the tax depending upon the amount of the quarterly gross receipts from the business. Upon that basis the quarterly tax upon the business of the defendant was \$21.

The validity of the ordinance is attacked upon the ground that it is contrary to the provisions of the city and county charter prescribing the powers of the board of supervisors, referring to section 1 of chapter 2, art. 2, Stats. 1899, p. 248. The section contains 35 subdivisions. The parts of it with which we are here concerned are the opening sentence and subdivision 15, which are as follows: "Subject to the provisions, limitations, and restrictions in this charter contained, the board of supervisors shall have power * * * (15) To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter." The exception covering kinds of business re-

quiring a police permit refers to the business of selling intoxicating liquors and the kinds of business mentioned in article 8, c. 3, § 1, and chapter 4, § 7. Stats. 1899, p. 327. This exception does not affect the present case.

On behalf of the appellant, the argument is that one who keeps a restaurant is engaged in the business of selling goods, and hence that he comes within the terms of the prohibition against the imposition of license taxes on a person who sells goods, wares, and merchandise at a fixed place of business. It cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum, with the charge for service and use of dishes, chair, and table. It is nevertheless a sale of the food consumed, within the technical definition of that term.

But this single point of coincidence does not necessarily bring the restaurant keeper within the class described in the exempting clause. We are not dealing solely with the question whether or not he does, in his business technically sell goods, but with the question whether or not, within the meaning of the provision prohibiting license taxes upon described places of business, he is a person who "sells or manufactures goods, wares, or merchandise." We must look to the phrase as a whole, consider its object and purpose, and give it a meaning according to the ordinary acceptance of the words used. When we speak of a place where the business of selling or manufacturing goods, wares, or merchandise is carried on, we do not usually think of restaurants in that connection. One who mixes and cooks food-stuffs is engaged in the business of manufacturing goods, if we use the words according to their literal meaning, but, if we mention manufactures, we should scarcely expect to be understood to refer to the keepers of restaurants. A restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer. The fact is that both the sale and the manufacture of food are mere minor incidents to the keeping of a restaurant. A restaurant is, primarily, a public eating place. It is not, primarily, or according to the ordinary habit of speech, a place where the business of manufacturing or selling goods, wares, or merchandise is carried on. We are of the opinion that this phrase in the charter was used in its ordinary acceptance to describe what is usually understood by the words when used in that collocation, and that, when so understood, the business of selling or manufacturing goods, wares, or merchandise does not include the business of keeping a hotel or restaurant. The opening clause of the subdivision confers general power to impose

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

license taxes upon all kinds of business. As this particular business does not fall within the exemption provided in the second clause, it follows that the board of supervisors had power to enact the ordinance under which the judgment was given.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

S. H. HARMON LUMBER CO. v. BROWN et al. (S. F. 5,802.)

(Supreme Court of California. March 24, 1913. Rehearing Denied April 23, 1913.)

1. MECHANICS' LIENS (§ 75*)—IMPROVEMENTS BY LESSEE—CONSTRUCTIVE NOTICE TO LESSOR.

An owner of a lot was chargeable with constructive notice of the construction of lienable improvements made by a lessee where the lease required such improvements to be made, as was another lessor under a lease which did not require, but which contemplated the making of such improvements.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 103-107; Dec. Dig. § 75.*]

2. MECHANICS' LIENS (§ 75*)—IMPROVEMENTS BY LESSEE—CONSTRUCTIVE NOTICE TO LESSOR.

Owners of adjoining lots, who leased them under leases requiring or contemplating the construction of improvements thereon, were chargeable with notice of the construction of a single building extending over both lots, where, by making diligent inquiry, they would have discovered that the building was being erected under single authorization of persons claiming a leasehold interest in both lots.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 103-107; Dec. Dig. § 75.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Consolidated actions by the S. H. Harmon Lumber Company, by E. L. Malsbary, by Harry Palmer, and by W. P. Fuller & Co. against I. I. Brown and others. Judgment dismissing the actions, and plaintiffs appeal. Reversed.

Cooper, Gray & Cooper, Gray & Cooper, and Adams & Adams, all of San Francisco, for appellants. Joseph Haber, Jr., and Stafford & Stafford, all of San Francisco, for respondents.

SLOSS, J. The above-entitled actions for the foreclosure of mechanics' liens were consolidated for trial. At the close of the cases of plaintiffs, the defendants made motions for nonsuit, which were granted, and judgment dismissing the action entered. The plaintiffs appeal from the judgment.

The defendant Brown was and is the owner of a lot on the corner of Mission and Seventeenth streets, in the city and county of San Francisco, having a frontage of 110 feet on Mission street. Adjoining this property

to the south is a lot, fronting 50 feet on Mission street, owned by the defendant Agnes C. Doran. On July 17, 1903, Brown leased his lot to the defendant Louis T. Samuels for a term of five years from August 1, 1903. The term was subsequently extended to July 31, 1914. In the lease Samuels covenanted that he would, with all reasonable dispatch, erect building improvements upon the demised premises. It was also agreed that all such improvements should at the expiration of the term, or sooner determination of the lease, become the property of the lessor. Samuels, on July 29, 1903, sublet the premises to the defendants Moses Davis and Samuel Davis for a term ending August 1, 1914, by a lease containing the same provisions with reference to improvements as those found in his lease from Brown.

On January 21, 1907, the defendant Agnes C. Doran leased her lot to said defendants Davis for a term of eight years beginning February 1, 1907. By this lease the lessees agreed to pay all taxes on "the value of all improvements that may be erected upon said land by said" lessees. They were given authority to remove any buildings or other improvements that might be erected by them on the land, provided that such improvements were removed before February 15, 1915. If not then removed, the improvements were to become the property of the lessor. It was further agreed that all improvements made upon the land should be security for the payment of rent and for the other covenants of the lease. After the execution of the leases to the defendants Davis, said defendants employed the plaintiff Malsbary to prepare plans for a building and to superintend its erection. The building was commenced in April, 1907, and completed in November, 1907. The various plaintiffs furnished labor and materials for use in, and which were used in, the construction of the building, and, within the time allowed by the statute, filed claims of lien for the unpaid portions of their respective demands.

The building erected covers a frontage of 120 feet of Mission street. It occupies all of the Brown lot and the northerly ten feet of the Doran lot. Neither Brown nor Mrs. Doran ever posted the notice described in section 1192 of the Code of Civil Procedure, disclaiming responsibility for said improvements. The record contains no evidence tending to show that either of said defendants had actual knowledge of the construction in time to have posted such notice.

[1] The principal question is whether, under the facts above recited, the defendants Brown and Doran should be held to have had constructive notice of the erection of the building in question in such manner as to render their interests in the respective lots subject to the liens claimed by plaintiffs. The respondents contend: First, that there was nothing to impute to either of the own-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ers notice of the erection of any kind of an improvement upon either of the lots; and, second, it is argued that, if notice were to be imputed to them at all, it could only be notice to each owner of a building erected solely upon his or her lot, and not notice that a single building, covering, in part, both lots, was being erected "jointly on the two parcels of land." As a corollary to the second position, it is urged that neither lot of land is, so far as the interest of the defendants Brown and Doran is concerned, subject to the liens here asserted. In discussing these questions, we make no separate mention of the defendant Samuels, as his position is, for the purposes of this inquiry, substantially the same as that of the defendant Brown.

To the first of the propositions just stated, viz., that neither of the owners would, under the circumstances disclosed, be chargeable with notice of the erection of a building standing entirely upon his or her lot, we cannot give our assent. Under section 1192, as it read at the time of the transactions here in question, improvements erected upon the land of one who, although not in fact authorizing them, fails to give the required notice within three days after obtaining knowledge of the construction or intended construction are deemed to have been constructed at the instance of the owner, and his interest is made subject to liens. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. The knowledge which will subject the owner to this burden is not alone actual knowledge. Constructive knowledge (i. e., notice of circumstances which would put a prudent man upon inquiry as to the fact in question [Civ. Code, § 19]), is equally potent to bind the owner. *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 Pac. 555; *Evans v. Judson*, 120 Cal. 282, 52 Pac. 585; *Hines v. Miller*, 122 Cal. 517, 55 Pac. 401. In each of the cases just cited the owner was, upon facts very similar to these appearing here, held to have had constructive notice of the contemplated improvements. In *Santa Monica L. & M. Co. v. Hege*, the owner, after verbally leasing a lot, gave his lessee permission to construct certain additions to a building which stood upon the lot. Upon these facts, the court below "properly held," says this court, "that the building was constructed with the knowledge of the appellant [owner] and that his failure to give the notice required by section 1192 of the Code of Civil Procedure rendered his interest in the land subject to the lien." In *Evans v. Judson*, notice was held to be imputed to the owner from the fact that he had made a lease for six months, giving to the lessee the privilege of removing improvements made by him in the premises, unless the removal would damage the existing structure, in which case the added improvements were to become the property of the lessor. *Hines v. Miller* reached the same result. There the owners of a mine had leased it, giving to the lessees the right to

sink shafts and run tunnels in working and developing the mine; the lessors to receive one-fourth of the gross output.

These decisions leave no room for question that Brown, at least, was chargeable with constructive notice of the erection of improvements under the authority of the lease made by him. That lease did not merely permit improvements; it bound the lessee to erect a building on the entire lot "with all reasonable dispatch." It further vested the ownership of such building in Brown upon the termination of the lease. These circumstances certainly required him, as a prudent man, to prosecute inquiry to ascertain whether his lessee was complying with his obligation to promptly construct improvements which were to inure to the benefit of the lessor. Under the terms of the lease, it may further be remarked a failure by the lessee to perform any of his covenants, including the covenant to build, was made a ground for terminating the lease.

In the case of the defendant Doran, the conclusion is not so obvious. Yet we think that she, too, must be held to have had constructive notice of the erection of any building that might be constructed on her lot by her lessees. While her lease to the defendants Davis did not require the latter to erect improvements, it contained provisions indicating clearly that the parties contemplated such erection. The lessees bound themselves to pay taxes on improvements that might be erected. While they were given the right to remove such improvements, this right was conditioned upon the removal being effected within a certain time. The lessor stipulated for and obtained under the lease a beneficial interest in any building that might be constructed. Not only was she to become the owner of such building if it were not removed within the time limited, but it at once became security for the performance of all covenants of the lessees. Knowing, then, that she had given the lessees the right to erect improvements upon her property, and being interested in any improvements which they might erect, the due protection of her own rights required her to make such inquiry as would disclose whether or not the lessees were proceeding to build upon the lot. Some weight, too, is to be attributed to the circumstance that the property leased was a vacant city lot, and that the lessees contracted to pay a substantial rental. The expectation of the parties must have been that the lessees would utilize the only available method of realizing a benefit from such property; that is to say, by improving it with a building which could be rented or used by themselves.

The decisions cited above fully justify the conclusion that the facts in evidence were sufficient to give Mrs. Doran constructive notice of the erection of a building on her lot by her lessees. Her position is closely analogous to that of the lessor in *Evans v.*

Judson, *supra*. In that case as in this there was a lease authorizing, but not requiring, the making of improvements, and giving the lessor, in certain contingencies, an interest in any improvements made. The respondents seek to distinguish the Evans Case upon the ground that the lease there under consideration was for a term of six months only. But, while the opinion does lay some stress upon the shortness of the term, we do not regard that circumstance as the controlling one. The essential facts putting the lessor upon inquiry were that he knew that improvements were contemplated, and that he had an interest in such improvements as might be made. See *Hines v. Miller*, *supra*.

[2] There remains the question whether there is to be imputed to the respective lessors notice of the construction of a single building covering, in whole or in part, the lots owned by them severally. As the respondents view the case, the question is whether an owner of one lot can be charged with liens for the construction of a building erected in part on his lot and in part on the property of another, where the owners of the two lots have not jointly authorized the construction. It is, in effect, conceded that, where there has been such joint authorization, the owners have by their act treated the several lots as a single parcel, and thus subjected the combined property to liens for the building or improvement erected on them jointly. *Lamont v. Le Fevre*, 96 Mich. 175, 55 N. W. 687; *Miller v. Shepard*, 50 Minn. 268, 52 N. W. 894; *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815; *Carter Lumber Co. v. Simpson*, 83 Tex. 370, 18 S. W. 812. In such cases, the several holdings are, for the purposes of the lien law, to be regarded as a single tract. *Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 Pac. 378. But, say the respondents, such union of different parcels cannot be held to result where the respective owners have not joined in making or authorizing the construction. Neither Brown nor Mrs. Doran had actual knowledge that a building was being erected, or was authorized to be erected, on the land of the other. The constructive notice to be imputed to each owner is limited, as is claimed, to the improvement of the lot of such owner. The conclusion contended for is therefore that there was neither an actual joinder between the owners for the erection of a single building covering the property of both, nor constructive notice of such erection, binding them as if they had expressly so joined. This argument, we think, unduly limits the scope of the notice imputed to the respondents and the effect, under section 1192, of their failure to post a disclaimer of responsibility.

The provisions of the Code of Civil Procedure impose a lien upon the building or improvement. Section 1183; *Willamette S. M. Co. v. Kremer*, 94 Cal. 205, 208, 29 Pac.

683. A lien upon the land upon which the building or improvement is constructed, or so much thereof as may be required for the convenient use and occupation thereof, is also given. Section 1185. But the primary thing is the lien upon the building. The lien upon the land is incident thereto. *Humboldt L. M. Co. v. Crisp*, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811.

The lien imposed upon the land under section 1185 is limited to the interest of the person who caused the building to be constructed; but, by the provisions of section 1192, the interest of other persons who, with knowledge of the construction, fail to disclaim is also subjected to the lien. *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686. The defendants Davis had, under their leases, an interest in each of the two lots. Making a contract for the erection of a building to occupy said lots, they rendered the building itself, when constructed, liable as an entirety for liens of persons furnishing labor or materials in the construction. And unquestionably the interest of these defendants (Davis) in the several lots had been so joined for the purposes of the improvement as to render that interest in the land equally subject to the liens. The effect of section 1192 is to put the nondisclaiming owner (with notice) in the position which he would have occupied if he had himself authorized the construction. The building "shall be held to have been constructed * * * at the instance of such owner." If, then, the owners of the two lots here in question were chargeable with notice of the erection of the building, they are by the statute identified with the persons who actually caused the erection. The building was in fact authorized to be built as a whole upon land treated as a single parcel. The result of such authorization and construction properly falls upon those at whose instance the work must, under the statute, be held to have been done.

But, it is said, the respondents are not chargeable with notice that any joint construction on the two lots was being undertaken. If such notice was necessary to the imposition upon their land of liability for the liens, we think they had it. The constructive notice imputed to them by the facts putting them upon inquiry extended to all matters which they would have learned by a proper prosecution of such inquiry. The execution of the leases required them, as we have seen, to be reasonably diligent to learn what improvements were being put upon their lots by their lessees. Such inquiry, if it had been undertaken, would have disclosed that a single building was being erected upon ground which comprised, in whole or in part, both lots. This fact itself, if properly followed by the inquiry which it would naturally induce, would have led to the further discovery that the building was being erected under the single authorization of

persons claiming a leasehold interest in both lots. There is no reason for holding that each of the owners had a right to assume that the lessees would erect nothing but separate buildings upon the respective lots. Neither lease contains any restriction to this effect, and it is not contended that the defendants Davis violated any duty which they owed to either lessor by constructing the building as they did.

We hold, accordingly, that the land necessary for the convenient use and occupation of the building was liable, as a whole, for liens, regardless of the separate ownership. This being so, there is no merit in the additional ground of nonsuit urged against three of the plaintiffs, viz., that they had failed to prove allegations of their complaints to the effect that eleven-twelfths in value of the work done was bestowed upon the property of Brown, and one-twelfth upon that of Mrs. Doran. In view of our conclusion that the land of both of these defendants was chargeable as a unit, this allegation was entirely immaterial, and no proof in support of it was required.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

LAKE et al. v. SUPERIOR COURT IN AND FOR KERN COUNTY. (S. F. 6,245.)

(Supreme Court of California. March 22, 1913. Rehearing Denied April 21, 1913.)

1. INJUNCTION (§ 230*)—VIOLATION—PUNISHMENT—MODE OF PROCEDURE.

A proceeding to punish for contempt any violation of an injunction may be properly initiated by citation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

2. INJUNCTION (§ 223*)—DECREE—VALIDITY—VIOLATION—CONTEMPT.

Where, in a suit in equity to sustain a certificate of sale of state land after the rights of the holder had been forfeited by foreclosure, the court found in favor of the defendants who claimed under a subsequent certificate holder, and in the exercise of jurisdiction enjoined petitioners claiming under the foreclosed certificate from thereafter asserting or claiming any right to or interest in the property or any part thereof, and from in any manner asserting or claiming that a previous judgment terminating the certificate was invalid, petitioners committed a contempt of court in thereafter filing a cross-complaint in a subsequent action, in which they sought to again attack directly the validity of such original judgment and to enforce a claim under the original certificate to the land.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448-473; Dec. Dig. § 223.*]

3. INJUNCTION (§ 228*)—VIOLATION—CONTEMPT—PERSONS LIABLE.

Where persons claiming an interest in certain land under a forfeited state land certificate were enjoined from thereafter making any claim to the land thereunder, a suc-

cessor in interest of one of such persons was charged with notice of the injunctive decree, bound by the judgment, and chargeable in contempt proceedings for violating it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 484-495; Dec. Dig. § 228.*]

4. INJUNCTION (§ 226*)—VIOLATION—CONTEMPT—ATTORNEYS—CONTUMACIOUS CONDUCT.

Where claimants under a forfeited state land certificate were enjoined from thereafter claiming any interest thereunder, and an attorney subsequently filed a cross-complaint for the claimants asserting and claiming under such certificate, and insisted on maintaining the cross-complaint after his attention had been called to the injunction, he was not excused for his contempt because he overlooked the injunctive provision of the decree at the time he filed the cross-complaint.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 478; Dec. Dig. § 226.*]

In Bank. Writ of Review to Superior Court, Kern County; Paul W. Bennett, Judge.

Petition for writ of review by Fred W. Lake and others against the Superior Court of the State of California in and for the County of Kern to review a judgment declaring petitioners in contempt. Writ discharged.

James F. Peck, of Oakland, and J. C. Campbell, of San Francisco (Walter Shelton, of San Francisco, of counsel), for petitioners. Frank H. Short and Everts & Ewing, all of Fresno, George E. Whitaker, of Bakersfield, and J. W. McKinley and Hunsaker & Britt, all of Los Angeles, for respondent.

HENSHAW, J. This court issued its writ to review a judgment of the superior court of the county of Kern declaring petitioners to be in contempt. The contempt charged and found rests upon the violation by petitioners of another judgment given by the same superior court, enjoining them from the assertion of any rights or claims to certain real estate situated in the county of Kern. In the last-mentioned case an appeal from the order denying a motion for a new trial was affirmed by this court, whose decision will be found in *Lake v. Bonyne*, 161 Cal. 121, 118 Pac. 535. In the opinion handed down in that case will also be found a statement of many of the facts bearing upon this consideration. It may be convenient, however, briefly to summarize them.

In 1889 S. Davis procured a certificate of purchase for 640 acres of land belonging to the state of California. In 1892 in the superior court of Kern county was commenced by the people of the state of California an action against S. Davis to foreclose his interest in the land and annul his certificate of purchase on account of his failure to pay the interest on the unpaid balance of the purchase price. On December 27, 1892, a decree so foreclosing and annulling Davis' certificate of purchase was entered. No appeal was taken from this judgment and it became final on December 27, 1893. There was at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time of the commencement of the action nothing of record with the registrar of the state land office to disclose that Davis had parted with any interest in his certificate of purchase. In July, 1899, Mary A. Bonyngé made application to purchase the same land from the state, and a certificate of purchase therefor was issued to her on January 21, 1900. On December 7, 1900, Davis executed a conveyance of all his interest in his certificate to one Charles H. Gilman. Gilman retained a one-fourth interest and conveyed three-fourths to Lake and Snow, under an agreement on their part to take and maintain all necessary legal proceedings to establish the validity of the Davis certificate of purchase. On December 31, 1900, in pursuance of this agreement a motion was made by F. W. Lake to vacate the judgment of foreclosure in *People of State of California v. Davis*, upon the ground that no service of summons, actually or constructively, had been made on Davis. This motion was made upon the records and files in the action, supported by the affidavits of Davis, Gilman, and Lake. The outcome of this controversy will be found reported in *People v. Davis*, 143 Cal. 673, 77 Pac. 651. In brief, the decision of this court upheld the action of the trial court in refusing to vacate the judgment upon the ground that, as the motion so to do was not made within the time limit fixed by section 473 of the Code of Civil Procedure, the court could grant it only from an inspection of the judgment roll, and then only if such an inspection showed that the judgment was void upon its face. It was held that the judgment in *People v. Davis* was not void upon its face, for the reason that, however defective the affidavit for publication of summons or the order for publication of summons might be, they constituted no part of the judgment roll under the law in force at the time the judgment was given, and therefore could not be considered upon the motion. While the motion to vacate the judgment so made in *People v. Davis* was a direct attack upon the judgment, it was a direct attack of so limited a character that the trial court was confined to a scrutiny of the judgment roll and could not entertain any evidence dehors that record to show its invalidity; this court saying, "The sole remedy of the aggrieved party who may not in fact have been served is to be found in a new action on the equity side of the court." *People v. Norris*, 144 Cal. 422, 77 Pac. 998; *Bacon v. Bacon*, 150 Cal. 484, 89 Pac. 317; *Pioneer L. Co. v. Maddux*, 109 Cal. 642, 42 Pac. 295, 50 Am. St. Rep. 67.

On the 24th day of March, 1900, Thomas L. Moran filed in the office of the state surveyor general his affidavit and application to purchase the same land. The contest which thus arose was by the surveyor general referred to the superior court of the county of Kern for trial and determination, and upon

July 25, 1900, Thomas L. Moran commenced his action against Mary A. Bonyngé and others for the determination of this contest. Gilman and his associates, Lake and Snow, sought leave to intervene in this contest and were permitted to intervene. In their intervention they set up the Davis certificate of purchase, asserted its validity, charged the invalidity of the judgment in *People v. Davis* for the reason that the trial court had not in any manner obtained jurisdiction to render a valid or any judgment against Davis, and asked for a decree declaring the judgment in *People v. Davis* to be null and void, canceling the certificate of purchase issued to Mary A. Bonyngé, and establishing the validity of the Davis certificate. To this complaint in intervention a general demurrer was interposed on behalf of Mary A. Bonyngé, and the demurrer was sustained. The interveners suffered judgment accordingly. From the judgment in favor of Mary A. Bonyngé against the interveners upon demurrer sustained, and against Moran after trial on the facts, the interveners appealed. The opinion of this court upon their appeal will be found reported in *Moran v. Bonyngé*, 157 Cal. 295, 107 Pac. 312. In brief, that opinion declares that the demurrer was properly sustained because of the failure of the complaint in intervention to allege the facts necessary to show that Davis was a qualified purchaser at the time he made his application and received his certificate; and, further, that the court's refusal to allow the interveners leave to amend must be regarded "as fully justified, since there is no bill of exceptions nor any facts to show the contrary."

The third phase of this litigation will be found reported in *Lake v. Bonyngé*, 161 Cal. 120, 118 Pac. 535. In January, 1909, the defendant Mary A. Bonyngé had paid to the state the full purchase price of the land and had received the state's patent therefor. On March 1, 1909, Lake and Snow, representing the claimants to the Davis certificate, brought an action against Mary A. Bonyngé and others, asserting the validity and legality of the Davis certificate, and that it is the only valid subsisting certificate of purchase issued by the state, alleging that the certificate of purchase issued to Mary A. Bonyngé, the receipt of moneys from her, and the final issuance of patent to her, were all inadvertently and illegally done and made by the state, and the complaint prayed that Mary A. Bonyngé be decreed to hold the naked legal title to the land in trust for the plaintiffs. The answer of Mary A. Bonyngé, after denying the material averments of plaintiff's complaint, set up the judgment in *People v. Davis*, averring that it was duly given and made and was and is a valid, subsisting, and final judgment under which all the rights of Davis and his successors in interest in and to his certificate of purchase were foreclosed and annulled. The court found in favor of

the defendants as to the validity and effect of the judgment, and entered its decree in their favor, sustaining the patent to the defendant Mary A. Bonynge, and concluding with the following language: "It is further ordered, adjudged, and decreed that the judgment and decree of the superior court of the county of Kern, state of California, given, made, and entered December 27, 1892, in the action of the People of State of California v. S. Davis, foreclosing and annulling certificate of purchase No. 11,487, issued by the state of California to S. Davis, and all rights of said S. Davis thereunder of, in, and to said section 36, township 12 north, range 24 west, San Bernardino meridian, is a good, valid, and subsisting judgment, whereby said certificate was annulled, and all rights of said S. Davis and of the plaintiffs herein thereunder were terminated and forever foreclosed. And it is further ordered, adjudged, and decreed that the plaintiffs Fred W. Lake and H. H. Snow and each of them be, and they are and each of them is, hereby perpetually restrained and enjoined from asserting or claiming any right to or interest in said real property, or any part thereof, and they are, and each of them is, hereby forever restrained and enjoined from in any manner asserting or claiming that said judgment is not a good, valid and subsisting judgment." We quote thus at length, as it is this language in this judgment which forms the foundation of the present contempt proceedings.

In July, 1911, while *Lake v. Bonynge*, which we have just considered, was pending on appeal to this court, the administrator of Charles H. Gilman (to whom it will be remembered Davis conveyed all his interest in his certificate, and who in turn conveyed certain interest therein to Lake and Snow) instituted a suit against the same persons who were parties defendant in *Lake v. Bonynge*, alleging the invalidity of the judgment in *People v. Davis*, and seeking a decree setting that judgment aside and imposing a trust in favor of the plaintiff upon the lands held under patent by Mary A. Bonynge and her successors in interest. On the 14th day of December, 1911, Lake and Treadwell, the latter successor to the interest of Snow, who also had been made defendants in the action instituted by the administrator of Gilman, filed a cross-complaint, alleging the qualifications and right of Davis to secure his certificate of purchase, and the issuance of it to him.

The cross-complaint then attacked the judgment in *People v. Davis* for lack of jurisdiction of the person of Davis for a failure, either actually or constructively, to serve him with summons, set up the proceedings in the case of *Moran v. Bonynge*, alleging, however, that in that action the superior court "did not adjudge the rights of the said interveners or either of them on the merits in said action," and, finally, set up the appeal

pending in *Lake et al. v. Bonynge*, 161 Cal. 120, 118 Pac. 535, which, at the time of the filing of the cross-complaint, had not been passed upon by this court, and attacked the judgment in that case. The relief sought was a decree establishing that Mary A. Bonynge and her successors in interest held the legal title to the land in trust for the plaintiff and the cross-complainants, with a demand for an accounting of the valuable oils which by the other defendants had been extracted from the land.

All of these proceedings in these different actions were had, and all of these judgments were rendered, by the superior-court of the county of Kern. Upon the filing of this cross-complaint, and after affirmance by this court of the order appealed from in *Lake v. Bonynge*, contempt proceedings were instituted against the petitioners, based upon the injunctive decree in *Lake v. Bonynge* which has been above quoted and which had become final. The court found that the conduct of the petitioners was willful, contumelious, and in violation of the language of this decree, and adjudged them guilty of contempt accordingly. This consideration is not complicated by the fact that the cross-complaint was filed before the appeal in *Lake v. Bonynge* had been decided, for the contention of the cross-complainants—petitioners herein—upon the hearing in contempt was that they were entitled to press the issues tendered by their cross-complaint to a hearing and determination, and that they were not violating the injunction of the judgment in *Lake v. Bonynge* in so doing.

[1] Conceding for the moment the proposition that petitioners herein have violated the injunctive clause of the judgment in *Lake v. Bonynge* in this their effort to prosecute their action under their cross-complaint, no doubt can be entertained but that the method which the trial court adopted, that of citation and punishment for contempt, was proper. In *re Chiles*, 22 Wall. 157, 22 L. Ed. 819; *Silliman v. Whitmer*, 173 Pa. 401, 34 Atl. 56; *Montana, etc., Co. v. Boston, etc., Co.*, 27 Mont. 410, 71 Pac. 403; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637.

[2] Thus we reach the crucial question in the case: Do the acts of the petitioners amount to a violation of the injunctive portion of the judgment in *Lake v. Bonynge*? If they do, then petitioners must submit to the enforcement of the judgment in contempt which has been given against them. If they do not, they have committed no contempt. The divergent views of the parties to this proceeding may be thus briefly indicated: By respondent it is contended that the judgment in *Lake v. Bonynge* is a judgment by a court of general jurisdiction having in fact complete jurisdiction of the parties and of the subject-matter of the action; that the decree which it rendered was one fully within its power to render; that the judgment given under these circumstances, whose valid-

ity has been finally established, is to be construed from its language alone; and that, by so construing it, that judgment declares that petitioners have not, nor has either of them, any right, title, interest, or estate either *legal* or *equitable* in or to the real property or any part thereof, and enjoins and perpetually restrains these petitioners from ever asserting or claiming any such right, title, interest, or estate, and from questioning in any manner the judgment in *People v. Davis*. Further respondent argues that whatever may have been the reasoning and discussion used by this court in its opinion in *Lake v. Bonynge*, whether sound or unsound, correct or mistaken, the fact remains that the sole judgment which this court entered was one affirming the order denying appellants' motion for a new trial; wherefore the reasoning and discussion upon which this court reached its conclusion, even if it be erroneous, is not a matter of guidance, much less a matter controlling the construction of the judgment from which an appeal had not been taken, which was not before the court and which therefore could not have been construed or have been the subject of construction on the appeal from the order denying a new trial; and that therefore the judgment must and does speak for itself.

The opposing contention of petitioners is that unless they have lost their right by the bar of the statute of limitations, by laches, by waiver, or by some other familiar method (no question of which is here involved), they are entitled to their day in court to make such showing as they can in a direct attack against the validity of the judgment in *People v. Davis*. They point out that their effort by motion to cause the vacation of the judgment in *People v. Davis*, while itself a direct attack, was a direct attack of so narrow a character that they were limited in their presentation of it to the judgment roll alone and could not establish the propositions for which they contended by the affidavits and other evidence which they there offered; that therefore as to the judgment in *People v. Davis* by their motion to vacate they not only had not lost their right to attack it directly, but in no sense had they been able to make a direct attack, this court advising them in terms that their relief for their grievance was to be found through the medium of a direct action in a court of equity. To the judgment against them upon demurrer sustained in *Moran v. Bonynge* they say: First, that there was no trial upon the merits because this court held that they had insufficiently pleaded Davis' right to secure the certificate of purchase (see 1 Freeman on Judgments, § 267); and, second, that in trying contests over land referred to the courts by the surveyor general, the court itself acts as a tribunal of limited jurisdiction, and could not entertain an equitable plea to vacate the judgment in *People v. Davis*. The

propositions thus advanced are so plainly true that they require no discussion.

Finally, petitioners argue that in *Lake v. Bonynge* they were denied the right to make proof by way of direct attack against the judgment in *People v. Davis* under the view taken by the trial court and affirmed in terms by this court, namely, that the attack which they were there attempting to make upon the judgment in *People v. Davis* was itself a collateral attack, and that upon such collateral attack, under well-settled rules, they could do no more than demand from the trial court a scrutiny of the judgment roll and a declaration after such scrutiny whether or not the judgment was void upon its face, the same single and narrow proposition which they had contested in *People v. Davis*, which had been resolved against them by the decision of this court in *People v. Davis*, and which had thus become *res adjudicata*. They argue that the language of the opinion of this court in *Lake v. Bonynge* fully establishes all this, and establishes further that the sole reason which this court gave for sustaining the ruling of the trial court in excluding their offered evidence attacking the judgment in *People v. Davis*, for failure of service of summons, is that the attack was collateral and that such evidence was therefor inadmissible. They argue further that this court must have and would have reversed the order from which they were appealing, and so the judgment, in *Lake v. Bonynge* for the exclusion of this evidence, excepting for the reason that this court held the attack to be collateral. And in conclusion they say that, such being the case, the opinion and discussion of this court amounts necessarily to a construction of the judgment in *Lake v. Bonynge*, and that this construction in turn necessarily is this: That the petitioners had again made a collateral attack upon the judgment; that by virtue of the decision of this court in *People v. Davis*, 143 Cal. 673, 77 Pac. 651, that judgment was immune from collateral attack under the doctrine of *res adjudicata*; and that therefore all that the injunctive decree in *Lake v. Bonynge* means or could mean is to restrain these petitioners from ever again making such a collateral attack.

But petitioners' contention carries the doctrine of the construction of judgments beyond permissible bounds. It is not to be doubted that in the action of *Lake v. Bonynge*, under its pleadings and issues, the court had full jurisdiction to declare the judgment which it entered. Indeed, in that action the very purpose of the litigation was to determine for and against the litigants finally and forever their rights to the land in controversy, and the injunction to enforce those rights was both permissible and proper. *Brooks v. Calderwood*, 34 Cal. 563; *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Axtell v. Gerlach*, 67 Cal. 483, 8 Pac. 34; *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55.

Upon the face of the judgment, moreover, no question can arise as to its intended scope. It is broad enough, and designedly broad enough, to prohibit these petitioners, their successors and privies, from ever again in any manner attacking the validity of the judgment in *People v. Davis*, or asserting or claiming any right to or interest in the real property affected by that judgment, and it formally declares that the claims and pretensions of the petitioners are without merit either in law or equity. If the plaintiffs in *Lake v. Bonyng* were dissatisfied with the judgment, if they believed it should be reversed or modified, they should have taken appropriate steps by appeal to effect this end. They did not do so. They appealed merely from the order refusing to grant their motion for a new trial, and upon their appeal pressed upon the consideration of this court certain rulings of the trial court in receiving and rejecting evidence. However erroneous the rulings of the trial court in this regard may be thought to have been, or, in turn, however erroneous the declarations of this court reviewing those rulings may be thought to have been, the fact still remains that the consideration was addressed solely to such rulings, and the determination upon those rulings could not operate to modify the plain terms of an injunction within the issues and within the power of the court to grant. *People v. Bank of San Luis Obispo*, 159 Cal. 66, 81, 84, 112 Pac. 866, 87 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148; *In re James*, 99 Cal. 376, 33 Pac. 1122, 37 Am. St. Rep. 60; *Ex parte Joutsen*, 154 Cal. 540, 98 Pac. 391.

[3] It has been said heretofore that, if the petitioners have violated the injunction, they are in contempt. This statement requires brief amplification. Petitioner Treadwell succeeded to the interests of Snow after the judgment in *Lake v. Bonyng* was rendered, and with notice of it. He therefore is bound by the judgment and chargeable in these contempt proceedings. Code Civ. Proc. § 1908, subd. 2; *G. & C. Merriam Co. v. Saalfeld*, 190 Fed. 927, 111 C. C. A. 517; *Ahlens v. Thomas*, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820; *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110.

[4] Petitioner Boynton is an attorney at law, and the attorney who represented petitioners in the filing of the cross-complaint. The court finds that this petitioner's answer to the citation, to the effect that in filing the cross-complaint he had overlooked the injunctive provisions of the judgment, which provisions were first called to his attention when served with the order to show cause, is true, but that his contempt is not thereby excused by reason of his contumacious conduct in insisting upon maintaining the cross-complaint after his attention had been so called to the judgment in *Lake v. Bonyng*. These findings constitute a sufficient warrant for the

judgment. Code Civ. Proc. § 282; *Lamberson v. Superior Court*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619; *Havemeyer v. Superior Court*, 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650; *Cape May, etc., R. R. Co. v. Johnson*, 35 N. J. Eq. 422; *Stolts v. Jackson*, 82 App. Div. 81, 81 N. Y. Supp. 638.

It follows therefrom that the judgment of the trial court is not in excess of its jurisdiction, and therefore the writ of review is discharged.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; ANGELLOTTI, J.; LORIGAN, J.

In re DE BERNAL'S ESTATE.

(S. F. 6307.)

(Supreme Court of California. March 26, 1913.)

1. WILLS (§ 561*)—DEVISES—INTEREST OF DEVISEES.

A devise to grandchildren, share and share alike, of 5 acres of a certain bounded and described parcel of land of about 25 acres, in which testatrix owned an undivided three-fourths interest, was not a devise of her interest in the 5 acres, but was a devise by quantity, so that the grandchildren took an undivided interest of full 5 acres in the tract, rather than an undivided three-fourths of 5 acres.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1221-1224; Dec. Dig. § 561.*]

2. WILLS (§ 751*)—RIGHTS OF DEVISEES—GENERAL OR SPECIFIC DEVISE—“SPECIFIC LEGACY.”

Testatrix, owning an undivided three-fourths interest in a tract of 25 acres, described and bounded the tract and devised to her grandchildren 5 acres of the tract, without specifying and distinguishing that portion from the other portions of her interest, and gave all the rest and residue of her estate to her son and executor. Civ. Code, § 1357, declares that a legacy of a particular thing specified and distinguished from all others of the same kind belonging to the testator is specific, and that, if such legacy fails, resort cannot be had to other property of the testator. *Held*, that the question whether a testamentary gift is specific or general is to be determined by the same test where the subject of the gift is real as where it is personal property, and that the devise was a specific devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1938; Dec. Dig. § 751.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6600-6604; vol. 8, p. 7803.]

3. WILLS (§ 754*)—RIGHTS OF DEVISEES—SPECIFIC LEGACY—SHARES OF STOCK.

A gift of a specific and designated amount of the very shares in a corporation which testator then owned, as, for instance, all of the shares, or one-half of them, or a designated number thereof, is a specific legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1945, 1946; Dec. Dig. § 754.*]

4. WILLS (§ 812*)—SPECIFIC DEVISE—ABATEMENT.

Testatrix, owning an undivided three-fourths interest in a tract of 25 acres, made to her grandchildren a specific devise of 5 acres thereof, and left the residue of her estate to her son and executor; there being sufficient other estate to pay the debts and

expenses of administration and to leave the son an adequate provision. Civ. Code, § 1859, provides that, after property expressly appropriated to the payment of debts and property not disposed of by the will, debts shall be paid from property devised to a residuary legatee, property not specifically devised, and all other property ratably; and Code Civ. Proc. § 1563, provides that specific devisees are exempt from such liability, if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate. *Held* that, regardless of whether the two sections conflicted, the devise to the grandchildren was exempt under section 1563.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2108; Dec. Dig. § 812.*]

5. WILLS (§ 812*)—SPECIFIC DEVISE—ABATEMENT—SECURED “DEBT.”

A mortgage of testatrix, created before the execution of her will to secure her note on which she was personally liable, was a mere incident of a debt evidenced by the note, and the liability of testatrix on the note was just as much a “debt” within the meaning of the word as used in the probate act, providing for the payment of debts, as any of her unsecured liabilities, and as between the executor and residuary legatee, primarily liable for the payment of debts, and specific devisees of a part of the mortgaged realty, was to be paid in the same manner as the general unsecured debts of testatrix, unless the will disclosed a different intent; and it could make no difference that the mortgagee did not present his claim against the estate, but preferred to rely entirely on the future enforcement of his mortgage lien, so that the balance of the mortgage debt and interest accrued thereon was to be paid and satisfied first out of the property other than that specifically devised, without any credit to the executor on account of an amount paid by him on the principal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2108; Dec. Dig. § 812.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

6. EXECUTORS AND ADMINISTRATORS (§§ 39, 41*)—ASSETS AND ADMINISTRATION.

An executor holds all the property of the estate for the purposes of administration, including not only the rents and profits of land specifically devised, but the land itself, subject if necessary, to disposition for the payment of debts and expenses.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 280, 283, 285-294; Dec. Dig. §§ 39, 41.*]

7. WILLS (§ 728*)—RIGHTS OF DEVISEES—RENTS AND PROFITS.

As between the residuary legatee of an estate, primarily liable for its debts, and the devisees of specific realty, part of a larger parcel, subject to a mortgage with accrued interest, where there was sufficient other estate to pay all the debts and expenses, the devisees were entitled to the rents and profits accruing from their part of the realty, less their proportion of the taxes on the whole realty paid by the executor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1759-1780; Dec. Dig. § 728.*]

8. EXECUTORS AND ADMINISTRATORS (§ 469*)—PROBATE COURT—JURISDICTION.

The superior court, sitting in probate in proceedings for final settlement, has jurisdiction, as between the executor and residuary legatee and the devisees of a specific part of mortgaged realty, to determine their rights and liabilities as to the payment of debts and expenses, the payment of interest on the mort-

gage, and the application of the rents and profits of the realty devised.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2000-2009, 2012, 2013; Dec. Dig. § 469.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Geronima Ruffino De Bernal, deceased. From portions of the decree of settlement of the final account of the executor and final distribution, Jose Cornello Bernal, executor, and others appeal. Reversed, with directions to enter new decree.

Sullivan & Sullivan, Theo. J. Roche, and John J. O'Toole, all of San Francisco, for appellants. Norman A. Eisner, of San Francisco, for respondents.

ANGELOTTI, J. These are appeals by various parties from portions of the decree of settlement of the final account of the executor of the will of deceased, and final distribution, which, by stipulation, have been brought to this court upon one transcript and submitted for decision together.

The material facts are undisputed. Deceased died testate September 6, 1905, leaving her surviving as her only heirs her son, appellant Jose Cornello Bernal, who is the surviving executor of her will, and eight grandchildren, six of whom are the children of her deceased daughter Elodie Macdonald, and two of whom are the children of her deceased daughter Jovita McKinnon, whom we shall designate hereafter as the Macdonalds and the McKinnons. She left valuable real property, one portion thereof being an undivided three-fourths interest in a tract of land in the city and county of San Francisco, containing some 25 acres, known as the Italian Gardens. This, at the time of her death, was incumbered by a mortgage given by her on January 28, 1903, to the Columbus Savings & Loan Society, a corporation, to secure the payment of her promissory note of the same date to said corporation for \$13,500, with interest at 6 per cent. per annum, and no part of the principal sum of which note had then been paid. She also owned real property in San Mateo county, which was and still is an unincumbered part of her estate, and which exceeded in value the sum of \$50,000. Two weeks before her death, viz., on August 23, 1905, deceased executed her last will, which was subsequently admitted to probate, and upon which the decree appealed from is based. She said nothing therein about her debts, and made but two dispositions of property. In the first place, she gave, devised, and bequeathed to her said grandchildren, naming them, “share and share alike to each, five acres of that certain piece or parcel of land situate, lying and being in the city and county of San

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Francisco, state of California, bounded and described as follows:" (describing by metes and bounds the real property known as the Italian Gardens). Nothing was said therein as to the acreage of this tract. She then provided: "All the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath unto my son Jose Cornello Bernal." With the exception of a request of her sister Fortuna as to the disposition of a portion of a ten-acre tract in San Mateo county theretofore conveyed by her to such sister, the will contained nothing else except the appointment of said son and her sister Francisca to act as executors, without bonds. The will was admitted to probate and the executors named appointed as such. On June 11, 1907, said Francisca died, and the son has ever since continued to act as sole executor.

During the administration, but two claims against deceased were presented. They aggregated only \$735.70 and have been paid. No claim was ever presented on behalf of the Columbus Savings & Loan Society on account of such note and mortgage. During the administration, the executor has paid on account of the principal the sum of \$1,500, leaving \$12,000 still due. He also paid interest in full to February 12, 1912, being \$5,837.79. The note and mortgage are still subsisting obligations, and an action for the foreclosure of the mortgage is pending. The \$1,500 paid on account of the principal was one-half the sum received by the executor on the sale by him of the undivided three-fourths interest of deceased in two small portions of the Italian Gardens to the Ocean Shore Railway Company, containing .301 and .114 acres, respectively, which have been released from the lien of the mortgage. No real property of deceased has been sold during administration other than the property just referred to.

Since the death of deceased, the executor has collected the sum of \$8,000 as rents from her undivided three-fourths interest in the Italian Gardens property, and has paid out for taxes levied thereon the sum of \$1,967.52, leaving a balance of \$6,032.48. No portion of this has ever been paid to any grandchild of deceased. All of said sum has been expended by the executor in paying interest on said mortgage and debts of deceased and expenses of administration. All moneys coming into his hands have been so expended. In fact, it was necessary for the executor to waive the payment of his portion of the executor's commission in order to close the estate without selling any more of the real property.

Pending the administration of the estate, an action for the partition of the Italian Gardens tract was instituted in the superior court by some of those who were cotenants with deceased therein at the time of her death. All parties interested in the tract,

including all those interested in the estate of deceased, were made parties to this action, and the same was tried and an interlocutory decree made and entered therein. By this decree the court in partition attempted to segregate and declare the respective interests under the will of deceased. No appeal was taken from this decree, and the time for appeal had elapsed when the matter before us was initiated in the probate court. A question as to the jurisdiction of the court in partition to give any judgment that could affect the right of the court in probate to determine for itself the rights among themselves of those claiming under the will, entirely regardless of the interlocutory decree in partition, is raised, and argued at some length by respective counsel; but, inasmuch as we are of the opinion that, independent of the partition decree, the property of deceased should have been distributed under the will to the respective parties in the manner and upon the terms specified in the partition decree, it is unnecessary to consider this question of jurisdiction. It may be assumed, for all the purposes of this decision, that the partition decree was ineffectual in so far as it attempted any segregation of interests under the will of deceased.

The foregoing being the facts, various questions arose on the hearing in the lower court between the Macdonalds and the McKinnons on the one hand, and the son of deceased on the other.

[1] The lower court held that under the will the grandchildren, as claimed by them, were entitled to an undivided interest of full five acres of the Italian Gardens tract, rather than simply to an undivided three-fourths of five acres. This was also the conclusion of the court in partition. This conclusion is assailed in his brief in this court by counsel for the son. His appeal, however, is, under the terms of his notice of appeal, from specified portions of the decree only, and the portion of the decree awarding this interest to the grandchildren is not among the portions so specified. However, we are of the opinion that the conclusion of the lower court on this point was right. The gift was one by deceased, not of her interest in five acres, but one of five acres of a tract of land specified; a gift by quantity. The only description by metes and bounds was one of the larger parcel of land from which the five acres given were to be taken. So far as this matter is concerned, we have no means of determining the intent of the testatrix other than the language she has used in her will, together with the fact that she owned an undivided interest in the tract equivalent to nearly 19 full acres. The language here involved is very different from that used in the deed construed in *Adams v. Hopkins*, 144 Cal. 40, 77 Pac. 720, referred to by counsel for the son. The language there used by Willson, an owner of about 673

acres undivided in a tract of nearly 20,000 acres, was, "Gives, sells, and conveys all his right, title, and interest * * * to 320 acres of land to be taken out of his interest which he now holds in a certain tract of land," etc., and this court said: "The deed does not purport to convey the specified number of acres undivided, or an interest equal to that quantity of land, but only the interest of the grantor in 320 acres, to be taken by the grantee in some part of the ranch other than 'where the said Wilson or any of his tenants are in possession.'" In the will before us, we have not a gift of the interest of the testatrix in any particular land or in any specified number of acres, but a gift of a definite number of acres.

The interest of the deceased in the Italian Gardens property was distributed by the lower court, subject to the lien of the mortgage. It was accepted as a fact that a full five acres undivided in said property was four-fifteenths of the whole interest of deceased in the property. The court adjudged that the undivided interest of five acres distributed to the grandchildren should be subject to and liable for the payment of four-fifteenths of the balance of \$12,000 principal due on the mortgage and four-fifteenths of the interest accruing from February 29, 1912, and that the interest distributed to the son should be subject to and liable for the remaining eleven-fifteenths of said principal and interest. All parties appeal from this portion of the decree, though we do not understand that counsel for the son claims error therein if the grandchildren were entitled to full five acres undivided instead of an undivided three-fourths of five acres, except in so far as he claims that the son should be reimbursed to the extent of four-fifteenths of the \$1,500 paid by him on account of the principal of said mortgage. The grandchildren claim that the whole of said principal sum of said promissory note and mortgage, and all interest accruing thereon since the death of deceased, should first be paid out of the interest of the son before resort is had for such purpose to any portion of their five acres undivided.

The lower court found that the administration of the estate should have been brought to a close at the expiration of one year from October 5, 1905, and that consequently the grandchildren were entitled to their four-fifteenths' portion of the rents and profits since that date, less their proportion of the taxes and four-fifteenths of the amounts paid by the executor on account of interest on the note and mortgage, which would give them in the aggregate \$194.76, or \$24.34 each, and the latter amount was distributed to each of them. They were held to be entitled to no part of the rents and profits prior to October 1, 1906, all of which were applied to expenses of administration, payment of taxes, and payment of debts (including interest on the mortgage debt). All parties appeal from this portion of the decree,

but on widely different grounds. The son claims that there was no inexcusable delay in closing the administration, and that all of the rents and profits from the date of death of the deceased to the actual close of administration were in fact properly applied to the purposes above stated, in the absence of other personal property, leaving no balance for distribution. The grandchildren claim that, as long as there was other property of the estate available for that purpose, none of the rents and profits accruing on their interest, received after the death of deceased, should have been applied to any of these purposes, except the payment of taxes on their portion, and that they were entitled to receive from the estate on distribution, instead of an aggregate of \$194.76, four-fifteenths of the rents and profits received by the executor for said property since the death of deceased, less four-fifteenths of the taxes paid thereon. Such receipts being \$8,000, and the taxes \$1,967.52, they would be entitled on this theory, as we figure it, to about \$1,600 in the aggregate, instead of \$194.76. The varying contentions in regard to the questions we have stated are so interwoven that they will be considered together.

[2, 3] It was said in *Estate of Painter*, 150 Cal. 505, 89 Pac. 100, 11 Ann. Cas. 760, that in this state the question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is real as where it is personal property. Section 1357 of the Civil Code declares: "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator." It is urged that the devise to the grandchildren cannot be considered specific in nature for the reason that the particular portion of the interest of deceased in the Italian Gardens tract that is to go to them is not specified and distinguished from the other portions of her interest. It is unquestionably specific to the extent that it minutely describes the tract of land on which the devise is to operate, and it is also clear that it possesses one of the characteristics of a specific devise or legacy peculiar to such a gift, viz.: That resort cannot be had to property of the deceased other than her interest in the Italian Gardens tract to satisfy it. The disposition here certainly partakes more nearly of the character of a specific devise or legacy than of any other disposition that we know of. And we do not think that the reason advanced by the son against the claim that the devise is specific is a sufficient answer to such claim, under the circumstances here existing. The disposition was as specific as the nature of the subject permitted. Testatrix was the owner simply of an undivided three-fourths interest in a specified 25-acre tract of land, equivalent, assuming such land to be of uniform value throughout,

to nearly 19 full acres. She desired the grandchildren to have 5 full acres thereof, which was practically five-nineteenths of her interest, or, as it was agreed on the trial, four-fifteenths thereof. The situation here is practically the same as it would have been had she described the disposition to the grandchildren as "an undivided four-fifteenths of my interest in" the Italian Gardens property. Would the fact that she had an undivided eleven-fifteenths in such property over this disposition necessarily preclude the conclusion that the disposition was specific? We think not. If we assume that the devise is somewhat analogous to a bequest of a designated number of shares of stock in a particular corporation by one who owns exceeding that number of such shares, and who does not describe the shares so bequeathed in such a way that they can be distinguished from his other shares in the same corporation, the son's case is not materially assisted. Such a bequest may or may not be a specific bequest. Whether it is or not depends upon the intent of the testator, as the same is manifested by the language he uses. If he intended simply to give a certain number of shares in the corporation, just as, in the case of money legacy, one gives a certain number of dollars, it is not a specific legacy. As to such a case, it was held in a case cited by counsel for the son that the mere fact that, at the date of his will, he had shares of stock in such corporation to the extent designated will not of itself make the bequest specific. *Tift v. Porter*, 8 N. Y. 516, 518. But if he intended to give a specific and designated amount of the very shares in such corporation that he then owned, as, for instance, all of said shares, or one-half of said shares, or a designated number thereof, it is a specific legacy. This is recognized in the very case cited by counsel for the son. The following have been held to be specific legacies: "Ten shares of my Essex County National Bank stock." (*Moore, Executor*, v. *Moore*, 50 N. J. Eq. 554, 561, 25 Atl. 403, 405); "one-half of all my stock" in certain railroads (*Loring v. Woodward*, 41 N. H. 391); "ten shares of stock" of a certain railroad company, when subsequent clauses bequeath the balance of testator's stock in such company (*Harvard, etc., Society v. Tufts*, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390); a legacy of part of a sum due on an obligation (*Titus v. McLanahan*, 2 Del. Ch. 200); a certain number of oxen, horses, etc., to a wife, "to be of her choice" (*Everitt v. Lane*, 37 N. C. 548); a bequest of \$500 to a wife in personal property "such as she may select" (*Wallace v. Wallace*, 23 N. H. 149). See, also, *Page on Wills*, §§ 768, 769; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277.

Such a situation as we have here presents a much stronger case, in so far as any question of intent is concerned, than cases in-

volving legacies of shares of stock ordinarily present, for it is recognized that in such cases it is often very difficult to determine the intent of the testator. But here it is beyond the realm of dispute that the testatrix intended to give to her grandchildren a specified undivided interest then owned by her in a designated parcel of land. This she singles out from all her property and gives to her grandchildren. She then proceeds as follows: "All the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath unto my son, Jose Cornello Bernal." It seems very clear to us, from the language of the will itself, considered in connection with the admitted facts as to the character and value of her estate, that the deceased desired the children of her deceased daughters to have the portion of her property so designated, and that her son should take the remainder of whatever property she had at the time of her death as residuary legatee. The disposition to the grandchildren must be regarded as a specific devise.

[4] While the testatrix did not in terms provide for the payment of her debts, or in any way refer to the same, we think that the will clearly enough shows, when considered in connection with the condition and value of her property and the small amount of indebtedness, that she intended her grandchildren to have the comparatively small proportion of her property given them in any event, leaving the remainder of her property to pay the expenses of administration and debts and to furnish her son with what she considered an adequate provision. Section 1359 of the Civil Code recognizes the appearance of such an intention under such circumstances as here exist by expressly providing that the property of a testator, except as otherwise specially provided in such Code and the Code of Civil Procedure, must be resorted to for the payment of debts in a prescribed order, which is, after property expressly appropriated by the will for that purpose and property not disposed of by the will: First, "property which is devised or bequeathed to a residuary legatee;" second, "property which is not specifically devised or bequeathed;" and, third, "all other property ratably"—the section further providing that, before any debts are paid, the expenses of administration and the allowance to the family must be paid or provided for. If this were all the legislation on the subject, it would at once settle the question of contribution from the property given to the grandchildren as to all debts of deceased and expenses of administration. But section 1563 of the Code of Civil Procedure provides that "the estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt

from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate." Whether there is any conflict between these sections material to the question we are considering, we do not deem it necessary to determine, inasmuch as we consider the devise to the grandchildren to be a specific devise, and further consider that it appears that the exemption thereof from liability for the debts, etc., is necessary to carry into effect the intention of the testatrix. As we have seen, there is other estate, sufficient not only to pay all such debts, etc., but also sufficient to leave for the son, after such payment, much more in value than the property given in the aggregate to the children of the two deceased daughters. Even if section 1563 of the Code of Civil Procedure in any way limits the effect of section 1359 of the Civil Code, the case here measures fully up to the requirements for exemption specified in the former section.

[6] The mortgage debt in this case was one created by the testatrix herself prior to the making of her will. The mortgage on her interest in the Italian Gardens property was given by her to secure her promissory note of the same date, on which, at the time of the making of the will and the time of her death, she was personally liable. The mortgage was a mere incident of the debt evidenced by such note. Her liability on account thereof was just as much a "debt," within the meaning of the word as used in the provisions regarding payment of debts contained in our probate act, as any of her unsecured liabilities. In section 765, Page on Wills, it is declared that "the rule that a testator's debts are primarily payable out of his personality applies not only to his general debts but to such debts as have become liens upon specified property of testator, whether real or personal. Unless the contrary appears in his will, those debts are payable primarily out of his personal estate not specifically bequeathed." Of course in this state we have now abolished all distinction between real and personal property as to priority in this matter (section 1358, Civ. Code; section 1516, Code Civ. Proc.); the rules as to priority being prescribed by the Codes, regardless of the character of the property. But this does not affect the principles declared in the section from Page on Wills that we have quoted. We find no dissent in the authorities on the proposition that where the mortgage lien was created by the testator himself to secure his own debt, and at the time of his death the mortgage is simply collateral security for the personal obligation, it is to be paid, as between executors, devisees, legatees, and heirs, in the same manner as the general unsecured debts of the deceased, in so far as the question from what property of deceased it is to be paid is concerned, unless the will dis-

closes a different intent on the part of the testator. This principle was stated as "the settled rule of English and American law" in *Estate of Woodworth*, 31 Cal. 600. See, also, *Brown v. Baron*, 162 Mass. 56, 37 N. E. 772, 44 Am. St. Rep. 331; *Higbie v. Morris*, 53 N. J. Eq. 177, 32 Atl. 372. It is likewise held that, as between the executor and those interested in the estate, it can make no difference in this regard that the holder of the mortgage does not present his claim against the estate, but prefers to rely entirely on the future enforcement of his lien against the specific property mortgaged. See Page on Wills, § 765; *Turner, Administrator, v. Laird*, 68 Conn. 198, 35 Atl. 1124. As suggested in the case just cited, the extent of the testator's bounty to a certain person cannot thus be reduced by the acts or omissions of the creditor, and, as between the executor and those interested in the estate, the payment should be made from other funds of the estate, so far as it can be, in order to effectuate the gift from the testator to the specific devisee.

What we have said not only establishes the merit of the claim of the grandchildren as to the balance remaining unpaid on the mortgage debt and interest accruing thereon, but also disposes of the claim of the son that he is entitled to a credit on account of the \$1,500 already paid on account of the principal of the mortgage debt.

[6, 7] It further practically establishes as valid the claim of the grandchildren in regard to the rents and profits derived from the land. The title to the real property devised to them vested in them at the moment of the death of the testatrix, subject only to the possession of the executor for purposes of administration, including the payment of expenses of administration and debts in the order prescribed by law, in view of the provisions of the will. It was said in *Estate of Woodworth*, supra: "That is to say, that the rents of the real estate accruing subsequent to the death of the testator, for the purpose of marshaling the assets, should be regarded as belonging to the realty from which they were derived. Such was the rule at common law, and no change in this respect appears to be intended." There is nothing in our statutes, so far as we have found, that is contrary to this view. We think the discussion in *Estate of Woodworth*, supra, 31 Cal. at pages 604 and 605, sufficiently shows that this is true. The executor holds all the property of the estate for purposes of administration, including not only the rents and profits of land specifically devised, but the land itself, and all of this property is subject, if necessary, to disposition for the payment of expenses and debts. But, in such a case as the one before us, we must primarily resort to a certain portion of the property of the deceased for such purposes, and cannot resort to the other por-

tion until the primary fund for such purposes is exhausted. And here such primary fund is that given to the residuary legatee. As between him, he being the only other person interested in the estate, and the grandchildren, the net rents and profits of the real property specifically devised to the children, accruing since the death of deceased, are a part of such realty, and, there being sufficient other property to pay all debts and expenses in full, should have been awarded to the grandchildren. It was not, as between the son and the grandchildren, a proper application of any part thereof to pay the same on account of interest on the mortgage or on account of any expense of administration or debt of deceased.

[8] There can be no doubt of the power and duty of the court in probate to determine all such questions between heirs, legatees, and devisees in regard to their rights as such, as are here presented. See *Estate of Heydenfeldt*, 106 Cal. 434, 440, 39 Pac. 788; *Estate of Woodworth*, supra. We cannot see that the claims of the grandchildren in this regard were not made before the probate court in such manner as to entitle them to have them determined, and the matter was disposed of in that court upon the theory that it was properly before the court for determination. We do not see that *Estate of Porter*, 138 Cal. 618, 72 Pac. 173, is in point on any of the material questions in this case.

From what we have said, it follows that the executor should have been adjudged to have in his hands, for distribution to the grandchildren, four-fifteenths of the amount of rents and profits of the Italian Gardens property received by him from the date of death of deceased, less four-fifteenths of the amount of taxes paid by him on such property, and that the net amount thus ascertained should have been distributed in equal shares to the eight grandchildren, and also that the decree of distribution should have provided that the whole of the principal sum of the promissory note and mortgage and all unpaid interest thereon should first be paid, satisfied, and discharged out of said real property known as said Italian Gardens, other than the undivided interest of five acres distributed to the grandchildren, before resort is had for such purpose to any portion of the undivided interest of five acres distributed to said grandchildren. As the only persons interested in the estate are the appellants here, the son (who is the executor), and the grandchildren, the controversy can be finally settled by the ascertainment of the amount of rents and profits now due the grandchildren and the entry of a new decree in accord with the views expressed herein.

It is ordered that the decree appealed from be reversed, with directions to the

lower court to ascertain the amount of rents and profits now due the grandchildren under the views we have expressed, and to enter a new decree in accord with such views.

We concur: SHAW, J.; SLOSS, J.

CLYDE v. CITY OF MOSCOW et al.

(Supreme Court of Idaho. March 29, 1913.)

1. MUNICIPAL CORPORATIONS (§ 293*) — STREET IMPROVEMENTS—ORDINANCE—SUFFICIENCY.

Under the provisions of section 4, c. 81, Sess. Laws 1911, it is the duty of the city council before entering upon the grading, paving, or improvement of a street, where the cost is to be assessed against the property benefited, to first pass an ordinance or resolution declaring the intention of the council to make such improvement, stating the names of the streets and alleys to be improved and the general character of the proposed improvement. It is a sufficient compliance with this statute for the city council to pass an ordinance giving the names and description of the streets to be improved and the character of the improvement to be made, and reciting that the public interest and convenience demand that such improvement be made, and designating a time on or before which protests may be made and filed with the city clerk against such proposed improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

2. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCE—TITLE AND SUBJECT.

Title to Ordinance No. 361 of the city of Moscow examined and considered, and held sufficient to embrace the subject-matter contained in the body of the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.*]

3. MUNICIPAL CORPORATIONS (§ 317*)—STREET IMPROVEMENT—RIGHT TO OBJECT.

Where an initial ordinance or an ordinance declaring the intention of the city council to make certain street improvements in describing such improvement states that the streets shall be paved the full width thereof, which the plans show to be 56 feet, but the ordinance thereafter passed ordering and directing the work, and providing the contract therefor shows that a portion of a certain street is to be paved to the width of 18 feet only, held, that if such change is in any way fatal to the final ordinance and contract for doing the work or is in any manner prejudicial to any one, it can only be prejudicial to such persons as own property abutting on the portion of the street where the width of the pavement is reduced from that originally proposed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 831; Dec. Dig. § 317.*]

4. MUNICIPAL CORPORATIONS (§ 342*)—STREET IMPROVEMENTS—CONTRACT—VALIDITY.

Where the statute (section 16, c. 81, Sess. Laws 1911) provides that all contracts which are made by the city or village for any improvement authorized under such statute shall be made by the council in the name of the city, such statute is substantially complied with by the council passing and the mayor approving an ordinance providing for the contract and authorizing its execution, and prescribing the terms and conditions thereof, and further providing that a formal contract shall be executed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the city, and signed and attested by the mayor and city clerk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 867; Dec. Dig. § 342.*]

5. MUNICIPAL CORPORATIONS (§ 840*)—STREET IMPROVEMENTS — ORDINANCE — DESCRIPTION OF WORK.

Where a city ordinance providing for the paving of streets recites that the description and character of the improvement shall be a pavement done with "brick, asphalt, sheet asphalt, bitulithic, hassam, asphalt concrete, asphalt macadam, or other standard pavement," and the contract made thereunder provided for a "Dolarway" pavement, and the evidence of the witnesses shows that "Dolarway" pavement is a standard pavement, *held*, that the contract is in conformity with the notice given in the ordinance, and is covered by the term "standard pavement."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 869; Dec. Dig. § 340.*]

6. MUNICIPAL CORPORATIONS (§ 304*)—STREET IMPROVEMENTS—ORDINANCE—VALIDITY.

The provision contained in Ordinance No. 365 of the city of Moscow authorizing the mayor by and with the consent of the council to appoint a committee of three citizens and taxpayers of the city to aid and assist the mayor and city council, and be advisory to them in the construction of the improvements described in the ordinance, is not fatal to the ordinance, and does not render the ordinance invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 811-816; Dec. Dig. § 304.*]

7. MUNICIPAL CORPORATIONS (§ 340*)—STREET IMPROVEMENTS — ORDINANCE — ESTIMATE OF COST.

An estimate in an initial ordinance or ordinance of intention reciting that the cost of paving the street together with curbs and curbing will be the sum of \$2.10 per square yard throughout will be held to include both the curb and paving, and such estimate will not prevent the city from contracting at a lower rate than the estimate so made.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 869; Dec. Dig. § 340.*]

8. MUNICIPAL CORPORATIONS (§ 413*)—STREET IMPROVEMENTS — INTERSECTIONS WITH ALLEYS—LIABILITY FOR COST.

Under the provisions of subdivision 6 of section 2238, Rev. Codes, the expense of all improvements in the space formed by the junction of two or more streets, wherein one main street terminates in or crosses another main street, and all street crossings or crosswalks shall be paid by the city, but this statute does not include spaces in streets opposite alleys or intersections with alleys, and the city at large is not required to pay for the paving of such portions of the street. Alleys are conveniences to the lots on which they abut and afford means of ingress and egress from the main streets to the rear of lots, and the paving of the street in front of such alleys should be borne by the improvement district rather than by the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1014-1016, 1019, 1020; Dec. Dig. § 413.*]

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by Anna J. Clyde against the City of Moscow and others. From judgment for defendants, plaintiff appeals. Affirmed.

Forney & Moore, of Moscow, for appellant. George G. Pickett, City Atty., of Moscow, for appellees City of Moscow and officers thereof. William M. Morgan, of Moscow, for appellees Contracting Company and its officers.

AILSHIE, C. J. This action was brought by a property owner and taxpayer within an improvement district in the city of Moscow for the purpose of procuring an injunction against the city authorities restraining them from proceeding with a pavement contract. The district court denied the relief sought, and this appeal has been prosecuted.

[1] A great many errors have been assigned, going to the sufficiency and regularity of the ordinances passed by the city providing for the improvement involved in this case. It is contended that the first ordinance looking to this improvement, No. 361, was not a proper or sufficient ordinance declaring the intention of the city to make the contemplated improvement, and that, in fact, there was no ordinance of intention to improve as provided for and required by section 4, c. 81, of the 1911 Sess. Laws (1911 Sess. Laws, p. 268). That section of the statute, among other things, provides as follows: "The city council or trustees shall, before or during the grading, paving, or other improvement of any street or alley, the cost of which is to be levied and assessed upon the property benefited, first pass at a regular or special meeting, a resolution or ordinance declaring its intention to make such improvement, and stating in such resolution or ordinance the name of the street or alley to be improved, the points between which said improvement is to be made, the general character of the proposed improvement. * * * The ordinance here in question, No. 361, after setting out the title and describing the streets to be paved, has this further recital introductory to the enacting clause: "Whereas, the public interest and convenience require and demand that such improvements be made upon the hereinbefore described streets, between the points thereon herein set forth, in the manner hereinafter ordered, now, therefore, be it ordained by the mayor and city council," etc. The ordinance further provides in section 5 thereof that "any person or persons, company or corporation, being the owner of any of the lots or lands or parcels of lots or lands, abutting, fronting, contiguous or tributary to the streets or portions of the streets in section 1, of this ordinance, * * * which would be or is affected by such improvement, * * * who desire to file protest or protests against said proposed improvements, as in this ordinance mentioned and set forth, shall on or before the 15th day of June, A. D., 1912, file such protest or protests in the office of the city clerk of the city

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Moscow, Idaho, to be thereafter taken up and heard by the mayor and city council." While this ordinance in part declares unqualifiedly that the city will make the improvements, it also in other portions thereof gives notice to the property owner that an opportunity for a hearing will be accorded and that protests are invited. The ordinance was in fact passed and reads as if it were intended as a permanent ordinance, but it conforms to the requirements of the statute, except as to the formal notice and directions which such an ordinance might contain. We are satisfied, however, that it substantially complied with the statute and gave the property owners all the notice that any ordinance could give them under the statute, and that their rights were in every respect protected under this ordinance.

[3] The next objection made is that "the initial ordinance No. 361 in describing the improvement of Main street states that the street shall be paved the full width thereof, which the plans show as 56 feet, but the ordinance ordering the work and the contract show that on the south end of the street the pavement has been cut down to a width of 18 feet. This the council has no power to do. They cannot give the property owner notice of one kind of improvement, and then make another kind." In support of this contention counsel cite a number of authorities (28 Cyc. 1009; *Stockton v. Whitmore*, 50 Cal. 554; *Smith v. Chicago*, 214 Ill. 155, 73 N. E. 346; *Trenton v. Collier*, 68 Mo. App. 483; *Page & Jones, Taxation by Assessment*, § 510; *Pells v. People*, 159 Ill. 580, 42 N. E. 784; *Kutchin v. Engelebret*, 129 Cal. 635, 62 Pac. 214; *City of Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853; *Auditor General v. Stoddard*, 147 Mich. 329, 110 N. W. 944), many of which seem to be in point on the proposition suggested. It is argued by counsel for respondent that the law does not require that the initiatory ordinance give the width of the street, but merely the "general character of the proposed improvement," and that the statement in the initiatory ordinance that the street was to be paved the width of 56 feet was surplusage, and not binding or conclusive on the mayor and council, and that they might pass their final ordinance and let their contract for a less width. However this may be, it does not appear to us that the objection is well taken in the present case, for the reason that the change in the width of this pavement only affects one street for a distance of about 400 feet, and within that distance there are no street crossings. It is clear to us that this change could make no difference with any one other than a property owner abutting on the particular portion of the street in which the reduction in width of pavement is made. This change would make no difference with any other property owner either in the amount of his assessment or the benefits

which he might receive from the improvement or the use of the street. On the other hand, we can readily understand why it might affect a property owner whose property abuts on the particular portion of the street in which the change is made. A man might be willing to have the street paved in front of his property, provided the pavement would come up to the curb or sidewalk so as to give him free and easy ingress and egress. On the other hand, he might seriously object to having a strip of 18 feet paved down the center of the street, and leave him a mud hole between his property and the pavement, and consequently make it even more difficult for him to get in and out than it would have been without any pavement at all. It does not appear in the present case, however, that the party complaining owns property abutting on this particular portion of the street or which would be affected by this particular change, and the objection is not based on that ground.

[2] The contention that the title to Ordinance No. 361 is not sufficient is not well taken. The title states the general purpose of the ordinance, and meets the substantial requirements of the statute. Section 2276, Rev. Codes; *Village of St. Anthony v. Brandon*, 10 Idaho, 205, 77 Pac. 322; *State v. Calloway*, 11 Idaho, 719, 84 Pac. 27, 4 L. R. A. (N. S.) 1109, 114 Am. St. Rep. 285.

[4] Complaint is made that the contract was not entered into by the city council, but, on the contrary, was entered into by the mayor and city clerk. The statute (section 16, c. 81, of the 1911 Sess. Laws) provides that "all contracts which are made by the city or village for any improvements authorized by this section, or any subdivision thereof, shall be made by the council in the name of the city or village." Now, in this case, the council by its Ordinance No. 365 provided that a contract should be entered into and in effect made the contract on the part of the city by and through this ordinance. It merely authorized the formal signing and executing the same by the mayor and city clerk. These acts, however, were merely the acts of the council, evidenced by their duly constituted representatives, the mayor and the city clerk.

[5] The description of the work to be done and the improvement to be made as contained in Ordinances Nos. 361 and 365 was sufficient to apprise property owners of the "general character" of the work, and was a substantial compliance with the statute. It has been argued, however, that since the ordinance did not enumerate "Dolarway" pavement as one of the possible classes of pavement that might be used or as a "standard pavement," to contract for that kind or class was therefore a violation of the ordinance. The ordinance provided, among other things (section 1, Ordinance 361), that the pavement should be done with "brick, asphalt,

sheet asphalt, bitulithic, hassam, asphaltic concrete, asphalt macadam, or other standard pavement." The city introduced two experts (Ashton and Wycoff) who testified that "Dolarway" is a "standard pavement." This was a question of fact, and the evidence seems to sustain the contention that "Dolarway" is a standard pavement and that it falls within the provisions of section 1 of the ordinance.

[6] Objection has also been urged against that provision of Ordinance No. 365 which authorizes the mayor by and with the consent of the council to "appoint a committee of three citizens and taxpayers of said city to aid and assist the mayor and city council and be advisory to them in the construction of the improvements in this ordinance made and provided for." We fail to see wherein this provision of the ordinance and action of the council was in any way fatal to the ordinance or to the contract for pavement. It appears that the contract was actually made by the mayor and council, and that the business is to be conducted and transacted on the part of the city by the mayor and council and such officers as may be authorized by law and the city council to transact such business. The selection of this committee in an advisory capacity only could in no way invalidate an action which was otherwise legal.

The objection that the contract was awarded prior to the completion and confirmation of the assessment roll is not well taken. It cannot become a consummated binding contract until such time as all the preliminary provisions of the ordinance are complied with and the necessary statutory conditions precedent to the consummation of the contract are complied with. As a matter of fact our attention has not been called to any place in the record showing that the contract was really let before the completion of the assessment roll.

[7] Complaint is made that Ordinance No. 361 contained no estimate as to the necessary cost for curbing. That ordinance provides that the estimated cost of paving a street, together with curbs and curbing, will be the sum of \$2.10 per square yard throughout. By this it was evidently intended to include curbing in measuring width of paving and that the number of square yards of curbing and paving should be computed together, and that the estimated cost should not exceed \$2.10 per square yard. This ordinance of intention to improve did not commit the city to pay that much if it could finally secure a better and more favorable price.

[8] Considerable argument was indulged in over the provisions of subdivision 6 of section 2238 of the Rev. Codes which deals with the subject of paving street intersections. That provision is as follows: "The expense of all improvements in the space formed by the junction of two or more streets or where-

in one main street terminates in or crosses another main street, and also all street crossings or cross walks, shall be paid by such city or village." The same subdivision provides that the cost of all work and improvements for street pavements shall be assessed upon the lots and land fronting thereon. In the ordinances under discussion here the council provided for the payment by the city at large for street intersections, but makes no specific provision for that part of the street immediately opposite and abutting on an alley.

It is argued by appellant that the ordinance is defective in not providing for the paving of the intersection of alleys with streets. Counsel for the respondent contends that subdivision 6 of section 2238 does not contemplate the payment for alley intersections by the city, but that such intersections are paid for by the improvement district the same as any other part of the street pavement. An alley is clearly a convenience and benefit to the abutting lots only, and it is not a general convenience of necessity to the city at large. It follows, therefore, that the pavement of that part of the street immediately in front of an alley or abutting on an alley should be paid for by the property owners. If, therefore, the pavement of this part of the street is paid for out of the general fund of the improvement district, the expense thereof will in the last analysis fall upon the property receiving the benefit. It was not necessary, and, indeed, would not have been within the contemplation of statute, to provide by ordinance for the city paying for paving the spaces included in intersections of streets with alleys.

We find no reason for reversal of the judgment of the trial court in this case. The judgment should be affirmed, and it is so ordered. Costs in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

AYRES et al. v. WALKER.

(Supreme Court of Colorado. April 7, 1913.)

ALTERATION OF INSTRUMENTS (§ 7*)—NOTES—MATERIALITY AND EFFECT OF ALTERATION.

Rev. St. 1908, § 4587, provides that, where a negotiable instrument is materially altered without the consent of all the parties, it is avoided, except as against a party who has himself altered it and subsequent indorsers, and section 4588 declares that an alteration as to date, rate of interest, or time or place of payment is a material alteration. *Held* that, where at the time the defendant signed the note sued on there were unfilled blanks for the rate of interest and the time from which the interest should be paid, which were filled up thereafter without defendant's authority, the alterations were material and avoided the note as between the original parties.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 84-89; Dec. Dig. § 7.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error to District Court, Pueblo County; C. S. Essex, Judge.

Action by C. C. Walker against Charles Ayres and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. S. Palmer and Lyman I. Henry, both of Pueblo, for plaintiffs in error. W. O. Peterson, of Pueblo, for defendant in error.

SCOTT, J. In this case suit was instituted by the defendant in error, as plaintiff below, on a promissory note in words and figures as follows: "\$300.00. Pueblo, Colo., Nov. 4, 1910. On or before one year after date for value received, I, we or either of us, promise to pay to the order of C. C. Walker, Pueblo, Colorado, three hundred no/100 dollars. To bear interest at the rate of two and one-half per cent. per month from date until paid and further hereby agree that if this note is not paid when due to pay all costs necessary for collection, including ten per cent. for attorney's fees. Interest payable monthly. No. 1 due ——. Will W. Walter. Chas. W. Ayres. C. W. Walter."

The defendants admitted the execution of the note in the amount named, but alleged that, when the note was signed by the defendants Chas. W. Ayres and C. W. Walter, the rate of interest, term of interest payment, and time from which the interest should date were in blank; in other words, that, when these defendants signed the note, it read as follows: "\$300.00. Pueblo, Colo., Nov. 4, 1910. On or before one year after date for value received, I, we or either of us, promise to pay to the order of C. C. Walker, Pueblo, Colorado, three hundred no/100 dollars. To bear interest at the rate of — per cent. per — from — until paid and further hereby agree that if this note is not paid when due to pay all costs, necessary for collection, including ten per cent. for attorney's fees. Interest payable ——. Will W. Walter. Chas. W. Ayres. C. W. Walter."

The three defendants testified in substantial conformity with the allegations of the answer, including want of knowledge upon the part of the plaintiffs in error of the change, or consent to the change, made by the filling in of the blanks as appears by the form of note sued on. The plaintiff testified that the note was as appears in the complaint, when presented for signatures.

The defendant Will W. Walter, principal obligor, took the note to the sureties Chas. W. Ayres and C. W. Walter, and, after procuring their signatures, presented it to the plaintiff and received the money represented by its face. The defendant Will W. Walter testifies that the rate of interest and other matters represented by the blank spaces were filled in by the plaintiff after it was returned with the signatures of the other defendants. The plaintiff denies this statement. The de-

fendant Will W. Walter pleaded a discharge in bankruptcy and was dismissed as a defendant.

Over the objection of the defendants, the court instructed the jury, in substance, as follows: Instruction 5 instructs the jury that, if they find from the evidence that, at the time Ayres and C. W. Walter signed the note, there were no unfilled spaces and that the same was filled in and complete at that time, then the jury should find in favor of the plaintiff and against Ayres and C. W. Walter for the face of the note; that is, \$300, plus interest at 2½ per cent. per month from September 15, 1911, including an attorney's fee of 10 per cent.; that it, a verdict for the sum of \$396.25. Instruction 6 was to the effect that, if the jury find from the evidence in this case that there were in the note in question, at the time same was signed by Chas. W. Ayres and C. W. Walter, the unfilled blank spaces as alleged, then the presumption of law is that the note drew interest at 8 per cent. per annum from maturity; and, if you so find, your verdict will be in favor of the plaintiff and against defendants Chas. W. Ayres and C. W. Walter, for the face of the note; that is, \$300, plus interest at 8 per cent. per annum from November 4, 1911, including an attorney's fee of 10 per cent.; that is, a verdict for the sum of \$344.40.

The jury returned a verdict in the sum of \$344.40, thus in effect, under these instructions, finding for the defendants in their contention that the note, as signed by them, did not contain the rate of interest, date from which it should run, nor the period of interest payments. This is conceded by counsel for defendant in error, who says in his brief: "Under the verdict and judgment below, the plaintiffs in error were held liable on the note in the form they claim it was when they signed it." The contention of plaintiffs in error is that the alteration of the note by the plaintiff, in the manner suggested, invalidated the whole contract as to the defendants Chas. Ayres and C. W. Walter.

Our statute provides that: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Section 4587, Rev. Stat. 1908. The statute likewise provides that any alteration as to date, rate of interest, or time or place of payment is such a material alteration. Section 4588, Rev. Stat. 1908.

It will be seen that this note was not in the hands of a holder in due course, but was in the hands of the original payee, who brought the suit; hence under the statute, if

the note was altered after being signed and after coming into his hands, without the consent or notice of the appealing defendants, it was as to them void, and the jury should have been so instructed. This is an old and wise provision of the law, and the reason for it is apparent when we consider the absoluteness of custody and control by the payee or holder and the utter helplessness to prevent an alteration in the case of the maker in that respect. And so the law has provided as a penalty, not only a criminal liability, but a forfeiture and cancellation of the obligation in its entirety.

This question was determined in the case of *Hoopes v. Collingwood*, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565, wherein the facts were almost identical with those presented here, except that the alteration was made by the indorsee of the note. In that case the court said: "(1) Does such a note, with such blanks, thereby carry authority to the purchaser thereof to fill the blanks in the manner here shown, whereby the rate of interest is changed from the legal rate, viz., 10 per cent. per annum to 24 per cent. per annum? We answer not. *Rainbolt v. Eddy*, 34 Iowa, 440 [11 Am. Rep. 152]; *Bank v. Stowell*, 123 Mass. 196 [25 Am. Rep. 67]; *Holmes v. Trumper*, 22 Mich. 427 [7 Am. Rep. 661]. (2) Is the note vitiated and avoided by such change in its terms by the purchaser, without the knowledge or consent of the makers? We answer that it is, for thereby it ceases to be the promise they made, and the effect is the extinguishment of the promise. 1 Greenl. Ev. § 565; *McGrath v. Clerk*, 56 N. Y. 35 [15 Am. Rep. 372]; *Inglish v. Breneman*, 5 Ark. 377 [41 Am. Dec. 96]; *Coburn v. Webb*, 56 Ind. 96 [26 Am. Rep. 15]." See, also, 2 Cyc. 154, and authorities cited.

The instructions of the court complained of, as hereinbefore referred to, were erroneous. The judgment is reversed, and the case remanded for further proceedings in accord with this opinion.

Reversed and remanded.

MUSSER, C. J., and GARRIGUES, J.,
concur.

WOLFE v. ABBOTT et al.

(Supreme Court of Colorado. April 7, 1913.)

1. TRESPASS (§ 10*)—SEARCHES AND SEIZURES.

A person has no right to enter and search another's home, and seize, carry away, or destroy his property without proceeding according to the law of the land.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 8, 12; Dec. Dig. § 10.*]

2. EVIDENCE (§ 32*)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

The district court could not take judicial notice of town ordinances.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 42; Dec. Dig. § 32.*]

3. CRIMINAL LAW (§ 103*)—INFERIOR COURTS—JUDGMENT—SHOWING JURISDICTION.

A police magistrate's court is a court of inferior jurisdiction, and its record must recite the facts necessary to confer jurisdiction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 218; Dec. Dig. § 103.*]

4. MUNICIPAL CORPORATIONS (§ 183*)—MARSHAL—WRONGFUL ACTS—JUSTIFICATION.

A police magistrate's docket entries showing that plaintiff was complained against charged with selling intoxicating liquor and keeping liquor for sale contrary to a town ordinance, and was found guilty of maintaining a nuisance, fined, and the nuisance ordered abated, did not establish justification for the acts of the town marshal and acting marshals in entering plaintiff's residence against his will, seizing, removing, and destroying intoxicating liquors found therein, since not having been charged with or tried for maintaining a nuisance he could not be found guilty of that offense.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 472-481; Dec. Dig. § 183.*]

5. MUNICIPAL CORPORATIONS (§ 110*)—ORDINANCES—PUBLICATION—NECESSITY.

Under Rev. St. 1908, § 6673, requiring all ordinances imposing any fine, penalty, or forfeiture to be published in a newspaper, and providing that it shall be a sufficient defense to any suit or prosecution for such fine, penalty of forfeiture, that no such publication was made, where part of an ordinance was omitted therefrom as published, the ordinance was in force as published, and the unpublished portion did not take effect.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 239-244; Dec. Dig. § 110.*]

6. INTOXICATING LIQUORS (§ 259*)—ABATEMENT OF NUISANCE—EXERCISE OF POWER.

Rev. St. 1908, § 6525, par. 45, authorizing towns to declare what shall be a nuisance, to abate the same, and to impose fines on the parties responsible therefor, is not self-executing, and the power therein conferred may be exercised only by an ordinance, and hence, where there was no ordinance providing for the abatement of a nuisance, a police magistrate upon convicting a person of selling intoxicating liquors could not order the abatement of the nuisance by directing the seizure and destruction of liquors in his possession.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 398; Dec. Dig. § 259.*]

7. INTOXICATING LIQUORS (§ 260*)—PROHIBITORY ORDINANCES—ENFORCEMENT.

Under Rev. St. 1908, § 6525, par. 45, authorizing towns to declare what shall be a nuisance, to abate the same, and to impose fines on parties liable therefor, and paragraph 18 authorizing towns to prohibit by ordinance the selling or giving away of intoxicating liquors within the town or within one mile beyond its boundaries, the sale of liquors outside the town, but within one mile of its boundaries, can be punished only by imposition of a fine, and not by the abatement thereof as a nuisance; paragraph 45 only applying to nuisances within the corporate limits.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 399; Dec. Dig. § 260.*]

8. INTOXICATING LIQUORS (§ 260*)—PROHIBITORY ORDINANCES—ENFORCEMENT.

Assuming that Rev. St. 1908, § 6525, par. 58, authorizing towns to prohibit within their limits or within one mile beyond their boundaries any offensive or unwholesome business or establishment, or the carrying on of any business or establishment in an offensive or un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wholesome manner, applies to sales of intoxicating liquors, the town can only prohibit such sales and enforce the prohibition by fine and imprisonment, and has no power to abate such sales as a nuisance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 399; Dec. Dig. § 260.*]

9. INTOXICATING LIQUORS (§ 10*)—PROHIBITING OFFENSIVE OR UNWHOLESOME BUSINESS.

Rev. St. 1908, § 6525, par. 53, authorizing towns to prohibit within their limits or within one mile of their boundaries any offensive or unwholesome business or establishment or the carrying on of any business or establishment in an offensive or unwholesome manner, applies only to things which are offensive to the senses or unwholesome in the sense in which the terms are ordinarily used, such as dead carcasses, offensive and unwholesome slaughterhouses, etc., and not to sales of intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

10. INTOXICATING LIQUORS (§ 260*)—WHAT CONSTITUTES.

The mere sale of or keeping for sale of intoxicating liquors is not a nuisance per se.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 399; Dec. Dig. § 260.*]

Error to District Court, Washington County; H. P. Burke, Judge.

Action by Willis Wolfe against W. A. Abbott and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Allen & Webster, of Denver, for plaintiff in error.

GARRIGUES, J. 1. The complaint alleges that June 26, 1908, defendants unlawfully, willfully, maliciously, and forcibly entered plaintiff's residence, about half a mile from the town of Akron, Colo., when he was away, and his wife and child were at home, and took therefrom and destroyed eight barrels of beer and one barrel of whisky, and greatly frightened and made ill and sick his wife and child, to his damage, etc. Defendants pleaded in justification that plaintiff Wolfe was tried and convicted before the police magistrate for maintaining a nuisance by storing and keeping for sale at his residence within one mile beyond the outer boundaries of the town intoxicating liquors, in violation of a town ordinance, which nuisance, upon his conviction, the police magistrate ordered abated; that pursuant to the order defendant Abbott as marshal and the other defendants, excepting Mitchell, as acting marshals, of the town, abated the nuisance by seizing, removing, and destroying the liquor. The district court after hearing the evidence dismissed plaintiff's suit, and he brings the case here on error.

2. On the afternoon of June 26, 1908, plaintiff Wolfe was tried and convicted in the police magistrate's court of the town of Akron. Immediately thereafter defendants, except Mitchell, went to his residence about half a mile beyond the town limits, when he was

absent, entered the house, and against the protests of his wife seized and took from the house and destroyed four or five barrels of beer and a part of a barrel of whisky. This suit by Wolfe is to recover damages for the alleged trespass.

[1] 3. One person has no right to enter and search another's home, and seize, carry away, and destroy his property without proceeding according to the law of the land. *Canon City v. Manning*, 43 Colo. 144, 151, 95 Pac. 537, 17 L. R. A. (N. S.) 272.

[2] Defendants attempted to justify their conduct under an ordinance which they say plaintiff was duly convicted of violating. The district court could take no judicial notice of the town ordinances. Defendants were obliged to introduce the ordinance upon which they relied in evidence. It was admitted over plaintiff's objection, and is as follows:

"Ordinance No. 74.

"An ordinance concerning the sale of intoxicating liquors.

"Sec. 11. It shall be unlawful for any person to sell, barter, exchange, offer, keep or store for the purpose of selling, or to give away, offer to give away, or to keep or store for the purpose of giving away, in any building within the corporate limits of the town of Akron or within one mile of the outer boundaries of said town, any intoxicating, malt, vinous, mixed or fermented liquors; and the sale, storing, bartering, exchanging, offering or keeping for sale or keeping or storing for the purpose of giving away any such liquors within any building as aforesaid, is hereby declared to be a nuisance, and may be abated as any other nuisance.

* * * Any person violating the provisions of this section shall be deemed guilty of an offense, and upon conviction thereof shall be fined in a sum not less than \$100, nor more than \$200, for each offense."

"Sec. 14. Whereas in the opinion of the board of trustees, an emergency exists requiring that this ordinance take effect and go in (force) from and after its passage."

To prove plaintiff was convicted of violating this ordinance, defendants introduced the journal or written docket entries of the trial, kept by the police magistrate, as follows:

**"State of Colorado, County of Washington,
Town of Akron—ss:**

**"In the Police Court within and for the
Town Aforesaid, before T. D. Mitchell,
Police Magistrate.**

**"The Town of Akron, Plaintiff, v. Willis
Wolfe, Defendant.**

"June 23, 1908. Complaint made and filed by John F. Dole charging the violation of Ordinance 74. Selling liquor and keeping liquor for sale, in Akron, Colorado, and with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in one mile thereof, and warrant issued for the arrest.

"June 25. Case set for June 26, at 9 o'clock a. m.

"June 26. Court convened and case continued till 1 o'clock p. m. * * * Trial had and defendant found guilty of maintaining a nuisance in the City Drug Store in Akron, Colorado, and fine assessed at \$200, and costs of suit, and nuisance ordered abated. Defendant found guilty of maintaining a nuisance within one mile of city limits, and in the Yeamans house or ranch. Fine assessed at \$200, and costs of suit and nuisance ordered abated as per order to the town marshal, and defendant committed to the town jail until fine and costs are paid."

[3, 4] 4. We do not know whether the complaint upon which plaintiff was tried and convicted, and the alleged order abating the nuisance given by the magistrate upon which it is claimed defendants acted, were, in fact, introduced in evidence or not. They are not in the record, or bill of exceptions which recites that it contains all the evidence. The police magistrate's court was a court of inferior jurisdiction, and its record had to recite the facts necessary to confer jurisdiction. There being no copy of the complaint here, we can only determine the nature of the charge by the docket entries. This record kept by the magistrate discloses no lawful authority or justification for the conduct of the defendants in entering plaintiff's residence against his will, seizing, removing, and destroying his property. The magistrate's docket shows that Wolfe was charged with, and tried for, selling and keeping for sale in the town, and within one mile beyond the outer boundaries thereof, intoxicating liquor, in violation of Ordinance 74; that he was convicted of maintaining a nuisance at two different places, at his City Drug Store in town, and at his residence beyond the town limits; that he was fined \$200 for each offense, and each nuisance ordered abated. He was not charged with or tried for maintaining a nuisance, hence there could be no judgment finding him guilty of that offense. He was charged with selling and keeping liquor for sale in violation of the ordinance. There was no complaint or trial for keeping a nuisance, and the order of abatement, if one was given, was illegitimate. One cannot be convicted, fined under a town ordinance for maintaining a nuisance, imprisoned to collect the fine, and his property seized and destroyed to abate the nuisance, without due process of law. *Houston v. Walton*, 23 Colo. App. 282, 129 Pac. 263.

[5] 5. Section 6673, Rev. Stats. 1908, provides: "All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, * * * and all by-laws of a general or permanent nature, and those imposing any fine, penalty or forfei-

ture, shall be published in some newspaper published within the limits of the corporation, * * * and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty or forfeiture, to show that no such publication is made; * * * such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been so published." One of the issues in the district court was that the ordinance has not been published, and it was admitted on the trial that the italicized portion, "And may be abated as any other nuisance," was not published. This ordinance was in force as published. The unpublished portion never took effect; hence the omitted part could constitute no justification. *Union Pacific Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619; *Union Pacific Co. v. McNally*, 54 Neb. 112, 74 N. W. 390; *O'Hara v. Town of Park River*, 1 N. D. 279, 47 N. W. 380; *Kneib v. People*, 50 How. Prac. (N. Y.) 140; *Herman v. City of Oconto*, 100 Wis. 391, 76 N. W. 364; *Carpenter v. Yeadon Borough*, 208 Pa. 396, 57 Atl. 837; *Nat. Bank v. Town (C. C.)* 48 Fed. 278.

[6] 6. Section 6525, par. 45, R. S. 1908, relating to the powers of towns, provides they shall have power "to declare what shall be a nuisance, and to abate the same, and to impose fines on parties who may create, continue or suffer a nuisance to exist." It is claimed this statute gave power to the town to declare what should constitute a nuisance, and to abate it without any ordinance; therefore the clause omitted from the printed ordinance was immaterial because the town had that power anyway, under the statute, without the ordinance. This statute is not self-executing. It grants the power; but it must be exercised through an ordinance.

[7] 7. Assuming, under paragraph 45, the town had power to declare it a nuisance for one to sell or keep for sale intoxicating liquor inside the corporate limits, and by ordinance regulating the procedure to abate the nuisance, this does not confer power to declare what shall constitute a nuisance within a mile beyond the outer boundaries, and abate it. Towns possess such powers as are granted them. We are not unmindful of the fact that paragraph 18 of the section confers powers upon towns by ordinance to prohibit the selling or giving away of intoxicating liquor within one mile beyond the outer boundaries; but the manner of enforcing the prohibition is through an ordinance imposing a fine.

[8, 9] Paragraph 53 provides they shall have power to prohibit within or within one mile beyond the outer boundaries of the town any offensive or unwholesome business or establishment, and to prohibit the carrying on of any business or establishment in an offensive or unwholesome manner within one mile beyond the outer boundaries of the

town. This statute does not apply to liquor, and, if it did, there is no power given to declare the enumerated matters a nuisance with power to abate the same. The town must prohibit the things mentioned, and enforce the prohibition by fine and imprisonment. The power by ordinance to prohibit and abate a nuisance within a mile beyond the outer boundaries of towns is not conferred by this paragraph. Besides, it must be evident to any comprehensive mind that paragraph 53 was intended to apply to those things which are offensive to the senses, or unwholesome in the sense in which the terms are ordinarily used. They refer to such things as dead carcasses, offensive and unwholesome slaughterhouses, privy vaults, pig sties, feeding pens, and the like.

[18] 8. The mere sale of or keeping for sale intoxicating liquors is not a nuisance *per se*; but the town council had power to declare it a nuisance by ordinance. *Houston v. Walton*, 23 Colo. App. 282, 129 Pac. 263. This power did not authorize the police magistrate, when Wolfe was tried and convicted before him on a charge of selling liquor contrary to the ordinance, to summarily declare him guilty of maintaining a nuisance and order the marshal to abate it. The procedure should be regulated by an ordinance, and the manner of abatement not left to the discretion of the officer executing the order. The ordinance provides that this nuisance shall be abated as any other nuisance, which means in a lawful manner. The ordinance after declaring what should be a nuisance should have provided the manner of abating it, and the defendant should have been tried for maintaining a nuisance, and, if convicted, the order of abatement should have been in conformity with the provisions of the ordinance.

Reversed and remanded.

MUSSER, C. J., concurs specially. SCOTT, J., concurs.

MUSSER, C. J. (specially concurring). While I concur in a reversal of the judgment, I am unable to agree with all that is said in the opinion of Mr. Justice GARRIGUES, and am therefore impelled to give my reasons for a reversal.

The eighteenth subdivision of section 6525 of the Revised Statutes of 1908 gives to boards of trustees in towns such as Akron power over liquors in language as follows: "To have the right, subject to the laws of the state, to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor within the limits of the * * * town, or within one mile beyond the outer boundaries thereof, except where the boundaries of the two * * * towns adjoin; the license not to extend beyond the municipal year in which it shall be granted, and to determine

the amount to be paid for such license," etc. This statute gives a town the same power to regulate or prohibit the sale of intoxicating liquors within one mile beyond its boundaries as is given to it with respect to the same matter within its limits. If the town may prohibit such sale within its boundaries by the exercise of a power given it, the sale may be prohibited in the same way within one mile beyond its boundaries. Subdivision 45 of the same section gives to such boards of trustees the power "to declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist." This subdivision grants the power (1) to declare what shall be a nuisance; (2) to abate the same; and (3) to impose fines upon the parties designated. It appears to me from this subdivision that the town may abate a nuisance by proceeding against the thing itself or procure its abatement by imposing a fine upon the person who may suffer it to continue, or abate the nuisance in some way and fine the party responsible. This subdivision is not self-executing. It is necessary for a town to do something to carry the power granted into effect, and in the sixty-sixth subdivision of the same section a town is given the power to pass all ordinances and rules, and to make all regulations proper or necessary to carry into effect the power granted. By virtue of the eighteenth subdivision aforesaid, a town may, by an ordinance, declare unlawful the selling of intoxicating liquors within its limits or within one mile beyond its outer boundaries. There is no doubt, under the authorities, that when a town has, by ordinance, made it unlawful to sell or keep for sale intoxicating liquors within its limits, it may denounce such selling or keeping for sale as a nuisance, and under such circumstances the denunciation is conclusive. *Laugel v. Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 286; *Houston v. Walton*, 23 Colo. App. 282, 129 Pac. 263, and authorities therein cited. It may do this with reference to the selling or keeping for sale of intoxicating liquors within one mile of its limits, because by subdivision 18 it is given the same power with respect to intoxicating liquors within one mile of its limits as within its limits. After a town has thus declared such sale or keeping for sale a nuisance, it may provide for the abatement thereof. Like the power to denounce the nuisance, the power to abate it cannot be effective until the town elects to exercise the power and declares how it shall be exercised. This power is not self-executing, but must be carried into effect by some affirmative action of the town. This must be true, for nuisances may be abated in various ways, and it was surely not intended to leave the manner of their abatement to the whim of the officers or persons authorized to abate them.

The particular nuisance denounced in this

case was not the liquor itself, but it was the unlawful sale or keeping for sale that constituted the nuisance, and it was the selling or keeping for sale that was to be abated. It might have been abated by destroying the liquor, by removing it more than one mile beyond the limits of the town, by fining the person selling it or keeping it for sale for each day of its maintenance, so that he would be induced to cease selling it or keeping it for sale, or the town might conclude that its abatement might be obtained by fining the person a single amount. It seems to me that it is for the board of trustees, to whom the power to abate is granted, to determine in some suitable way the lawful manner in which they will exercise the power, and the manner, if lawful, so determined by the board is the one to be followed by the town officers. What did the trustees of the town of Akron do in regard to this matter? The record discloses section 11 of Ordinance 74 of the town of Akron, as set out in the opinion of Mr. Justice GARRIGUES. It is plain that the portion of the printed ordinance, which was not published, to wit, "and may be abated as any other nuisance," is not a part of the ordinance. If we assume that the rest of the ordinance stands, which is the most that can be assumed for the defendants in error, the section provides that the selling or keeping for sale of intoxicating liquors within the territory mentioned is unlawful, denounces such selling or keeping for sale as a nuisance, and imposes a fine for any violation of the provisions of the section. The only penalty prescribed by this ordinance for the violation of any of its provisions is a fine. The only manner declared by the ordinance by which an abatement was sought or might result was the imposition of a fine. The trustees by this ordinance had not determined to abate the nuisance therein denounced by a destruction of the liquor. If the ordinance had provided that, upon conviction before the magistrate, the liquor should be seized and destroyed, an entirely different question would be presented, and one upon which I express no opinion because it is not in this record.

When the defendant was charged in the magistrate's court with selling and keeping for sale intoxicating liquors, it appears to me that he was sufficiently charged with maintaining a nuisance, for it was the selling or keeping for sale of liquor that was denounced as a nuisance, and the declaration in the ordinance that it was a nuisance was conclusive on that point, as is amply sustained by the authorities cited above. The trial and judgment in the magistrate's court was a judicial determination of the fact that he did maintain a nuisance, and the magistrate imposed a fine as provided in the ordinance. That is as far as the magistrate could go under that ordinance.

If the words not published, to wit, "and

may be abated as any other nuisance," were a part of the ordinance, still the defendants would not be justified so far as this record is concerned, for no ordinance of the town of Akron was introduced showing that the board of trustees had elected to abate such a nuisance by the destruction of the property. The court would not be able, under such circumstances, to say that the nuisance was abated as any other nuisance.

NUTT v. DAVISON.

(Supreme Court of Colorado. April 7, 1913.)

1. ANIMALS (§ 23*)—INJURY TO CATTLE—NEGLECT OF BAILEE—BURDEN OF PROOF.

Under a bailment of cattle to be cared for upon a range and on death of part of them, the burden was on the bailee to show that the loss did not result from his fault.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 43-48; Dec. Dig. § 23.*]

2. BAILMENT (§ 31*) — NEGLIGENCE OF BAILEE—PRESUMPTION.

Delivery of property to a bailee in good condition and its destruction or return in an injured condition affords prima facie proof of his negligence.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 124-131; Dec. Dig. § 31.*]

3. APPEAL AND ERROR (§ 1064*)—REVERSIBLE ERROR—CONFLICTING INSTRUCTIONS.

In an action against a bailee for loss of cattle, conflicting instructions as to the burden of proof to show negligence constituted reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

4. ANIMALS (§ 23*)—DUTY OF BAILEE.

Under a bailment of cattle to be cared for, the bailee was bound to use ordinary care to avoid death of the cattle through starvation or exposure, if the bailor had no knowledge as to the condition of the pasture, and the bailee did know thereof.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 43-48; Dec. Dig. § 23.*]

En Banc. Error to District Court, Montrose County; Sprigg Shackelford, Judge.

Action by Thomas Nutt against L. A. Davison. Judgment for defendant, and plaintiff brings error. Reversed.

S. S. Sherman, of Montrose, for plaintiff in error. Bell, Catlin & Blake, of Montrose (P. W. Mothersill, of Denver, of counsel), for defendant in error.

WHITE, J. This is an action brought by a bailor against a bailee in whose exclusive and immediate possession the property bailed, or a portion thereof, suffered injury and was destroyed. The judgment was in favor of the bailee, and the bailor brings the cause here for review. The subject of bailment was approximately 400 head of cattle, intrusted to the bailee for a fee, to be cared for during a specified time, upon a designated cattle range, and at the expiration of the term returned to the bailor. The greater

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

portion of the cattle were received by the bailee April 1st, and the remainder May 20th. Between these dates at least 10 of the first herd had died, of which fact the bailee had knowledge but did not apprise the bailor thereof when he received the second herd, though at that time he asked of the bailor and received of him personally a check in part payment for his services under the contract of bailment. During the first 60 days of the term, 97 head of the cattle died. It was the contention of the bailor that the cattle died from starvation and exposure by reason of confinement in a pasture, at a high altitude, not sufficiently supplied with food and shelter, while the defendant claimed they were placed and kept therein temporarily by direction of the plaintiff.

[1] Over the objection and exception of plaintiff, the court instructed the jury, in effect, that, before the plaintiff could maintain his cause of action and recover against the defendant, he must show the cause of the death of the cattle and that they died only by reason of the negligence of the bailee, and of what that negligence consisted. We think the court erred in so instructing the jury. While the authorities are in conflict, the greater weight thereof and the better reason place the duty upon the bailee to satisfactorily explain the nondelivery of the thing bailed, or its delivery in an injured condition such as only culpable carelessness would probably have caused.

[2] The general rule is that in cases where the evidence shows that the property was delivered to the bailee in good condition and returned damaged, or not at all, the presumption of negligence on the part of the bailee instantly arises, making a prima facie case in favor of the bailor, and thereupon the bailee is under the necessity, if he would escape liability, of showing that the damage or loss was not due to his negligence. This may be done *inter alia*, by showing that he exercised a degree of care, under all the facts and circumstances, sufficient to overcome the presumption of negligence. *Union Pacific R. R. Co. v. Stupeck*, 50 Colo. 151, 114 Pac. 646; *Schouler's Bailments & Carriers* (3d Ed.) § 23; 5 Cyc. p. 217; 8 Am. & Eng. Ency. of Law (2d Ed.) p. 750; *Funkhouser v. Wagner*, 62 Ill. 59; *Higman v. Camody*, 112 Ala. 267, 20 South. 480, 57 Am. St. Rep. 33.

The rule rests upon the consideration that, where the bailee has exclusive possession, the facts attending loss or injury must be peculiarly within his own knowledge. Besides, the failure to return the property, or its return in an injured condition, constitutes the violation of a contract, and it devolves upon the bailee to excuse or justify the breach. A clear summary of the law, as to the liability of the bailee for loss or injury to the thing bailed, is found in a note to section 23 of *Schouler's Bailments &*

Carriers, supra, where it is said: "Admitting the danger of wide generalizations on this subject, and granting the force of special circumstances in each case, we may perhaps fairly reach these conclusions: (1) That the bailor who charges his bailee with losing or injuring the thing bailed to him must make out his prima facie case; that is, he must show the creation of the particular bailment in fact, and the delivery on his own part of the specified thing in due condition, with corresponding acceptance by the bailee; also, the bailee's default of final delivery over, or else the final delivery of the thing in unsuitable condition, as the case may be. And whatever might obstruct a prima facie showing to this point, and justify an inference that the thing was injured by himself or his agents, or by his or their participation in the mischief, or that its inherent qualities would naturally have developed the mischief—all this the plaintiff must overcome to make out his case. (2) The prima facie case being thus made out as claimed, showing (a) that the property bailed for a certain purpose was not delivered back or over at all by the bailee as contemplated, or (b) that when delivered over it was found so damaged that probably the bailee or his agent caused the injury, the inference is deducible that the bailee is to blame and must answer. And now it rests upon the defendant bailee to explain the loss and exonerate himself, which he may do by showing (a) that the loss or damage was due to some special cause which ought specially to excuse him; or (b), more generally, that he, the bailee, was not culpably negligent. * * * (3) But if the bailee, under such circumstances, shows some cause of loss or damage to the thing, such as ought legally to excuse him, he need not go further and prove affirmatively that no negligence on his part operated in producing that cause, but may rest upon a showing which, on the face of it, leaves him sufficiently exonerated. The burden now shifts back to the plaintiff bailor, who is to overcome, if he can, the bailee's prima facie exoneration."

[3] Moreover, the instruction under consideration is in conflict with instruction No. 3, wherein the duty of overcoming the presumption of negligence, arising from the failure to return the property, was properly placed upon the bailee. Those instructions were upon a material point in the case. The latter stated a correct principle of law applicable to the facts of the case. The former misdirected the jury in that respect. This constitutes reversible error, as it is impossible to determine by which instruction the jury were guided in arriving at their verdict. When we bear in mind that the bailee, according to his own contention, had the immediate possession and control of the cattle, in a particular and limited space, and the great number that died within so short a period after

the bailee received them, it is evident that the duty devolved upon the bailee to come forward and show that the death of the cattle arose from no fault of his. Under such circumstances, the fact of death alone would hardly be a satisfactory explanation of the nondelivery. It might be otherwise if the number of deaths was not excessive.

[4] The jury were likewise instructed that the bailee would not be responsible for the place where he kept, or the manner in which he handled, the cattle, if he obeyed the directions of the bailor in that respect. The facts of the case did not warrant the instruction. The bailor claimed that the cattle were to be kept upon a particular range, and the bailee, while admitting that to be the contract generally, claimed that by express direction of the bailor the cattle were to be kept in a pasture until they became accustomed to the locality. The bailor had no knowledge of the pasture or the food supply therein, while these matters were all within the knowledge of the bailee. Moreover, according to the bailee, the bailor had given such directions upon the representation by the bailee that the pasture was a suitable place, supplied with sufficient food in which to properly keep the cattle. Under these circumstances, the law imposed upon the bailee the duty of exercising that degree of care in respect to the property which a man of average prudence and diligence would bestow on his own property under like conditions and circumstances, and which the law denominates "ordinary care." The care thus required is illustrated in Schouler's Bailments & Carriers, § 137, as follows: "Let us take, for example, a case by far the most familiar under this head to English and American courts, namely, that of a horse hired for use. Now, unless the bailee took the animal for too short a time, or under a special arrangement whereby the bailor was to look after his own property, he ought to provide the creature regularly with proper food and drink, afford due shelter and repose, and, in general, take reasonable heed that the animal, while resting, is so fastened up that it may not readily run away or be stolen. While putting the horse to active use he should not harness carelessly, overload, overdrive, be heedless of what he perceives to be the creature's frailties, nor fail to supply, prudently, wants essential to its health and good condition. If disease or bruise be discovered during the bailee's term, he should be discreet in its treatment, and in extremity call in some farrier or expert; or else, informing his bailor promptly, throw the responsibility, as he may generally do, upon the owner. He should not take dangerous risks of travel. During his whole term of use the bailee ought to act honorably, humanely, and with such reasonable regard for preserving the animal's value unimpaired as from prudent men might be expected."

Were we to assume that the pasture, when the cattle were first placed therein by directions from the bailor, was supplied with sufficient food and was a proper place in which to keep them until they had been accustomed to the range, nevertheless, if it became apparent to a reasonably prudent person that the subsequent condition of the pasture, by reason of snow, the lack of food, or other causes, rendered it an unfit and improper place in which to keep the cattle, it thereupon became the duty of the bailee to take proper action and precaution, such as a reasonably prudent person would take under like circumstances, to preserve the cattle unimpaired, or inform the bailor promptly of the changed conditions and thereby place the responsibility upon the latter.

We cannot commend the complaint as a model pleading. It contains much surplusage, and many allegations are found therein that should properly be embodied in a replication. However, this does not remove the prejudice arising from the giving of erroneous, inconsistent, and conflicting instructions. If all the facts of the case and the presumptions arising therefrom show that the loss of the cattle was due to some special cause which ought specially to excuse the bailee, or that the latter was not culpably negligent, the alleged cause of action fails and the plaintiff cannot recover; otherwise, he can, the bailment and loss being admitted. Under such circumstances, it would be wholly immaterial as to which of the parties furnished the proof. But that is a different matter from telling the jury that the proof of certain facts devolves upon the plaintiff when the law presumes their existence without proof, unless the contrary is shown. The plaintiff was undoubtedly under the necessity of establishing his case by a fair preponderance of the evidence, but he was not called upon, under the facts and circumstances, of this case, to assume the burden placed upon him by the instructions.

The judgment is reversed.

CITY OF VICTOR v. SMILANICH.

(Supreme Court of Colorado. April 7, 1913.)

1. WITNESSES (§ 40*)—COMPETENCY—CHILDREN—STATUTORY PROVISIONS.

Rev. St. 1903, § 7273, providing that children under 10 years of age, who appear incapable of receiving just impressions of the facts or of relating them, shall not be witnesses, implies that the competency of a child under the prescribed age to testify is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.*]

2. APPEAL AND ERROR (§ 971*)—DISCRETION OF TRIAL COURT—COMPETENCY OF CHILDREN TO TESTIFY—REVIEW.

The determination of the trial court whether a child under ten years is competent to tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trial will not be disturbed on appeal, unless the trial court clearly abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.*]

3. WITNESSES (§ 40*)—COMPETENCY—CHILDREN.

The action of the trial court in admitting the testimony of a boy about six years old, who fairly understood the obligation of an oath and the facts which he detailed, and who understood that he could be punished if he did not tell the truth, was not an abuse of discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.*]

4. TRIAL (§§ 139, 140*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The credibility of a boy under 10 years of age as a witness, and the weight to be given to his testimony, in view of his age, are for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 334, 335, 338-341, 365; Dec. Dig. §§ 139, 140.*]

5. WITNESSES (§ 409*)—CONTRADICTION—EFFECT.

A witness may be contradicted by circumstances as well as by statements of others contrary to his own, and the jury and the court may exercise their own judgment as to the probative value of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1283; Dec. Dig. § 409.*]

6. EXPLOSIVES (§ 8*)—NEGLIGENCE IN KEEPING—QUESTION FOR JURY.

Whether caps for the explosion of powder used in excavating a trench for a city which boys of tender years secured were left by employes of the city at the door of a shed containing explosives for the work, and whether the employes were guilty of negligence in so doing, so as to render the city liable for injuries to a boy by an explosion of a cap, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

7. TRIAL (§ 143*)—CIRCUMSTANTIAL EVIDENCE—QUESTION FOR JURY.

Where circumstantial evidence is of a nature from which it can be reasonably inferred that it contradicts direct testimony, the jury must determine the weight thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

8. TRIAL (§ 143*)—EVIDENCE—SUBMISSION OF ISSUES TO JURY.

Where circumstantial evidence contradicting direct and positive evidence is of sufficient strength to justify a reasonable inference by reasonable men that the fact in dispute is established thereby, the issue must be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Appeal from District Court, Teller County; John W. Sheafor, Judge.

Action by Peter Smilanich by Gabriel Smilanich, his next friend, against the City of Victor. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee, as plaintiff, by his next friend brought suit against the city of Victor to recover damages sustained by the alleged negligence of the latter. The trial resulted in a verdict and judgment in favor of plaintiff in the sum of \$7,500, from which the defendant has appealed.

The complaint alleged, in substance, that plaintiff at the time the injury was sustained was about 4½ years of age; that at this time the city was engaged in extending its municipal water system by constructing a ditch through the residence district adjacent to the city, employing laborers for that purpose, who, with tools and explosives, were removing rock and soil from the ditch; that plaintiff resided with his parents in the vicinity of the ditch; that many other small children resided in the same neighborhood; that defendant's employes engaged in excavating the ditch carelessly and negligently permitted a box of explosive caps, intended to explode with great force when struck with a hard instrument, to remain where the children of the neighborhood, including plaintiff, could gather them up; that these caps were of an attractive appearance, and enticing to plaintiff as playthings; that plaintiff and one of his playmates, by the name of Willie Vranesich, not knowing the dangerous character of the caps, and having access thereto, took a number of the caps; that plaintiff held one of them in his hand, and Willie, not knowing the danger to which he and the plaintiff were exposed, struck the cap with a rock, causing it to explode, whereby plaintiff was grievously injured in particulars specified. For answer the defendant, so far as material to consider, denied the negligence charged; that is, denied that its employes negligently and carelessly left explosive caps where plaintiff and other children would have access to them.

The evidence established that plaintiff at the time of his injury was of the age charged in the complaint, and that his playmate, Willie, was about six years of age; that Peter was injured by the explosion of a cap commonly used to explode giant powder; and that thereby his right hand was torn from his wrist, the bone in the thigh of his right leg broken, and his flesh and muscles badly lacerated. The evidence further establishes that defendant was engaged in excavating the trench for its waterworks system, and that in prosecuting this work its employes used explosives, including caps of the character in question, for the purpose of exploding giant powder, and that such caps will explode when struck by a hard substance. It also appears that part of this work was being done by contractors, who had contracts from the city, and gratuitously by owners of property in the vicinity, all of whom used explosives, for whose conduct, however, the defendant was not responsible. The tools and explosives used by the employes of the city were kept in a shed near the residence of the parents of Peter, which was kept locked, the key being carried by one of them. Peter's mother testified that on the day her boy was injured, and shortly before the injury, she heard shooting in the trench. The

employés of the city were engaged in working in the ditch at this time. These parties admitted that they kept explosives in the shed mentioned, which were used in excavating the ditch; that a few days prior to the time Peter was injured they had brought to their work a round tin box about two-thirds full of caps. A full box contains 100 caps. There was testimony to the effect that other parties who had been engaged on the ditch, either as contractors or on their own account, had completed their work nearly a month previous to the injury, and that they had not left any caps on the work.

Willie was called as a witness for the plaintiff, and over the objection of the defendant was permitted to testify. The objection urged was his age, which, at the time of the trial, was about 6½ years. On his voir dire he was examined by counsel for both sides, and by the court, by a line of questions intended to elicit his understanding of the obligations of an oath, and also his intelligence, after which the objection was overruled. From this examination it appears he had some idea of the obligation of an oath, that he understood he could be punished if he did not tell the truth, and that he was fairly intelligent for a boy of his age. He testified that he and Peter found the caps in a tin box just outside the door of the shed, where the tools and explosives were kept by the city's employés engaged on the ditch, and just prior to the time Peter was injured, and that Peter held one of the caps in his hand, which the witness struck with a rock. Shortly after the explosion about 35 caps were taken from Willie's pocket, which he said he found in the box at the door of the shed, and quite a number were found on the ground in the immediate vicinity of where the injury occurred. This witness further testified that he never got caps out of an empty house, nor from under the sidewalk, and that all the caps he ever got he took from the box by the door of the shed. There was also testimony tending to prove that Willie could not have secured the caps about the residence of his parents, as explosives were not kept there. It appears that the employés of the city could not have used in the prosecution of their work but a few caps each day. One of the employés of the city testified that there were no caps in the shed on the day Peter was injured, that neither he nor his coemployé used any explosives on that day, and that he did not leave any caps lying around, or the box containing the caps, at the door of the shed, and that three days before he had taken the unused caps to his house. The testimony of the other employé was to the same effect. At the conclusion of the testimony on the part of plaintiff, a motion for a directed verdict was interposed by the defendant, which was overruled. A similar motion was interposed by defendant at the time the testimony on both sides was con-

cluded, which was, also, denied. After the verdict the defendant made a motion for a new trial, and also for a judgment non obstante veredicto, both of which were overruled.

Edward J. Boughton, of Cripple Creek, and W. M. Alter, of Victor, for appellant. J. E. Ferguson, of Cripple Creek, and Wm. Melten, of Victor, for appellee.

GABBERT, J. (after stating the facts as above). The contention of counsel for the city is (1) that Willie should not have been permitted to testify; and (2) that the evidence is insufficient to sustain the verdict, because it fails to establish negligence of the city.

[1] Our statute (section 7273, R. S. 1908) provides that "children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," shall not be witnesses. This provision does not apply to all children under 10 years of age, but only to those under that age who "appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." This language clearly implies that the competency of a child as a witness under the prescribed age is a question addressed to the sound discretion of the trial court to determine.

[2] When, therefore, the trial court has determined this question, it will not be disturbed on review, unless it appears from the examination of the child on its voir dire or its testimony that the trial court clearly abused its discretion. *State v. Blythe*, 20 Utah, 378, 58 Pac. 1108; *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; *State v. Juneau*, 88 Wis. 180, 59 N. W. 530, 24 L. R. A. 857, 43 Am. St. Rep. 877; *People v. Walker*, 113 Mich. 367, 71 N. W. 641.

[3] From the record before us it appears the boy understood that as a witness he was required to tell the truth, that he could be punished if he did not, and that he had a fair understanding of the obligation of an oath, and the facts which he detailed; and hence it does not appear the trial judge abused his discretion in permitting him to testify.

[4] The credibility of the boy as a witness and the weight to be given his testimony, considering his age, was for the jury to consider and determine.

[5-8] The vital question of fact in the case was whether the caps which the boys secured were left by the employés of the city at the door of the shed. Counsel for defendant insist this must be resolved in favor of the city, for the reason that the testimony of its employés to the effect that they did not leave them there or at any place where the boys could have access to them, was not contradicted or impeached. The sufficiency of the

evidence to justify the submission of the case to the jury was determined by the trial court contrary to the contention here, by overruling a motion of defendant for a directed verdict at the conclusion of the plaintiff's testimony, and by also overruling a similar motion when all the testimony was in. The jury resolved the fact in dispute in favor of the plaintiff, and the trial judge refused to disturb this finding by overruling a motion for a new trial, and a motion for a judgment non obstante veredicto.

There is testimony that the caps were found by the boys at the door of the shed in which the city's employes stored explosives used in excavating the ditch, and the jury must have found this to be the fact. The employes say they did not leave them there; and, although this testimony is not directly controverted, the jury must have determined they did, and the trial judge has ruled that the evidence was sufficient to not only submit this question to the jury, but also sufficient to justify this finding of fact by them. It does not always follow that because positive testimony of a witness is not directly controverted that a jury must treat such evidence as true. A witness may be contradicted by circumstances, as well as by statements of others contrary to his own. In such cases neither courts nor juries are bound to refrain from exercising their own judgment as to the probative value of his testimony. 80 Ency. 1068. There is testimony that the caps were found by the boys in a box corresponding with the one which the employes admitted they purchased containing caps. The number of caps in this box, bearing in mind that 35 were found in Willie's pocket which he says he took out of the box, with the number found on the ground immediately after the explosion, tallies approximately with the number not used. There is testimony that the employes were using explosives the morning of the injury, although they deny it. The caps were found where they might have been placed, and inadvertently left, in unlocking and locking the door of the shed. There is evidence that all the explosives used by others in excavating the ditch had been removed about one month previous to Peter's injury. These are circumstances tending to contradict the positive testimony of the city's employes, for the reason that from the testimony as a whole they tend to prove that the caps the boys found belonged to the city, and that it was not altogether improbable they had been left (no doubt, inadvertently) at the door of the shed by the employes of the city, as no one else would have been likely to leave them at that place. When circumstantial evidence is of a nature from which it can be reasonably inferred that it contradicts the direct and positive testimony of witnesses, it is the province of the jury to determine the weight to which such evidence

is entitled. *United States v. Pacific Express Co.* (D. C.) 15 Fed. 867. In many instances evidence to establish a fact is circumstantial. If it is of sufficient strength and force, considering the surrounding circumstances and conditions, to justify a reasonable and well-grounded inference by reasonable men that the fact in dispute is thus established, the question should be left to the jury to determine. *C. & F. Lumber Co. v. D. & R. G. R. Co.*, 17 Colo. App. 275, 68 Pac. 670; *Colo. Midland Ry. Co. v. Snider*, 38 Colo. 351, 88 Pac. 453.

Tested by these rules, we think the trial court was right in submitting the question of the alleged negligence of the employes of the city to the jury to determine, and that their finding on the subject is justified by sufficient substantial evidence to sustain it.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

POWERS v. CITY OF BOULDER.

(Supreme Court of Colorado. April 7, 1913.)

1. PLEADING (§ 406*)—OBJECTIONS—AMBIGUITY—WAIVER.

Where an allegation in a complaint is ambiguous, but no motion is made to have it made more specific, and no demurrer is filed on such ground, the ambiguity is waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

2. MUNICIPAL CORPORATIONS (§ 741*)—ACTION AGAINST CITY—PRELIMINARY NOTICE—SERVICE—SUFFICIENCY.

A complaint in an action against a city for injuries alleged that plaintiff caused a written notice of the accident to be served on defendant by serving the same on its mayor, who at the time informed plaintiff that he would accept service for and on behalf of the defendant, and that plaintiff need not serve any other notice on any other officer, and that the city and the mayor, council, and clerk had full notice of the accident and plaintiff's injuries in their official capacity within 90 days thereafter, and acted thereon in their official capacity. *Held*, that such allegation showed a substantial compliance with Rev. St. 1908, § 6361, providing that no action for personal injury against a city on account of negligence shall be maintained unless written notice, etc., is given to the clerk of the city, or recorder of the town, within 90 days, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.*]

Hill, Garrigues, and White, JJ., dissenting.

En Banc. Error to District Court, Boulder County; Harry P. Gamble, Judge.

Action by G. A. Powers against the City of Boulder. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Reversed.

F. T. Johnson, of Denver, and J. M. Essington, of Boulder, for plaintiff in error. J. T. Atwood, of Boulder, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SCOTT, J. This is an action upon the part of the plaintiff on account of personal injuries alleged to have been sustained by him by reason of certain acts of negligence upon the part of the defendant city. A general demurrer to the amended complaint was sustained by the trial court. The plaintiff elected to stand upon his amended complaint, and the ruling of the court sustaining the demurrer is the only question presented, and this is confined to the allegations as to service of notice of the injury required by the statute. The allegation of the amended complaint in this particular is as follows: "That on or about August 24, 1911, plaintiff caused a written notice of said accident to be served upon the defendant by serving the same upon its mayor, respectively, setting forth the time, place, and cause of said injuries, and plaintiff further alleges that at the time of said service plaintiff was informed by said mayor that he, the said mayor, would accept service of said notice for and in behalf of said defendant, and that plaintiff need not serve any other or further notice upon any other officer of said city, all of which plaintiff relied upon as being sufficient and valid in every way so far as serving any other or further notice was concerned, and plaintiff alleges upon information and belief that as a matter of fact the said city and its duly constituted authorities, consisting of its mayor, board of council, and clerk thereof, had full notice of said accident and plaintiff's injuries arising therefrom in their official capacity within 90 days from the happening thereof, and duly acted thereon in their official capacity."

Revised Statutes of 1908, § 6661, provides: "No action for the recovery of compensation for personal injury or death against any city of the first or second class, or any town, on account of its negligence, shall be maintained unless written notice of the time and place and cause of injury is given to the clerk of the city or recorder of the town by the person injured, his agent or attorney, within ninety days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But the notice given under the provision of this act shall not be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury; Provided, it is shown that there was no intention to mislead and that the city council or board of trustees was in fact not misled thereby."

There is no objection that the notice was not in writing, nor that it was not in all respects sufficient, nor that it was not served within the time provided, but only that it was served on the mayor of the city rather than the city clerk, as provided by the statute. Did such allegation of service upon the mayor, when considered with the additional allegation as to official consideration by the constituted authorities, meet the substantial requirement of the statute? The complaint

in addition to service of the notice upon the mayor alleged "that the mayor, clerk and board of aldermen all had full notice of the accident and plaintiff's injuries in their official capacity within ninety days thereafter, and that the mayor declared at the time of the service on him, that no further notice would be required." There is no claim that the city council did not have full or sufficient notice, or that they did not act on it. The defendant rests solely upon the technical contention that the service was not made upon the city clerk as designated by the statute, but who by the very nature of things could perform no other duty in the matter than to present it to the mayor and council, who were vested with authority to act in the premises.

[1] It may be conceded that the part of the complaint wherein it is said that the mayor, board of council, and clerk all "had full notice of said accident and plaintiff's injuries arising therefrom, in their official capacity, within ninety days from the happening thereof, and duly acted thereon in their official capacity," was ambiguous, and that the court may have well sustained a motion to make the complaint more specific, definite, and certain in that particular, or have sustained a demurrer upon such specific ground; but no such motion or demurrer was presented, and therefore the right to attack the complaint on the ground of such ambiguity was waived. The complaint was not for this reason alone subject to general demurrer. Under these circumstances, the complaint may be construed to charge that the mayor, clerk, and council were in fact presented with the notice so served on the mayor, and that they acted officially thereon, and within the time required by law. If so, then every purpose of the notice was accomplished.

[2] It is true that service of a sufficient notice on the clerk would have bound the city in that respect, even though he may not have presented it to the mayor and council at all. But the sole purpose of the statute is to give the mayor and council notice of the claim of damage for the specific injury within the designated time, so that they may have opportunity to take official action thereon, and to properly protect the interests of the city.

In the case of *City of Grand Forks*, 153 Fed. 532, 83 C. C. A. 554, it was held by the United States Circuit Court of Appeals, where such notice was required by the statute to be presented to the mayor and city council, that the presentation of such notice to the city auditor was a sufficient compliance with the statute, and the court there said: "A brief reference to the statutes and decisions of North Dakota will serve to show that the filing of the claim with the auditor was a presentation of it to the mayor and council within the meaning of the law. The mayor and common council of each city is

constituted a board of audit of such city. Section 2171, Rev. Code 1899. The city council consists of the mayor and aldermen. Section 2172, Rev. Code 1899. Only the writing signed by the plaintiff and properly verified is contemplated by section 2172, supra. When so executed and verified, it is to be presented to the mayor and council 'for audit and allowance.' Section 2174. Giving due consideration to these provisions of the statutes considered collectively, we cannot agree with counsel for the city that the claim should have been presented to the mayor separately from the council. The claim manifestly should be so presented to the body authorized to audit it as to secure the attention of that body, and, when it is done, it would seem that the requirement of the statute has been complied with."

To the same effect is *Pyke v. City of Jamestown*, by the Supreme Court of North Dakota, 15 N. D. 157, 107 N. W. 359, construing the same statute. The facts in that case were as follows: "He presented one copy to the mayor and one copy to the city auditor. The copy presented to the mayor was delivered at his office. The copy delivered to the auditor was delivered upon the street. Accosting that officer, he inquired whether he was the city auditor, and, receiving an affirmative answer, he gave him the copy, informed him what it was, and stated that he desired to have it presented at the next meeting of the city council. The claim was addressed: 'To the City Council of the City of Jamestown, N. D.' The mayor testified that he submitted the copy he received to Mr. Thorp, the city attorney. He also testified that 'the notice was not discussed or presented to the council at any time.' Two aldermen testified to the same effect. The present city auditor testified that he could find no copy of the claim among the records and no entry in reference thereto. The auditor to whom the claim was presented died in the following December." Commenting upon this, the court said: "We are of opinion that the presentation was sufficient. The manifest purpose of the statute is to protect cities from the unnecessary expense and the annoyance of legal proceedings until claims against them can be investigated. The person injured must present his claim within 60 days from the date of the injury, during which period the facts are fresh and ascertainable. The city is given 60 days thereafter in which to inform itself as to the merits of the claim and determine whether it will audit and allow it. If not allowed at the end of that period, the party injured may pursue his remedy by action."

The Minnesota statute requires such notice to be given to the city council or other governing body. In *Lyons v. City of Red Wing*, 78 Minn. 20, 78 N. W. 868, the notice was left with the clerk who read it to the council. This was held to be a sufficient compliance with the statute.

In *Wormwood v. City of Waltham*, 144 Mass. 184, 10 N. E. 800, the law required the notice to be given to the mayor, clerk, or treasurer. The notice was given to an alderman, and was afterward read to the board of aldermen. This was held sufficient.

In *Janse v. City of Boston*, 201 Mass. 348, 87 N. E. 633, construing the same statute, it appears that one acting for the plaintiff handed the notice to a person in the clerk's office, and asked that it be handed to the clerk; the person saying, "All right." This was held to be good. So in this case if the notice was handed to the mayor, and if such notice was officially considered by the mayor, clerk, and council, what important difference can it make to the defendant? Every purpose of the law was thus accomplished and to hold that the plaintiff must hand the notice to the clerk personally in order to substantially comply with the statute is to demand form and ignore substance.

If the allegations in the amended complaint as herein construed are sustained by the proof, then the notice in this case was sufficient.

The demurrer should have been overruled.

The judgment is reversed and the case remanded for further proceedings in accord with this opinion.

GABBERT, J. (concurring). There is an additional reason why the judgment should be reversed. The plaintiff's cause of action is the alleged negligence of the city. In order to maintain his action, unless legally excused, he is required to give the statutory notice. The purpose of this notice is to afford the municipal authorities opportunity to investigate his claim, and take steps to protect the city. It is therefore solely for the benefit of the city, and service upon the official designated in the statute may be waived. In my opinion the complaint alleges facts from which it appears that service of notice upon the clerk was waived.

WHITE, J. (dissenting). I think the giving of the notice of injury in the form and in the manner prescribed by statute, and upon the person designated, is a condition precedent to the right of plaintiff to maintain his action, and, that the complaint having failed to allege such facts, the demurrer thereto was properly sustained. In *City of Denver v. Saulcey*, 5 Colo. App. 420, 422, 28 Pac. 1098, 1099, it is said: "The notice must not only contain all the things the statute requires, but it must be served on the persons which the law designates, and in the way specified, if the statute be specific in this particular. * * * The importance of making the service on the proper person has been a matter of judicial consideration, and it has accordingly been adjudged that, where the service must be upon a trustee or upon a mayor or upon a council, service upon the clerk, even though he be one of the principal

officers of the corporation, is not such a compliance with the provision as to permit the maintenance of the suit"—citing *Nichols v. City of Boston*, 98 Mass. 39, 93 Am. Dec. 132; *Underhill v. Town of Washington*, 46 Vt. 767; *Wade on the Law of Notices*, §§ 1312, 1313. And in 28 Cyc. p. 1459, it is said that: "Service of notice or presentation of the claim must be made in the manner prescribed by the statute; or, if not prescribed, then as provided by general law for the service of notice, and within the time prescribed. The notice or statement must be served upon or presented to the board or officers, designated in the statute to be notified, such as the corporation counsel, or city council." It may be that if the city clerk and council were, in fact, presented with the notice within the time limited by the statute, it would be a sufficient service upon the clerk, though it had actually been brought before him by the mayor. But I am unable to find in the complaint any fact alleged that would warrant the conclusion, or even inference, that these things occurred. How it can be said that the allegation "that the mayor, clerk and board of aldermen all had full notice of the accident and plaintiff's injuries in their official capacity within ninety days thereafter" "may be construed to charge that the mayor, clerk and council were in fact presented with the notice so served on the mayor" is beyond my comprehension. Neither can I conceive that there is anything ambiguous in the language quoted from the complaint. How can it be said that an allegation that certain persons "had full notice of the accident and plaintiff's injuries in their official capacity" is in any wise ambiguous? There is not the slightest intimation in such allegation that the notice of the injury required by the statute as a condition precedent to plaintiff's right to maintain the action had ever been brought before the clerk or the council, or that they had knowledge of its existence. It is said in the opinion that "there is no claim that the city council did not have full or sufficient notice, or that they did not act on it." The very fact that a demurrer was filed to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action in respect to the service of the notice is essentially a claim that the city did not have full and sufficient notice to make it liable under the statute. Moreover, that which the statute required the plaintiff should do, as a condition precedent to maintain his cause of action, cannot be legally excused by the courts, even though the latter should think the requirement harsh or unwise. To do so is to annul legislation and determine the rights of litigants, not in accordance with the law of the land, but as the court thinks the law should be.

I am authorized to state that Mr. Justice

HILL and Mr. Justice GARRIGUES concur in the views I have herein expressed.

GARRIGUES, J. (dissenting). I cannot agree with the majority opinion. I think service of the notice required by statute to be made upon the clerk before bringing suit is a condition precedent to the right to bring the action. The Legislature having the power to deny the right to bring the suit could prescribe the conditions under which it could be brought. In my opinion *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098, is decisive of this case. It is there said on page 422 of 5 Colo. App., on page 1098 of 38 Pac.: "The charters of nearly all cities contain a provision like that found in the charter of this city. In providing satisfactory plans for municipal government it seems to have been found expedient to attach this requirement as a condition precedent to the general right which the injured person is given to recover damages for such alleged wrongs. Since the right to sue the city is a matter of statute, lawmakers have the undoubted right to require the observance of these reasonable conditions. Wherever similar provisions have come before the courts for construction, it has been almost, if not quite, universally held that the giving of the notice in the form and in the manner prescribed is a condition precedent without which the plaintiff may not maintain his action."

I am authorized to state that Mr. Justice HILL and Mr. Justice WHITE concur in this dissenting opinion.

BECK v. SCHOOL DIST. NO. 2 IN BENT COUNTY.

(Supreme Court of Colorado. April 7, 1913.)
COMPROMISE AND SETTLEMENT (§ 19*)—CONTRACT OF SETTLEMENT—MISTAKE—EFFECT.

A contract settling a contractor's claim under mutual mistake that a balance of \$2,285 only was due him, whereas the amount due was \$3,285, will be reformed at his suit.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 67, 71-75; Dec. Dig. § 19.*]

Error to District Court, Bent County; Henry Hunter, Judge.

Action by Frank J. Beck against School District No. 2, in the County of Bent, and State of Colorado. Judgment sustaining a demurrer to the complaint, and plaintiff brings error. Reversed and remanded.

H. L. Lubers, of Denver, for plaintiff in error. Allen M. Lambright, of Las Animas, for defendant in error.

MUSSER, C. J. The object of this proceeding is to review the action of the district court in sustaining a general demurrer to a complaint filed by the plaintiff in error, and a judgment against him for costs; he having elected to stand on the complaint. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

complaint alleged that the plaintiff had entered into a contract with the school district to erect a schoolhouse for \$5,785, setting out the contract; that the plaintiff erected the schoolhouse, and thereafter, on the 26th day of May, 1910, sent to the directors a statement of the amount due him, wherein he stated that the balance unpaid on the contract price was \$2,285, and there was due him for extras \$100 and for damages for delay of removal of the old building and material \$100, making a total of \$2,485; that on May 27th, believing the statement rendered and sent by him to be true, he wrote a letter to the school board offering to accept \$2,300 in full, providing settlement was made at once. Then comes the following allegation: "That on the 4th day of June, A. D. 1910, the plaintiff and defendant came to an accounting and settlement, they mutually believing the statement made by the plaintiff to the defendant, dated the 26th day of May, 1910, wherein a balance of \$2,285 was shown in favor of the plaintiff on the contract price for the said building, to be a correct statement of the balance due, and both parties, acting in that belief, thereupon entered into a written settlement, which is in words and figures as follows:" Then follows the contract of settlement, wherein it was recited that the plaintiff and the school district, through its board of directors, entered into a written agreement for the erection of the school building; that divers sums of money had been paid to the plaintiff on account of the contract; that divers disputes existed between the parties, the board claiming that the contract had not been kept by the plaintiff, and that they had been delayed in the use of the building and thereby greatly damaged, and that they became liable for architect's charges, time, and expense, and had been otherwise damaged, and that the plaintiff also claimed that he had been delayed with his work by the failure of the board to remove the old schoolhouse and furnish cement on demand; that the plaintiff had offered to compromise the differences and to take and accept the sum of \$2,385 in full payment, satisfaction, and discharge of all the balance due on account of the amounts to be paid under the said contract, and all extras and damages of whatever nature and in full for all sums due him, and the district had accepted the compromise offered. After the recital of these matters, the contract stated that in consideration of the premises and of \$1 to each party in hand paid by the other, and in consideration of the payment of \$2,385 to the plaintiff, the receipt of which he acknowledged, each party acknowledged that settlement in full had been made of all amounts due or to become due under the building contract, or any extras or damages, in whatever manner, arising out of said contract, and of all damages or claims held by said district against the

plaintiff on account of any delays, damages, or default in any manner, and the parties released and discharged each other from all claims, debts, or liabilities which existed between them.

The complaint then alleged that, since the settlement, the plaintiff had discovered error and false credit given the district, of which he was ignorant at the time, and that the statement of account rendered by him, showing a balance of \$2,285 unpaid him on the contract price, was error and wrong; that the balance due was \$3,285, and set forth the payments made; that the error arose on the part of the plaintiff through the fact that he was erecting another schoolhouse for district No. 7, and had received a payment from that district of \$3,500, and, through inadvertence, error, and mistake, mixed the accounts of the two districts and had given the defendant district a credit of \$3,500, which was \$1,000 more than he had received from it, and then alleges: "That on June 4, 1910, the plaintiff, believing that he had received from the defendant the sum of \$3,500 on such contract, and the board of directors of the defendant believing that they had paid such sum unto the plaintiff, they and each of them, in that belief, entered into said final written settlement of said date; and that said settlement is incorrect in that the balance therein should have been \$3,300 in favor of the plaintiff instead of \$2,300."

The complaint then goes on and alleges that as soon as the plaintiff discovered the error, about one week after the settlement, he notified one of the directors of the mistake and asked that it be corrected, and that the defendant pay him the further sum of \$1,000; that from time to time thereafter he had demanded of the several directors the payment of said sum, and that the directors refused to correct the settlement of June 4th. Plaintiff prayed to be let in to prove the error in stating the account and in the settlement of June 4th, and that the same be corrected, and that there be judgment against the defendant for \$1,000, with interest.

There is no doubt that the complaint alleges that the settlement of June 4th, evidenced by the written contract, was made upon the understanding by each of the parties that the balance due on the contract price was \$2,285, and that it alleges that both parties were mistaken about this, and that the true amount unpaid on the contract price was \$3,285 instead of \$2,285. So that it appears from the complaint that the compromise offer made by the plaintiff and its acceptance by the defendant, and the written agreement of settlement of June 4th, occurred without consideration by either of the parties of this difference of \$1,000, and was based upon mutual error and mistake. There can be no question that the amount unpaid from the district to the plaintiff on the con-

tract price was an essential element to be considered in the settlement of the controversy existing between them, and that the complaint alleges that there was a mistake made as to this element. In 1 Page on Contracts, § 71, it is said that it is substantially unquestioned that the general rule is that a contract entered into because of mistake as to an essential element is void. Perhaps it is better to say that the general rule is that a contract entered into because of a mistake as to some essential element may be avoided in a proper action. If the plaintiff made his offer of compromise under the mistaken idea that he had received \$3,500 from the district, when he had received but \$2,500, and the directors, falling into the same error, or knowing that the plaintiff was in error, took advantage of it, accepted the compromise offer, whereupon the contract of full settlement was made, it certainly seems that in equity and good conscience the plaintiff ought to be relieved from such a contract, induced by such an error, and an examination of the authorities show that they are practically unanimous in saying that such a mistake will vitiate such a contract. In 1 Page on Contracts, § 72, it is said: "So if A. gives his note to B., thinking that there is a balance due from him to B. for which such note is given, when in fact nothing is due, such note may be avoided as to B. or an indorsee with notice. Thus, if A. is mistaken as to the amount of his indebtedness, and under such mistake gives a note for too large an amount, equity will give rescission and cancel the note on payment of the amount due, and, if he has overpaid his debt, will decree repayment of such excess. A similar rule exists where one by mistake assumes a debt due him to be smaller than it is. * * *

So if under a mistaken belief that no credit had been given for a payment which had been made, and in fact credited, the creditor gives a receipt in full on payment of less than the real amount due in pursuance of a contract settling the account, he may recover such difference. Any other contract entered into under mistake as to the amount due on a pre-existing liability and based thereon may be avoided for such mistake."

In *St. L. L. B. B. Co. v. Colo. Nat. Bank*, 8 Colo. 70, 5 Pac. 800, it is said that an account stated or settled is open to impeachment for mistakes or errors. The following authorities, wherein settlements induced by or made through mistakes as to essential elements occurring in various ways, and wherein such settlements were set aside or the injured party permitted to recover the amount lost by the mistake, support the conclusion that, if the allegations of the complaint in this case are true, the plaintiff is entitled to relief. *Lawler v. Jennings*, 18 Utah, 35, 55 Pac. 60; *Russell & Co. v. Stevenson*, 34 Wash. 160, 75 Pac. 627; *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39

Am. St. Rep. 501; *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787; *Conville v. Shook*, 144 N. Y. 686, 39 N. E. 405; *Aultman Co. v. Graham*, 29 Ill. App. 77; *Powell v. Plant* (Miss.) 23 South. 399; *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750.

The complaint sets out the contract of settlement, and the plaintiff prays to be let in to prove the error in the settlement and that it be corrected. This shows sufficiently that the plaintiff desires that the contract of settlement of June 4th be set aside and a new settlement be made, based upon the true facts, and undoubtedly, if the allegations of the complaint are true, the plaintiff is entitled to such relief, and the court erred in sustaining the demurrer. The judgment is therefore reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WHITE and BAILEY, JJ., concur.

PEOPLE, for the Use of LAMAR PUB. CO.,
v. HOAG et al.

(Supreme Court of Colorado. April 7, 1913.)
COUNTIES (§ 101*) — COUNTY CLERK — PERFORMANCE OF DUTY—LIABILITY TO INDIVIDUALS.

Under the rule that nonperformance of an officer's duty to the public must be redressed in a public prosecution, if at all, the publisher of a daily newspaper cannot sue on a county clerk's bond for any failure of such clerk to make a publication in the newspaper required by law; such requirement being for the benefit of the public only.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 152-159; Dec. Dig. § 101.*]

Error to District Court, Prowers County; Henry Hunter, Judge.

Action by the People of the State of Colorado, for the use of the Lamar Publishing Company, against Charles F. Hoag and another. Judgment for defendants, and plaintiff brings error. Affirmed.

C. C. Goodale, of Lamar, for plaintiff in error. Merrill & McCarty, of Lamar, for defendants in error.

MUSSER, C. J. The plaintiff in error filed a complaint in the court below, alleging substantially that Hoag was the county clerk of Prowers county, and the National Surety Company was surety on his official bond; that the publishing company was the owner and publisher of the only daily newspaper in that county; that it was entitled to have published, and that it was the duty of the county clerk to publish therein, for at least six successive days prior to the election day in November, 1910, the list of all the nominations to office to be voted for at that election, as provided in section 2150, Rev. Stat.; that the publishing company demanded of

the county clerk that he publish this list in the said daily newspaper for six successive days prior to the election, which the county clerk, in breach of his duties in that behalf, failed and refused to do, whereby the publishing company was damaged.

To this complaint a demurrer was filed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and the plaintiff refused to further plead; whereupon the complaint was dismissed and judgment rendered against the plaintiff for costs.

It is the contention of the plaintiff in error that it was the duty of the county clerk to publish the list of nominations in the daily newspaper, and if the clerk would have performed his duty in that behalf the paper would have received from the county, in payment for such publication, the sum of \$972, and that because the plaintiff refused to publish it the publishing company was damaged in that sum. The defendants in error deny that the statute imperatively required the clerk to publish the list in a daily newspaper. We will not determine this, but will assume that the statute required that the clerk should publish the list in a daily newspaper, if there was one published in his county. The plaintiff in error contends that, while the duty of the county clerk to publish the list of nominations in the daily newspaper was a public duty, yet in this public duty was involved also a duty to the publishing company, and that the latter has suffered a special and peculiar injury by reason of the nonperformance of the duty by the county clerk on the principle announced in *Cooley on Torts* (3d Ed.) p. 757, and 23 Am. & Eng. Ency. of Law, p. 379. *Gage v. Springer*, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191, is cited to show the applicability of that principle to this case. There, however, the individual had paid a special assessment for a public improvement of a certain quality, and the public official had corruptly permitted the substitution of an inferior and cheaper quality. The publishing company, in this instance, did not part with any special consideration to obtain the publication; nor is the clerk charged with any corruption in failing to publish. Nor is the case of *Wright v. Shanahan*, 149 N. Y. 495, 44 N. E. 74, of assistance. There it was the duty of the official to remove flushboards from the crest of a dam, so as to permit the waters of a lake to flow over it until the spring freshets had passed. As we understand that case, the duty imposed, and which had not been performed, was mainly for the purpose of preventing the impounded water from overflowing private lands. Of course, under such circumstances, the injury was peculiarly of a private nature. *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189, is another case cited by plain-

tiff in error. There a statute provided that it was the duty of a tax collector to make collection from personal property upon the land, before resort should be had to the land itself. Instead of performing that duty, the collector falsely made a return of no goods, which made the land liable, and it was sold. There the duty to take the personal property was more for the individual than for the public. The only interest the public had was that the tax should be collected, and it made no special difference to it whether it was collected out of the personal property or the land.

The statute requiring the clerk to publish the list of nominations was clearly intended for the benefit of the public, and not for the benefit of newspapers. The benefit to the latter was only incidental. Certainly the law was not passed with the idea of benefiting publishers. So that the duty imposed was purely a public one. When the duty imposed upon an officer is one to the public only, its nonperformance must be a public and not an individual injury, and must be redressed in a public prosecution of some kind, if at all. 2 *Cooley on Torts* (3d Ed.) 756. Numerous instances are given by the author. For instance, the duty of a policeman is to watch the premises of individuals and protect them against burglary and arson. If he goes to sleep in front of a house and a burglar enters it or it burns down, which would have been prevented had the policeman been awake, the owner cannot recover from the policeman; for the latter owed the former no legal duty. His duty was to the public. The author says further on: "An individual can never be suffered to sue for any injury which technically is one to the public only; he must show a wrong which he specially suffers, and damage alone does not constitute wrong."

In *Miller v. Ouray E. L. & P. Co.*, 18 Colo. App. 131, 70 Pac. 447, the minor son of the plaintiff, while confined in a jail, charged with a criminal offense, was suffocated by a fire which took place in the jail. The fire was charged to have been caused by defective electric wiring of the building. The county commissioners were made defendants with the electric light company. The plaintiff sought to hold the commissioners liable, because the statute required them to make personal examination of the jail, of its sufficiency and management, and to correct all irregularities and improprieties found therein, which it was charged they failed to do. It was held that the duty imposed by the statute was a public one, and its breach was held not to constitute a private wrong for which the injured party could recover in an individual action. *Colo. P. Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630, was a case in which Murphy, in his complaint, alleged that he was the lowest reliable and responsible bidder on a paving contract in the city of Denver, notwithstanding

ing which the board of public works awarded the contract to the paving company, in violation of a provision of the city charter that the contract should be awarded to the lowest reliable and responsible bidder. The court held that it was obvious that the provision of the charter was not enacted for the benefit of bidders, and that Murphy had no right of action. The court quoted from *Strong v. Campbell*, 11 Barb. (N. Y.) 135-138, wherein it was said: "Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action."

In *Talbot P. Co. v. Detroit*, 100 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604, the substance of the opinion is stated in the syllabus thus: "Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted." It was so held because the charter provision was not passed for the benefit of the bidder, but as a protection to the public.

So in the present case the statute was not passed in order that newspapers might make money by the publication of the list of nominations, but in order that the voters should be advised of the candidates whose names would appear upon the ticket at the election. The ruling of the district court, therefore, in sustaining the demurrer to the complaint was right, and the judgment is affirmed.

Judgment affirmed.

GARRIGUES and SCOTT, JJ., concur.

DENVER, B. & W. R. CO. v. McDONOUGH. (Supreme Court of Colorado. April 7, 1913.)

RAILROADS (§ 446*)—INJURIES TO STOCK—JURY QUESTION—NEGLIGENCE.

In an action against a railroad company for the negligent killing of two colts, evidence held to make it a jury question whether the animals were killed by defendant's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

Garrigues, J., dissenting.

En Banc. Error to Boulder County Court; E. J. Ingram, Judge.

Action by John McDonough against the Denver, Boulder & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. E. Whitted, R. H. Widdicombe, and J. M. Cates, all of Denver, for plaintiff in error. O. A. Johnson, of Boulder, for defendant in error.

SCOTT, J. This is an action to review a judgment of the county court of Boulder county, wherein the defendant in error recovered the sum of \$200 for the loss of two colts by reason of the alleged negligence of the plaintiff in error. The cause was first tried before a justice of the peace, and afterward, and upon appeal, by the county court. There are no pleadings in the case, and, in so far as the abstract discloses, no instructions, and none are discussed in the brief, although counsel assigns as error that the verdict is contrary to the instructions.

It appears that plaintiff's colts were traveling in an easterly direction, and on the tracks of defendant, near the village of Sunset, in Boulder county. Both colts were on a trestle or bridge, upon which the tracks were laid. One of the animals was at the time apparently entangled, by its legs having dropped through spaces between the ties on the trestle. It is not clear whether the other one jumped or was struck by the engine of defendant's train, but it was found on the ground below the trestle, the tracks upon which were from 10 to 12 feet above the surface. Its back was broken, and there were other injuries, so that it became necessary to kill it. The animal on the trestle was crushed, and it would seem instantly killed. The bridge or trestle was 64 feet long and straight, but located in what is termed a left-hand curve, looking toward the west. The creek bank on the right side of the track, looking westward, would appear from the testimony to be anywhere from 10 to 30 feet high.

The record is very hazy as to just where on the trestle the animals were when the accident occurred. The train was moving up-grade and westward. The engineer was the only eyewitness to the accident, and testifies in substance: That the first intimation he had that there was anything ahead of him on bridge No. 31 was after the engine had rounded the curve and straightened up so he could see ahead, at which time his engine was on the east end of the bridge. That he saw some object, but could not tell whether it was a dog, man, or what it was, whereupon he set the emergency brake. The train was moving at a speed of between 15 and 18 miles per hour. It took him probably two or three seconds to put the emergency brake in operation. He did not reverse the engine, because he did not have time. He was looking straight ahead, but was unable to see the bridge until the pilot was on the east end of the bridge, on account of the sand box and smokestack, which are in the way. That you have to wait until the engine straightens

around, and that you cannot see all of the bridge at any time when going west, for the reason that the engine is in the way; the line of vision being obstructed by the head of the boiler and steam dome. That he cannot see over the top of the boiler. That he can only see straight out in front. The fireman testifies that he was shoveling coal at the time, and had been so engaged for about two minutes.

On the part of the plaintiff, several witnesses, testifying from measurements, say that there is a clear vision from a point east and on the outer rail for a distance of 170 feet from where the animal, or animals, were said to have been struck by the engine. This distance, it will be observed, would be much greater on the fireman's side of the engine. The engineer says that the train was stopped within from 54 to 60 feet after applying the emergency brakes.

The contention of appellant is that there was no proof of negligence, and that the court erred in refusing to direct a verdict for the defendant. It will be seen that the testimony is conflicting, in that the engineer testifies that he did not and could not see the animals in time to prevent the accident, while the testimony on the part of plaintiff tends to show that by the exercise of care and diligence he could have seen the animal in time to have prevented the collision.

This latter contention would appear quite well established, if the fireman is to be considered as the company's representative in this respect. The case of *R. G. W. R. R. Co. v. Boyd*, 44 Colo. 122, 96 Pac. 781, presents a similar case of conflicting testimony, and it was there held to be a question for the jury.

Upon the authority of that case, the judgment is affirmed.

GARRIGUES, J., dissenting.

CURTIS v. NUNNS.

(Supreme Court of Colorado. April 7, 1913.)

1. MECHANICS' LIENS (§ 132*)—PROCEEDINGS—LIMITATIONS.

The owner's acceptance of the building from the principal contractor would not start limitations running against one furnishing materials to such contractor, where substantial materials were put into the building after such acceptance.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 132.*]

2. MECHANICS' LIENS (§ 156*) — NOTICE OF LIEN—NECESSITY OF SERVICE.

Under Rev. St. 1908, § 4025, providing that if the contract for erecting a building be not filed as provided therein labor furnished by materialmen, subcontractors, etc., before the contract is filed shall be deemed furnished at the personal instance of the owner, so as to give such materialmen a lien for the value thereof, if the contract is not filed for record, a subcontractor performing labor is placed in

the position of the principal contractor as to his lien right so that a copy of the notice of lien need not be served on the owner by such subcontractor, as is required by section 4033 to give a lien to subcontractors.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 187; Dec. Dig. § 156.*]

Error to District court, Garfield County; John T. Shumate, Judge.

Action by J. H. Nunns against Leonard E. Curtis, Sr. Judgment for plaintiff, and defendant brings error. Affirmed.

James R. Moore, of Colorado Springs, for plaintiff in error. Darrow & Rowe, of Glenwood Springs, for defendant in error.

SCOTT J. This action was to establish and foreclose a mechanic's lien. The plaintiff claimed a lien in the sum of \$413.70 for work and labor performed in the construction of defendant's dwelling. This included the assigned claim of \$34.50 of another laborer upon the same building, but the same state of facts exists as to both. The court sustained the claim of lien and ordered foreclosure.

The errors alleged are: "(a) Plaintiff's action was not commenced within six months after the completion of the building. (b) Plaintiff's lien claim statement was not filed in the office of the county clerk and recorder of Garfield county within one month next after the completion of the building. (c) The owner of the property was not served with a copy of the lien claim statement at or before the time same was filed in the office of the county clerk and recorder."

Much of this contention hinges on the date of the completion of the building. This question was determined by this court as to the same building in the case of *Curtis v. McCarthy*, 53 Colo. 284, 125 Pac. 109. Under the state of facts in that case presented, and not materially different in this case, it was there held that the building was completed on the 15th day of October, 1910. The trial court so found in this case, and for the reasons given in *Curtis v. McCarthy*, supra, the finding will not be disturbed. This suit was filed on the 7th day of April, 1911, and therefore within six months from the completion of the building, October 15, 1910, as required by the statute. Section 4034, Rev. Stat. 1908.

But Curtis testifies that he accepted the building on September 7, 1910, from Lukenbill, his principal contractor, and at that time specifically waived all objections to it, and it is argued that this fixes the time of completion as of that date, regardless of what may be found to be the fact as to the time of actual completion.

[1] This testimony is from its very nature self-serving, and is strangely in contradiction of the conduct of Lukenbill, who refused to pay plaintiff or accept his work until he had performed the labor demanded of him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by Lukenbill, and which was performed by plaintiff on October 15, 1910. But, as will appear hereafter, the plaintiff, in so far as his claim of lien is concerned, was to that extent a principal contractor, and as such may have filed his statement of lien at any time within three months from the completion of the building. But it has been held by this court that the fact that the owner accepted the building from the principal contractor, who had completed his contract, did not start the statute running as against a person who had furnished material to such contractor, and where, after such acceptance, there was put into the building by others material or labor not trivial in character. *Lichty v. Houston Lumber Co.*, 39 Colo. 53, 88 Pac. 846.

It would be a singular state of the law if Curtis, the owner, could by words of acceptance addressed to his principal contractor, with no recorded contract to guide subcontractors, thus change the actual time of completion and in this way defeat the honest claim of a subcontractor.

The last work and labor was preformed on the 9th day of September, 1910. The statement of lien was filed on the 8th day of October, 1910, and after the last labor for which the lien is claimed was performed, and within one month after the completion of the building. Section 4033, Rev. Stat. 1908.

But service of a copy of the lien statement was not served upon the owner or reputed owner at or before the time of filing with the county clerk and recorder, as provided by said section 4033. It is contended that such service is jurisdictional, and hence in this case the claim of lien may not be sustained.

The plaintiff in error, owner of the building, entered into a contract with one Lukenbill, as principal contractor, for the construction of the building. The defendant in error and his assignor were employed by Lukenbill. It is admitted that the contract price exceeded the sum of \$500, and that the contract was not filed for record, as provided by the statute (section 4025, Rev. Stat. 1908). But this statute also provided: "And in case such contract is not filed, as above provided, the labor done and materials furnished by all persons aforesaid [mechanics, materialmen, contractors, subcontractors, builders, and all persons of every class performing labor upon any building] before said contract or memorandum is filed, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

[2] Therefore, in case of failure to file the contract for record under this proviso, the labor performed by a subcontractor shall be deemed to have been done at the personal instance of the owner; and such claimant is to that extent placed in the position of the

principal contractor, in so far as it relates to his claim of lien.

But no copy of the contract between Curtis, the owner, and Lukenbill, the contractor, was filed with the clerk and recorder, as provided in section 4025, Rev. Stat.; and therefore, under that section, the work and labor performed by the plaintiff is deemed to have been done at the personal instance of the owner, and he is entitled to a lien for the value thereof.

Under this state of the law and the facts presented here, the plaintiff stands in the light of an original contractor, in so far as it relates to the matter of the establishment and enforcement of his lien. Therefore the notice is not required to be served in such case. *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588.

The judgment is affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

CASTNER v. GRAY.

(Supreme Court of Colorado. April 7, 1913.)

1. APPEAL AND ERROR (§ 917*)—RECORD—DISPOSITION OF DEMURRER.

Although the record does not affirmatively say that the court passed upon a demurrer to a replication, its recital that plaintiff elected to stand upon his replication shows that the demurrer thereto was sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3708-3709; Dec. Dig. § 917.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—DISPOSITION OF DEMURRER.

Where defendant as a matter of law was entitled to judgment, plaintiff on appeal cannot complain that the court did not dispose of the demurrer to his replication before rendering judgment on the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

3. APPEARANCE (§ 20*)—WAIVER OF PROCESS.

The voluntary written appearance of the wife in her husband's action for divorce is sufficient to confer jurisdiction over her person, without the necessity of serving her with summons.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 91-102; Dec. Dig. § 20.*]

4. ATTORNEY AND CLIENT (§ 129*)—ACTION FOR NEGLIGENCE—QUESTION FOR JURY.

The question of an attorney's negligence in failing to issue any summons to defendant in a divorce action, who with knowledge of the cause had voluntarily entered her written appearance and consent to a trial, was a question of law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 284-291; Dec. Dig. § 129.*]

Error to District Court, Montrose County; Sprigg Shackelford, Judge.

Action by Quincey O. Castner against John Gray. Judgment for defendant, and plaintiff brings error. Affirmed.

Dexter T. Sapp and James B. Nash, both of Gunnison, for plaintiff in error. Hugo Selig and T. J. Black, both of Montrose, for defendant in error.

GARRIGUES, J. 1. Plaintiff Castner alleges that he employed and paid the defendant Gray as an attorney at law, to bring a divorce action in the county court of Montrose county against his wife, Nellie Castner; that the defendant did not use ordinary care and diligence in bringing, conducting, and prosecuting the case for plaintiff in this: that he filed the complaint May 10, 1907, but neglected to issue any summons, and, without causing such a writ to be issued or served on the defendant, induced the court to try the case the next day and render judgment granting plaintiff a divorce; that his wife did not appear in the action, or at the trial, and the court acquired no jurisdiction over her person, so that on the 25th day of June, 1909, upon her motion the decree was vacated and set aside, thereby causing him large additional expense in retrying the case, to his damage, etc. Defendant in his answer admits that the case was tried, and a divorce decree entered May 11, 1907, against Nellie Castner without a summons being issued or served upon her; but alleges that prior to the hearing she voluntarily entered her written appearance and consent to a trial at the convenience of the court, as follows: "State of Colorado, County of Montrose—ss.: County Court. Quincey O. Castner, Plaintiff, v. Nellie Castner, Defendant. Action for Divorce. Now comes defendant appearing in this action for divorce, and enters her appearance herein, and announces that the case may be called for hearing in its regular course and at the convenience of the court. [Signed] Nellie Castner, Defendant." Plaintiff in his replication admits that his wife entered her written appearance in the action in the manner and form as alleged in the answer; but denies that it was sufficient in law. There were other matters pleaded; but this, we think, states the material issue in the case. The record recites that a demurrer was filed to the replication, and the cause coming on to be heard, plaintiff elected to stand by his replication. Whereupon defendant moved for judgment on the pleadings, which was granted, and a judgment for costs entered against the plaintiff, who brings the case here on error.

[1, 2] 2. The record does not affirmatively say that the court passed on the demurrer, and it is urged that it was reversible error to entertain defendant's motion for a judgment on the pleadings without disposing of the demurrer. Plaintiff cannot complain here because the court did not dispose of the demurrer before rendering judgment on the pleadings. If, as a matter of law, defendant was entitled to such a judgment, it could make no difference to plaintiff what

became of that demurrer. Aside from this, the fact that the record recites that plaintiff elected to stand upon his replication shows that the demurrer was sustained.

[3] 3. Mrs. Castner, knowing that her husband had filed an action for divorce, voluntarily entered her written appearance in the case, which, irrespective of what may be said regarding the regularity of the subsequent proceedings, was sufficient to confer jurisdiction over her person, and there was no necessity of serving her with summons.

[4] This issue being a matter of law, there was nothing to submit to the jury. The action of the court in entering a judgment for defendant on the pleadings was proper, and the judgment will be affirmed.

Affirmed.

MUSSEY, C. J., and SCOTT, J., concur.

HORN v. CLARK HARDWARE CO. et al. (Supreme Court of Colorado. April 7, 1913.)

1. MECHANICS' LIENS (§ 20*) — PROPERTY LIENABLE—LEASEHOLD INTEREST.

Under Rev. St. 1908, § 4027, providing that liens provided for by the act shall extend to any assignable, transferable, or conveyable interest of the owner in land upon which the building is erected, a mechanic's lien may attach to a leasehold interest.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 21; Dec. Dig. § 20.*]

2. FIXTURES (§ 27*) — AGREEMENT BETWEEN LANDLORD AND TENANT—LIENS BY THIRD PERSON.

No agreement between lessor and lessee as to the removal of machinery after the lease expired would affect the character of such machinery as a fixture or otherwise with reference to the rights of third persons claiming a lien thereon as realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

3. FIXTURES (§ 4*)—MACHINERY.

In determining whether machinery placed in a plant by a lessee became a fixture, the question is whether the machinery was attached to the building or ground with an intention that it should become a part of the plant as a whole, in which case it became a part of the leasehold interest, if essential to the successful operation of the plant.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 3, 6; Dec. Dig. § 4.*]

4. MECHANICS' LIENS (§ 32*)—FIXTURES—MACHINERY.

An engine and boiler was attached to the ground in a mill building, and the motive power generated therefrom was communicated to shafting attached to the building, which operated other machinery, and all the appliances were reasonably necessary to operate the plant. *Held*, that the engine and boiler were fixtures of the leasehold estate, and subject to a mechanic's lien on the leasehold.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 37; Dec. Dig. § 32.*]

5. MECHANICS' LIENS (§ 157*) — PROPERTY LIENABLE.

The fact that certain articles furnished in the construction of a plant were not lienable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would not defeat the entire liens of mechanic's lien claimants, but they would be entitled to liens for the value of such articles furnished as were lienable.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

6. APPEAL AND ERROR (§ 719*)—PRESENTATION BELOW—NECESSITY.

Where error was not assigned to the effect that mechanics' liens were allowed for the value of items not lienable, the question cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.*]

7. MECHANICS' LIENS (§ 263*)—PROCEEDINGS—PARTIES.

Rev. St. 1908, § 4035, providing that the owner of the property to which a mechanic's lien shall have attached and all other parties claiming any interest therein shall be made parties to the proceeding, would not require the lessor owner to be made a party to suit to establish and foreclose a mechanic's lien against the lessee.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 471-481; Dec. Dig. § 263.*]

Error to District Court, Gilpin County; Chas. McCall, Judge.

Action by the Clark Hardware Company and others against Henry E. Horn. Judgment for plaintiffs, and defendant brings error. Affirmed.

Gillette & Clark, of Denver, for plaintiff in error. James M. Seright and Wm. C. Fullerton, both of Central City, for defendants in error.

GABBERT, J. The Pewabic Consolidated Mines Company owned a stone structure known as the "old freight depot" located on mill site No. 39, adjoining Blackhawk, in Gilpin county. It was without a floor, ceiling, roof, partitions, doors, or windows. This building and the ground upon which it was located was leased to the plaintiff in error for the period of 10 years. By this lease Mr. Horn was granted (quoting from the lease) "the privilege of fitting up the said old freight depot with any and all machinery necessary for the concentration of tailings from North Clear creek, and for working any and all ores by the methods usually adopted by plants for the reduction of the precious metals; and further granting unto the said party of the second part the privilege of diverting and using all the water from North Clear creek necessary to operate said machinery; and further granting unto the said party of the second part the right, upon the surrender, termination, or forfeiture of this lease, to remove all machinery, furniture, and fixtures placed upon said premises by the said party of the second part." This lease, with the consent of the lessor, was assigned to the Denver Mining & Reduction Company, which we shall refer to in the course of the opinion as the lessee. The latter fitted up the structure so as to afford

proper shelter and housing for the machinery of a mud mill by putting on a roof and equipping it with doors and windows. The company then installed in the building the necessary tables and other machinery and equipment for a mud mill. After the mill had been in operation for a time, the mine upon which it depended for tailings shut down, and the mill was idle for several months. A little later the company decided to convert it into a custom mill by the addition of such other machinery as might be necessary. Of the new machinery required to make this change a portion was supplied by the Denver Mining & Reduction Company, purchased in Denver, and a portion by the defendants in error, Stroehle & Sons. The machinery was placed in position by the latter; the Reduction Company furnishing a part of the labor. The engine with which the mud mill had been equipped was taken out, and a new one furnished by the company placed in the building on a concrete foundation sunk in the ground. A new boiler furnished by Stroehle & Sons was placed in the building, set in its own four walls of brick, open in front. In addition to the boiler, Stroehle & Sons furnished other material and equipment in the way of lumber, screens, jigs, shafting, belting, and other fittings used in constructing the mill. The company also owned or furnished as part equipment of the mill a number of appliances used in operating it, and also a number of appliances necessary to use in connection with operating the machinery, and a lot of lubricating oil, also used for this purpose. The only portion of the machinery that came in contact with the building was the shafting. It was laid upon stringers, or girders, and extended across the building. The shafting ran in boxes, or journals, bolted to the stringers. The power generated in the building was communicated to this shafting, which in turn, by belts and pulleys operated the machinery. There is testimony to the effect that all the machinery could be removed without materially injuring the building.

In fitting up the mill the company purchased material from the defendant in error the Clark Hardware Company, consisting of tools, brasses, nails, and other materials which were used in the construction and operation of the mill. In July, 1911, the plaintiff in error recovered a personal judgment against the Denver Mining & Reduction Company. A few days later the sheriff of Gilpin county, under an execution issued on this judgment, levied upon and took into his possession, as the personal property of the judgment debtor, the tables, engines, and other equipment of the mill, which was a part and parcel of it, as installed in the building, and also some tools and supplies, and advertised the same for sale as personal property. Prior to the date fixed for the sale of this property under execution, the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendants in error, joining as plaintiffs, brought suit against the Denver Mining & Reduction Company, the plaintiff in error, and the sheriff of Gilpin county, the purpose of which was to foreclose a mechanic's lien upon the mill, including the structure and the machinery and equipment therein, which embraces the property levied upon by the sheriff under the execution issued on the plaintiff in error's judgment, and to restrain the latter and the sheriff from selling this property under the execution by virtue of which it had been levied upon. A temporary injunction was issued, restraining the execution sale. The trial of the case resulted in a judgment, making the temporary injunction perpetual, and adjudging the plaintiffs entitled to liens upon the property levied upon by the sheriff, the building in which it was situated, the land upon which the building stands, and decreed that all this property should be sold in satisfaction of the liens so established. To review this judgment, Horn, the judgment creditor, has brought the case here on error.

[1] The first point urged by counsel for plaintiff in error to consider is that under the present statute of Colorado a lien will not lie against a leasehold interest in real estate. Section 4027, R. S. 1908, provides *inter alia* that "any lien provided for by this act * * * shall extend to any assignable, transferable or conveyable interest of such owner, or reputed owner, in the land upon which such building, structure, or other improvement shall be erected or placed." The act of 1889, Session Laws of that year, p. 247, provided that, "except when otherwise indicated, any person having an assignable, transferable, or conveyable interest or claim in or to any land, building, structure, or other property mentioned in this act, shall be deemed an owner." This provision was considered in the case of Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744, where it was held that by virtue thereof a mechanic's lien attached to a leasehold interest in real estate. The purpose of the provisions of the act of 1889 and our present act was and is the same, namely, to give to those entitled to a lien the right to subject the owner's interest in real estate to such lien. The lien which attaches is not limited to an estate in fee, but extends to any interest of the person that is transferable, assignable, or conveyable in the real estate at whose instance and upon which a building, structure, or improvement is erected. For the purposes of the act, such person is deemed the owner. If he owns the fee, the lien is upon the fee. If he owns a lease estate, the lien attaches to that interest. *Ombony v. Jones*, 19 N. Y. 224; *Badger Lumber Co. v. Malone*, 8 Kan. App. 121, 54 Pac. 692; *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. 29; *Williams v. Vanderbilt*, 145 Ill. 233, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486. That it was not the purpose of the act of 1889 to limit the right to a

lien to an estate in fee is manifest from the fact that it expressly provides a lien shall attach to whatever interest the person has in the land at whose instance the building or structure or other improvement was erected or placed thereon for which the lien is claimed; and further provides that "any lien provided for by this act shall extend to and embrace any additional or greater interest in any of such property acquired by such owner at any time subsequent to the making of the contract, or the commencement of the work upon such structure, and before the establishment of such lien by process of law." Section 4027, *supra*. Clearly, these provisions were wholly unnecessary if, as contended by counsel for plaintiff in error, a lien could only be asserted against an estate in fee. The evident purpose of these provisions is that a mechanic's lien shall operate upon the estate, whatever it may be, which the person employing labor and procuring materials for the construction of an improvement has in the land upon which such improvement is placed before the lien is established by a decree of court. We think the leasehold interest of the Denver Mining & Reduction Company could be subjected to a lien under our present lien act. To hold otherwise would be directly contrary to the terms of this act.

The next proposition urged on behalf of plaintiff in error is that the plant of machinery in the mill was trade fixtures, and therefore personal property against which a mechanic's lien would not lie, and hence subject to be levied upon under the execution issued on the judgment obtained by plaintiff in error. In support of this proposition it is contended that the Denver Mining & Reduction Company was merely a tenant, and had the right to remove the machinery on the expiration or forfeiture of its lease. This question is not really material in determining whether or not the lien claimed by the plaintiffs attached to the machinery. In other words, what the rights of the lessee may be, with respect to removing the machinery, as against the lessor, is of no particular moment in ascertaining the rights of the lien claimants.

[2] The lessor and lessee might agree between themselves that the machinery could be removed by the latter when the lease expired, or was forfeited, or by reason of the relation between them it might be that, independent of any agreement, the machinery could be removed by the lessee on the happening of either of these events, and that as between them the machinery, in determining their rights, would not be regarded as a fixture or part of the realty, but their private agreement, or their respective rights in the machinery by operation of law, would not change the character of this property, so far as the rights of third persons were concerned, who claimed a lien thereon as realty. *Mollie Gibson C. M. & M. Co. v. McNichols*,

51 Colo. 54, 116 Pac. 1041; Dobschustz v. Holliday, 82 Ill. 371; Hathaway v. Davis, supra.

[3] The vital question, then, is whether or not, as between the lien claimants and the lessee, the machinery in the building was a part of the leasehold interest of the latter. In determining this question the test is whether the lessee placed the machinery in the building and attached it either to that structure, or the ground therein, in whole or in part, with the intention that it should become a part of a plant intended, as a whole, to constitute a mill or reduction works, the purpose of which was to extract the values from tailings and crude ores. If that was the object, and its use was necessary or essential for the successful operation of the mill for the purposes designed, then the machinery so placed became a part of the leasehold interest of the lessee. *Mollie Gibson O. M. & M. Co. v. McNichols*, supra; *Cary Hardware Co. v. McCarty*, supra.

[4] That such was the purpose of the lessee, that the machinery was necessary and essential to accomplish the object for which it was installed, and that each article was a component part of the whole, the evidence establishes beyond question. The engine and boiler were attached to the ground within the building. The motive power generated by these fixtures was communicated to shafting attached to the building, which, in turn, operated other machinery therein. All these appliances were reasonably necessary and essential to effect the purpose for which they were placed in the building, and were therefore a part of the leasehold interest of the lessee. Had the Denver Mining & Machinery Company been the owner of the fee of mill site No. 39, and as such owner had placed the machinery in the building in the same manner and for the same purpose it did, as lessee, it would hardly be contended that such machinery could be levied upon under execution as personal property, either as affecting its rights or the rights of others having a prior lien upon the building in which it was placed. In such circumstances the machinery would admittedly be a fixture. In the case at bar the situation and rights of the parties are no different from what they would be in the supposed case, for the obvious reason that the question of whether the machinery was or was not a fixture must be determined by the same rule in each case. We have determined that a leasehold estate may be the subject of a lien, and logically it must follow that whatever is a fixture of that estate can be subjected to the same lien. That such is the purpose of the act is made clear by a consideration of another portion of the section 4027, supra, whereby it is provided: "The liens granted by this act shall extend to and cover so much of the land whereon such building, structure, or improvement shall be made as shall be nec-

essary for the convenient use and occupation of such building, structure, or improvement, * * * and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, mills, structures, or improvements." Suppose the lessee should sell its leasehold interest without any reservation, the machinery with which the mill is equipped would pass to the purchaser without being specially mentioned, or if it should sell the mill with a clause conveying its appurtenances and fixtures, such machinery would have been conveyed to the vendee, or suppose the Denver Mining & Reduction Company had seen fit to raise the question that its mill could not be dismantled by the execution creditor levying upon and removing the machinery therein as personal property, for the reason that such machinery was a part of its estate in the premises; would it not be held without question that it was not personal property? Counsel for plaintiff in error cite cases which seemingly sustain his contention; but an examination of these cases discloses that they are distinguishable from the one at bar, either because of the facts or for the reason that the lien acts are different from ours. Counsel concedes that if the machinery had been made a part of the realty, and our statute provided for a lien against a leasehold interest, it might as a part of the realty be included in a general lien against such realty. We think our statute as a whole beyond question does provide for a lien against a leasehold interest, and in determining to what such lien attaches the rule is no different from what it would be if the lien was asserted against an estate in fee.

[5, 6] It is also contended the evidence discloses that some of the articles for which liens were claimed and allowed were not lienable, and that, therefore, the liens must fall. This is not tenable. To the extent that articles not lienable, if any, were furnished the lessee, liens should not have been allowed; but this would not defeat the entire liens of the respective claimants, as in such circumstances they would be entitled to a decree awarding them liens for the value of such articles furnished by them as were lienable. If liens were allowed for the value of articles not lienable, the judgment (if the record justified it) might be modified; but no error is assigned which raises this question, and hence it is not presented for consideration.

[7] The final question urged is that the liens must fall because the owner of the property—that is, the Pewabic Consolidated Gold Mines Company—was not made a party. This contention is based upon section 4035, R. S. 1908, which provides that "the owner or owners of the property to which such lien shall have attached, and all other parties claiming of record any right, title, interest or equity therein, whose title or in-

terests are to be charged with or affected by such lien, shall be made parties to the action." The owner meant by this section is the person upon whose interest in the property the lien is claimed, and sought to be established. No claim was made by claimants as against the interest of the Pewabic Company. The liens asserted and sought to be established by claimants were limited to the interest of the lessee, and it was therefore the owner of the property, as contemplated by the section of the statute above quoted.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

HARRISON v. DENVER CITY TRAMWAY CO.

(Supreme Court of Colorado. April 7, 1913.)

1. EMINENT DOMAIN (§ 69*)—DAMAGE TO PROPERTY—CONSTRUCTION OF STREET RAILROAD—RIGHT OF ACTION.

Const. art. 15, § 11, inhibits the construction of a street railroad in any city without the consent of the local street authorities. Rev. St. 1908, § 5420, provides that the consent of the city to the construction of a street railroad shall not protect such road against any claim "for damages to private property which otherwise, without such consent, might be lawfully maintained against" the persons constructing the road, and Const. art. 2, § 15, prohibits private property from being taken or damaged for public or private use without just compensation. *Held*, that the liability of a street railroad company to a property owner for actual damage from the construction of its road was merely that which the city would have incurred if it had built and maintained the road.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

2. EMINENT DOMAIN (§ 100*)—SUBJECTS OF COMPENSATION—DAMAGING PROPERTY.

A physical damage to private property by the construction of a street railroad, as contradistinguished from personal annoyance or inconvenience from operating the cars, is necessary to entitle a property owner to recover damages under Const. art. 2, § 15, prohibiting the damaging of private property for public or private use without compensation; mere incidental injuries arising from a careful exercise of the power of eminent domain being *damnum absque injuria*.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-264, 267; Dec. Dig. § 100.*]

3. EMINENT DOMAIN (§ 100*)—PARTICULAR USES—STREET RAILROADS.

Incidental injuries arising from a careful exercise of the right given by a city to use streets are *damnum absque injuria*, unless the use be extraordinary or unusual, or causes unreasonable changes in the street, when damages to private property therefrom may be recovered by the property owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-264, 267; Dec. Dig. § 100.*]

4. EMINENT DOMAIN (§ 100*)—USE OF STREET—STREET CAR COMPANY.

The use of streets for a street railroad is an ordinary use, if the road be properly constructed, which does not increase the servitude upon the streets so as to entitle abutting property owners to additional compensation, and the mere fact that the construction of a street railroad track caused an additional number of cars to operate on the line, resulting in increased vibration and noise near private property, and that one rail was only three feet from the curb, would not entitle such property owner to damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-264, 267; Dec. Dig. § 100.*]

5. EMINENT DOMAIN (§ 100*)—DAMAGE TO PROPERTY—USE BY STREET CARS.

The mere fact that street railroad tracks are laid so close to an abutting owner's property that vehicles cannot stand between the track and the sidewalk does not entitle such owner to recover for property damaged under the damage clause of Const. art. 2, § 15.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-264, 267; Dec. Dig. § 100.*]

6. STREET RAILROADS (§ 28*)—USE OF STREET—RIGHT.

A street railroad company, as well as abutting property owners and the public generally, are each entitled to the reasonable use of the streets, having due regard to the rights of the others.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 89-92, 44, 45, 56, 61, 63-65; Dec. Dig. § 28.*]

7. EMINENT DOMAIN (§ 100*)—DAMAGE—NATURE OF DAMAGE.

To recover for property damaged under the damage clause of Const. art. 2, § 15, prohibiting private property from being damaged for public or private use without just compensation, plaintiff must show that the injury to him was different in kind as well as greater in degree than that suffered by the public generally, so that a mere showing by an abutting property owner of damage from the construction of a street railroad line, consisting of loud and disagreeable noises and vibrations produced by the cars, and of the fact that a conveyance could not stand between the curb and the track were merely incidental injuries, suffered by the public generally as well as such owner, so that he could not recover therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-264, 267; Dec. Dig. § 100.*]

Musser, C. J., and Scott, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action by J. Henry Harrison, administrator of Mary V. Macon, deceased, against the Denver City Tramway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. T. McNeal, of Denver, for plaintiff in error. Gerald Hughes and Howard S. Robertson, both of Denver, for defendant in error.

WHITE, J. December 9, 1907, Mary V. Macon brought suit against the Denver City Tramway Company for damages claimed to

have been sustained as a result of injury to her residence property. The complaint, as amended, alleges, in substance, that since November, 1890, the plaintiff has owned and been in possession of two described lots at the corner of Ogden street and Eleventh avenue, in the city and county of Denver, together with a 2½ story brick dwellinghouse of 14 rooms, situate thereon, and occupied by her as a residence; that prior to certain acts of defendant hereinafter set forth the plaintiff's property was of great value as a dwelling, and the location thereof one of the most desirable in the city; that Ogden street extends in a northerly and southerly direction, and is 30 feet wide between the curbs in front of plaintiff's residence; that Eleventh avenue extends in an easterly and westerly direction; that for 10 years prior to 1907 the defendant, under a franchise from the city, operated a double-track electric street car line from the business section of the city on Eleventh avenue to its intersection with Ogden street; thence on Ogden street north by curves to Twelfth avenue; thence east to Fillmore street; that in the summer of 1907 the defendant, under its franchise, extended its Eleventh avenue car line from Fillmore street 15 blocks eastward, and connected the same with its Fairmount line, and, over the protest of plaintiff, likewise constructed an additional line from its southerly track on Eleventh avenue by a sharp curve into and upon Ogden street to Ninth avenue; thence easterly and then northerly through Downing street to Eleventh avenue, and thence west to an intersection with its tracks at Eleventh avenue and Ogden street; that in front of plaintiff's residence the west rail of defendant's tracks on Ogden street is 13 feet at its most remote point from the curb, and at its least remote point 3 feet therefrom; that the cars upon said track pass within about 35 feet of the front of plaintiff's residence, while the cars on Eleventh avenue pass within about 40 feet of the north line thereof; that since the construction of the extended and additional lines defendant has run, and continues to run, its electric cars past plaintiff's house over such tracks at the rate of 40 cars per hour; that prior to the construction of such additional lines south through Ogden street visitors and others wishing to approach plaintiff's residence by carriage, automobile, or other vehicles were accustomed to alight and leave their vehicles in safety in front of her residence; that subsequently thereto they have been deprived of such privilege by the frequency with which cars are operated upon said tracks, and are compelled to alight at the rear entrance on Eleventh avenue or elsewhere than at the sidewalk in front of her residence; that the frequent passage of cars over the curves of the tracks makes a loud, grinding, shrill, and nerve-racking noise, and jars the building and creates almost a constant rumbling, disturb-

ing sound, accompanied by the ringing and clanging of alarm bells and danger signals; that it is thereby made impossible the greater portion of the time for inmates of her home, or visitors therein, to conduct on the veranda or in the front rooms conversation in an ordinary tone of voice, or enjoy any form of social intercourse or entertainment during the day or evening, or enjoy undisturbed sleep at night, or occupy the house with any degree of comfort or quietude; that by reason of such things the rental and selling value of her property has been greatly depreciated to the plaintiff's damage, etc. A demurrer to the amended complaint was sustained and the plaintiff brings the cause here for review. The demurrer inter alia challenged the sufficiency of the facts stated to constitute a cause of action.

[1] Section 11 of article 15 of the Constitution inhibits the construction of a street railroad in any city without the consent of the local authorities having control of its streets. Section 5420, R. S. 1908, re-enacts, in effect, the constitutional provision, and further declares substantially that the consent upon the part of a city to the construction of a street railroad therein shall not operate to relieve or protect those constructing the road, etc., "against any claim for damages to private property, which otherwise, without such consent, might be lawfully maintained against" the persons constructing the road. Section 15 of article 2 of the Constitution declares "that private property shall not be taken or damaged, for public or private use, without just compensation." Under these provisions of the law, damages to private property by whomsoever caused and for whatsoever purpose must be paid; and the defendant, though armed and protected by the power of eminent domain, must respond to plaintiff, if in the construction of its road it has taken or damaged her property. However, neither the constitutional inhibition against the construction of a street railroad in a city, without the consent of the local authorities, nor the consent of the municipality to the construction of defendant's road, enlarged or lessened the rights of plaintiff. Her rights depend solely upon whether her property has been taken or damaged. The constitutional inhibition recognizes the right of cities to control their streets, while the statutory provision makes it certain, as between municipalities and those constructing street railroads therein, that the latter shall make compensation for private property taken or damaged in the construction of such public works. In other words, as to the liability for compensation for private property taken or damaged, those constructing the road stand in the place of the city. So in the case at bar. If the city of Denver had constructed and operated the road in question in the same place and manner as has the defendant, and no cause of action arose thereby against the municipal-

ity and in favor of plaintiff, none has arisen in her favor by reason of the construction and operation of the road by defendant.

[2] A physical taking of plaintiff's property was not essential to a cause of action in her favor, but physical damage thereto, as contradistinguished from personal annoyance or inconvenience, was. It must appear that plaintiff had some right in, user of, or interest pertaining to the property which has been wholly or partially destroyed before she can maintain a cause of action for damages to her property. The right disturbed may be either public or private, but it must be a right which she enjoyed in connection with her property, and which gave to it an additional value, and without which, or as affected by the disturbance, the property itself is damaged. The disturbance of the right or easement may be at a distance from the property injured, but the interference must be with some right held with regard to that property. As said in *Gilbert v. Greeley S. L. & P. Ry. Co.*, 13 Colo. 501, 506, 22 Pac. 814, 815: "Private property must be taken, or private property must be damaged, before a cause of action arises. The damage must be to the property, or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property, and which is not shared with or enjoyed by the public generally." The injury sustained must be damages to her property, not incidental injuries arising from a careful exercise of legal rights by defendant in a manner that does not invade the legal rights of plaintiff. The principle expressed in the phrase "*damnum absque injuria*" has not been repealed. *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Denver Cir. R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714. For annoyance and inconvenience to owners of private property arising from the lawful and reasonable acts of another, or the lawful and reasonable use by another, without negligence and without malice, of that which is his, no matter how seriously such acts may depreciate the market price of adjoining property, the owner thereof is without remedy. The fundamental law gives a remedy for private property taken or damaged by requiring payment therefor, but does not extend that remedy to include compensation for personal annoyance and inconvenience suffered by reason of the proper and reasonable operation of either public works or private enterprises.

[3] Moreover, it is certain from our decisions that a municipality in this state may use or authorize its streets to be used for all ordinary and necessary uses to which city streets are usually subjected, and to such further local uses and means of conveyance as the lawmaking power may have authorized for the streets and thoroughfares of the entire city, and that incidental injuries arising from a careful exercise of those rights are *damnum absque injuria*; but as to ex-

traordinary or unusual uses or unreasonable changes in the street no such immunity exists. *City of Denver v. Bayer*, supra; *City of Denver v. Vernia*, 8 Colo. 399, 8 Pac. 656; *Denver Cir. R. Co. v. Nestor*, supra; *D. & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *Gilbert v. G. S. L. & P. L. R. Co.*, supra; *Pueblo v. Strait*, 20 Colo. 13, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273; *City of Denver v. Bonesteel*, 30 Colo. 107, 69 Pac. 595; *Lelper v. Denver*, 36 Colo. 110, 85 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101, 10 Ann. Cas. 847. As said by Mr. Justice Helm in his concurring opinion in *Denver Cir. R. Co. v. Nestor*, supra: "The framers of the Constitution and the people who voted for its adoption understood that with this instrument in force certain injuries suffered by the proprietor of land through the legitimate and careful improvement of adjoining ground would continue to be wrongs for which the law provides no remedy. So, also, did the convention and the people understand that the abutting lot owner would anticipate in making his purchase that the street would necessarily be occupied by the local public for all the usual and ordinary uses of a highway; that the city would, from time to time, under the statutory powers conferred, so change and improve the street as to render it more convenient and useful for such purposes; and that incidental injuries indirectly resulting to him from such improvements would still be, as they were before the Constitution, wrongs without a legal remedy."

And in speaking of the power of the city over its streets in *City of Denver v. Bayer*, supra, we said: "In determining what changes and improvements are most conducive to (the greater convenience of the public), the council exercises a large discretion. And unless unreasonable changes are made, or injury results to the adjoining premises through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain, though, in fact, the real value and convenience of his property are diminished thereby; for in purchasing his lot, or in relinquishing the public easement, he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof." And in *Lelper v. Denver*, supra, many cases are reviewed, and it is held that an "abutting lot owner was bound to anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the usual and ordinary purposes of a highway, and that the city would, from time to time, so change and improve the street as to render it more convenient for such purposes, and that indirect injuries resulting to him therefrom remain now, as they existed before the constitutional provi-

sion was adopted, wrongs without a legal remedy." When lands are taken or dedicated for a town or city street, the nature and extent of the public right therein are well defined. Such lands are acquired for the purpose of providing a means of free passage common to all the people. When a street is laid out, it may be rightfully used throughout its entire extent in such manner as will render it most useful for a highway. And unless unreasonable changes are made therein, or it is subjected to an extraordinary or unusual use, or injury results to the adjoining premises through faulty or improper construction, the owner of such premises has no cause of action, though, in fact, the real value and convenience of his property are diminished thereby. *City of Denver v. Bayer*, supra; *Pueblo v. Strait*, supra; *Leiper v. Denver*, supra. Such changes and uses, if properly made and controlled, do not in any substantial respect destroy the street as a means of free passage common to all people, nor ordinarily impose thereon an additional servitude. By the reasonable, ordinary, usual, and lawful use of a right already fully vested in the public, abutting property is not thereby damaged in a manner that can be made the basis of additional compensation under the constitutional provision.

[4] It is equally well settled that the use of the streets in municipalities for a street railway is one of the ordinary and usual purposes for which such streets and highways may be used, and does not, when properly constructed with due regard to existing, local conditions, augment the burden or servitude upon the street so as to entitle the owner of abutting property to additional compensation. *Cooley on Const. Lim.*, p. 683; *Dillon on Munic. Cor.* (4th Ed.) § 723; *Elliott on Roads and Streets*, §§ 698, 699; *Booth on Street Railways*, §§ 82, 83; *Joyce on Electric Laws*, §§ 336, 339, 341; *San Antonio, etc., Ry. Co. v. Limburger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730; *Rafferty v. Cen. Trac. Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; *Wagner v. Bristol B. L. Ry. Co.*, 108 Va. 594, 62 S. E. 391, 25 L. R. A. (N. S.) 1278; *Placke v. Un. Depot R. Co.*, 140 Mo. 634, 41 S. W. 915.

On this point, in *Ransom v. Citizens' Railway Co.*, 104 Mo. 375, 16 S. W. 416, it is said: "Such a street railway as this, so laid and operated as not to materially impair access to, or the enjoyment of, the adjacent property, may lawfully be placed in the public highways of the city, if expressly sanctioned by proper authority. Such a use does not impose any additional burden entitling the owner of adjoining land to compensation; nor can it be justly regarded, at the present day, as any substantial impairment of the public easement or of the private rights of proprietors of land abutting on the street." And in *Placke v. Union Depot R. Co.*, supra, it is said: "We think it

must now be regarded as settled law that an electric street railway laid to grade is not an additional servitude, and does not infringe upon the property rights of those whose lots abut on the street."

Testing the complaint before us by the rules announced, it is clear that no cause of action is stated therein. It contains no allegation that the railway track is above or below the surface of the street, or was in any wise improperly or negligently constructed, or that the road, as a structure, in any way hampers ingress or egress. The gravamen of the complaint is the additional number of cars operated on the line, with the consequent increase in vibration and noise by reason thereof. While it is alleged that at one point in front of plaintiff's residence the west rail of defendant's road is but three feet from the curb, it is not claimed that thereby ingress and egress to plaintiff's property is affected. The inconvenience alleged in that respect arises from "the frequency with which cars are operated upon said tracks," and in no sense from the structure itself. The defendant is not liable for inconvenience of either character, because they are merely incident to the use of the highway for public travel. *Denver & S. F. Ry. Co. et al. v. Hannegan*, 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100.

[5, 6] The mere fact that street car tracks are laid so close to an abutting owner's property as not to permit vehicles to stand between the tracks and the sidewalk does not constitute a cause of action in favor of the abutting property owner under the damage clause of the Constitution. *Wagner v. Bristol Belt Line Ry. Co.*, supra. The right to the use of the street is the same after the tracks are laid and the cars running thereon as it was before. Both he and the defendant company, and likewise the public generally, are entitled to its reasonable use with due regard to the rights of each and all. *Denver City Tram. Co. v. Wright*, 47 Colo. 366, 107 Pac. 1074; *Carson v. Central R. Co.*, 35 Cal. 325, 327.

As said in *San Antonio Rap. Tran. Ry. Co. v. Limburger*, supra, 88 Tex. 86, 30 S. W. 535, 53 Am. St. Rep. 730: "In regard to the matter of access to the property, the question is not whether the construction and maintenance of the railway interferes with the ingress and egress to and from the storehouses, but it is whether such construction and maintenance infringe upon the right of access. It is possible that the operation of a line of omnibuses or drays, or the frequent passage of all kinds of vehicles for the conveyance of persons or property, may seriously interfere with and obstruct the occupants of the buildings in the receipt and delivery of goods; and yet it could not be held that such interference was unlawful. Every one has the right to the use of the street for the

purpose for which it was dedicated, and still in any crowded thoroughfare the driver of any one vehicle almost necessarily interferes with the passage of some other. One cannot, however, unreasonably delay to the obstruction of another. So with the case of a street railway. Its passage may be lawfully interfered with by persons lawfully using the thoroughfare for pleasure or for business. It may obstruct the passage of other vehicles; but it cannot legally do so, except upon reasonable necessity. The right of the company to move its cars over its track is not superior to the right of another person in the use of the street."

And in *Rafferty v. Central Traction Co.*, supra, it is said that if at any time the abutting owner has occasion for the presence of vehicles on the street in front of his property to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and, if in such exercise of the right the passage of street cars is impeded, they must wait.

[7] Moreover, the well-recognized rule is that in order for a plaintiff to state a cause of action under the damage clause of the Constitution he must allege facts showing that the injury to him is not only greater in degree, but different in kind from that suffered by the public at large. The complaint contains no such allegations. The annoyance, discomfort, and injury suffered by the plaintiff from the loud and disagreeable noises and vibrations produced by the cars passing over the tracks and around the curves, and the ringing of alarm bells at the place and times in question, are the same, except in degree, as are suffered by the public generally as far as such sounds and vibrations are heard and felt. And as to injury to the ingress and egress to and from the premises it is not different in kind from that suffered by every other owner of property along the street. The use of the street by any one in the most careful manner, whether by operating street cars thereon, driving teams or automobiles or other vehicles over the same, or traveling upon foot, does to some extent obstruct ingress and egress to and from the property abutting upon the street. But these are temporary and passing inconveniences, and affect the general public in the same manner as they affect the abutting property owner, differing only in degree. *Romer v. St. Paul, etc., Co.*, 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455. Whether street car tracks are at the side or in the center of the street, if they damage, in the constitutional sense, an abutting property owner's ingress and egress to and from the street, he has a cause of action. But, as said in the syllabus of *Wagner v. Bristol Belt Line Ry. Co.*, supra: "An abutting owner is not entitled to damages merely because his property is made less desirable and less comfortable as a residence

by reason of the fact that a street car track is laid on the side of the street next to his residence instead of in the center of the street. When the acts complained of amount simply to an inconvenience or discomfort of the occupants of the property, but the property itself does not suffer any diminution in substance, and is not rendered intrinsically less valuable by reason of the public use, there can be no recovery. The property is not damaged within the meaning of the Constitution."

The conclusions we have reached herein are in accord with the principles this court has heretofore announced, and likewise consistent with the best-reasoned cases in other jurisdictions. So it is unnecessary to continue the discussion further. The judgment is affirmed.

Judgment affirmed.

MUSSER, C. J. (dissenting). Each case is governed by its own peculiar facts. As I read the complaint, it appears to me that it alleges facts, which, if not denied or if not explained, are sufficient to show that the property in question has suffered such special damage as to call for compensation within the true intent and meaning of the provision of our Constitution, which says, "That private property shall not be taken or damaged for public or private use without just compensation" (Const. art. 2, § 15), as that provision has been heretofore construed by this court. The demurrer should have been overruled.

SCOTT, J., joins with me in this dissent.

PINNACLE GOLD MINING CO. et al. v.
POPST et al.

(Supreme Court of Colorado. April 7, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE OF REALTY TO PAY DEBTS—COLLATERAL ATTACK.

Where the county court has no jurisdiction over proceedings to sell a decedent's real estate to pay debts, or over the parties, and the want of jurisdiction is disclosed by an inspection of the record, a decree ordering a sale is void, and can be attacked either directly or collaterally; but where the jurisdictional infirmity can be discovered only by evidence aliunde the record, the judgment is voidable only, and is good until set aside, reversed, or declared void in a suit brought to try that very issue.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1446, 1449-1455; Dec. Dig. § 349.*]

2. EXECUTORS AND ADMINISTRATORS (§ 336*)—
SALE OF REALTY TO PAY DEBTS—PETITION.

An administrator's petition, showing that the amount and value of a decedent's personal estate, as shown by the inventory and appraisal, was \$4,108, that \$108 thereof consisted of household goods and furniture exempt from sale for the payment of debts, that the remainder of the estate consisted entirely of shares of stock in a mining company having no market or salable value, and which the administrator had been unable to sell, but which had a pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spective value by reason of the favorable location of the property, that the amount of claims against the estate amounted to about \$1,000, that decedent owned an interest in certain unpatented mining lode locations which he believed it was to the interest of the estate to have sold for the payment of debts, and that they were unproductive, and the decedent's interest was likely to be lost for failure to do assessment work thereon, was sufficient to give the county court jurisdiction to order a sale of such property.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1385-1396; Dec. Dig. § 336.*]

3. JUDGMENT (§ 501*)—EFFECT OF MISTAKES, ERRORS AND IRREGULARITIES.

Mistakes, errors, and irregularities, although they might reverse a case on review, are not jurisdictional, and will not render the judgment void.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 941; Dec. Dig. § 501.*]

4. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF REALTY TO PAY DEBTS—COLLATERAL ATTACK.

The county court's finding, in a proceeding to sell land to pay debts, that the personalty was not sufficient to discharge the debts against the estate could not be overthrown, in an action in the district court to set aside such sale, by evidence that the county court was mistaken, especially in the absence of a direct issue that such finding was based on fraud.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380.*]

5. EXECUTORS AND ADMINISTRATORS (§ 326*)—SALE OF REALTY TO PAY DEBTS—SUFFICIENCY OF CLAIMS.

A widow's allowance, which she elected to take in money in lieu of the specific property allowed her by the appraisers, was a sufficient claim against the estate to support a proceeding to sell the realty to pay debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1843; Dec. Dig. § 326.*]

6. EXECUTORS AND ADMINISTRATORS (§ 348*)—SALE OF REALTY TO PAY DEBTS—SETTING ASIDE.

A decree of the county court ordering the sale of a decedent's realty for the payment of debts was voidable, and would be set aside, in a suit brought for that purpose, as to children of the decedent who were not served with process, although the sheriff's return and the decree recited such service.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1448; Dec. Dig. § 348.*]

7. EXECUTORS AND ADMINISTRATORS (§ 348*)—SALE OF REALTY TO PAY DEBTS—SETTING ASIDE.

Before a decree of the county court ordering the sale of a decedent's realty to pay debts can be set aside for want of service of process, where the decree and the sheriff's return recite such service, the proof must be clear, unequivocal, and convincing, or, in other words, beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1448; Dec. Dig. § 348.*]

8. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF REALTY TO PAY DEBTS—ACTIONS TO SET ASIDE—EVIDENCE.

In an action to set aside the sale of a decedent's realty to pay debts, brought 11 years after the sale, evidence held insufficient to over-

come the recitals in the decree and the sheriff's return of the service of process, or to support a finding that process was not served on the decedent's children.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380.*]

9. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF REALTY TO PAY DEBTS—ACTIONS TO SET ASIDE—EVIDENCE.

In an action to set aside the sale of a decedent's realty to pay debts, evidence held insufficient to support a finding that process was served on decedent's infant children less than 10 days before the return day.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380.*]

10. EXECUTORS AND ADMINISTRATORS (§ 337*)—SALE OF REALTY TO PAY DEBTS—SERVICE BY PROCESS.

The county court had no jurisdiction to order the sale of a decedent's realty to pay debts on the first day of a term, unless the parties were served at least 10 days prior thereto; and if not so served the judgment was voidable, and would be set aside.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1397-1409; Dec. Dig. § 337.*]

11. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF REALTY TO PAY DEBTS—ACTIONS TO SET ASIDE—EVIDENCE.

Where the decree ordering the sale of a decedent's realty to pay debts and the sheriff's return showed a proper service of process, the sale would be set aside, on the ground that process was served within 10 days of the return day, only on evidence clearly establishing the untruthfulness of the record.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380.*]

12. PROCESS (§ 148*)—RETURN—CONCLUSIVE-NESS.

A sheriff's return of service of process cannot be impeached by a record or statements made by him.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 201; Dec. Dig. § 148.*]

13. PROCESS (§ 141*)—RETURN—CONCLUSIVE-NESS.

A sheriff's return of service of process is controlling, even over the recitals in the judgment, and if defective or erroneous must be amended.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 189-192; Dec. Dig. § 141.*]

14. WITNESSES (§ 379*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

Where a sheriff testifies orally in support of his return of service of process, contradictory statements made by him are then admissible for the purpose of impeaching his testimony, when a proper foundation has been laid.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

15. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF REALTY TO PAY DEBTS—SETTING ASIDE.

The district court is not a court of review, and had no jurisdiction to set aside a proceeding in the county court to sell the lands of a decedent to pay debts, the conveyances thereunder, and a United States patent to a subsequent purchaser, but if the proceedings were void on account of the fraud of the administrator, of which subsequent purchasers had knowledge, it could grant relief only by declaring

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such purchasers to be constructive trustees and compelling a reconveyance.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380.*]

16. EXECUTORS AND ADMINISTRATORS (§ 388*)
—SALE OF LAND—BONA FIDE PURCHASERS
—CONSTRUCTIVE NOTICE.

After the death of the owner of an interest in two mining claims, his widow and the other owner conveyed the claim to V., who conveyed to a corporation under an agreement with the other organizers of the corporation that if they became dissatisfied the claims conveyed by each party would be reconveyed. They did become dissatisfied, and the claims conveyed by the other parties were reconveyed. One of the other organizers was appointed administrator of the decedent's estate and sold such claims for the payment of debts. V. had them purchased at such sale for him, in order to perfect his title, had the interest in one of such claims acquired at such sale conveyed to the corporation, and by it to defendant's grantor, and received the pay therefor, the corporation and the other organizers receiving no part thereof, pursuant to the agreement for reconveyance. He had the interest in the other claim conveyed to his wife, who immediately conveyed it to the administrator for a valuable consideration. Defendants bought the property in good faith, without actual knowledge of any infirmity in the title. *Held*, that if there was any fraud in connection with the sale on the part of the administrator defendants were not charged with constructive notice thereof.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.*]

17. EXECUTORS AND ADMINISTRATORS (§ 367*)
—SALE OF REALTY TO PAY DEBTS—SETTING ASIDE.

An administrator's sale of the decedent's realty for the payment of debts was not fraudulent or invalidated because the purchaser bought the land for the purpose of perfecting his title under a conveyance from the widow; the purchaser's intent in bidding ordinarily being immaterial.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1549; Dec. Dig. § 367.*]

Appeal from District Court, Teller County; James Owen, Judge.

Action by Mary A. Popst and others against the Pinnacle Gold Mining Company, the Flying Cloud Gold Mining Company, and others. From a judgment for plaintiffs, the defendants named appeal. Reversed and remanded.

Franklin E. Brooks, Michael B. Hurley, and George W. Blerbauer, all of Colorado Springs, Guy P. Nevitt, of Cripple Creek, and H. Alexander Smith, of Colorado Springs, for appellants. Charles C. Butler, of Denver, for appellees.

GARRIGUES, J. John Popst died intestate May 15, 1895, owning an undivided interest in unpatented mining lode locations in the Cripple Creek district. He left as his heirs his widow, Honora Popst, and eight minor children, for whom she was appointed guardian. John Nolon, the administrator, under an order from the county court, sold the estate's interest in the Brindsmald and

Uncle Sam locations at public sale to Frank Dodson. By mesne conveyances the title to the Brindsmald passed to Farnsworth, who patented it and conveyed it to the Pinnacle Company, which conveyed a portion to the Flying Cloud Company. The Blanche Company acquired the Uncle Sam. Before this suit was commenced, two of the children, George M. and John F., became of age and deeded an undivided one thirty-second, and the widow deeded an undivided one-sixth, interest in both locations to S. A. Phipps and W. R. Gillpatrick, in consideration for which they were to bear the expense of this litigation. George M. Popst, John F. Popst, Honora Popst, S. A. Phipps, and W. R. Gillpatrick individually, and Mary, William, Michael, Hugh, Harry and James Popst, minors, by Honora Popst as guardian, commenced this suit July 2, 1902, against the Pinnacle Gold Mining Company, the Flying Cloud Gold Mining Company, John Nolon, and the Blanche Gold Mining Company. The subject of the action was the Brindsmald and Uncle Sam locations; the object of the action was to recover the title that had been divested by the administrator's sale of real estate to pay debts. The court found all the issues in favor of the children; also in favor of Phipps and Gillpatrick as to the one thirty-second interest conveyed to them by George and John. It found against Honora Popst; also against Phipps and Gillpatrick on the one-sixth interest conveyed by her. It declared the county court judgment void and ordered it, the administrator's sale, the certificate thereof, order approving it, administrator's deed, patent to Farnsworth, and all the mesne conveyances from Dodson to appellants, annulled and set aside. It found these were clouds which it ordered removed from the title of those in whose favor it found. The Pinnacle and Flying Cloud Companies appealed; the Brindsmald being the only property affected by the appeal.

There were four issues involved: First, that the county court acquired no jurisdiction over the proceedings to sell real estate to pay debts, because the petition failed to state necessary jurisdictional facts, and the order contained recitals showing the court acted without jurisdiction; second, that no summons was in fact served on the children, though the decree recites and the return shows they were personally served; third, that the summons was not in fact served 10 days prior to November 2, 1895, though the return shows and the decree finds 10 days' prior service; fourth, that the purchaser at the administrator's sale fraudulently purchased the locations for the administrator and his associates for an inadequate price, of which fraud appellants had notice. The district court made no specific findings on any issue, but found all of them in favor of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the children, which has compelled us to review all the issues and a very voluminous record. To make the case intelligent, we feel obliged to set forth rather fully the petition and order of sale, as follows:

"Petition for Sale of Real Estate.

"(Filed October 21, 1896.)

"State of Colorado, County of El Paso—ss.:

"In the County Court.

"In the Matter of the Estate of George Popst, Deceased.

"Petition for the Sale of Real Estate.

"John Nolon, as administrator of the estate of George Popst, shows the court: That the amount and value of the personal estate belonging to deceased at his death, as shown by the inventory and appraisal herein, was \$4,108.00; that of said amount, the \$108.00 consists of the household goods and furniture which are exempt from sale for the payment of debts; that the \$4,000.00 consists entirely of 72,499 shares of the capital stock of the Mineral Rock Mining Company, which stock has no market or salable value at this time, and cannot now be sold or disposed of, although your petitioner has used every effort to secure a sale thereof; that while the stock has now no market or salable value, it has a prospective value by reason of the favorable location of the property, and on this account something is likely to be realized from it for the estate in the future; that for this reason none of the estate's personal property has been sold; that the amount of claims allowed against the estate, and the amount still existing and not allowed, as near as he is able to estimate the same, is about \$1,000; but he is unable to state what portion thereof has been allowed.

"Decedent died seized of the following interest in real estate: One-fifth interest in the Cristle Lite lode, value \$25.00; one-fourth interest in the Sarah Ann McDonald lode, value \$25.00; one-fourth interest in the Flying Cloud lode, value \$25.00; one-half interest in the Brindsmid lode, value \$25.00; one-half interest in the Uncle Sam lode, value \$50.00; one-third interest in the Little Mary lode, value \$25.00; one-fifth interest in the Mollie Gibson lode, value \$25.00; one-fifth interest in Old Branch lode, value \$25.00; one-fifth interest in Roanna lode, value \$150.00—in the Cripple Creek mining district. That they all consist of mining lode locations only; no patents having been issued for any of them. That he believes it will be to the interests of the estate to have its interest in the Roanna, Brindsmid, and Uncle Sam locations sold by order of court for the payment of debts for the following reasons: First, because there is no personal property and no funds in the hands of petitioner with which to pay or discharge debts. Second, because said lode mining claims are unproductive, and

no revenue can be received from them without much expense, and the assessment work thereon for the year 1896, has not been done, and there is great danger that the estate's interest in the locations may be lost unless the property is sold. That, in his judgment, the estate's interest in the claims can be sold to better advantage at private sale than at public auction. That the heirs of decedent are Honora Popst, his widow, John F., James, Harry A., Hugh J., Michael, William and Mary Popst, his minor children. Prayer for summons. That he be directed to sell the locations at private sale. That the court aid him in disposing of the property, or otherwise provide for the payment of claims against the estate.

"Decree for Sale of Real Estate.

"(Filed November 14, 1896.)

"State of Colorado, County of El Paso—ss.:

"In the County Court in Probate.

"November Term, A. D. 1896.

"In the Matter of John Nolon, Administrator of the Estate of George Popst, Deceased, Petitioner, v. Honora Popst, Widow, John F., George M., James, Harry A., Hugh J., Michael, William and Mary Popst, Respondents.

"Decree for the Sale of Real Estate to Pay Debts, Filed November 14, 1896.

"This day comes John Nolon, administrator and petitioner herein, and the respondents John F., George M., James, Harry A., Hugh J., Michael, William and Mary Popst also come by George W. Musser, as their guardian ad litem, and file their answer, and the cause coming on to be heard, and it satisfactorily appearing to the court from the records and files herein that the respondents have been personally served with summons by the sheriff of this county more than ten days before the return day thereof (November 2), thereupon it is ordered that Honora Popst be called, and she, being three times solemnly called in open court by the sheriff, comes not, nor any one for her, but makes default; whereupon it is ordered that the petition be taken as confessed against said adult respondent.

"And now this cause coming on to be heard upon the petition taken as confessed, as aforesaid, the answer of the guardian ad litem, and the exhibits, proofs and testimony produced and taken in open court, and it satisfactorily appearing to the court that George Popst departed this life May 15, 1895, leaving Honora Popst, his widow, and John F., George, Harry A., Hugh J., Michael, James, William and Mary Popst, his children and only heirs at law, that the petitioner was duly appointed administrator of his estate, and that letters were duly granted to him, bearing date September 30, 1895, and that petitioner has made a just and true account of the condition of the estate to the

court, and that the personal estate is insufficient to pay the debts of George Popst, deceased, and the expenses of administration, and it further appearing, and the court so finding, that the amount of the deficiency, aforesaid, is the sum of \$135.50, besides accrued interest thereon, and costs, that the petitioner has made and returned to the court an inventory of the real estate of the deceased, and caused it to be appraised as required by law, the appraised value thereof amounting in the aggregate to the sum of \$250.00, and it further appearing that the said George Popst died seised of the following real estate situated in El Paso county, to wit, one-half interest Brindsmald, one-half interest Uncle Sam, and one-fifth interest Roanna lode mining locations, and the court having ascertained that it will be necessary to sell all the interest of the said estate therein to pay the deficiency aforesaid, with the expenses of administration due and to accrue, and petitioner having filed his bond with surety thereon, which is approved and acceptable to the court:

"It is therefore ordered that said petitioner sell at private sale one-half interest in the Brindsmald, one-half interest in the Uncle Sam, and one-fifth interest in the Roanna mining lode locations to pay the debts now due from said estate and the costs of administration due and to accrue.

"It being the opinion of the court it would benefit the estate to sell at private sale, it is ordered that said premises be sold upon the following terms: For cash upon 10 days' notice in the Morning Times, a daily newspaper of general circulation in El Paso county, which terms shall be distinctly set forth in all the advertisements of sale. And if sold at private sale, the real estate shall not be sold for less than the appraised value of each separate parcel; and in no event shall the petitioner herein, either directly or indirectly, become the purchaser of any part thereof. And it is further ordered that upon making such sale, and payment by the purchaser, that petitioner execute and deliver to the purchaser a certificate of sale as in the case of sales of real estate upon execution, and report his action to the court; further that the cause stand continued to the next term for the hearing and action upon the report.

"Done in open court the 14th day of November, 1896."

On November 27, 1896, the administrator, at a duly advertised public auction on the street in Cripple Creek, sold the estate's interest in the Brindsmald and Uncle Sam locations to Dodson for \$200. The sale was approved by the court, and January 4, 1897, the administrator gave Dodson a deed.

[1] 2. Discussion has arisen at the beginning whether the attack on the county court proceedings is direct or collateral. This

kind of a direct attack is usually brought for the purpose of establishing by evidence allunde the record the untruthfulness of its recitals and to have the voidable judgment resting upon the untruthful record declared void. If the county court acquired no jurisdiction over the proceedings by petition to sell real estate, or over the person by service of summons, and an inspection of the record disclosed the want of jurisdiction, the judgment was void, and could be attacked in any action, either directly or collaterally, whenever and wherever it was brought in question. If there was any jurisdictional infirmity in the county court proceedings which could only be discovered by evidence allunde the record, then the judgment was not void, but voidable, and was good until set aside, reversed, or declared void in a suit brought to try that very issue. Where the issue is that the judgment is void, the trial is by an inspection of the record. Where the issue is that the judgment is voidable, the trial is by matters dehors the record. *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Board of Commissioners v. Platt*, 79 Fed. 567, 25 C. C. A. 87; 52 Cent. Law J. 420.

[2] 3. An inspection of the county court record ordering the administrator to sell real estate to pay debts does not disclose that the order was void on account of the failure of the court to acquire jurisdiction over the proceedings. The petition conforms substantially with the statute, and by the great weight of authority was sufficient to invoke the jurisdiction of the court over the proceedings. *Nichols v. Lee*, 16 Colo. 147, 26 Pac. 157; *Bateman v. Reitter*, 19 Colo. 547, 36 Pac. 548; *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 88 Pac. 473, 8 L. R. A. (N. S.) 1215, 120 Am. St. Rep. 132; *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Manson v. Duncanson*, 166 U. S. 533-547, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Kretsinger v. Brown*, 165 Fed. 612, 91 C. C. A. 450; *Iverson v. Loberg*, 26 Ill. 180, 79 Am. Dec. 364; *Stow v. Kimball*, 28 Ill. 108; *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217; *Moore v. Nell*, 39 Ill. 256, 89 Am. Dec. 303; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214; *Salter v. Hilgen*, 40 Wis. 363; *Tallman v. McCarty*, 11 Wis. 401; *Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250; *Magee v. Big Bend Co.*, 51 Wash. 406, 99 Pac. 16; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Estate of Devincenzi*, 119 Cal. 498, 51 Pac. 845; *Sweet v. Ward*, 43 Kan. 695, 23 Pac. 941; 18 Cyc. 771.

[3] Mistakes, errors, or irregularities are not jurisdictional, and, though they might reverse a case on review, will not render the judgment void.

In *Nichols v. Lee*, supra (on rehearing) 16 Colo. 154, 26 Pac. 157, no inventory and appraisal were filed, and it was contended that the filing of these documents was a

condition precedent to the right to sell real estate; but this court held the statute meant that whenever it shall appear *after* and not *by* an inventory and appraisal; that *after* was a designation of time, not jurisdictional, fixing the order of proceeding; that a failure to file any inventory and appraisal might be an irregularity sufficient to reverse the case on review, but would not prohibit the court from acquiring jurisdiction over the proceedings; that the petition is, in effect, a complaint, and is sufficient to confer jurisdiction upon the court if it contains enough to call upon those heirs who are parties to respond; because nothing is taken as confessed, the court must take the testimony and decide the case on the evidence.

[4] The county court is a court of general jurisdiction, and presumably it found from evidence produced on the hearing of the petition that the personalty was not sufficient to discharge the debts against the estate. This finding could not be overthrown or reversed on the trial in the district court by evidence showing that the county court was mistaken.

It is claimed the inventory and appraisal show that the Mineral Rock stock owned by the estate was valued at \$4,000. They do; but the petition recites that it was the only personal property belonging to the estate, except exempt household goods, appraised at \$108, selected by the widow at that valuation as a part of her allowance; that the value of the mining stock was wholly prospective; that it had no market value, and could not be sold at any price. The presumption is that the court heard evidence on this allegation, and found it true, which left the estate with no available assets.

The district court took evidence upon the value of this mining stock to ascertain, as we understand, whether there was a necessity to sell real estate to pay debts when the petition was filed. This it had no right to do, especially in the absence of a direct issue that the finding of the county court was based upon fraud. But waiving the irregularity of admitting this evidence, it shows that at the time the petition was heard the stock was only worth about one cent, or a cent and a half, a share.

[5] Counsel further claims that the probate files introduced in evidence in the district court show that no claim had been allowed against the estate when the petition to sell was filed. If these files were competent for the purpose of impeaching the findings and judgment of the county court (which we do not decide), still counsel is mistaken as to their effect. The files show that the widow's allowance was fixed at \$1,860; that the exempt household goods and furniture were appraised at \$108; that on October 25, 1895, she relinquished her claim to the appraisers'

estimate of specific property allowed her as widow's allowance, and in lieu thereof elected to take the household goods at the appraised value of \$108, and the balance of the allowance, \$1,752, in money. This was a year before the petition to sell real estate was filed, and was a claim against the estate, for the payment of which the administrator, in the absence of personal property from which it could be realized, could resort to the real estate. The court was not justified in finding the first issue, that the judgment of the county court was void, against the appellants.

[6, 7] 4. If, in truth, the children were not served with process, though the sheriff's return shows and the order recites, they were, then the judgment was voidable as to them, and the court could declare it void in this suit brought for that purpose. *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512. But before the officer's return and the court recitals could be overthrown and the judgment declared void, the proof must be clear, unequivocal, and convincing; in other words, beyond a reasonable doubt. *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Butsch v. Smith*, 40 Colo. 66, 90 Pac. 61; *Baird v. Baird*, 48 Colo. 509, 111 Pac. 79; 32 Cyc. 517.

[8] At the time of the death of Popst in May, 1895, the children were of the following ages: Mary, 3; William, 4; Michael, 6; Hugh, 8; Harry, 10; James, 11; George, 12; and John, 16 years. This trial was in April, 1907, 12 years afterward. The sheriff's return shows the summons from the county court was served in October, 1896, almost 11 years before this trial. All the children except the two oldest, George and John, testified, and their evidence was intended to show that none of them had been served with summons. In fact, James and some of the others stated positively they were not served, and he being the oldest, we will analyze his testimony. He was a mere boy at that time, and it was a long period in a boy's life before this trial occurred. It is unbelievable that at the time he testified he could by his unaided memory recollect that no summons was served upon him almost 11 years before. When questioned as to how he knew he was not served, he said because on the date of the alleged service he had taken dinner with Mrs. Dorrity, which, with nothing to aid his memory, was even more astonishing. The most charitable view to be taken of such evidence is that he had no recollection of being served, which, in fact, is the effect of his testimony. After so long a time it would be extremely dangerous to accept the unaided recollection of any person to overthrow the findings of a court and the return of a sworn officer, and more especially is this true of the statements of children, who have no conception of court procedure.

The return of the officer showed personal service upon these children; the decree recites they were personally served; the at-

torney who conducted the proceedings for the administrator testified that he made previous arrangements with Mrs. Popst, who at that time was friendly to and aiding in the proceedings, to have all the children at home so they could be served; and the officer who made the service testified that he went to their home, found the children there according to arrangements of which he had been told, and served them all personally in the manner designated in the return. The evidence on the trial that the children were not served was negative in character, and was not of that clear and convincing nature required to overcome the positive evidence, taken in connection with the official return and court recitals in the judgment. The district court was not warranted in finding the second issue against appellants.

[8] 5. The third issue tried was that the summons was served on the 29th instead of the 22d of October, as shown by the return. The summons was prepared and signed October 20th by the attorneys Seeds & Parker, and October 21st was issued by the clerk of the court. The final clause signed by the attorneys, save their signatures, was typewritten, as follows: "Witness our hands on this 20th day of October, 1896. [Signature.]" The clerk issuing the summons wrote the following: "Given under my hand and the seal of said court this 21st day of October, 1896. [Signatures and court seal.]" The return, excepting the day of the month, is typewritten, as follows: "State of Colorado, County of El Paso—ss.: I hereby certify that I have duly served the within summons on this 22nd day of October, A. D. 1896, upon the within-named defendants Honora Popst, John F. Popst, George M. Popst, James Popst, Harry A. Popst, Hugh J. Popst, Michael Popst, William Popst and Mary A. Popst, and each of them, by reading the same to them and each of them personally in the county of El Paso and state of Colorado. W. S. Boynton, Sheriff, by J. W. Lupton, Deputy." Mrs. Popst testified Lupton came to her home in October, 1896, and served some process, and, while she did not fix the date, an attempt was made to show that it was on the 29th. As the court found against her, and she has assigned no cross-errors, we would not consider this question, were it not that all the issues were found in favor of the children, from which it is argued the service on them was on the 29th, notwithstanding the inconsistent position is taken that they were not served at all. The possibility that the court may have declared the judgment void for this reason compels us to review this matter.

[10, 11] The county court was without jurisdiction, under our statute, to try the case on the first day of the term, unless respondents were served at least 10 days prior thereto. If the service was in fact on the 29th, then the officer's return and the recitals in the order are untrue, the judgment was voidable, and the district court, on direct attack,

could declare it void. It could, however, do this only upon evidence clearly establishing the untruthfulness of the record. No one testified that the service was on the 29th. Plaintiffs' attempted proof consisted of (1) a certified copy of a record kept in the sheriff's office at Colorado Springs, showing the summons was received and served on the 29th; (2) records of a livery stable, kept in Cripple Creek, showing that Officer Lupton, who made the service, had out a double team on that day from 10 o'clock a. m. to 3:20 p. m.; (3) statements made by Lupton that whatever the record in the sheriff's office recited was correct.

[12, 13] Under some circumstances evidence of this character might be admissible for impeachment; but, in the first instance, an official cannot impeach the return he has made on a writ by a record kept in his office. This court has held that the return is controlling, even over the recitals in the judgment, and, if defective or erroneous, must be amended. It would be useless to require a return if it could be impeached in another trial by a record kept in the sheriff's office. Conceding the admissibility of a certified copy of such a record, it could have no greater weight than the original, which, while in a proper case it might be admissible for some purposes, could not be used primarily to impeach the return. There was no evidence that Lupton used the rig he obtained on the 29th to make this service. A sheriff's return into court cannot be impeached by his oral statements afterwards any more than can the verdict of a jury by the talk of a gossiping jurymen. To uphold such methods would open the door to fraud and render insecure all legal procedure.

[14] When an officer testifies orally in support of his return, which has been attacked, then, upon laying a proper foundation, will be the time to introduce any contradictory records, or prove statements made by him out of court, for the purpose of impeaching his testimony in court. The summons was prepared and issued by Seeds & Parker, attorneys, October 20th. The return was typewritten at the same time, with the expectation and intention that the service would be made on that day. Judge Seeds, a witness for the plaintiffs, testified that the return as originally prepared in his office read, "I hereby certify that I have duly served the within summons on this 20th day of October;" that as attorneys they became doubtful of their authority to issue the writ, and to be on the safe side he went to Colorado Springs the night of the 20th, arriving there the morning of the 21st, had the summons issued by the clerk and returned to Cripple Creek that night, reaching there on the morning of the 22d, when he gave it to the officer for service. He also testified they had made arrangements with Mrs. Popst to have the children all at home on the 22d,

so they could be served. The original typewritten figures in the return, whatever they had been, were erased with a pen and ink, and immediately above was written in ink, "22nd." It is claimed that the erased portion was originally "29" and not "20," and that the erasure and interlineation of "22nd" in ink constitutes an alteration or forgery made after the indorsement of the return. This is a mere conjecture, wholly unsupported by any evidence. The plaintiffs' own witness, who prepared it, testified that it was originally typewritten "20," exactly as in the summons, and explained the necessity for the change. The officer who made the service testified that he received the summons on the 22d; that he went on that day to Mrs. Popst's home, where he found all the children and served them; that in making the return he erased the typewritten figures 20 or 29, whichever they were, with a pen, and made the interlineation himself by writing the figures "22" above the erased figures, and that it was in this condition when he returned the writ into court. The attorneys knew that the service had to be made at least 10 days before the 2d day of November, and made a special trip from Cripple Creek to Colorado Springs, consuming two days and nights, for the very purpose of having the summons issued by the clerk within time, and it is unreasonable to believe that after going to this trouble and expense they kept it until the 29th before giving it to the officer. The children were represented on the 2d of November by an attorney appointed by the court, and if the return then disclosed that the service was on the 29th it is most singular that it escaped the attention of the court and all counsel. The district court was not justified in finding the third issue against the appellants.

[15] 6. In the fourth issue it is contended that Dodson purchased the Brindsmald and Uncle Sam locations at the sale for the administrator, of which appellants had knowledge. When a judgment is declared void on account of the fraud of a party, in a suit brought for that purpose, the power of the court in granting relief is exerted against the wrongdoer by enjoining him from collecting the judgment, or, if he holds property which he has obtained under it, by compelling a reconveyance. It acts upon his conscience. In this case that could not be done, because the judgment of the county court had been fully executed, and the property had passed to third parties, who had no part in the original transaction. The court attempted to afford relief to appellees by setting aside all the county court proceedings, all the conveyances thereunder, and the United States patent. This was not proper. We have held many times that the district court is not a court of review. The county court is a court of general jurisdiction, and the dis-

trict court has no power to review and set aside its judgments. Neither do we think in this case it could or should have canceled the United States patent to Farnsworth. If it found the county court proceedings were void on account of the administrator's fraud, of which appellants had knowledge when they acquired the Brindsmald, it could have granted relief by declaring them trustees of a constructive trust, and compelled them to reconvey the legal title to the beneficiaries. If they purchased the property with knowledge of the alleged fraud, then they held the legal title in trust for the equitable owners.

There has been some discussion as to whether this attack upon the county court proceedings on the ground of fraud of the administrator is direct or collateral as to appellants. As to the parties to the county court proceedings, the attack is direct; but appellants claim as to them it is collateral. In support of their contention they cite *Moore v. Neil*, 89 Ill. 256, 89 Am. Dec. 303, where it is said: "Where a bill in chancery is filed to set aside an administrator's sale, the proceedings should not, perhaps, be regarded as collateral to the former suit, so far as it relates to the parties to that suit; but as to the purchasers, whose title derived from the sale is sought to be divested, it is as purely collateral as an action of ejectment." Also *Kerr on Frauds and Mistakes*, page 48, where it is said: "The transaction being valid until it is avoided, third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded." And at pages 312 and 313, as follows: "The right to impeach a transaction on the ground of fraud has no place as against third parties, who have paid money and acquired a legal right to property without notice of the fraud. As against a purchaser for valuable consideration without notice, having the legal title, no relief can be had in equity. If a man has paid his money in ignorance of the fact that another party has an equitable claim to the property, a court of equity will not deprive him of the benefit of his legal title, even although his equitable claim be of later date than that of the other party. The rule that a man who advances money bona fide, and without notice of the infirmity of the title of the seller, will be protected in equity applies equally to real estate, chattels, and personal estate. The rule is subject to no exceptions, even in favor of charities." Also sections 2 and 3 of *Van Fleet on Collateral Attack*, where it is said a bill in equity to set aside a judgment for fraud becomes a collateral attack when it seeks to affect a bona fide purchaser under the judgment; that it is direct only when pursued, in the time and manner provided by law, against one who is not a bona fide purchaser. We do not think it makes any difference in this

case, because appellees admit appellants were purchasers for value, and that the court could grant them no relief against appellants, unless it found they had knowledge of the fraud. The power to grant relief against appellants turns upon their knowledge of the fraud. This issue then embraces (1) proof of the fraud, and (2) proof of appellants' knowledge thereof.

[16] Appellees admit appellants bought and paid for the property in good faith, without actual knowledge of any infirmity in the title; but it is claimed they had constructive knowledge of the administrator's alleged fraud. Disregarding mere generalities, the specific matters which, it is contended, constitute constructive knowledge are: (1) Deeding the Brindsmald and Uncle Sam locations to the Shurtloff Company by Vedder, in which Nolon, the administrator, held stock. (2) Deeding an undivided half interest in the Uncle Sam to Nolon by Mrs. Vedder. (3) The relationship and association existing between Dodson, Nolon, Vedder, Becker, and Cree. To intelligently understand this claim, one must be familiar with the circumstances connected with the conveyances. Prior to Popst's death, he and Allen each owned an undivided half interest in the locations. Dodson's title originates from two sources. The first is the Allen-Popst deed in 1895, purporting to convey to him all the title in the Brindsmald and Uncle Sam. This chain of title runs from Dodson to N. W. Vedder, December 14, 1895; N. W. Vedder to King, trustee, December 14, 1895; King, trustee, to Shurtloff Company, March 3, 1896. It subsequently developed that this deed in fact only conveyed the Allen interest, although Vedder supposed at the time that he bought all the title. He learned afterwards that Mrs. Popst had no authority to convey the undivided one-fourth interest belonging to the children, and that there might be a defeasance of the interest of the heirs in the Popst title by an administrator's sale to pay debts. The title to these two locations from this source, after passing to the Shurtloff Company, separates; the Brindsmald going to the appellants and the Uncle Sam to the Blanche Company. The second source of Dodson's title begins January 4, 1897, in an administrator's deed to the Popst undivided half interest in both locations, which was the interest he failed to get by the Allen-Popst deed. From this source of title Dodson conveyed the Brindsmald to the Shurtloff Company February 1, 1897. This converged the chain of title to the Brindsmald from each source into the Shurtloff Company, from which it runs: Shurtloff Company to Carnduff, February 1, 1897; Carnduff to Farnsworth, February 24, 1897; U. S. patent to Farnsworth, June 3, 1899; Farnsworth to Pinnacle, March 1, 1901; Pinnacle to Flying Cloud (a part), March 9, 1901.

The Uncle Sam not being involved in this

appeal, we would say nothing further about it, were it not that the contention is made that its conveyance throws light upon the transaction. We have already seen that the Allen title to the Uncle Sam, acquired by Dodson by the Allen-Popst deed, reached the Shurtloff Company through a conveyance from N. W. Vedder. After Dodson received the administrator's deed conveying the Popst undivided half of the Uncle Sam, he conveyed this title to it, acquired through the administrator's sale, to Mrs. J. E. Vedder, wife of N. W. Vedder, April 28, 1897, and she on the same date deeded it to Nolon. The title to this Popst half interest then runs: Nolon to Creighton, December 17, 1897; Creighton to Carlton, October 31, 1897; Carlton to Blanche Company, November 6, 1899. The title to the Uncle Sam derived from the administrator's deed never was conveyed to the Shurtloff Company. The title through the Allen-Popst deed to the Allen undivided half of the Uncle Sam we trace to the Shurtloff Company. It then continues: Shurtloff Company to Mrs. J. E. Vedder, April 29, 1899; Mrs. J. E. Vedder to Carlton, April 23, 1899; Carlton to the Blanche Company, November 6, 1899. In September, 1895, Allen and Mrs. Popst deeded the Brindsmald and Uncle Sam to Dodson. The evidence shows that N. W. Vedder bought these locations from Dodson for \$800, which he paid in currency, and that Vedder thought he owned all the title. Nolon, Becker, and Cree owned a patented lode called the Shurtloff. They all entered into a mutual agreement to deed these claims to a corporation in which each would receive stock representing his interest. The Shurtloff Company was formed some time in the winter of 1895-96, to which Vedder deeded the Brindsmald and Uncle Sam, and under the agreement received 250,000 shares of stock. Nolon, Becker, and Cree deeded the Shurtloff lode to the Shurtloff Company under the agreement, and took stock. The Shurtloff claim was a patented lode, beyond any annoyance of conflicts and adverses, and Vedder agreed to put his locations on an equal footing by patenting them and giving a clear title. If he did not, or if any one became dissatisfied with his title, it was a part of the agreement that all the claims should be deeded back to the original owners. Becker, hearing of the defects in Vedder's title and rumors of adverses, became dissatisfied, and asked that the properties be reconveyed, which was done in the following manner: The Shurtloff Company deeded back to Nolon, Becker, and Cree each an undivided one-third in the Shurtloff lode. The mere legal title to the Brindsmald and Uncle Sam stood in the Shurtloff Company; it did not own them. These locations, after the agreement was rescinded, belonged to Vedder, and he could cause them to be deeded to whomever he pleased. He sold the Brindsmald to the Pinnacle Company for \$2,000, and caused the Shurtloff Company to

make the deed to the purchaser. This \$2,000 belonged to Vedder, and he received the money. The Shurtloff Company, Nolon, Becker, or Cree received no part of it. Vedder then gave the Uncle Sam to his wife, and had the deed made to her. In this way all the parties to the agreement received their original properties. When Vedder learned the Popet interest in these locations was to be sold at an administrator's sale, he knew it would perfect his title to have Dodson purchase it, and, while there is no evidence showing it, it is only natural that he should want him to do so. Dodson bought them at a public, not a private, sale, as argued, in which all persons had an equal opportunity to participate, and paid the administrator \$200 in cash for them.

[17] Of course, the purchase was intended to perfect Vedder's title. Dodson's intent in bidding in the property does not make the sale fraudulent, and is immaterial. The intent with which one bids at a public sale, ordinarily at least, cannot invalidate the sale. After Dodson received the administrator's deed, Vedder had him convey the title from this source to his wife, to perfect the title he had given her. Vedder owed Nolon \$1,700, and Nolon agreed to cancel the debt for an undivided half interest in the Uncle Sam, and this was the consideration for which Vedder had his wife deed a half interest to Nolon. Nolon sold this half interest to Carlton for \$2,500, got \$500 in cash and a note for \$2,000, payable in one year. Carlton promoted the Blanche Company, to which he deeded the Uncle Sam, and succeeded in paying his \$2,000 note to Nolon with Blanche Company stock. The other undivided half interest in the Uncle Sam Vedder sold to Carlton, to whom his wife deeded, and Carlton conveyed the property to the Blanche Company.

The evidence only raises a suspicion that Dodson, in bidding at the administrator's sale, was purchasing for Nolon. The inference is drawn from the subsequent conveyance to Nolon and to the Shurtloff Company, in which he had stock. The undisputed evidence shows that Nolon was a bona fide purchaser of the half interest in the Uncle Sam which he bought from Vedder; and, though he was a stockholder in the Shurtloff Company, he received no interest in the Brindsmid, and no part of the consideration for which it was sold. When these matters of suspicion and inference are explained by the undisputed evidence, any presumption of knowledge arising from the conveyances vanishes. If the Shurtloff Company in fact owned the Brindsmid and sold it to the Pinnacle Company for \$2,000, which was paid to the Shurtloff, it seems as though it would have been impossible to so cover up the transaction that no evidence of it could have been discovered. Appellees produced no other evidence, but rested this issue sole-

ly upon the inference arising from the conveyances, and then themselves destroyed the inference by oral testimony. It is claimed in argument that these parties were all partners in the Nolon clubroom, which circumstance makes the transaction look suspicious. The evidence shows that Nolon was the owner of the clubroom; that Vedder worked for him on a percentage; and that none of the others had any interest in it. Dodson, when he first bought the locations, was not working for Nolon as claimed, and scarcely knew him. Nolon, Becker, and Cree were not partners in any business. They owned the Shurtloff lode together, but that could not be called a partnership. Appellants were purchasers for value, and while the law is, if the administrator's fraud, of which they had knowledge when they bought the property, vitiated the sale, equity will bind their consciences and declare them trustees of a constructive trust and compel them to reconvey, appellees failed to sustain this issue. Appellants paid \$2,000 for the property in good faith, after diligently investigating the title. They had no actual knowledge of the alleged fraud from any source. If we concede the administrator's alleged fraud, appellees are without relief against appellants, unless the evidence satisfactorily shows they had constructive knowledge; that is, information which, if pursued with reasonable diligence, would have led to actual knowledge. It will not be presumed that any reasonable investigation appellants might have made would have led them to the discovery of any more or different knowledge than appellees proved on the trial in attempting to establish constructive notice. If the court found the fourth contention in favor of appellees, it was not warranted by the evidence.

The judgment will be reversed and the cause remanded.

Reversed.

GABBERT and WHITE, JJ., concur.

BOARD OF REGENTS OF STATE UNIVERSITY v. WILSON et al.

(Supreme Court of Colorado. April 7, 1913.)

WILLS (§ 856*)—CONSTRUCTION—INTENTION OF TESTATOR—FAILURE OF PRIMARY GIFT.

Where a testator bequeathed \$50,000 for a home and hospital in a city named for a building, provided the city or the county would support it, otherwise to revert back to and be divided among certain legatees, on the primary gift being declared void as depending on an unenforceable condition precedent, the money should go to the state legatees and not the residuary legatee; courts being bound to give such construction to a will as will put into effect the plain intention of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2172; Dec. Dig. § 856.*]

Error to Boulder County Court; E. J. Ingram, Judge.

Action by the Board of Regents of the University of the State of Colorado against T. V. Wilson, executor of Andrew J. Macky, deceased, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Benjamin Griffith, Atty. Gen., and Charles O'Connor, Asst. Atty. Gen. (John A. Gordon, of Denver, of counsel), for plaintiff in error. Henry O. Andrew and Frank L. Moorhead, both of Boulder, for defendants in error.

BAILEY, J. The matter to be determined is, what does paragraph 7 of the will of the late Andrew J. Macky mean, and what is its effect?

After making a number of specific money bequests to relatives and friends, the testator undertook, in that paragraph, to make a charitable gift for a hospital building and home for poor widows and orphans, as follows:

"7th. I further give and bequeath to and for a hospital building and a home to be built in Boulder, County of Boulder, and State of Colorado, for the comfort of poor widows and orphan children, while sick and unable to care for themselves, the sum of Fifty Thousand (\$50,000) Dollars. Providing the City of Boulder, by its officers, or the County Commissioners and their successors in office, will support and maintain the same, otherwise the said \$50,000 to revert back and the same to be divided up among the following legatees; to wit, Lydia A. Snow, Jerome Macky, Alonzo Macky, Chauncy Macky, Celia B. Dickerson, Anna C. Walker, Mary Aldrich and Emma Aldrich, Cora Doyle, George Robbins, Elmer Robbins, Earl Harold Robbins, Lola Robbins and Monabelle Robbins in proportion as their legacies herein mentioned bears to the said (\$50,000) Fifty Thousand Dollars."

The City of Boulder declined to accept the gift, but the Board of County Commissioners offered to do so upon the condition imposed, and asked that the individual members of the board be appointed trustees of the legacy for the purposes set forth in the bequest. In the case of Robbins v. County Commissioners, 50 Colo. 610, 115 Pac. 526, this court held the primary gift to charity void, for the reason that "its vesting is made to depend upon an impossible, legally unenforceable condition precedent"; whereupon the executor of the estate, joined by certain of the legatees named in that paragraph as legatees over of said \$50,000.00, filed in the county court their petition asking for an order of distribution according to the terms of the bequest. To this petition the Board of Regents of the Colorado State University, as residuary legatee, interposed objection and filed a petition asking for a construction of paragraph seven, claiming the fund of \$50,000.00 under the residuary provision of the will. The county court held the gift over to Lydia A. Snow and others valid, and ordered a distribution of the \$50,000.00 according-

ly. The Regents bring the case here on error, seeking a reversal of the judgment of the county court.

The primary gift being out of the way, the question is, does the gift over take effect and is it to be enforced? It is a settled rule that the intention of the testator must govern, when such intention is made clear by the terms of the will itself. This has been repeatedly declared by our own and other courts to be the guide in all matters involving construction of wills. Courts are bound to give such construction to a will as will carry out and put into effect the plain intention of the testator. Bacon v. Nichols, 47 Colo. 81, 105 Pac. 1082, 40 Cyc. 1386, and cases cited.

The first gift contained in the paragraph of the will under consideration depended, as has already been determined by this court, upon a condition precedent, impossible of legal enforcement. In deciding the case of Robbins v. County Commissioners, supra, this court did not directly pass upon the question involved in this case, and the statement in that case as to the nature of the condition upon which the primary gift depended does not necessarily determine the status of the gift over. It having been adjudged that the primary gift is void, it now remains to determine the meaning and effect of the words in paragraph seven of the will following the attempted gift to the City of Boulder or to Boulder County. The condition precedent which was by this court held impossible of enforcement reads: "Providing the City of Boulder, by its officers, or the County Commissioners and their successors in office, will support and maintain the same" (the hospital building and home). Following this proviso comes the clause which is now before the court for consideration, to wit: "Otherwise the said \$50,000, to revert back and the same to be divided up among the following legatees," Lydia A. Snow and others. The testator did not say that the gift to the county should take effect on condition that the county expressed a willingness to accept the gift, but imposed as a condition precedent to the vesting of the gift that the county should permanently support and maintain the hospital and home. That such was the intention of the testator, and that such is the meaning of the proviso, is made clear by the language of the court, in Robbins v. County Commissioners, supra, where this is said:

"When Mr. Macky said that the \$50,000, which he undoubtedly intended should be used in building a hospital and home, should revert back and be distributed among certain legatees, if the county commissioners and their successors would not furnish the necessary support and maintenance, he undoubtedly meant thereby to postpone the vesting of his gift until Boulder County, through appropriate action by its board of commissioners, became legally bound to do

so. Mr. Macky did not intend to make provision for some mere temporary thing. His purpose was to provide a hospital and home for all time to come for those who were entitled to enjoy its privileges. It is not the building, for whose erection the money was given, but 'the said \$50,000' itself, that is to revert and be so distributed if the required support was not forthcoming."

The clause in the will which provides that the county commissioners "will support and maintain the same," means provided they shall, or do, support and maintain it. It in no sense implies that a mere willingness on the part of the board to do so is sufficient. It requires that this support be absolutely and unconditionally provided for and furnished, else the condition is not met. And if for any reason, because the law interposed an obstacle against providing such support and maintenance, or for any other reason, such support was not forthcoming, then the condition upon which the primary gift rests was not fulfilled and the gift failed. Attaching this meaning to the condition precedent then, we look to the provision of the will itself in this behalf to determine the status of the gift over. By this paragraph of the will Mr. Macky said, in effect, if the City of Boulder, or if the Board of County Commissioners of Boulder County, will not, do not, or can not, furnish maintenance and support for the proposed charitable institution, then the gift of \$50,000.00, primarily intended for that charity, shall be divided among those certain other legatees in the will, specifically named in this paragraph. Language could scarcely make it plainer that the testator intended this money to go to erect a charitable home for poor widows and orphans, who under the terms of the will were entitled to such privilege, if either Boulder City or the County of Boulder could and would permanently support and maintain it; if not, then to the other legatees named. It is manifest that the plain intention of the testator was that the gift over should take effect if, for any reason, the City of Boulder, or the Board of County Commissioners of Boulder County, should fail to provide for the permanent support and maintenance of the hospital and home, and there being no legal objection to be urged against such gift, it ought, upon every consideration, to be given full effect.

Since by the language of the will itself the intention of the testator respecting this fund is clear, and under well settled principles of law such intention must control in the disposition thereof, as the gift over contravenes no established rule of law or public policy, the various other matters, so ably presented by opposing counsel, upon the question of conditional limitation and kindred subjects, and the rules of law applicable thereto, need not be considered. Neither is it necessary to determine what the status

of the residuary legatees would be, had both gifts been held void, as it is clear, under the construction here given to paragraph seven of the will, that such legatee has no claim upon or interest in the fund in question.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

PEOPLE ex rel. BUTLER et al. v. DISTRICT COURT OF SIXTH JUDICIAL DIST.
et al.

(Supreme Court of Colorado. April 7, 1913.)

1. PROHIBITION (§ 4*)—DISCRETION OF COURT.
The granting of a writ of prohibition rests in the sound discretion of the court; the writ not being a writ of right.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 3; Dec. Dig. § 4.*]

2. PROHIBITION (§ 18*)—DEFENSES—LACHES.

Receivers were appointed for defendant corporation on February 7, 1911, and upon March 1st petitioners filed a petition praying leave to intervene as defendants and to file a motion to vacate the order appointing the receivers, which petition was denied on March 4th. Petitioners did nothing further until January 6, 1912, when they filed another petition for leave to intervene, stating, as excuse for delay in presenting it, that they had abandoned their former petition and acquiesced in the appointment of the receivers because it was represented to the court, at the time of such appointment, that shortly funds would be raised sufficient to pay the corporation's pressing debts and develop its properties, and that the refusal to allow the first petition for intervention was largely based on such circumstances, but that nothing had been done to relieve the corporation from financial embarrassment, but a large additional indebtedness had been created. *Held*, that an application for prohibition filed November 22, 1912, to restrain the district court from proceeding further in the proceeding in which the receivers were appointed, and to set aside the order appointing the receivers, would be denied for laches in presenting the application.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 67; Dec. Dig. § 18.*]

3. APPEAL AND ERROR (§ 78*)—JUDGMENTS APPEALABLE—"FINAL JUDGMENT."

An order denying a petition for leave to intervene was a "final judgment" against petitioners, to which a writ of error would lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7633.]

En Banc. Application for prohibition by the People on the relation of Joseph G. Butler, Jr., and others against the District Court of the Sixth Judicial District of the State of Colorado and others. Application denied.

A. M. Stevenson and L. M. Goddard, both of Denver, for petitioners. Charles W. Waterman and Caldwell Martin, both of Denver, for respondents.

HILL, J. This is an original application for a writ of prohibition to restrain the dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trict court of San Juan county and the Honorable Charles A. Pike, judge thereof, from proceeding further in a certain cause pending in said court, and to compel the court to quash, set aside, and annul certain orders appointing receivers therein and authorizing receivers' certificates of indebtedness. The order and rule to show cause were issued and return made thereto, wherein the respondents challenge the sufficiency of the petition, etc.; it also raises the question of acquiescence and laches upon behalf of the petitioners.

Upon February 7, 1911, E. E. Dick, as plaintiff, filed in the district court of La Plata county his complaint against the Green Mountain Mining & Milling Company as defendant. Among other things this complaint states that the defendant is the owner and in possession of sundry mining properties, etc., in San Juan county of a value in excess of \$1,000,000; that it has heretofore been engaged in operating these properties, etc.; that it has issued \$800,000 of interest-bearing bonds secured by mortgage upon its property, of these \$180,000 is an outstanding indebtedness; that \$440,000 of the bonds are held as collateral security for the payment of \$290,000 of other indebtedness of the defendant; that it has a floating indebtedness of \$480,000 now due and payable; that six months' interest on the \$180,000 bonds aforesaid is past due and unpaid; that the plaintiff is the owner of 120 shares of the capital stock of the defendant; that the defendant is indebted to him in the sum of \$560 for salary as secretary and treasurer; that, in addition thereto, he holds two notes of the defendant for \$2,000, which are long past due; that defendant is wholly unable to pay the principal or interest on its bonds or any of its indebtedness as the same matures or has matured; that its property is subject to judgments, executions, and attachments at the hands of its numerous creditors; that suits have been brought against it by its creditors in Pennsylvania and Colorado; that, if receivers are not appointed, the defendant will be subject to a multiplicity of suits and litigation of various sorts in Pennsylvania, Colorado, and elsewhere; that its assets will be dissipated and sacrificed; that certain creditors will secure a preference over others; that its property will be taken upon execution and sold piecemeal; that its property will be greatly dissipated, diminished, impaired, and wasted; that, if the interest on its bonds be not paid, the holders will declare default and proceed to foreclose their mortgage; as a result, the bondholders will secure a preference over the unsecured creditors and all the property will be consumed in the satisfaction of the indebtedness secured by the bonds; that, if the assets of defendant are not sacrificed by forced sales in the threatened litigation, they are far in excess of the liabilities of the defendant, and, if properly administered,

will pay all its debts and leave a substantial residue for its stockholders; that the procuring of a comparatively small amount of money will permit the operation of the mines and plant of the defendant; that, if defendant is enabled to again resume operation of its property, it can eventually discharge and pay its indebtedness without sacrifice of its property. This is followed with detailed statements how this can be accomplished. It is alleged that the taxes for 1910 are unpaid and the result which will follow if not arranged for. It states that the plaintiff is informed and believes that the defendant will be able to procure funds sufficient to accomplish the results above indicated, if given a reasonable period to do so before there is foreclosure and forced sales of its property. This is followed with detailed information as to how this is to be done, with the further allegations that, unless the court assumes jurisdiction and appoints receivers, the claims of all unsecured creditors will be ultimately lost, as well as great damage to the secured creditors and stockholders. It is also alleged that, in a United States court in Pennsylvania, receivers have been appointed and have proceeded to take charge of the assets of the company in that state; that in that action the company by answer admitted the allegations of the bill which were, to a certain extent, the same as those contained in this complaint. The prayer is for judgment against the defendant for \$2,512 and interest, for the appointment of receivers with detailed authority, and that the officers and agents of the company be compelled to turn the property over to them, and that all creditors be enjoined from instituting suits or attempting to enforce collections other than through the receivership, etc., and for general relief.

Upon the same day the defendant company purported to file its answer in which it admits the truth of the allegations contained in the complaint and consents to the appointment of receivers. Three receivers were appointed upon the day the complaint and answer were filed; they thereafter qualified and took possession of the property, and, it appears, have thus continued under the orders of the court.

Upon February 8, 1911, the court, upon its own motion, transferred the cause to San Juan county; it appearing that it was one affecting both real and personal property situate in that county.

On March 1, 1911, these petitioners, Joseph G. Butler, Jr., and C. A. Ferguson tendered for filing in the action above referred to their verified petition for intervention wherein they allege, among other things, that they were not served with notice and had no knowledge of the appointment of the receivers until February, 1911; that the Pennsylvania court was without jurisdiction in the premises, and that the appointment of

receivers there, as well as here, was without notice, except to one De Armit, who claimed to be the president of the defendant company, and one Ralph Hartzell, attorney, who assumed to file an answer for the defendant; that the company is indebted to Butler in the sum of \$23,625.85, with interest upon certain notes, describing them, also an additional \$5,000 furnished as a loan which is long past due; that he is a large stockholder owning 204,000 shares; that Ferguson is a creditor, and upon January 21, 1911, obtained a judgment for \$3,500, with interest, against the defendant in the courts of Pennsylvania; that Ferguson is a stockholder owning 135,420 shares; that a large majority of the stockholders and creditors are opposed to the appointment of receivers either in Pennsylvania or Colorado; that it appears on the face of the bill in this suit that this court was without jurisdiction to appoint receivers; that there is no equity in the bill (this is followed with detailed reasons attempting to thus show); that Ralph Hartzell, purporting to answer for the defendant, had no authority to represent it; that there was no proper notice given to the company, nor any notice given to the stockholders, creditors, or bondholders; that the complaint fails to state a cause of action; that the appointment of receivers is not in the interest of the stockholders, etc. The prayer is for permission to intervene and become defendants, to include such other stockholders and creditors as desire to join them, that they may be permitted to file a motion to vacate the order appointing the receivers, to demur to the bill, or otherwise plead.

This petition was duly considered by the court, and after arguments, on March 11, 1911, the court declined to allow the petitioners to intervene. No exceptions appear to have been taken to this ruling, and nothing further appears to have been attempted by these petitioners until January 6, 1912, when they presented to said court another petition for intervention in said action. This petition sets forth a copy of the former one, with a statement of the disposition thereof. In addition to the allegations contained in the first petition, which are reiterated in the second, other matters are alleged, some of which are that the decision of the judge in refusing to allow the petitioners to intervene upon their former petition was largely based upon the fact that, at the time of the appointment of receivers, it was represented to the judge, if he appointed the receivers, that one William P. De Armit and his associates would, within a very short time, raise the necessary funds to pay the pressing debts of the defendant company and also sufficient other money to develop and improve its properties and to enable it to work and operate them and make it a going concern; that, upon account of these promises, the judge appointed the receivers; that more

than ten months have elapsed since the appointments, but that no part of the pressing, or any, debts of the company have been paid; that no improvements have been made upon the property since that time, and, in fact, nothing has been done to relieve the company from its financial embarrassment or to put its property in a condition to work and operate, but, on the contrary, a large amount of additional indebtedness has been incurred since the appointments; that the petitioners have used every diligence to intervene; that, after the decision refusing to permit the petitioners to intervene, they were advised and verily believed that it would not be proper and in fact would be unavailing for them to attempt to intervene until a reasonable time had elapsed for the fulfillment of the promises said to have been made on behalf of De Armit, as hereinbefore stated; that when the representations were made to the judge, as aforesaid, that the indebtedness of the defendant company would be paid or substantially reduced and provisions made for working the properties, etc., the said De Armit was then and has ever since been insolvent and was and is entirely without means of his own and without ability to raise money from other sources for the use of the defendant, or in fact to do anything of a substantial character to relieve the defendant company of its financial embarrassment; that Dick was an employé of De Armit and sustained the closest confidential relation to him; that Dick was and is one of the smallest creditors; that Dick, De Armit, and others conspired and confederated together for the purpose of obtaining the appointment of receivers in order to prevent the creditors from collecting their just claims so that Dick, De Armit, and others might, through said receivers, obtain more complete control of the property of the defendant for the purpose of harassing and annoying the creditors and the majority of the stockholders to the end that the creditors would compromise their indebtedness against the defendant company for a small per cent.; that the stockholders would part with their stock for a trifling amount and thus enable the said De Armit, Dick, and others in such conspiracy to obtain ownership of the property without paying any substantial amount therefor; that Dick, De Armit, and others, claiming to be the directors of the company, prior to the appointment of receivers, attempted to reduce the capital stock from \$3,000,000 to \$1,250,000. Then follows a history of this transaction whereby it appears all the stock of the corporation was turned over to certain trustees, in which manner it is alleged that De Armit and his associates had controlled the affairs of the company against the interest of its creditors and those owning a majority of its stock.

Other allegations are set forth pertaining to the history of the defendant company and

the alleged fraudulent acts of Dick, De Armit, and others in connection with its management. The prayer is the same as in the former petition. The court, upon January 6, 1912, after considering the application and hearing the arguments of counsel, ordered that the application and petition be denied. Thereupon the petitioners offered for filing a motion to vacate and set aside the order made January 7, 1911, appointing receivers. The court refused to allow this motion to be filed. Mr. Ferguson then presented for filing a demurrer to the complaint. This was likewise refused. The petition praying for the writ of prohibition was filed in this court upon November 22, 1912.

The contentions of the petitioners are that, while the court had jurisdiction to entertain the action proper, which they claim is a suit upon notes and for services rendered, it was without jurisdiction over the property of the corporation attempted to be covered in that portion of the petition setting forth alleged reasons for the appointment of receivers; that if this position is wrong, and the court had jurisdiction to pass upon the question, when the allegations of the petition are considered, it fails to disclose facts sufficient to justify the court in its appointment of receivers, and, in so doing, it exceeded its legitimate powers; that by presenting their petition for intervention with these reasons therein stated, they gave to the trial court an opportunity to correct its erroneous ruling in this respect, which it declined to do; and that this is sufficient to give them the right to petition this court for the writ of prohibition therein, although they have not yet become parties to the action, and that they have no plain, speedy, and adequate remedy at law to protect their rights in the premises.

[1] This court has universally held that a writ of prohibition is not a writ of right, but rests in the sound discretion of the court. *Leonard v. Bartels*, 4 Colo. 95; *People ex rel. v. District Court*, 6 Colo. 534; *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516; *People ex rel. v. District Court*, 19 Colo. 343, 35 Pac. 731; *People ex rel. v. District Court*, 21 Colo. 251, 40 Pac. 460; *People ex rel. v. District Court of Lake Co.*, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850.

[2] For the reasons hereinafter stated, we are of opinion that, upon account of the acquiescence and laches of the petitioners, this court ought not to entertain this application. This makes unnecessary any consideration of the many intricate questions presented.

It will be observed that the receivers were appointed February 7, 1911; that upon March 1st, same year, the petitioners tendered for filing their first petition of intervention. This was denied upon March 11th following. Nothing further was done by them until January 6, 1912, a period of approximately ten months, when they filed another petition to intervene, wherein they

set forth, in substance, as excuses for delay in its presentation, that they have abandoned any right to stand upon their former petition, and acquiesced in the appointment of the receivers for the reason, as they allege, that it was represented to the court, at the time of the appointments, that, within a very short time, funds would be raised by those who desired the appointment of receivers sufficient to pay the pressing debts of the defendant company, and also to develop and improve its properties and to enable it to work and operate them and make its plant a going concern, and that the court's decision in refusing to allow them to intervene was largely based upon these promises, but that, during these ten months, nothing had been done in this respect to relieve the company from its financial embarrassment or to put its property in a condition to work and operate, but, on the contrary, a large amount of additional indebtedness had been incurred, etc. In other words, they said to the court that while we did not approve of the appointment of receivers, and thought you were without jurisdiction in so doing, and we thus stated in our first petition for intervention, yet, upon account of the promises made to you that the emergency debts of the corporation would be paid and sufficient other funds arranged for to make the defendant's business a going concern, we acquiesced therein and said nothing further for a period of ten months in order to see if such arrangements would be carried out by that faction of the stockholders of the defendant who desired and secured the appointment of the receivers. To put it in another way, it was to say that, if things work out all right and to our advantage, we acquiesce in the appointment of receivers, but, if they go wrong (although we have not said so and will not until it is necessary to act), it is our intention, when it is thus ascertained, to again object to the appointments and challenge the jurisdiction of the court to make them. Such action upon behalf of the petitioners was unquestionably an acquiescence in the appointment of the receivers and in their handling of the property during the ten months following their appointment.

The second petition for intervention was presented January 6, 1912, and by the court acted upon and refused the same day. The petition for the writ of prohibition was filed in this court November 22, 1912. It fails to give any excuse or reason why it was not applied for until over ten months after the district court for the second time had refused to grant the relief prayed for.

Regardless of whether the case is of such importance as the petitioners claim, we are of opinion that their actions as above stated, during the ten months after these appointments were made, present a case of acquiescence during that period, and that their delay for the 10½ months thereafter, before

making application here for the writ of prohibition, presents a case of laches; and, when both are considered, they are sufficient to justify this court in refusing to consider the questions raised pertaining to the merits of the controversy under its extraordinary jurisdiction by writ of prohibition. While it is claimed that the petitioners (by presenting their petition of intervention) gave to the trial court an opportunity to pass upon the question of its jurisdiction to appoint receivers in an action to which the petitioners were not then parties (a question unnecessary to determine), it is conceded the only thing that the court did pass upon was their right to intervene.

[3] Its refusal was such a final judgment against them to which a writ of error will lie. *Henry v. Travelers' Insurance Co.*, 16 Colo. 179, 26 Pac. 318; *Curtis v. Lathrop*, 12 Colo. 169, 20 Pac. 250; *Limberg v. Higginbotham*, 11 Colo. 316, 18 Pac. 33; *Harman v. Barhydt*, 20 Neb. 625, 31 N. W. 488; *First Nat. Bank v. Gill & Co.*, 50 Iowa, 425; *Nat. Distilling Co. v. Seidel*, 103 Wis. 489, 79 N. W. 744.

Had a writ of error been promptly sued out upon the court's first refusal to allow the petitioners to intervene, the matter could probably have been reached and disposed of in the regular manner by this time. Whether the petitioners had the right to present a second petition to the court, raising the same contention, with the further statements that the appointment of the receivers had not proven successful or accomplished what was promised, is unnecessary to determine. They elected, as they say, after the first refusal to take their chances; and, had the appointments brought the results alleged to have been promised, it appears they would have been satisfied and continued to acquiesce in the jurisdiction of the court; but, inasmuch as they did not work out as they alleged was promised, they now desire to have the question determined in this extraordinary manner. Under such circumstances, the application ought not to be entertained.

For the reasons stated, the alternative order and rule will be quashed and the writ denied.

Application denied.

NORCROSS v. CUNNINGHAM.

(Supreme Court of Colorado. April 7, 1913.)

1. ACTION (§ 38*)—INCONSISTENCY OF ALTER-NATIVE REMEDIES.

An action by a purchaser of land requiring water for its irrigation with a contract right to take water for that purpose to have his deed decreed to convey as appurtenant to the land a certain amount of water on the theory that such amount had been conveyed to him by his deed, and his claim in the same action to recover damages for the vendor's alleged fraudulent representations as to the water rights on the

theory that such rights had not been conveyed to him by his deed, were inconsistent remedies. [Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

2. ELECTION OF REMEDIES (§ 3*)—EFFECT AS BAR OR ESTOPPEL.

Where a purchaser of land requiring water for irrigation, with knowledge of all the facts, has elected to proceed for a decree as to the water rights claimed to have been conveyed by his deed, he is bound by such election and is thereafter estopped from an inconsistent claim against the purchaser for damages for alleged misrepresentations as to the rights conveyed by the deed.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. §§ 8, 4; Dec. Dig. § 3.*]

Error to District Court, Larimer County; Harry P. Gamble, Judge.

Action by T. R. Norcross against John M. Cunningham. Judgment for defendant, and plaintiff brings error. Affirmed.

Rhodes & Farnworth, of Ft. Collins, for plaintiff in error. Fred W. Stow and Homer S. Stephens, both of Ft. Collins, for defendant in error.

HILL, J. Upon motion judgment on the pleadings was granted in favor of the defendant. The plaintiff's complaint alleges, in substance, that in May, 1906, he purchased from the defendant a farm situate under the Hillsborough Canal, from which it requires water for its irrigation; that he paid \$10,000 for the land and water to be conveyed therewith; that as a part of the consideration the defendant represented that there would be conveyed in the same warranty deed and in connection with the land, 125 inches of water in this canal; that this water was and would be a water right to said land for the entire irrigation season of each year; that it was of the earliest water appropriated from the Big Thompson river, the stream from which the canal received its supply; that certain crops, which could be raised and which made the farm especially desirable and very valuable, required late irrigation, and that the water rights which would be conveyed would furnish water during the late irrigation season to raise such crops; that relying upon defendant's representations with reference to the water to be conveyed and that was conveyed, he purchased said land and water and in May, 1906, received from defendant a warranty deed, which deed conveyed the land and 125 inches of water in one instrument; that upon receipt of the deed he entered into possession, began and has ever since continued to cultivate the farm; that after plaintiff took possession, defendant claimed that the water conveyed in connection with and for the irrigation of this land was simply a right to take water from this canal by reason of a contract entered into between the owner of the canal and other persons, which contract, through sundry conveyances, had been conveyed to defendant; and that the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had only conveyed by his deed to plaintiff what was known as this water contract. The plaintiff further alleges that the canal company was under no obligations to furnish water under this contract, except when there was water in the canal derived from the Big Thompson river under an appropriation known as Priority No. 25, being of a late date; that he has been unable under and by reason of the water conveyed to him by said deed to obtain any water from this canal for the irrigation of this land, except in the early portion of each irrigation season, up to about July 1st; that after the 1st of July said water right so conveyed furnishes no water for said lands; that this condition has prevailed ever since the purchase, and it will so continue hereafter, except an intermittent amount during the early portion of the irrigation season; that by reason of these facts he cannot raise any crops upon the lands, except early crops; that the land without a water right furnishing water during the entire irrigation season, but only for the early portion, is of no value in excess of \$5,000; that plaintiff has been injured, damaged, and defrauded by the defendant through his false and fraudulent representations, etc., in the sum of \$5,000, for which amount judgment is prayed.

[1] In his answer the defendant, among other things, alleges that subsequent to the sale and in March, 1909, with full knowledge of all facts, the plaintiff instituted a suit, etc., against the defendant by which he sought to have this deed for the land and the 125 inches of water decreed to convey as an appurtenance under the deed and to the land and as annexed to the land, a certain other 1.75 cubic feet of water which was a part of the canal's Big Thompson Priority No. 1; that in the same suit the plaintiff also sought to recover damages alleged to have resulted to him by reason of the alleged false and fraudulent representations made at the time of the sale pertaining to the water rights and upon account of his failure to procure the same; that, at the time of the commencement of the other suit, the plaintiff had full knowledge of all facts relative to his rights, etc.; that at the time there were two remedies open to him for the enforcement of his alleged claims arising out of the purchase of this land and water, which were, by claiming that he had received by this deed the 1.75 cubic feet of water above referred to and having it so decreed by the court, or that he had not received the water which he should have received by the deed, and recover damages against the defendant for failure to convey it; that these remedies are inconsistent, in that by the first his claim is based upon the fact that he had received the water, while the latter is based upon the fact that he did not receive the water; that both of said remedies were adopted and sought

to be enforced by the plaintiff in the former suit and were so alleged in his complaint; that during the pendency of this suit the plaintiff elected to base his claim upon the fact that he had received said water by said deed; that his complaint was amended accordingly; that he thereafter abandoned his claim made therein, based upon the fact that he had not received the water and made no claim for damages in the action upon account of such failure on the part of the defendant to convey the said water, as contained in his original complaint; that the suit now instituted is upon the same transaction and based upon the same claim as that portion of plaintiff's former suit, which related to damages; that the facts and circumstances as set forth in plaintiff's former suit in that portion which was by him abandoned by his election, as aforesaid, are the same as here; that by reason of said election he is now barred from claiming any damages or relief in this suit; that having claimed in the former suit that he had, by the deed, received the water, he is now estopped from claiming damages by reason of the failure on the part of the defendant to convey the same. As a further defense it is alleged that during the progress of the former trial, the plaintiff's counsel, with his consent, acquiescence, and ratification, and in his presence and in open court, stated that the plaintiff did not claim that any fraud had been committed upon him in the transaction, for which reason that he is estopped from claiming damages in this suit against the defendant upon account of any alleged false and fraudulent representation on the part of the defendant.

The plaintiff, by replication, sets forth that in June, 1908, he brought suit against the ditch company and the defendant to compel them to recognize him (by virtue of the provisions of his deed from the defendant) as the owner of the 1.75 cubic feet of early water theretofore owned by the defendant. He states that this suit was decided against him. He admits that in March, 1909, he brought the suit against the defendant as alleged in the answer, in which he sought to have the deed conveying the land and 125 inches of water decreed to convey therewith as an appurtenance under the deed and to the land the 1.75 cubic feet of water, which was a part of the earlier priority. He also admits that this suit was decided against him, but denies that in either there was tried or determined the question of damages involved in this action.

It will be observed that the plaintiff has not denied that in his second suit brought against the defendant he also sought to recover damages growing out of the same transaction, and that during its pendency he elected to proceed under that portion of his complaint by which, if he was successful, it would secure for him the water which he claimed he had purchased. The great weight

of authority in which we concur is to the effect that the two remedies are inconsistent. 15 Cyc. 257; Bales v. Williamson, 128 Iowa, 127, 108 N. W. 150; 7 Ency. of Pl. & Pr. 360; Bracken v. Atlantic Trust Co., 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Wheeler v. Dunn, 13 Colo. 428, 22 Pac. 827; Bank of Santa Fe v. Board of Com'rs, 61 Kan. 785, 60 Pac. 1062; Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997; Campbell v. Kauffman Milling Co., 42 Fla. 328, 29 South. 435; Carroll v. Fethers et al., 102 Wis. 436, 78 N. W. 604; McWilliams v. Thomas et al. (Tex. Civ. App.) 74 S. W. 596; Taussig et al. v. Hart, 49 N. Y. 301; Lowenstein & Bros. v. Glass et al., 48 La. Ann. 1422, 20 South. 890; Ermeling v. Gibson Canning Co., 105 Ill. App. 196; Salyers v. Smith, 67 Ark. 526, 55 S. W. 936; Ogden v. Moore, 95 Mich. 290, 54 N. W. 899; Remington Paper Co. v. Hudson, 64 Kan. 43, 67 Pac. 636; James v. Parsons, Rich & Co., 70 Kan. 156, 78 Pac. 438; Elevator Co. v. U. P. Ry. Co., 97 Iowa, 719, 66 N. W. 1059; Conrow et al. v. Little et al., 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693.

[2] In the former action, the defendant (with knowledge of all the facts) having elected as to which of two inconsistent remedies he would pursue, we are of opinion that he is bound by such election. For this reason the motion for judgment upon the pleadings was properly sustained. See Anthony v. Slayden et al., 27 Colo. 144, 60 Pac. 826, and cases therein cited.

The judgment is affirmed.
Affirmed.

MUSSER, C. J., and GABBERT, J., concur.

BARROWS v. McMURTRY MFG. CO. et al.
(Supreme Court of Colorado. April 7, 1913.)

1. CONTRACTS (§ 117*)—LEGALITY—RESTRAINT OF TRADE—PROTECTION OF PROMISEE.

One may lawfully covenant not to pursue a particular business within a limited territory, even if it be an entire state, if the restraint thereby established is reasonable and affords only a fair protection to the one for whose benefit it is imposed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

2. CONTRACTS (§ 117*)—LEGALITY—RESTRAINT OF TRADE—PARTIAL OR GENERAL RESTRAINT.

The bare fact that a contract in restraint of trade applies to an entire state, or even to wider limits, that the restraint is general or partial, extensive or limited, is of itself immaterial; the public welfare is the first consideration, and if it is not adversely affected thereby the contract should be sustained, if it is reasonable and imposes upon the party bound no greater restraint than is necessary for fair protection within the plain purpose of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

3. CONTRACTS (§ 117*)—LEGALITY—RESTRAINT OF TRADE.

A contract, whereby the entire stock in trade and the good will of a plate glass company, of which defendant was the president and the largest stockholder, was sold to plaintiff for \$2,500, with a covenant that the sellers would not for 10 years engage, directly or indirectly, in any such business in the state, or accept employment with or work for any house engaged in such business, or invest any money in or become stockholders or directors in any company carrying on such business in the state, was not invalid as a contract in restraint of trade.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

4. CONTRACTS (§ 116*)—RESTRAINT OF TRADE—CONSTRUCTION.

The legality of contracts in restraint of trade is to be resolved on the particular facts of each contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

5. CONTRACTS (§ 116*)—LEGALITY—RESTRAINT OF TRADE—REASONABLENESS.

The test of whether a contract in restraint of trade is reasonable is whether the restraint is only such as to afford a fair protection to the promisee, and not so large as to interfere with public interests; and whatever restraint is larger than the necessary protection of the party, if oppressive, is, in the eye of the law, unreasonable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

6. CONTRACTS (§ 116*)—RESTRAINT OF TRADE—CONSTRUCTION.

The law looks with disfavor upon any condition which tends to stifle the free and unimpeded course of competitive buying and selling of necessary commodities in the open market.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

7. CONTRACTS (§ 117*)—LEGALITY—RESTRAINT ON MONOPOLY OF TRADE.

In an action to enjoin defendant, who sold the entire stock in trade and good will of a plate glass company, from a breach of his covenant not to engage, directly or indirectly, in any such business within the state for a term of 10 years, it appeared that the business of the company extended over 10 or 11 states; that when the sale was made conditions in the business were demoralized as a result of defendant's methods; that it was then impossible to make fair or reasonable profit therein; that plaintiffs had no control over the supply; that numerous other competitors remained; that capital was entirely free to enter the field; and that plaintiffs' selling schedules were advanced after the purchase. *Held*, that the contract did not give to plaintiffs an unlawful monopoly of the plate glass business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

8. CONTRACTS (§ 116*)—LEGALITY—RESTRAINT OF TRADE—CONSTRUCTION.

It is quite as important, as a matter of public interest and welfare, that individuals be not allowed with impunity to breach their contracts in restraint of trade, advisedly made, as it is that the public have protection from such restraint; and where, without violation of legal principles and public policy, such contracts may be upheld, they should be rigidly enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.
Action for an injunction by the McMurtry

Manufacturing Company and another against Stanley M. Barrows. Judgment for plaintiffs, and defendant brings error. Affirmed.

Davis & Whitney, of Denver, for plaintiff in error. Cranston, Pitkin & Moore, of Denver, for defendants in error.

BAILEY, J. The action was by defendants in error against Stanley M. Barrows, plaintiff in error, to enjoin him from continuing to violate the terms of a certain contract entered into May 5th, 1906, between himself, his sister and brother of the first part, the Denver Plate Glass Company of the second part, and the defendants in error of the third part. The defendant was the largest stockholder in, and president and general manager of, the Denver Plate Glass Company, a corporation engaged in the business of handling paints, varnishes and plate and window glass in Colorado and neighboring states. The McMurry Manufacturing Company and the McPhee & McGinnity Company, plaintiffs, were engaged in similar business in about the same territory. The chief place of business of the three companies was Denver, where their main offices were located. Under the contract the entire stock in trade of the Denver Plate Glass Company, except a portion of the paint stock, was sold to the plaintiff companies, including the good-will of the company and that of Stanley M. Barrows and his brother and sister. The amount charged and paid for the good-will was \$2,500.00. Among other things, the contract contained the following:

"And the parties of the first part and each of them agree with the third parties that if there is a consummation of this deal, until May 1st, 1916, they will not, nor will any of them, engage directly or indirectly in any business in the state of Colorado, which carries, handles or sells paints, varnishes or glass, or accept employment with or work for any house or business which handles any such goods or merchandise or class of business, or invest any money in or become stockholders or directors in any company or corporation which in any way carries on in the state of Colorado any class of business similar to that heretofore carried on by second party."

In substance, the complaint alleges that defendant violated this covenant, in that, soon after the consummation of the sale, he not only engaged in the glass business himself, but was instrumental in the organization of certain corporations within the state for like purposes, one of which, in particular, the Independent Glass Company, was incorporated within two weeks after the execution of the contract. The defendant answered that the contract is against public policy, secured under a collusive and fraudulent agreement for the purpose of creating a monopoly in restraint of trade,

and therefore void; and further, that it was executed by the defendant under duress, and for that reason unenforceable. A replication denied the charges of duress and conspiracy and other affirmative defensive matter. The court, without a jury, upon hearing found the issues joined generally for the plaintiffs, with specific findings as follows:

"That said defendant, Stanley M. Barrows, received and obtained a good and valuable consideration for the execution of said agreement, and for the making of the personal covenants made by him and contained therein; that the said contract was not executed by him under duress of any kind nor under intimidation or coercion of any kind, but was executed of his own free will and volition, and solely and alone for the consideration arising therefrom, and for the benefits he would receive from the payment of the moneys therein agreed to be paid; that neither the said contract nor any part thereof was or is invalid or void; that no agreement or covenant therein contained was or is in restraint of trade, and that the agreements therein contained made by the defendant, including the agreement contained in said tenth paragraph, were and are reasonable and fair, and were necessary to protect the plaintiffs in the purchase made by them of goods, wares and merchandise, and good-will.

"Second. The court finds, from the evidence, that said contract was not obtained by plaintiffs for the purpose of, nor with the intention of, securing or obtaining any monopoly of any kind, at any place, of any business, trade, occupation or calling, and that no monopoly of any kind was in any way obtained by plaintiffs, through or because of the execution or consummation of said contract, or at all. The court finds from the evidence that neither the said written contract nor any agreement therein contained was ever in any way waived or cancelled, or discharged by plaintiffs, or any of them, and that the said contract and all of the agreements made by plaintiffs have been fully kept and performed by them, and that said contract is now in full force and effect, and that plaintiffs are entitled to have the same specifically enforced and carried out.

"Third. The court, from the evidence, specifically finds that each of the defenses interposed in the answer of defendant is not sustained by the evidence, and on all of said defenses and on all of the issues herein joined, the court finds for the plaintiffs.

"Fourth. The court finds that the defendant, Stanley M. Barrows, from time to time, and frequently and continuously, by various and sundry pretenses, practices, devices and machinations, both directly and indirectly, has sought to evade, and has evaded, and has infringed and violated the terms of said agreement, and more particularly the provisions of paragraph 10th thereof; that he.

the said defendant, has been and is associated with the Independent Glass Company, a corporation doing business in Denver and throughout the state of Colorado, and which corporation was organized for the purpose of carrying, handling and selling, and which corporation has carried, and does carry, handle and sell glass in Denver and throughout the state of Colorado, and that he has worked for said the Independent Glass Company, has taken orders for it and has sought to build up its business in divers ways, and to deprive the plaintiffs of the benefit of the agreements made by the Denver Plate Glass Company and the defendant in said written contract of May 5, 1906, and that through said the Independent Glass Company he has been and is engaged in doing business in the state of Colorado, and handling and selling glass therein, and that the plaintiffs have suffered, and will continue to suffer, great and irreparable injury by the violation of said contract by defendant, unless they receive the protection of a court of equity.

"Fifth. The court further finds from the evidence that the said defendant has, under the guise of conducting the business of an agent for a plate glass insurance company, kept his office in the same room with the said the Independent Glass Company, and has been therein engaged in directing, or aiding in directing, the business of the said the Independent Glass Company, and that the practices and conduct of the defendant have been such that in order to make effective the said contract of May 5, 1906, and to protect the plaintiffs therein, it will be necessary for the court to restrain the said defendant, among other things, from continuing to maintain his office or place of business with the said the Independent Glass Company, during the period provided for in said contract, to wit, up to and including the first day of May, 1916."

A judgment and decree restraining the defendant from further acts in violation of the terms of the contract was accordingly entered. To review which defendant brings the case here on error.

[1-4] The main question is whether that part of the contract wherein and whereby the defendant agreed and undertook not to engage in the glass business in this state for a period of ten years, is void as being in restraint of trade, and thus against public policy. The defendant contends that it is, and predicates error on the fact that the court below held a contrary view.

That one may lawfully covenant to refrain from pursuing a particular business within the limits of a certain territory, even if it be an entire state, if the restraint thereby enjoined is reasonable and affords only a fair protection to the one in whose favor it is imposed, is no longer an open question. The following general rules ap-

plicable to contracts of this character are found in Eddy on Combinations, § 688 et seq.:

"It will be found that in the earlier days contracts in restraint of trade were looked upon with great disfavor by the courts. The attitude of the courts in this respect has greatly changed, and the most enlightened tribunals not only consider contracts in restraint of trade with favor, but look upon them as essential to the well-being and progress of the community. It is not seldom, however, that even now the courts, carried away by the earlier decisions, arbitrarily pronounce contracts, which as a matter of fact appear entirely reasonable under all the circumstances, to be void, not so much because they are unreasonable as because they seem contrary to some earlier authorities.

"Contracts in restraint of trade should be interpreted in the light of the following propositions:

"(a) The right to contract is fundamental to all social organization.

"(b) Good-will is property, and as such is subject to transfer like any other species of property; and in its enjoyment the purchaser is entitled to exactly the same measure of protection that is afforded the purchaser of tangible property; the law should not permit the vendor to regain possession, contrary to the terms of his agreement, of all or any part of that which he has sold.

"(c) All contracts made for the protection of the purchaser of good-will should be strictly enforced, unless it clearly appears that they are so unreasonable in their terms as to deprive the vendor or the party bound of valuable rights, without any corresponding benefit to the purchaser; even under such conditions a contract should be enforced wherever it is possible to so divide it as to declare it binding over such territory and for such time as are reasonably necessary for the protection of the purchaser, and declare it void as to such time and such territory as are not necessary for the protection of the purchaser. It will be found that it is occasionally possible for courts to hold the contract divisible in this respect.

"(d) A contract in restraint of trade being the contract by which the good-will of a profession, trade or calling, or of a business or enterprise, is sold, the courts should look with favor upon such contracts and enforce them, except in those cases where the enforcement would be manifestly inequitable and amount to the enforcing of a contract that is void for want of consideration.

"(e) The consideration for a contract in restraint of trade being that which is paid for the good-will of the profession, trade, calling, business or enterprise in question, it is obvious that the entire consideration is met by the transfer of the entire good-will, and any agreement which arbitrarily binds the

vendor beyond the territory and the time necessary for the protection of the good-will transferred is without consideration."

And in *Hammon on Contracts*, at section 244a, the rule respecting agreements of the kind under consideration is thus clearly stated:

"In reference to time and place, while it has always been held in the American states that a promise not to engage in a particular business within reasonable limits within the state is valid, even though the duration of the agreement is unlimited, the doctrine of a few of the earlier cases was that a promise not to carry on a particular business at any place within the state was illegal per se, because it would compel the promisor to transfer his residence and allegiance to another state in order to pursue his vocation. This reasoning, however, was hardly applicable to the several states of the Union, which form one entire nation, and, except in a few states, the doctrine no longer prevails, and, accordingly, the validity of a stipulation not to carry on a trade within the state ordinarily depends upon whether it is reasonably necessary for the protection of the promisee. If it is, it is lawful; otherwise, not. Some courts, applying the same principle, hold that an agreement in restraint of trade may be valid, even though it is general as to space, if the promisee requires its enforcement to protect him. This doctrine is the logical result of the conditions of modern trade.

"As generally laid down, the rule is that an agreement in restraint of trade is valid if the restriction does not go, as to its extent in space or otherwise, beyond what, in the judgment of the court, is reasonably necessary for the protection of the promisee, regard being had to the nature of the trade or business."

The bare fact that the restraint is applied to an entire state, or even to a wider territory, is not of itself sufficient to condemn and nullify a contract of this sort. The public welfare is the first consideration, and if it be not adversely affected thereby, the contract should be sustained, if it is reasonable, and imposes upon the party bound no greater restraint than is necessary for the fair protection, within the plain purpose and meaning of the contract, of the party for whom protection is intended. Such now is practically the universal criterion by which contracts of this character are to be adjudged; that is, the question of whether the contract, under the circumstances of each particular case, is reasonable or unreasonable is the controlling factor.

In *Beach on Modern Law of Contracts*, §§ 1569, 1575, the following is stated:

"The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly pre-

valled respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more by exceptions and qualifications, and a gradual change has taken place, brought about by the growth of industrial activities, and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment. Whether the restraint be general or partial is no longer considered a material question. * * *

"The modern doctrine is well-nigh universal that when one engaged in any business or occupation sells out his stock in trade and good-will or his professional practice he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named and he may be enjoined from violating this contract. * * *

The following authorities, with many others, announce the law to be as stated in the foregoing quotations, and uphold the doctrine that whether the restraint is general or partial, widely extended or narrowly limited, is in and of itself alone immaterial: *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 804, 53 O. C. A. 484, 58 L. R. A. 915; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; *Bancroft v. Union Embossing Co.*, 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298; *Beal v. Chase*, 51 Mich. 490; *Diamond Match Co. v. Roeber*, 108 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Fisheries Co. v. Lennen (C. C.)* 116 Fed. 217; *Oregon Steam Navigation Co. v. Winsor*, 87 U. S. (20 Wall.) 64, 22 L. Ed. 315; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Swigert v. Tilden*, 121 Iowa, 650, 97 N. W. 82, 63 L. R. A. 608, 100 Am. St. Rep. 374; *Oakdale Manufacturing Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *National Enameling & Stamping Co. v. Haberman (C. C.)* 120 Fed. 415; *Wood v. Whitehead*, 165 N. Y. 545, 59 N. E. 357.

But we are not without authority in our own state upon the precise question under consideration. In *Freudenthal v. Espey*, reported in 45 Colo. at page 489, 102 Pac. 280, 26 L. R. A. (N. S.) 961, the law respecting such contracts, from its incipency in the early English cases to the present, is reviewed, analyzed and applied. In the light of that decision it is unnecessary to enter upon a more exhaustive discussion to ascertain the rule in this jurisdiction applicable to the contract in question, for the doctrine is stated so plainly in that case that we have but

to examine the conditions of this one and apply the rule there announced to them, since each case is to be resolved on its own particular facts. *Harrison v. Glucose Sugar Refining Co.*, supra; *Oregon Steam Navigation Co. v. Winsor*, supra; *Alger v. Thacher*, 19 Pick. (Mass.) 51, 31 Am. Dec. 119. In *Freudenthal v. Espey*, supra, both parties were physicians; the defendant, a young practitioner, agreed not to enter "the practice of medicine, surgery or obstetrics, or the branches of either, in the city of Trinidad," either directly or indirectly, "for the full period of five years," if within that time he should quit the employment of the plaintiff, an old practitioner, to whom he was bound by contract at a stated salary for that period; there was a sufficient consideration; the defendant left the employment of the plaintiff before he was entitled to and immediately engaged in and continued the practice of medicine at Trinidad contrary to his agreement not to do so. Upon suit by plaintiff for damages for such breach, and injunctive relief, defendant relied upon the invalidity of the restrictive covenant in the contract as a defense. At page 493 of 45 Colo., at page 282 of 102 Pac. (26 L. R. A. [N. S.] 961), it was there said:

"Expanding commercialism, advancing science and arts, the desire and necessity for education, and the spirit of the age, however, eventually impressed the judicial mind with the necessity of remodelling the rule to meet the needs and requirements of men. It was recognized that both public interest and private welfare often render engagements not to carry on a trade or to act in a profession in a particular place for a limited time, proper and even beneficial. *Mallan v. May*, 11 M. & W. 653; *Homer v. Ashford*, 3 Bing. 326; *Herreshoff v. Boutineau*, 17 R. I. 3 [19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850].

"Thus impressed the courts sought to meet such requirements by first fusing into the law a distinction between sealed instruments and simple contracts. This distinction being without reason, and not founded upon principle, soon disappeared, and the more logical distinction between general and limited restraint of trade grew and found favor with the courts. The latter distinction appeared as early as *Broad v. Jollyffe*, Cro. Jac. 596, in which it was held that a contract not to use a certain trade in a particular place was an exception to the general rule, and not void. The seed thus sown did not fully fructify, however, until the leading case of *Mitchell v. Reynolds*, 1 P. Wms. 181, by which the attempted distinction between sealed contracts in restraint of trade and those not under seal was abrogated, and the distinction between general and limited restraints, or rather the true distinction, to wit, between unreasonable and reasonable restraints, was fully established."

And again at page 502 of 45 Colo., at page 285 of 102 Pac. (26 L. R. A. [N. S.] 961), this is declared:

"Agreements like this must be construed with reference to the objects sought to be attained by them. The object here is the protection of one of the parties against competition in his profession. The nature of the business to protect was a medical practice, extending far beyond the limits of the city of Trinidad; that the covenantor possessed this business, and the knowledge and the skill that enabled him to acquire it. Certainly in limiting the restriction to the city of Trinidad and for the period of five years was only affording 'a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.' The restraint was no larger than the needs of the covenantor required. It was of material benefit to him, and was not oppressive on the covenantor, nor was it in any sense injurious to the public. The contract is in no wise forbidden by any principle of policy or law. The defendant can be as useful to the public at any other place as at Trinidad, and the interests of the community elsewhere are as important as they are there."

[5] And in that case the court approves the rule as stated in *Horne v. Graves*, 7 Bing. 743, in the following quotation:

"We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

While it is true that in the *Freudenthal* Case the precise facts found in the case at bar were not present, still in so far as an application of the law be concerned, there is no essential difference between them. The *Freudenthal* Case brought up for the first time in this state a direct consideration of contracts in restraint of trade, and it became necessary to examine and analyze the cases on this subject, both ancient and modern, and to note the history and development of the law on the subject, and the growth of the modern as distinguished from the ancient rule, so that the one best adapted to present needs should be approved for this commonwealth, with the result that the doctrine of the *Freudenthal* Case, as indicated by the foregoing quotations from that opinion, respecting such contracts, is the one to which we are committed.

Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119, Tuscaloosa Ice Manufacturing Co. v. Williams, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125, and Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193, are relied upon by plaintiffs in error as upholding a contrary doctrine to that here announced, and requiring a reversal of the judgment. A careful examination of the decisions in these cases show that in none of them is the rule which we adopt denied or modified. The restraint attempted was found to be unreasonable, upon the facts of each of those cases, and they are therefore practically in accord with our views. The Illinois and California cases, *Lanzit v. Sefton Manf. Co.*, 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171, *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346, *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186, and *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621, may fairly be said to announce a different rule; but they stand substantially alone, and we are not disposed to approve or follow them.

[8, 7] Upon the contention that the contract was the result of a conspiracy to create a monopoly, the facts show that the three companies to the contract operated in practically the same field, throughout Colorado and in neighboring states. Mr. Barrows testified that the business of the Denver Plate Glass Company, at the time of sale, extended over Montana, Idaho, Wyoming, Nebraska, South Dakota, Kansas, Colorado, New Mexico, Texas, Arizona and Utah. It is clear from the uncontroverted testimony of several witnesses that no monopoly could or did result from the contract in question; that there were many dealers in glass in Denver and that competition was sharp. The witness Mineheart said:

"Q: I wish you would state to the court in your own way what the situation was in the City of Denver and what it was after May, 1906, with reference to whether the McPhee & McGinnity Company and the McMurtry Manufacturing Company had any monopoly?"

"A. The McPhee & McGinnity Company carry a large stock of plate glass. The McMurtry Manufacturing Company also carries plate glass. The Independent Glass Company carries plate glass, and prior the Denver Plate Glass Company carried plate glass. After we took over the Denver Plate Glass Company, this company, the Denver Plate & Window Company, was formed, for the purpose of winding up and disposing of the stock that was taken from the Denver Plate Glass Company; also the Hallack & Howard Lumber Company and the H. W. Bingham Lumber Company. The Salzer Lumber Company, the Fleming Bros., and perhaps a dozen other people took contracts for glass and buy it from St. Louis, Kansas City and Omaha.

The market in Denver is by no means closed. It is a physical impossibility to make any arrangement of that kind. The competition in the glass business in Denver in the last eight and a half years, since I have been here, and the competition throughout the country has been fierce; the history of the glass business has never seen the state of affairs that has existed in the past three years."

McMurtry and McPhee, as well as Williams, a witness for defendant, testified to the same effect. The testimony shows conclusively that the glass business was in a demoralized condition, in Denver and throughout the state, prior to the sale, as a result of the unbusinesslike policy of the defendant in carrying on the affairs of the Denver Plate Glass Company; that it was impossible at that time to make a fair or reasonable profit from the business at all.

In cases where a claim of this sort is made the courts will make most careful and diligent inquiry to ascertain whether there is any encroachment on the public welfare. The law looks with high disfavor upon any condition which tends to stifle the free and unimpeded course of competitive buying and selling in the open market of commodities which are necessities, and contribute to the general comfort and well-being of humanity. But it is not a judicial province to presuppose that such a condition exists, when as matter of fact it does not. It is sufficient to say, upon this branch of the case, that the testimony introduced by defendant, in support of the contention that the contract tended to create a monopoly, considered in the most favorable light for that purpose, utterly fails to establish that such was its effect. The selling schedule adopted by the plaintiff companies, after purchasing the stock of defendant under the contract, showed an advance over the price at which sales had been made before the purchase, and this was strongly relied upon to prove that the securing of the contract was part of a collusive and fraudulent scheme to create a monopoly. This alone is not sufficient to prove such claim. The single fact that the plaintiffs raised the price of glass after purchasing the Denver Plate Glass Company's stock and good-will, as well as the good-will of the defendant, does not show an intent even to create a monopoly, much less that one was in fact created; more especially is this true where the testimony discloses that the defendant had by his business policy, prior to the time of sale, completely demoralized the glass market and fixed prices that were ruinous to the trade. If the prices quoted after the purchase were exorbitant, and tended to show the existence of a monopoly, that could be best made to appear by a comparison with the prices at which other dealers in glass generally throughout the territory had been and were

selling it, and the effect of the new quotations upon the general market, rather than by a comparison with the cut prices at which the plaintiffs and defendant themselves had handled it just prior to the purchase of the business of defendant. The fact that, through organizing the Independent Glass Company only a short time after he had disposed of his stock in trade and good-will to the plaintiffs, the defendant engaged in that line again, is in and of itself alone a complete refutation of his contention that a monopoly had been effected. At most, only one competitor was removed by the purchase, and its tendency to create a monopoly is too remote for serious consideration. In a case like this, from a trade standpoint, the interests of the public were practically unaffected by such purchase. There simply has been the substitution of one tradesman for another. The plaintiffs had no control over the supply, numerous other competitors remained, fresh capital was entirely free to enter the field, and would certainly have done so had prices been held unreasonably high. No other concerns were purchased, and, as shown by the testimony, there were many dealers in the field competing for business. The plaintiffs themselves were bona fide competitors, as were also Eastern jobbers. The field was open to all comers, and there is little or no danger that the public will suffer from lack of persons to engage in a profitable business. Under the conditions shown to exist, it was impossible to create a monopoly through the contract in question; it neither did nor could confer a special or exclusive privilege. To hold that the purchase of a single business, in a wide field occupied by numerous competitors and open to all who might desire to engage in that business, is invalid, as tending to create a monopoly, would be to prohibit the purchase by any merchant of the stock in trade and good-will of another, carrying on a like business in the same place, and would be utterly inconsistent with a free exercise of the right of contract.

The plain truth is that the defendant was carrying on an unbusinesslike warfare, it may be for the express purpose of compelling some one to buy him out. It was entirely proper, under the facts of this case, for the plaintiffs to do so, since the defendant persisted in the employment of unfair methods in the conduct of his business. While it is doubtless true that competition is the life of trade, it is also equally true that competition of a certain sort almost inevitably leads to disaster, not alone to those immediately concerned, but to the public as well. It is safe to say that the general welfare is best served by healthy competition, which allows business enterprise, when conducted with energy and skill, to gather fair returns upon the ability, industry and capital employed. While ruinous competition, which demoralizes an

industry and business, and prevents reasonable returns on the investment, may sometimes bring temporary gain to the public, it must, in the very nature of things, finally result in general and permanent loss and disaster. The record wholly fails to support the claim of defendant, that the contract in question either did or could create for the plaintiffs a monopoly of the business under consideration.

Neither is the contention that the contract was executed by the defendant under duress, and therefore not binding, well founded. The testimony that threats were made against him by certain members of the plaintiff companies a month or so prior to the execution of the contract is flatly denied. It is manifest that even if such threats were made, they had little if any effect upon the defendant, for almost immediately after the sale, having received full consideration for his business and good-will, he re-engaged in the same line from which, as is claimed, such threats had driven him. From all of the testimony the conclusion is irresistible that the contract was voluntarily executed for the express purpose of consummating a sale, which upon the record showing was highly advantageous to the defendant, and out of which he secured a large price for his stock in trade, together with twenty-five hundred dollars cash additional for the good-will of the business.

[8] It may not be amiss to here suggest that there can be no sound and wholesome public policy, which operates in the slightest degree to lend approval to the open disregard and violation of personal contracts entered into in good faith, upon good consideration. It is quite as important, as a matter of public interest and welfare, that individuals be not allowed, with impunity, to transgress their solemn undertakings, advisedly entered upon, as it is that the public have protection in other respects. Where one is so lost to a sense of moral obligation as to accept a full consideration for his stock in trade and good-will, upon express condition that he refrain from again entering that business for a limited time, within a certain territory, and then immediately, having pocketed the fruits of the agreement, deliberately and willfully ignores the controlling condition thereof, courts should certainly not hunt for legal excuse to uphold him in such moral delinquency. On the contrary, in the interests of the general public, and to discourage bad faith conduct of that sort, wherever, without violation of legal principles and public policy, it may be done, contracts like the one under discussion should be rigidly upheld and enforced. A recent expression of the English Court of Appeals on this subject, in *Underwood v. Barber*, 68 L. J. Ch. Div. 201, meets with our cordial approval, and is as follows:

"If there is one thing more than another

which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is *prima facie*, at all events, contrary to the interests of any and every country."

To like effect are *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024, and *Swigert v. Tilden*, *supra*.

The conclusions announced in this opinion have been reached by the court upon a full, careful and independent examination and consideration of the testimony brought up and the complete record in the case. Fortunately, however, it appears that the honorable trial judge, who met the witnesses face to face, heard them under oath, observed their demeanor on the stand, marked any and all conflict of testimony, made full and explicit findings, all amply supported by evidence, although it may well be that on some points there was conflicting testimony, in harmony with the views we sustain. The result and effect of those findings were to establish: First. That plaintiffs below had no intention or purpose of obtaining a monopoly and obtained none; Second. That the restrictive clause of which complaint is made was reasonable and necessary to the fair protection of the plaintiffs in the enjoyment of the business and good-will purchased by them, and was in no sense contrary to public policy; Third. That the defendant executed the agreement freely, and received a good and adequate consideration therefor; and Fourth. That the plaintiffs have never at any time waived any right under the restrictive clause of the agreement, the terms of which the defendant had violated and was continuing to violate.

It is manifest, on principle, authority and public policy, that the agreement entered into between the defendant and plaintiffs should be given full effect, according to its very terms; and it is also equally plain that both the law and the facts abundantly support the findings of the court below and the judgment and decree entered.

Every person must pay the penalty for the wrong he does. The defendant is no exception to the rule. The law of compensation is fixed and certain. The defendant has willfully violated and ignored the terms of a lawful contract, entered into in consideration of a large sum of money paid him, which he retains. By these acts he has committed a wrong and must pay the price. It was so adjudged and decreed by the trial court, and that judgment and decree meets our sanction and approval.

Judgment affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

EMPIRE STATE SURETY CO. v. LINDENMEIER et al.

(Supreme Court of Colorado. April 7, 1913.)

1. EVIDENCE (§ 183*)—SECONDARY EVIDENCE—LOSS OF PRIMARY EVIDENCE.

To establish the loss of an instrument constituting primary evidence, so as to authorize parol evidence of its contents, the proof must show with reasonable certainty the loss of the instrument, which may be done by proof that diligent search and inquiry in places and of persons in whose custody the law presumes the instrument to be have failed to discover it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

2. EVIDENCE (§ 183*)—SECONDARY EVIDENCE—LOSS OF PRIMARY EVIDENCE.

Where an action on a building contractor's bond, the contract stipulating that the plans and specifications should remain the property of the architect, and that the owner should pay for the use thereof, and providing that the same should become a part of the contract, did not involve any failure of the contractor to comply with the plans and specifications, but was based on a failure to complete the building within the time agreed and to pay for the materials furnished, and both the owner and the architect testified to their inability to find the plans and specifications or any blue prints, the court did not err in admitting in evidence the contract, exclusive of the plans and specifications, which could be proved by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

3. PRINCIPAL AND SURETY (§ 73*)—OBLIGATION OF SURETY—INTEREST.

A surety is liable only to the extent of the penalty of the bond, but interest may be allowed from the time of default, though the judgment may then exceed the penalty.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 114, 115, 455; Dec. Dig. § 73.*]

4. PRINCIPAL AND SURETY (§§ 73, 155*)—LIABILITY—INTEREST—DEMAND—PLEADING.

A complaint in an action against a surety must claim interest which may only be computed from the time of the demand in case a demand is necessary, and not from the time of default; and, where the complaint in an action against a surety of a building contractor did not allege any demand prior to the commencement of the action, interest is allowable only from that time.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 114, 115, 455; Dec. Dig. §§ 73, 155.*]

5. PRINCIPAL AND SURETY (§ 59*)—CONTRACTS—CONSTRUCTION.

A contract of suretyship of a corporation organized to make bonds for profit must be construed most strongly in favor of the obligee.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

6. PRINCIPAL AND SURETY (§ 138*)—LIABILITY OF SURETY.

A bond conditioned on a building contractor performing a contract requiring him to provide all materials and perform all the work obligates the contractor and surety to pay for materials, and where the contractor fails to pay, and liens are claimed, established, and foreclosed, and the property of the owner ordered sold, the surety is liable, though the judgments have not been paid.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 387, 472½; Dec. Dig. § 138.*]

Error to District Court, Larimer County; Neil F. Graham, Judge.

Action by William Lindenmeier and others against the Empire State Surety Company. There was a judgment for plaintiffs, and defendant brings error. Modified and affirmed.

Murray & Ingersoll, of Denver, for plaintiff in error. J. F. Farrar, of Denver, for defendants in error.

SCOTT, J. The defendants in error on the 11th day of May, 1907, and who were at that time the owners of certain lots and buildings in the city of Ft. Collins, entered into a written contract with the Cole-Potter Construction Company, a corporation, for the construction of a theater building on the said premises. Under the contract, the construction company was to provide all the materials and perform all the work to be performed under the contract and specified therein. The work and material were to be in accord with the plans and specifications of the architect, El H. Moorman, named in the agreement, and which plans and specifications were declared to be a part of the contract. But it was expressly agreed: "It is further understood and agreed by the parties hereto, that any and all drawings and specifications prepared for the purpose of this contract by the said architect are and remain his property, and that all charges for the use of the same, and for the services of said architect, are to be paid by the said owner." The contract price was fixed at the sum of \$10,125, and the work performed and materials furnished were to be under the direction of the architect who was to furnish monthly estimates, and the owners were to deduct and retain 15 per cent. of these until the building was completed. As a condition of the signing of the contract, a bond in the sum of \$5,000 was required, and such bond was furnished by the construction company, with the plaintiff in error as surety. The present suit is upon such bond, and judgment was rendered in favor of the defendants in error in a sum equal to the penalty of the bond, \$5,000, with interest in the sum of \$703.35, the same being computed from the date of the foreclosure of certain mechanics' liens upon the property, which in amounts aggregated a total in excess of the present judgment. It appears that the construction company defaulted in its contract before the completion of the building, and also that it had not paid for certain materials furnished for use in the building, resulting in the filing and foreclosure of the liens above referred to.

The only errors complained of and discussed in the briefs, and which we are therefore justified in considering, are (a) the admission of oral testimony upon the hearing concerning the plans and specifications referred to in the original contract, the original and no copy of which could be produced at the trial; (b) error of the court in the allowance

of the \$703.35, interest; and (c) the rendition of judgment without proof of the payment of the lien judgments.

In regard to the first contention, it will be noticed that the plans and specifications were, under the contract, to be and remain the property of the architect. It seems, also, that no copy of these were recorded with or as a part of the contract, and also that the original nor a copy was attached to the contract. The architect testifies concerning the disposition and loss of the plans and specifications as follows: "I did have the original plans and specifications of that building, but I can't find them. I made a search for them very carefully. Q. Who had these plans and specifications? A. The original drawings are always found on file or supposed to be on file in the architect's office. There were several sets of blue prints made, and they were brought to Collins and left on the work. The Cole-Potter Company had one or two sets, and both of the owners had a set. Q. You are unable to find any set of these plans and specifications? A. No copy, not even a blue print. Q. You can find nothing? A. Not a thing. No claim was ever made upon me by the Cole-Potter Construction Company for any extension of time upon the contract. If I remember correctly, this work should have been completed by the Cole-Potter Construction Company under the terms of the contract, September 14, 1907."

W. El Aiken, one of the plaintiffs, testifies as follows: "I am one of the plaintiffs in this action. I haven't a set of the plans and specifications for the erection of the Orpheum Theater as prepared by Moorman, architect. I have made a search for them. I do not know where there is a set. I don't know of one being in existence at this time. I had a set. Mr. Moorman delivered it to me. Q. What did you do with your set? Did you give them to anybody? A. No, sir; I think the Cole-Potter Construction Company had them to use some of the time. I don't know where it is now. I have made an examination for the purpose of finding them and could not."

William Lindenmeier, Jr., another of the plaintiffs, testified concerning the matter in the following language: "I conducted the business for myself and my father so far as we were concerned in this matter. We had a set of plans and specifications between us. One set between us. I don't know where that set is now. It is not in my father's possession. Q. How do you know it is not in your possession? A. At the time this lien case came up we searched every place around the store and around home, and could not find it. I don't know whether there is a set in existence at this time. I don't know what became of our set. Q. Did you give them to anybody? A. I couldn't say where they are, but the probabilities are that the Cole-Potter Construction Company had them."

Cole, president of the construction company, conducted the business for it, and he left the country when he abandoned the contract about October 12, 1907, and his whereabouts were unknown.

It is contended that the plans and specifications were by the terms of the agreement made a part of it, and that the bond was conditioned upon the performance of the contract as a whole, and therefore the plans and specifications must be proved with the same degree of strictness as those parts of the contract and the bond, which are material to the determination of the cause. There does not appear to have ever been any question between the owners of the property and the construction company involving the plans and specifications as such, and neither is there any dispute or contention between the parties to this suit in that regard. In fact, the appellants introduced no testimony upon the trial of this cause at all except a letter between counsel, but for what purpose it does not appear, as it seems to be wholly foreign to any question involved.

[1] Counsel cite many authorities in support of their contention, but these are not applicable here. The rule of this court in this respect seems to be: "That a particular instrument existed is the most material inquiry; the fact of its existence and the contents of it are matters to be tried by the jury; the loss of it must be made out to the satisfaction of the court. The law exacts nothing unreasonable in such a case. If parol proof of the loss establishes the fact with reasonable certainty, that is sufficient. No precise rule can be safely laid down upon this subject, further than this: That diligent search and inquiry should be made of those places or persons in whose custody the law presumes the instrument to be." *Hobson v. Porter*, 2 Colo. 28; *Londoner v. Stewart*, 3 Colo. 47; *Hittson v. Davenport*, 4 Colo. 169. The law does not, however, require direct and positive evidence of the loss or destruction of the document, but requires only such evidence as will raise a reasonable inference of loss or destruction. 17 Cyc. 543.

[2] But there is no contention here that loss by reason of the contractor's default was occasioned by failure in any respect upon the part of the contractors to comply with the plans and specifications, but only because the building was not completed within the time agreed in the contract otherwise provided, and because of failure to pay for the materials furnished, as therein agreed. Besides, in the first paragraph of the contract it is provided: "This does not include any work or material in front of entrance of foyer, as shown on the drawings and described in the specifications prepared by E. H. Moorman, architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract." This identi-

fication by the signatures of the parties, when taken in connection with the testimony of the architect above recited, would clearly indicate that the plans and specifications were not to attach to the contract though to be construed as a part of it, but were to remain with and as the property of the architect. Indeed, no copies appear to have been made except blue prints unidentified, and for use in construction, and therefore the architect was in fact the only person who ever had possession or charge of them and his testimony as to loss of such plans seems to be satisfactory. While it appears that the owners subsequently entered into another contract for the improvement of certain store buildings in front of the opera house, yet the testimony is clear and not disputed that no claim is made in this suit for loss occurring by reason, or on account of, such subsequent contract, or in the making of such improvements. Indeed, the testimony referred to as being improperly admitted refers only in an inferential way to the plans and specifications, and the cause could be as well determined, if there never had been any specific plans and specifications. There was no error in the admission of the contract exclusive of the plans and specifications referred to therein.

[3] The next question raised by the appellant is that it was error to allow interest to the plaintiffs, thereby making the total amount of recovery in excess of the penalty of the bond which was \$5,000. The damage sustained by the plaintiffs by reason of the default of the contractors, as appears from the testimony, including the amount of the judgments for material furnished by the materialmen, and after making all proper deductions, was in excess of the amount of the judgment in this case, including the interest allowed. This judgment was for \$5,000 so limited by the penal sum of the bond, and \$703.35 additional as interest from the date of the lien judgments to the time of the rendition of judgment.

The question of interest in such cases is one concerning which there has been much conflict of authority. It is a general rule, and well settled, that sureties are liable only to the extent of the penalty of the bond. But the later and apparent preponderance of authority in this country is to the effect that interest may be allowed from the time of the default, even though this may make the judgment in excess of the penalty named in the bond, not, however, as a part of the debt for which he originally became responsible, but as damages for its detention.

It was said in *Bank of Brighton v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144: "There is a plain distinction to be observed between cases in which interest is given by way of damages and those in which it constitutes a part of the debt, as it does in contracts in which there is a promise to

pay interest. As a general rule, in all cases in which a debtor is in default for not paying money in pursuance of his contract, he is liable for interest thereon from the day of his default, and, when a demand is necessary to put the debtor in fault, interest is to be given only from the demand."

In *Goff v. United States*, 22 App. D. C. 536, the court quoting from a former opinion by that court said: "We think it may be stated as the general rule of the common law of our country, different, it is true, from the former rule in England prior to St. 3 and 4 William IV, c. 42, but perfectly well settled with us, 'that if a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor, compensation in damages equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default.' See 1 American Leading Cases, 1616, where the cases upon the subject are collated and discussed. And this rule has received the approval of the Supreme Court of the United States. *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923; *Chicago v. Tebbetts*, 104 U. S. 120, 26 L. Ed. 655; *Young v. Godbe*, 15 Wall. 562, 21 L. Ed. 250; *Curtis v. Innerarity*, 6 How. 146, 12 L. Ed. 380. It is true that, in order to be allowed, it should be claimed in the declaration; but, when it is so claimed, there can be no doubt of the right of a plaintiff, upon a proper showing, to recover interest as well as principal." This doctrine was asserted in the case of *Tazewell v. Saunders*, 54 Va. 354, wherein the court entered upon an extensive review of the authorities at that time, both American and English. See, also, 32 Cyc. 122, and authorities cited.

[4] But it seems from these authorities that interest must be claimed by the pleadings, and that it may be computed only from the time of the demand in case demand may be necessary, and not from the time of the default. Demand in this case would appear to be necessary, for it is not a case where the surety would be likely to know of the default in the absence of notice of that fact. In the complaint in this action there is an allegation that demand has been made and refused and which is admitted by the answer, but the date of such demand is not alleged, and there is no proof upon that point. The authorities seem to agree that the institution of the suit is a sufficient demand, and interest has accordingly been computed from that date. Therefore, in the absence of an allegation or proof of demand prior to the commencement of the suit in this case, the court should have allowed interest only from that date, August 23, 1910.

[5] It is contended by appellant that no judgment may be rendered in favor of the plaintiff in this case, other than for a nominal sum, for the reason that the plaintiff had not at the time of trial paid the judg-

ments and discharged the liens theretofore established. The defendant is a surety company engaged in the business of furnishing surety bonds, and must be considered in the light of the rule of construction as to strictness in such cases, differing from that of individual sureties. "Generally speaking, a contract of suretyship by a surety company is governed by the same rules as the contracts of other sureties, but some distinctions are made by the courts in construing such contracts. The doctrine that a surety is a favorite of the law, and that a claim against him is strictissimi juris, does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves 'surety companies,' their business is in all essential particulars that of insurers. Their contracts are usually in the terms prescribed by themselves, and should be construed most strongly in favor of the obligee." 32 Cyc. 306. An investigation of the authorities cited by the author will disclose that this text is a fair statement of the modern rule.

Counsel for appellant cite no case which seems to sustain their contention except that of *Henry v. Hand*, 36 Or. 492, 59 Pac. 330, though there are others sustaining this view. But this contention is not sustained by the weight of authority, neither does it appear to be supported by sound reason or justice. These authorities were extensively reviewed and the doctrine rejected in the case of *Stoddard v. Hibbler*, 156 Mich. 335, 120 N. W. 787, 24 L. R. A. (N. S.) 1075, and in which it was well said: "The reasoning of these cases does not commend itself to the court. In view of the statute of this state, which entitles laborers and materialmen to liens, it seems to us a most narrow construction to say that, when the contractor agrees to furnish all labor and material necessary to build and complete a house, he may comply with this requirement by simply placing the material on the ground, engaging the labor, and leaving the owner to pay for it, or to permit a lien to stand against his property. This is not furnishing the material in any substantial way, and we find that other courts have taken a very different view from that expressed in the cases referred to."

That court cited as sustaining the view there held the case of *Klewit v. Carter*, 25 Neb. 460, 41 N. W. 286, wherein it was said: "The plaintiff in error contends that the bond given by him and others does not provide for mechanics' liens; that he is a mere surety, and is not bound beyond the strict terms of the bond. The second paragraph of the contract provides that Kough is 'to furnish all the material, such as lumber, hardware, brick, lime, sand, paint, oils, etc., as may be necessary to complete said house according to the plans and specifications.'"

If Kough failed to pay for such materials therefor, and the plaintiff below was required to pay the same Kough paid for these articles, no mechanic's lien would have been filed. The lien is not a cause, but a consequence, flowing from the nonpayment of the materials. In other words, it is merely a mode of enforcing payment for materials used in the erection of a building." Also the case of *Closson v. Billman*, 161 Ind. 610, 69 N. E. 449, wherein it was held: "When we look to the contract, however, it is plainly provided that he is to furnish the lumber, and the provision concerning the payment of \$250 on presentation of receipted bills for materials furnished and delivered upon the lot makes it clear that it was contemplated that said Worley should pay for the materials he was to furnish. The bond provides that Worley is to build, construct, and complete the residence 'according to his contract,' and it was as much his duty to deliver the house free of liens on account of materials as it was to use materials which belonged to him. To hold, in the face of the bond and contract, that the construction and completion of the building in accordance with the plans and specifications was a compliance with the bond, although the owner would be compelled to pay out large sums in excess of the amount stipulated in the contract to discharge liens for the purchase price of materials, would be to keep the word of promise to the ear, but break it to the hope."

In *Mayes v. Lane*, 116 Ky. 566, 78 S. W. 399, the court took the same view, and it was there declared by the court: "Under the contract the sureties bound themselves that Lane would furnish the material and build the church 'in strict accordance with the terms and conditions of said contract.' * * * The sureties guaranteed that Lane would furnish the material and erect the building. In the erection of the building Lane had to perform the labor himself, or to employ some one to do it. It follows that the sureties guaranteed that the necessary materials and labor would be furnished to erect the building. But it is urged on behalf of the sureties that the terms of their bond were complied with when the material and labor were furnished; that their contract did not require them to protect the church against the cost of the material and labor. Reduced to the last analysis, their claim is that Lane complied with his contract by furnishing the material and labor, although the church was compelled to pay for such part for which Lane failed to pay. Lane did not comply with his contract when he furnished the material and labor, unless he paid for it, or released the building from liability therefor."

The conclusion we have reached is quite well stated in *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794, where the court said: "The

learned counsel for appellant cites numerous authorities with reference to the nonliability of sureties on bonds or covenants of indemnity 'to save and keep harmless the obligee from certain outstanding debts, or that the party indemnified shall not sustain damage incurred through the omissions or acts of the principal,' etc., until the obligee shall have paid or discharged such debts, or may have otherwise sustained financial loss. *Miller v. Fries*, 68 N. J. Law, 377, 49 Atl. 674. But there is a marked distinction between covenants of that description and agreements that the obligors shall perform specific acts. *Litchfield v. Cowley*, 34 Wash. 566, 76 Pac. 81; *Wright v. Whiting*, 40 Barb. (N. Y.) 235. The covenant in the building contract on the part of the contractors with Mrs. Friend is, as between them, equivalent to a direct promise to pay for materials used in the construction of the building, and a breach of the contract occurred when the contractor suffered the obligation to become a charge on her property; at least, she was entitled to treat it as a breach. It may be true that she was not obligated to do so; that she could have waited until the lien had become fixed and determined by judgment against her property, and treated that as the breach of the bond, thus escaping the onus of establishing, at the trial, the validity of such lien and the amount of the indebtedness, but she was not obliged to delay action in that behalf. She could treat the failure of the contractors to keep her property free from such incumbrance as a breach of the contract. Therefore the position of appellant's counsel that this action was prematurely brought is untenable."

[8] The contract in the case at bar provided that: "Article 1. The contractor shall and will provide all the materials and perform all the work for the concrete, stonework, brickwork, plastering, carpenter work, tin and galvanized iron work, cement work, iron work, roofing and exterior cementing of stage building." The bond provided that: "The conditions of the above obligation are such: That whereas the Cole-Potter Construction Company, has this day entered into an agreement with W. E. Aiken, William Lindenmeier, and William Lindenmeier, Jr., to furnish the materials and labor and construct a theater building on property to be designated in the city of Ft. Collins, Colorado, in accordance with certain plans and specifications furnished by F. H. Moorman, architect, for the sum of ten thousand, one hundred and twenty-five dollars (\$10,125.00), and whereas the said the Cole-Potter Construction Company has agreed to furnish all of said materials and to do all the work in the construction of said building in accordance with said plans and specifications which are referred to and made a part hereof, as though fully and at length set out herein: Now, therefore, if the said the Cole-

Potter Construction Company shall well and truly keep and perform each and every of the covenants and agreements in said contract contained on its part to be kept and performed, then this obligation to be null and void; otherwise to remain in full force and effect." It was as much the obligation of the contractors and their surety under this agreement and bond that the materials should be paid for as that they should be furnished. In fact, the value of these materials was clearly included within the consideration named in the contract, the performance of which the bond was given to secure. The contractors failed to make these payments, liens were claimed, established, and foreclosed, and the property of the plaintiffs ordered to be sold in payment of the judgments so rendered. The bond was security for these payments, and it would be nothing short of manifest injustice to hold that the plaintiffs must have paid these judgments before they can maintain action on the bond. Their property had been decreed to be sold in payment of the sums so secured by the bond.

The district court is instructed to so modify the judgment as to compute interest on the amount of the penalty on the bond from the day of the institution of the suit, and, as so modified, the judgment is affirmed.

Modified and affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

B. F. SALZER LUMBER CO. et al. v. LINDENMEIER et al.

(Supreme Court of Colorado. April 7, 1913.)

1. PROCESS (§ 154*)—SERVICE—SUFFICIENCY OF RETURN—RIGHT TO QUESTION.

A defendant may not raise in the action the question of the sufficiency of service of summons on a codefendant, where the sheriff's return showing personal service is regular on its face.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 209; Dec. Dig. § 154.*]

2. APPEARANCE (§ 24*)—WAIVER OF OBJECTIONS—DEFECTS IN SERVICE OF PROCESS.

A defendant who, without objection to the service of process on a codefendant, files an answer, enters thereby a general appearance, and waives any objection to the sufficiency of the service on the codefendant, and any objection to a return of service whether by a motion to quash or by plea in abatement must be taken in limine.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-146; Dec. Dig. § 24.*]

3. MECHANICS' LIENS (§ 48*)—LIENS FOR MATERIALS—STATUTES.

Rev. St. 1908, § 4025, providing that materialmen furnishing materials to be used in the construction of a building shall have a lien on the property, gives a lien to a materialman furnishing in good faith materials under contract with a contractor to construct a building for use in the building, and delivering them on the ground used for the storage of materials for use

in the building, though some of the materials were not used in the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 51; Dec. Dig. § 48.*]

4. MECHANICS' LIENS (§ 52*)—LIENS FOR MATERIALS—STATUTES.

A materialman furnishing materials to a contractor with knowledge that the contractor is engaged in the construction of two buildings for different persons, is not entitled to a lien on either building in the absence of an agreement that the materials should be used in such building, under the rule that, before a lien may attach, it must appear that the materials were expressly furnished and delivered for use in constructing a specified building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 54-56; Dec. Dig. § 52.*]

Error to District Court, Larimer County; James E. Garrigues, Judge.

Consolidated actions by the B. F. Salzer Lumber Company, the Hallack & Howard Lumber Company, and the Hinchman-Renton Fire Proofing Company, and others against William Lindenmeier and others. There was a judgment denying relief to plaintiffs named, and they bring error. Reversed in part, and affirmed in part.

Doud & Fowler, of Denver, for plaintiff in error, B. F. Salzer Lumber Co. Benedict & Phelps, of Denver, for plaintiff in error, Hallack & Howard Lumber Co. Geo. S. Redd, of Denver, for plaintiff in error Hinchman-Renton Fire Proofing Co. J. F. Farrar, of Denver, for defendants in error.

SCOTT, J. A number of lien claimants brought suit to foreclose their respective claims of mechanic's lien upon the premises owned by defendants in error for materials alleged to have been furnished in the construction of a building thereon, known as the Opera House building in the city of Ft. Collins. Among these several claimants were the plaintiffs in error. Each suit was a separate one, and upon the trial all were consolidated and tried at the one hearing as provided by statute. The lien claims in all cases were sustained, with the exception of those of plaintiffs in error, each of which was denied by the trial court.

It appears that the defendants in error entered into a contract with defendant the Cole-Potter Construction Company, a corporation, for the construction of such Opera House building. The owners prior to the commencement of construction filed for record a certain contract, but it is agreed that this was insufficient to protect the defendants under the statute in such case, and is therefore eliminated from consideration. It also appears that the Cole-Potter Construction Company some time during the month of October, 1907, and before the completion of the building, abandoned the contract. The Cole-Potter Construction Company made no appearance in any of these cases. The Hinchman-Renton Fire Proofing Company's claim was for certain metal lath furnished

and used in the construction of the building, and of the value of \$109.35. The only objection to the allowance of this claim urged and considered by the trial court was the claim of the appellees that no service of summons in the cause was had upon the contractors the Cole-Potter Construction Company. This service was questioned in the supplemental answer of appellees to the complaint of the Hinchman-Renton Fire Proofing Company, in which it was alleged that C. S. Potter, upon whom the personal service had been made as secretary of the Cole-Potter Construction Company, was not at the time of service of summons either an officer, director, stockholder, or employé of such corporation, and that said Potter at the time of the service of such summons so stated to the officer making the service. The return of the sheriff is in every respect regular on its face, showing personal service upon defendant company by personally serving C. S. Potter as its secretary.

[1, 2] It is not necessary, however, for us to consider the question of the impeachment of the return, for that is not a question that can be raised by the defendants in error in this case; and, if it was, the objection was waived by them by first filing an answer, without objection to the sufficiency of the service upon the Cole-Potter Construction Company, and thus entering a general appearance in the cause. The question was attempted to be raised by a supplemental answer filed more than a year after the general appearance. An objection to a return, whether made by motion to quash or by plea in abatement, must be taken in limine, for by appearing to the action and pleading to the merits all such objections are waived. 18 Enc. P. & P. 975.

This being the sole question in the case, and for this reason, the judgment of the district court as to the Hinchman-Renton Fire Proofing Company is reversed.

[3] The claim of the appellant the S. F. Salzer Lumber Company was for two cars of lumber to be used as sheeting, and of the total value of \$1,086.55. This was ordered by the Cole-Potter Construction Company, contractors, for use in the Opera House building of defendants, and the two cars were delivered on July 28 and August 19, 1907, respectively. This material was delivered and placed upon a lot adjoining the grounds upon which the opera house was being constructed, permission to use such lot for the purpose having been secured for the construction company through one of the defendant owners. There can be no question but that this sheeting lumber was sold by the lumber company to the construction company for the use specifically in the Opera House building then being constructed. But it is contended that little or none of this lumber was used in the construction of such building, and that some of it was used in an-

other building then being constructed by the Cole-Potter Construction Company, and for other parties, known as the State Mercantile building, and that some of the lumber was sold by the construction company to other parties. It is also urged that the construction company ordered for use in the building from the Salzer Company more of this kind of lumber than was necessary for the purpose, and likewise ordered more from the Hallack & Howard Company of the same kind of lumber than was used in the building. These contentions of fact must be admitted, with the additional statement that the Salzer Company did not have knowledge that lumber for the same purpose was being furnished by the Hallack & Howard Company. It appears, also, that the business office of the Salzer Company was at Denver, and that the lumber was shipped from its yards at Frazer, Colo.

It is insisted that under this state of facts, the lumber company was not entitled to its claim of lien. Section 4025, Rev. Stat. 1908, provides: "Mechanics, material men * * * furnishing materials to be used in the construction, alteration, addition to or repairs, whether in whole or in part, of any building * * * shall have a lien upon the property * * * for which they have furnished materials * * * whether at the instance of the owner or any other person acting by his authority or under him as agent, contractor or otherwise." In the case of *Small v. Foley*, 8 Colo. App. 444, 47 Pac. 67, this court, in construing a similar statute, said: "One of *Foley and Leonard's* assignors was the *Holmes Hardware Company*. It appears that of the hardware furnished by them for the houses, after it had been delivered at the proper places, \$35 worth was removed by Mr. Rankin to another house, and was not actually used in these houses. So far as appears, this material was removed by Rankin without the knowledge of the Hardware Company. Counsel say it was error to include this amount in the decree. The statute gives to any person who by contract with the owner shall furnish any material for the construction of any building a lien upon the building and the land it occupies. He is not required to see that it actually goes into the building. If, by contract, he furnishes it for the building, whether it is used there or not, he is entitled to the lien. This is what the statute says, and we cannot by construction distort his language into something else." This doctrine was reaffirmed as applicable to the present statute in *Rice v. Cassells*, 48 Colo. 73, 108 Pac. 1001. This was a case where the contractors had purchased for use in a building certain brick, which had been delivered on the ground near and convenient for such use. The contractors failed before the completion of the structure, and gave a chattel mortgage on the unused brick to a third

party. In an action of replevin by the mortgagee against the owners of the building, it was held that the action could not be maintained. The court said: "The reason for the rule is that in such circumstances the materialman is entitled to a lien upon the structure for the construction of which the materials are sold and delivered; and for the protection of the owner of the building under course of construction a qualified title to such material is vested in him. Of course, it will be understood that in stating the above rule it is limited to the facts of this case Crawford, who sold the brick to Mowrey and Klein, did so in good faith, and upon the credit of the building, for the reason that he sold them with the express understanding that they were to be used in the construction of that part of a building which the contractors had agreed to construct for the lodge. The brick were actually placed upon the ground in the immediate vicinity of the building, and part of them used in its construction. It would certainly be unjust to compel the lodge to discharge a lien which Crawford might have asserted for the brick furnished, of which it never had the benefit, and at the same time it would be equally unjust to defeat the right of the materialman to a lien for the brick furnished by holding that, because they had not been wrought into the structure, no lien attached."

There is nothing in this case tending to show other than a good faith sale by the Salzer Company to the contractors, and that the material so sold was for use in the Opera House building and delivered on the grounds in the city of Ft. Collins, used for the storage of materials to be used in such building. The claim of lien should have been sustained. The judgment of the lower court as to the Salzer Lumber Company is reversed.

[4] In the case of the claim of the Hallack & Howard Lumber Company it does not appear that the lumber was sold and furnished for the particular building, but rather that the company simply knew that the Cole-Potter Construction Company was at the time engaged in the construction of both the opera house, upon which the lien is claimed, and the State Mercantile Building. Neither does it appear that there was an agreement that the material so furnished was to be used in either of such buildings. The Hallack & Howard Lumber Company filed a claim of lien upon both buildings, but afterward abandoned the one on the State Mercantile building. The secretary of the company testified that he did know in which of these buildings the material had been used until his visit to Ft. Collins, after the completion of the building. So that from the testimony it does not appear that there was any contract between the Hallack & Howard Company and the construction company that the lumber so sold should be used in the Opera House building, which would seem nec-

essary to sustain a lien upon that property. Before a lien may attach, it must appear that the materials were expressly furnished and delivered for use in constructing a specified building. *Rice v. Cassells, supra.*

The judgment of the district court denying the claim of lien to the Hallack & Howard Lumber Company is affirmed. The case is remanded, with direction to the district court to enter judgment in accordance with the views herein expressed.

MUSSER, C. J., and BAILEY, J., concur.

SATISFACTION TITLE & INVESTMENT CO. v. YORK et al.

(Supreme Court of Colorado. April 7, 1913.)

1. BROKERS (§ 40*)—PRINCIPAL AND AGENT— UNDISCLOSED PRINCIPAL.

Defendant having placed certain property in the hands of P. for sale prior to the organization of plaintiff corporation, after it was organized, and after he had become its general manager, he applied to defendant for a relisting of the property, and she placed the same, with other lands, in his hands for sale and fixed a price at which all the lands should be offered, after which P., without disclosing that he was acting for plaintiff corporation, made efforts to sell the land. *Held*, that the subsequent acts of P. were for the benefit of plaintiff corporation, and that defendant's want of knowledge of its existence did not affect its right to recover commissions on a subsequent sale of the land to a purchaser alleged to have been produced by it.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

2. BROKERS (§ 88*)—RIGHT TO COMMISSIONS— SALE—PROCURING CAUSE—QUESTION FOR JURY.

In an action for broker's commissions, whether plaintiff was the efficient means of bringing the seller and buyer together *held* for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

3. BROKERS (§ 51*)—SALE—PERFORMANCE OF CONTRACT OF EMPLOYMENT.

A broker, in order to earn commissions, must have found and produced a person ready, willing, and able to purchase the property which he was engaged to sell, at the price and on the terms and conditions fixed by his employer, and must show that he was the efficient agent or procuring cause of the sale, and that the means employed by him and his efforts resulted in the sale; but it is not necessary that the broker should know the purchaser or that the latter should be introduced by the broker to the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 69; Dec. Dig. § 51.*]

Error to District Court, Montrose County; Sprigg Schackelford, Judge.

Action by the Satisfaction Title & Investment Company against Mrs. Lillie T. York and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Catlin & Blake, of Montrose, for plaintiff in error. C. J. Moynihan and Sherman & Sherman, all of Montrose, for defendants in error.

SCOTT, J. This is an action by the plaintiff in error, plaintiff below, to recover from the defendants in error, defendants below, a commission as broker for the sale of certain of defendants' lands. The defendants were the owners of several tracts of land, including the premises in question. They had, about two years prior to the occurrences upon which the suit was based, listed certain of their lands for sale with one Lincoln Pysher. Afterward, and on the 24th day of February, 1911, the plaintiff was organized as a corporation, and the said Pysher became its general manager. Afterward, and about the 1st of March, 1911, Pysher drove out to the house of the defendants, and what occurred at that time is better stated in his own language: "I went out to the York place to revise the list that I already had, and asked her if the old prices she had formerly given me would still be effective, if it would still be all right, and we talked the matter over, I and Mrs. York, and she concluded that, instead of just simply listing some of the property that she had formerly required me to sell, she would add some more to it, and consequently she listed all of her property at that time for sale, with the exception of a small tract between the railroad and the north 40, about 15 acres. All of her land laying south of the railroad was afterwards sold. Fourteen thousand dollars was the price placed on the land that was sold that lays south of the railroad. She was to pay a commission of 5 per cent. The property south of the railroad was listed with me at that time at \$14,000, without the crop. If the crop went with the south 40, I was to sell it for an additional \$500."

Mrs. York was acting for herself and as guardian for her two children. Pysher testifies that afterward, and at the earnest request of Mrs. York, he made a special effort to sell the property. That he showed the property to numerous prospective purchasers. That among these was a Mr. Nelson, introduced to the plaintiff by his neighbor Julius Krogh, and at that time the plaintiff drove Nelson and Krogh over the premises and priced the particular lands in question to Nelson, in Krogh's presence. Nelson did not buy, but afterward Krogh advised Pysher that other friends of his were coming to look for lands, and that later a cousin, Peter Krogh, did come. That Pysher asked Julius Krogh if this was one of the persons he had referred to as desiring to purchase lands. That Krogh replied that he was, but that he did not know that he would purchase at that time, but said, "You might show us around; he might buy something if he could find a bargain." Pysher reminded Krogh of the

York land which they had examined together with Nelson, and asked him to speak to his cousin about it, and arranged to take the two Kroghs to see it the following morning. Pysher accordingly went to the residence of Krogh the following morning and was advised that the Kroghs had gone to see another tract of land. But was told by Krogh that evening, when he again called, that the cousin, Peter Krogh, had contracted to purchase the York land. Pysher then called upon Mrs. York and told her that he claimed his commission and wanted her to so understand before she consummated the sale. Mrs. York declined to discuss the matter with him. The agreed commission was 5 per cent. of the purchase price, and the land was sold for the listed price of \$14,000. The defendants offered no testimony, but at the close of plaintiff's testimony moved for a nonsuit, which motion was sustained by the court, and the jury discharged, upon which ruling the case is before us for review.

Defendants in error have filed no brief, and the reasons for the court's action must be gathered from the language of his ruling as follows: "The evidence in this case discloses the fact that this man, Lincoln Pysher, had an agreement with the defendant Lillie T. York to take her property and attempt to sell it, and that listing, as it is denominated by the witness for the plaintiff in this case, occurred a couple of years ago, or, at any rate, a long time before the plaintiff in this case, which is a corporation, had any existence under the law. The witness testifies that last spring he had a talk with Lillie T. York, and that he had gone out there and revised his lists and to ascertain if there were any changes. The conversation with Mrs. York was such that it could not have been anything else than a perpetuation of the old contract, and that any agreement that he made with her was simply an agreement as to his own agency for her; it affirmatively appears that this is the case. Now, the doctrine as to the undisclosed principal, as attempted to be applied to this case by the plaintiff, is certainly not applicable; he could not have been an agent for a nonexistent company. I hold, then, that there is no contract existing between the plaintiff corporation and the defendant. As to the further proposition involved in this case, as to whether the company or Pysher was the procuring cause of this sale, I am constrained to hold that it affirmatively appears from the testimony of Pysher himself that he was not the procuring cause; he did talk to a cousin of the purchaser, Julius Krogh; he never, according to his own testimony, asked Krogh to do anything; Julius Krogh did go out there and have this talk and made a contract with the defendant in this case, and she sold the property to him, but neither Pysher or the company had ever seen the purchaser or had any talk with him, and there is no

evidence to show that he had even induced this Julius Krogh to influence his cousin to buy it; the evidence shows affirmatively that he intended himself to have the interview with him and to take him out to the ranch and show it to him, so the motion for a nonsuit will be sustained, and the jury will be discharged from the further consideration of the case; there is no directed verdict." It appears from this that the court held: (1) That the arrangement between Mrs. York and Pysher on February 24, 1911, was a continuation of the agreement of two years before, and therefore with Pysher personally, hence the corporation cannot recover; (2) that Pysher did not ask Peter Krogh to purchase the land and did not induce Julius Krogh to influence the purchaser in the matter.

[1] As to the first finding, it clearly appears from the evidence of Pysher that the listing on February 24th was a new arrangement, for it contained the inclusion of other lands and for a fixed price for the tract, with the additional lands so to be offered. There can be no doubt from the testimony that Pysher was acting at that time for the plaintiff corporation, though there was no mention of this fact to Mrs. York. Neither does it appear that Mrs. York knew of the existence of the corporation. But this could in no sense affect her interests or her rights in such case. Neither can it affect the right of the real party in interest to recover. *Parker v. Cochrane*, 11 Colo. 367, 18 Pac. 209; 31 Cyc. 1599.

[2] As to the second reason given by the court for his action in sustaining the motion for a nonsuit, it is well settled that as to whether or not the plaintiff was the efficient means of bringing the seller and the purchaser together was for the jury and not for the court. 19 Cyc. 286, 287. In fact, both questions upon which the court determined this case should have been submitted to the jury under proper instructions for they clearly involve findings of fact and not conclusions of law.

[3] It is the rule of law in this jurisdiction: "That is to say, he must have found and produced a person who was ready, willing, and able to purchase the property which was engaged to sell, at the price and upon the terms and conditions fixed by his employer, and must make it appear that he was the efficient agent, or procuring cause of the sale, and that the means employed by him and his efforts resulted in this sale." *Chaffee v. Widman*, 48 Colo. 34, 108 Pac. 995, 139 Am. St. Rep. 220.

In order to entitle the plaintiff to recover, it is not necessary that the broker should know the purchaser or that the latter should be introduced by the broker to the owner. The fact of employment being conceded and with no dispute as to the price of the lands

or the amount of the commission, it is sufficient if the broker shows that he was the moving cause of sale. *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880; *Leech v. Olemons*, 14 Colo. App. 45, 59 Pac. 230; *Williams v. Bishop*, 11 Colo. App. 378, 53 Pac. 239.

The judgment is reversed, and the case remanded.

Reversed and remanded.

MUSSER, C. J., and GARRIGUES, J., concur.

NATIONAL REALTY CO. v. NEILSON et al.

(Supreme Court of Washington. April 16, 1918.)

1. CORPORATIONS (§ 83*) — STOCK SUBSCRIPTION CONTRACTS—CANCELLATION.

A subscription contract for the total stock of a corporation may be canceled by unanimous consent of the subscribers, provided rights of creditors are not involved; and, where a contract is legally canceled, a subsequent subscription by a third person is not a contract for an overissue of stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 328-336; Dec. Dig. § 83.*]

2. CORPORATIONS (§ 83*) — STOCK SUBSCRIPTIONS—CANCELLATION—EVIDENCE.

A cancellation or abandonment of a subscription contract for the total stock of a corporation may be effectual without an express or formal agreement to that effect.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 328-336; Dec. Dig. § 83.*]

3. CORPORATIONS (§ 92*) — STOCK SUBSCRIPTIONS—LIABILITY OF SUBSCRIBER.

A subscriber of corporate stock who gives a note for a part of the price is not entitled when sued on the note by a bona fide transferee thereof to a judgment against the corporation, which is insolvent, for a sum equal in amount to the judgment in favor of the transferee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. § 92.*]

4. CORPORATIONS (§ 92*) — STOCK SUBSCRIPTIONS—LIABILITY OF SUBSCRIBER.

Where a subscriber of corporate stock of the par value of \$100 a share agreed to pay \$150 per share, and gave a note as full payment, and the fiscal agent of the corporation exchanged the note for bonds of the transferee who brought action on the note, the subscriber was not entitled to judgment against the corporation, which was insolvent, for the difference between the par value of the stock and the subscription price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. § 92.*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge. Action by the National Realty Company against James Neilson and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

W. W. Zent, of Spokane, J. W. McBurney, of Seattle, Wm. O'Connor (J. E. McAndrew, of Spokane, of counsel), for appellant. Burkley, O'Brien & Burkley, of Tacoma, for respondents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MAIN, J. The plaintiff the National Realty Company, a corporation, instituted this action for the purpose of recovering upon a promissory note. The defendant Joseph Johns, as receiver for the Pioneer Fire Insurance Company, a corporation, answered by general denial. The defendant James Neilson filed an answer and cross-complaint. To avoid confusion, the parties will be referred to by their respective individual designations. The Pioneer Fire Insurance Company was organized during the month of May, 1909, with a capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 per share. On May 24, 1909, the total amount of the capital stock was subscribed for as follows: J. H. Bridgeford and John D. Atkinson each 150 shares; Will Atkinson 4,700 shares; and Frank Leison 5,000 shares. On this date there was charged upon the stock ledger of the company to each of the subscribers the amount of their respective subscriptions. A few days later, and on June 1, 1909, by unanimous consent of all the subscribers, and before any business had been transacted or obligations incurred, the stock was surrendered to the company except that retained as follows: J. H. Bridgeford and John D. Atkinson each 20 shares, and Will Atkinson for himself, Frank Leison, and associates, 933 shares; and on this date each subscriber was given credit upon the stock ledger for the number of shares attempted to be surrendered by him to the company. There was an agreement that the amount retained should be paid for at \$150 per share, \$100 for the par value of the stock, and \$50 for the surplus fund. The original subscribers at all times regarded their subscription agreement of May 24th as a mere formality. As shown by the evidence, it was not expected by them that any of the stock then subscribed would be paid for. The fact is no stock was issued under the original subscription agreement, and the subscription was considered as not binding, and the stock was to be sold just the same as though no subscription had been made. Subsequent to June 1, 1909, solicitors were sent out to obtain subscriptions to the capital stock of the company, and on January 19, 1910, the defendant Neilson subscribed for 95 shares by agreement in terms as follows:

"Pioneer Fire Insurance Company. Stock Subscription. No. 71. Par Value \$100. Shares, 95. Subscription Price, \$150 per share. I, the undersigned, hereby subscribe for 95 shares of the capital stock of the Pioneer Fire Insurance Company, of Tacoma, Washington, and I promise to pay for the same at the rate of one hundred and fifty (\$150.00) dollars per share, which shall apply as follows: \$100.00 per share on stock, and \$50.00 per share for the surplus fund of said company. [Signed] James Neilson. P. O. Address, Lind, Wash. Dated this 19th day of Jan., 1910.

"Received this 10th day of Jan., 1910, on the above subscription seventy-five dollars per share to apply as follows: \$50.00 per share on stock, and \$25.00 per share on surplus fund. Pioneer Fire Insurance Company, by Geo. N. Marsh."

Prior to this time he had subscribed for five shares, which had been issued and delivered to him and upon which he had paid \$75, \$25 of which was to go to the surplus fund. It will be noticed that the subscription agreement contains an express promise to pay \$150 per share, \$100 on the stock and \$50 for the surplus fund. It was believed by the directors of the Pioneer Fire Insurance Company that \$75 per share would be sufficient to maintain the company and make it a going concern. Indeed, when Neilson subscribed, it was represented to him by one Marsh, then the vice president of the company, that the sum of \$75 per share would be all that would be required to be paid in upon the agreement. Payment of \$75 per share upon the 95-share subscription was made by Neilson by delivering to the company certain securities. Subsequently these securities were returned to him and he gave his promissory notes for the amount, the final payment on which was made to the company on October 27, 1910. Prior to this date, however, the board of directors of the insurance company, finding the financial condition of the company was involved and that it would be necessary to collect not only the \$75 per share, but the full \$150 per share upon the stock subscriptions, on August 18, 1910, made a call upon all the stockholders for such balance, and on September 27, 1910, Neilson was notified in writing of such call, and demand for payment made. Then followed a somewhat lengthy correspondence between Neilson and Bridgeford, the secretary of the company, Neilson desired that 50 shares of stock be issued and delivered to him as fully paid for the \$7,500, which the company had received from him, and that his subscription for the remaining 50 shares be canceled. Bridgeford from time to time assured him that the directors doubtless would be willing to do this, but finally wrote that the company had concluded that it could not legally cancel a subscription on account of the then existing rights of the creditors of the company. Thereafter, and on December 16, 1910, Neilson delivered his promissory note for the sum of \$7,500, payable to the order of the Pioneer Fire Insurance Company, due one year after date, in payment of the balance due upon the entire subscription. A letter urging the giving of this note contained the assurance that, if Neilson was unable to pay the whole amount when it became due, there would be no doubt but that a portion of it could be extended to a more convenient date. Subsequently the company, finding itself in great financial embarrassment and being threatened with a revocation of its license by the state insurance com-

missioner unless it could show an unimpaired capital sufficient to meet the requirements of the law, constituted one J. B. Askew its fiscal agent for the purpose of making some arrangements with the different subscribers whereby assets acceptable to the insurance commissioner could be produced. S. S. Askew, as a representative of J. B. Askew, met Neilson in Spokane on December 16, 1912, and there obtained from him a new note payable to his own [Neilson's] order and indorsed on the back by Neilson. Neilson at the same time and place indorsed in blank the certificate of stock for 95 shares in the Pioneer Fire Insurance Company, and thereupon delivered both the note and stock certificate to S. S. Askew; the old note being destroyed. This note and stock certificate were returned to J. B. Askew, who exchanged the note to the National Realty Company for bonds in that company, depositing the certificate of stock with the realty company as security for the payment of the note, and delivered the bonds to the Pioneer Fire Insurance Company. On March 20, 1911, the insurance company, being unable to pay its debts or longer continue in business, went into the hands of a receiver; it being indebted in an amount exceeding its assets, including all unpaid stock subscriptions. No certificates of stock were ever issued to the original subscribers, except for the limited number taken by them at \$150 per share. All of the stock subscribed subsequent to what has been mentioned as the original formal subscription was subscribed for on the same basis as appellant subscribed for his stock. Neilson in his answer and cross-complaint denied liability upon the note, and pleaded affirmatively that, if he should be held liable on the note, then he was entitled to a judgment against the Pioneer Insurance Company for an amount equivalent to any judgment that might be obtained against him on the note by the National Realty Company. The cause was tried to the court and a jury. The jury returned a verdict in favor of the National Realty Company and against Neilson on the note, and a verdict for a like sum in favor of Neilson and against the Pioneer Insurance Company. In due time a motion for judgment notwithstanding the verdict was made by the Pioneer Insurance Company. This motion being granted, Neilson appeals therefrom.

[1, 2] From the facts stated, the first question to be determined is whether or not Neilson's subscription for 95 shares constituted an oversubscription to the capital stock of the Pioneer Insurance Company. It will be remembered that the total amount of the capital stock was subscribed for on May 24, 1909, and a few days later, and before any business had been transacted by the company or rights of creditors arose, by mutual consent of all the then subscribers, the contract of subscription was considered aban-

doned. If this attempted cancellation were invalid, then it is clear that Neilson's contract called for an overissue. The right to cancel a subscription contract for capital stock by unanimous consent of all the subscribers, when rights of creditors are not involved, is well settled. *Helliwell, Stocks & Stockholders*, § 86; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *Shelby County Ry. Co. v. Crow*, 137 Mo. App. 461, 119 S. W. 435; *Scottish Security Co. v. Starks*, 117 Ky. 609, 78 S. W. 455. In the text of *Helliwell*, supra, the author states the law thus: "In considering the question of the validity of an attempted release of a subscriber by the corporation, distinction must be drawn between the cases which involve the rights of creditors and those which involve the rights of the corporation and its members only. Where the rights of creditors are not involved, the corporation acting with the unanimous consent of its members enjoys the right to enter into a contract with respect to its shares on whatever terms it may deem to be to its advantage. It may therefore permit a member to withdraw absolutely, canceling all claims against him for unpaid portions of the subscription price of his shares, and this, too, although no other person is substituted in his stead. As indicated, however, to such action on the part of the corporation the consent of the other stockholders must be unanimous." In order to effect a cancellation or abandonment of a subscription contract, it is not necessary that the agreement to cancel be express or formal. 1 *Cook on Corporations* (6th Ed.) § 169. Under these authorities, the attempted cancellation or abandonment was valid, and it follows that the subscription of Neilson was not for an overissue of stock. It was a binding and valid contract of subscription.

[3] It is next contended that, if the original subscription were canceled, then the total amount of the capital stock had never been subscribed for, and for that reason Neilson was entitled to a judgment against the insurance company for a sum equal in amount to the judgment against him in favor of the National Realty Company. Many of the cases cited in support of this position are cases where the action was brought by the corporation itself upon the contract of subscription, and no rights of creditors were involved. The case of *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130, is in accord with the other cases cited. It was there held that a corporation could not enforce subscriptions to its capital stock until the full amount of the capital stock had been subscribed for. But, where the rights of creditors are involved, a different rule prevails. In the case of *Cox, Receiver, v. Dickie*, 48 Wash. 264, 93 Pac. 523, it was held that the defense that the stock of the corporation had not been fully subscribed was ineffectual as against

the rights of the creditors of the corporation. It was there said: "The first five of these defenses [one of them being no full subscription to the capital stock of the company] may be considered together. It must be remembered that this is not an action by the corporation to enforce the collection of subscriptions for stock or its contracts with its subscribers, but is an action brought by a receiver under order of the court to enforce such subscriptions for the benefit of creditors. As between the corporation itself and the stockholders, all these defenses would probably be good, but as between the stockholders and the creditors of the corporation another rule prevails." It is urged that the cases of *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089, and *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643, sustain the doctrine of nonliability of the subscriber even as against the rights of creditors, unless the full amount of the capital stock had been subscribed; but these cases, in so far as they may not be in harmony with the later case of *Cox, Receiver, v. Dickle*, supra, are in effect overruled by that case.

[4] It is finally contended that Neilson is entitled to a judgment against the Pioneer Fire Insurance Company for the difference between the par value of the stock and the total amount paid. The par value was \$100 per share, while the subscription contract called for the payment of \$150 per share. The evidence shows that Neilson gave the note here sued upon by the National Realty Company as final and full payment of the obligation incurred by the subscription. The note was by the fiscal agent of the insurance company exchanged for bonds in the National Realty Company. These bonds then became a part of the assets of the Pioneer Fire Insurance Company. To give Neilson a judgment for the difference between the par value of the stock and the subscription price would be to permit a stockholder as such to share equally with the creditors in the application of the assets. There can be no question but that the rights of creditors in the assets of an insolvent corporation are superior to those of the stockholders.

The judgment will be affirmed.

MOUNT, MORRIS, ELLIS, and FULLERTON, JJ., concur.

BRADFORD et al. v. ADAMS et ux.

(Supreme Court of Washington. April 14, 1913.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, rendered under proper instructions, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. FRAUD (§ 13*)—MISREPRESENTATIONS—MISTAKE.

A vendor, who undertakes to point out to the purchaser boundaries of the land, must do so correctly; and where he makes an honest mistake, without intention to deceive, the purchaser, relying on the representation, may recover the damages sustained.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Evaline Bradford and another against Charles E. Adams and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hughes, McMicken, Dovell & Ramsey, Otto B. Rupp, and J. B. Joujon-Roche, all of Seattle, for appellants. Hastings & Stedman, of Seattle, for respondents.

MAIN, J. The object of this action is to recover damages for fraud and deceit alleged to have been practiced in the sale of land. During the fall of the year 1907 the defendants were the owners of a tract of land described as follows: The west half of the northwest quarter of section 10, township 22 north, range 4 east, W. M. This land lies some distance south of the city of Seattle and about 1½ miles west of O'Brien Station. Separating the White river valley, in which O'Brien Station is, and the tableland to the west, there is a bluff approximately 300 feet in height. The side of the bluff, extending from the valley below to the brow of the hill, is steep and precipitous, broken by ridges, ravines, and gulleys. The tableland from the brow of the hill to the west is substantially level. The northeast corner of the land above described is approximately 200 feet over the brow of the hill to the east, and the southeast corner approximately 500 feet. Extending north and south, and about 75 feet west of the top of the hill, there is an old military road. Standing in this military road, where it crosses the north line of the track in question, there is a hub or stake, with a tack in the top thereof. The level land to the west of the brow of the hill is of good quality and valuable. The land extending east of the brow of the hill is of little value. Some time during the month of October, 1907, negotiations looking to the purchase of the land by the plaintiffs were begun, and on October 18th Leslie Adams, the son of Charles E. Adams, one of the defendants, took the plaintiffs out to show them the land and its location. The plaintiffs claim, and their evidence is to the effect, that Leslie Adams on this date represented to them (1) that the hub or stake above referred to marked the northeast corner of the 80-acre tract; (2) that the east line was above the brow of the hill, except for a short distance at the southeast corner; (3) that no part of the land lay east of the

top of the hill, except not to exceed $3\frac{1}{2}$ acres at the southeast corner. A few days later, and on November 4th, Charles E. Adams, one of the defendants, again took the plaintiffs out to show them the land. Prior to starting out, Adams had arranged with a Mr. Espy to meet them upon the land and assist in pointing out the corners and boundaries. The plaintiffs, Adams, and Espy met upon the land. The plaintiffs' witnesses testify that substantially the same statements were made to them on this occasion as to the northeast and southeast corners, the location of the east line, and the amount of land over the bluff at the southeast corner, as that made to them by Leslie Adams on the previous occasion. The witnesses on behalf of the defendants deny having made any of the representations which the plaintiffs claimed. The plaintiffs also claim, and there is evidence tending to show, that they relied upon the representations, that they would not have made the purchase, but for them, and that they had no knowledge or other means of knowing the location of the corners and boundaries. The plaintiffs purchased the land for a consideration of \$10,000, and on November 14, 1907, received a conveyance therefor. Subsequent thereto the plaintiffs caused a survey of the land to be made, and for the first time ascertained that the stake marking the northeast corner was approximately 200 feet east of the hill and the one at the southeast corner approximately 500 feet; that there was east of the brow of the hill a much larger portion of the 80-acre tract than $3\frac{1}{2}$ acres. Suit was brought for the purpose of recovering damages on account of the misrepresentations as to the stakes and boundaries. The cause was tried to the court and a jury, and resulted in a verdict for the plaintiffs for the sum of \$525. Motion for new trial being made and overruled, the defendants appeal.

[1] The first contention of the appellants is that there is no evidence to sustain the verdict of the jury. But an examination of the record discloses that upon all the disputed questions of fact the evidence was directly and positively conflicting. It was therefore a question for the jury, under proper instructions, to determine whether or not the plaintiffs had been defrauded. It is also argued that the court instructed the jury upon matters which were foreign to the issues and the evidence, and that the defendants were prejudiced thereby. From a careful reading of the instructions given by the trial court, there does not appear to us to be any substantial basis for this contention.

[2] The appellants specifically complain of the instructions wherein the trial court told the jury that, if they found the misrepresentations as to corners or boundary were made, the defendants would be liable in damages, even though made honestly and with-

out intention to deceive. From numerous decisions of this court it has become the settled doctrine that the vendor, when he undertakes to point out lands or boundaries to a purchaser, must do so correctly. He has no right to make a mistake, except under penalty of having the contract rescinded or responding in damages. *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880; *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051; *West v. Carter*, 54 Wash. 236, 103 Pac. 21. In *Freeman v. Gloyd*, supra, it is said: "Representations involving mere matters of opinion or questions of judgment, as much within the knowledge of one party as the other, cannot be made the basis of an action to rescind or for damages, even when not in accord with the truth; but representations as to the boundaries of land are not of that sort. Such representations are regarded as representations of fact, and the owner, if he undertakes to point out the boundaries at all, must point them out correctly, under penalty of responding in damages or to an action of rescission." It is argued that a different rule was announced in *Curtley v. Security Savings Society*, 46 Wash. 50, 89 Pac. 180; but that case is based upon a wholly different state of facts, and when carefully read will be found to be in harmony with the view above expressed.

The judgment will be affirmed.

MOUNT, MORRIS, and FULLERTON, JJ., concur.

DAHLSTRUM v. BEARD FRUIT CO.

(Supreme Court of Washington. April 14, 1913.)

1. TENANCY IN COMMON (§ 20*)—ACQUISITION OF TAX TITLE—AGENCY.

Where plaintiff's cotenant had possession and control of the property and let plaintiff believe that he would pay the taxes as previously done, upon which assurance plaintiff relied, such cotenant was plaintiff's agent for the purpose of paying taxes.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 60, 61; Dec. Dig. § 20.*]

2. TENANCY IN COMMON (§ 20*)—ACQUISITION OF TAX TITLE.

An agent cannot take advantage of his own wrong to acquire the principal's property, so that if plaintiff's cotenant, who was her agent for paying taxes on the property and had previously paid the taxes, wrongfully, without plaintiff's knowledge, permitted the taxes to become delinquent and had the land purchased for himself at the tax sale, plaintiff could recover a half interest in the tract so purchased.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 60, 61; Dec. Dig. § 20.*]

Department 1. Appeal from Superior Court, Clarke County; H. E. McKenney, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Clora Markle Dahlstrum against the Beard Fruit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Griffith & Leiter, of Portland, Or., for appellant. Back, Hall & Drowley, of Vancouver, for respondent.

MOUNT, J. This action was brought to recover an undivided one-half interest in a certain tract comprising about 15 acres of land in Clarke county. It resulted in a judgment as prayed for in the complaint. The defendant has appealed.

The land in question was purchased in 1890 by George B. Markle, P. C. Kauffman, and S. M. Beard. Title was taken in the name of S. M. Beard, who as trustee held the title for the parties as follows: George B. Markle, an undivided one-half interest; P. C. Kauffman and S. M. Beard, each an undivided one-fourth interest. Beard held possession and had the management of the land. In 1894, at the request of George B. Markle, his interest was conveyed by Mr. Beard to Clora A. Markle, the plaintiff in this action, and the trust agreement was canceled. Clora A. Markle was a nonresident of this state at that time and still is such nonresident. She relied upon Mr. Beard to care for the property, which he did by retaining the management thereof, paying taxes, etc. In 1896 Beard conveyed his interest in the land to the Commercial Bank of Vancouver, of which bank he was the manager and principal owner. Mr. Kauffman about the same time conveyed his interest to the bank. In 1895 and 1896 the undivided half interest of the plaintiff was assessed in her name, and the taxes for those years were not paid. The plaintiff relied upon Mr. Beard to pay these taxes. The taxes became delinquent, and a certificate of delinquency was issued to one H. W. Arnold. Mr. Beard soon afterwards purchased this certificate of delinquency, and had the same assigned to his niece Mary E. Beard without notice to the plaintiff. This niece subsequently assigned the certificate of delinquency to one W. L. Gray, who brought a suit to foreclose the certificate. A default judgment was entered, and the property sold to said Gray on April 10, 1901. In November, 1901, the Commercial Bank of Vancouver conveyed its interest to Gray. In December, 1901, Gray conveyed to defendant, Beard Fruit Company. S. M. Beard was the uncle of Mary E. Beard, who was married to W. L. Gray. Mr. Beard was the manager of the Commercial Bank of Vancouver and also of the Beard Fruit Company. In October, 1909, soon after learning of the tax foreclosure and of the transfers as above stated, the plaintiff brought this action. The complaint is based upon the theory that, at the time the taxes became delinquent, plaintiff and S. M. Beard were tenants in common; that Beard had the care and management of the premises and

was charged with the duty of paying the taxes; that he permitted the taxes to become delinquent without notice to the plaintiff; and that he directed and controlled the proceedings resulting in the foreclosure of the tax certificate and the conveyance to defendant, for the purpose of defrauding the plaintiff. The answer denies all these allegations, pleads the title in the defendant and laches in bringing the action. A trial resulted in findings which are abundantly supported by the evidence, to the effect that the plaintiff has at all times named herein been a resident of Pennsylvania; that when she acquired her interest, S. M. Beard owned an undivided interest and was in charge of the property, caring for the same for his cotenants; that he led plaintiff to believe that he would thereafter pay the taxes thereon; that he permitted the taxes to become delinquent without notice to the plaintiff in order to acquire title to her interest; that all the proceedings leading up to the tax sale and subsequent conveyance to defendant were instigated and controlled by S. M. Beard, and the transfer to third parties was with notice and knowledge of such third parties of the purposes of said Beard to defraud plaintiff of her interest in the property; that the rents and income of the property have been collected by S. M. Beard and the Beard Fruit Company from the time of the original purchase; and that the rental value of the property has been in excess of the taxes.

The point made by the appellants upon this appeal is that the plaintiff had an agent at Portland, Or., who was authorized to look after this property, and because the property was assessed directly to the plaintiff, it became her duty to pay the taxes. Conceding the general rule that one cotenant cannot acquire title of another by purchase at tax sale, it is argued the rule does not apply in this case, and many authorities are cited to the effect that the rule does not apply where the relation of cotenancy has terminated, or where the interests were acquired under different instruments and at different times, or where the land has been assessed in the names of the respective owners. These rules do not in our opinion apply to this case. It is true that plaintiff had an agent by the name of Clohessy, residing at Portland, Or., who was authorized to look after her property in this state and pay the taxes thereon. But this agent did not have possession of this piece of property or control over it.

[1] Mr. Beard, the plaintiff's cotenant, had possession and control of the property. Not only that, but he had led the plaintiff to believe that he would pay the taxes as he had theretofore done, and she relied upon that belief. Mr. Beard was therefore her agent for that purpose, and plaintiff had no notice that the taxes were delinquent or that any proceedings were being taken against the land to enforce payment.

[2] It is plain that an agent cannot take advantage of his own default or wrong and thereby acquire the property of his principal, or, as was said in *Finch v. Noble*, 49 Wash. 578, 96 Pac. 3, 128 Am. St. Rep. 880, quoting from *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94: "If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such negligence, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly." This rule is fundamental and applies in all its vigor to the facts found in this case. It is unnecessary to cite other authorities, which may be found in abundance.

There is no merit in the contention that the plaintiff is guilty of laches. The statute of limitations had not run, and there has been no changed condition. The rental of the property has been more than sufficient to pay the taxes.

The judgment is therefore right and must be affirmed.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

STATE v. PACIFIC AMERICAN FISHERIES.

(Supreme Court of Washington. April 15, 1913.)

1. MASTER AND SERVANT (§ 13*) — REGULATION OF HOURS OF EMPLOYMENT—STATUTES—CONSTRUCTION.

Laws 1911, c. 37, entitled "An act to regulate and limit the hours of employment of females in any mechanical or mercantile establishment * * * except establishments engaged in * * * canning * * * perishable articles," and providing that no female shall be employed in any mechanical or mercantile establishment more than eight hours a day, except in harvesting, packing, or canning fruit or vegetables or in canning fish, does not exempt an establishment engaged in canning fish, and an employé in the establishment, not canning fish, is within the protection of the act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 14; Dec. Dig. § 13.*]

2. STATUTES (§ 211*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in construing a statute, must ascertain the legislative intent, and to do so the title of the statute may be considered.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 288; Dec. Dig. § 211.*]

3. CRIMINAL LAW (§ 1159*)—EVIDENCE—SUFFICIENCY.

A verdict sustained by any evidence will not be disturbed on appeal, though the evidence is not of the most convincing kind.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

4. MASTER AND SERVANT (§ 18*)—TRIAL—INSTRUCTIONS — PREJUDICIAL ERROR — "CANNING FISH."

An instruction on the issue whether the lacquering of cans containing canned salmon is a part of the canning of salmon within Laws 1911, c. 37, prohibiting the employment of females in mechanical establishments for more than eight hours per day, except females employed in canning fish, that if the lacquering was not a part of the canning, but the process of canning was completed without it, and if the lacquering was done after the canning to prevent the cans from decaying and to preserve the cans during the consumption of the salmon, and if it was not necessary to preserve the cans by lacquering, and if the lacquering could have been done after the canning in the usual course of business by the employment of females for not more than eight hours per day, the jury must find the employer guilty is sufficiently favorable to accused and he may not complain thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 18.*]

5. CRIMINAL LAW (§ 730*)—MISCONDUCT OF PROSECUTING ATTORNEY—INSTRUCTIONS.

Where the court, on objection to improper argument of the prosecuting attorney, specifically charged the jury to disregard the argument, which was not borne out by the evidence, and the prejudicial effect of the argument could be removed by the action of the trial court, the improper argument was not ground for reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Mount and Morris, JJ., dissenting.

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

The Pacific American Fisheries Company was convicted of crime, and it appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant. Frank W. Bixby and Howard C. Thompson, both of Bellingham, for the State.

MAIN, J. The defendant was charged by information with employing a female person for more than eight hours in one day. The information, so far as material to the present inquiry, is as follows: "Then and there, being on or about October 20, 1911, the said defendant, Pacific American Fisheries, a corporation, did then and there willfully and unlawfully employ a female, to wit, Mrs. E. B. Scrimscher, for more than 8 hours out of the 24 hours of said 20th day of October, 1911, to wit, for a period of 10 consecutive hours, save and except one hour intermission between 12 and 1 o'clock of said day. The said female, Mrs. E. B. Scrimscher, being employed in the lacquering department of the cannery of said corporation; the said employment not being in harvesting, packing, curing, canning or drying any variety of perishable fruit or vegetable, nor in canning fish or shellfish. The said lacquering consisting of immersing in a tank of fluid, called 'lacquer,' of the sealed can of salmon." To this information the defendant interposed a demurrer, which was overruled. In due time

the cause came on for trial before the court and a jury. It appears that for the season of 1911 the defendant began its canning operations on the 11th day of June. The process employed in the cannery was briefly as follows: The fish were first prepared and placed in cans. The cans then passed through the topping machine. From this machine they went to the soldering machine, after which they were immersed in water. If the cans did not develop any leaks, they were passed along and into a steam vat or retort and cooked. Following this, the cans were punctured for the purpose of allowing gas generated in the cooking process to escape. After the steam had escaped, the cans were again soldered, after which they were immersed in a strong solution of lye, for the purpose of cleansing from all oil or acid. The cans were then scattered about on the floor of the cannery to cool. After drying, they were again tested for leaks. They were then placed in the warehouse, where they were lacquered. By lacquering is meant the dipping of the cans in a certain solution for the purpose of preserving them from leaks and preventing rust. The lacquering takes place after the can is filled, cooked, and sealed. As above stated, the canning operations of the defendant for the season of 1911 began on the 11th day of June. Following this, the cans, as they were filled, cooked, and sealed, were placed in the warehouse where they remained until the 8th day of September, 1911, when the lacquering was begun. The lacquering of the cans continued from the 8th day of September, 1911, until approximately the 8th day of the following December. As shown by the charging part of the information, one Mrs. E. B. Scrimscher was on the 20th day of October, 1911, employed in lacquering the cans for a period of more than eight hours in one day. During the progress of the trial, counsel for the defendant repeatedly objected to statements made by the prosecuting attorney to and in the presence of the jury, for the reason that the statements complained of were dehors the record. As occasion required, the trial court promptly and specifically instructed the jury to disregard the statements not supported by the evidence. The trial resulted in a verdict of guilty. Motion for a new trial being seasonably made and overruled, the defendant appeals.

The questions here to be determined are: (1) Does the information charge a crime? (2) If it does, did the court err in submitting to the jury the question as to whether or not the lacquering was a part of the process of canning fish, as used by the defendant at the time charged in the information? (3) Did the trial court commit prejudicial error in its instructions to the jury? And (4) was appellant prejudiced by the statements of the prosecuting attorney?

[1, 2] 1. The question as to whether or not the information charges a crime involves the construction of chapter 37 of the Laws of 1911, known as the "Women's Eight Hour Law." The title of the act and section 1 are as follows:

"An act to regulate and limit the hours of employment of females in any mechanical or mercantile establishment, laundry, hotel or restaurant; except establishments engaged in harvesting, packing, curing, canning or drying certain perishable articles and providing a saving clause as to such exception; to provide for its enforcement and a penalty for its violation.

"Section 1. No female shall be employed in any mechanical or mercantile establishment, laundry, hotel or restaurant in this state more than eight hours during any day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four: Provided, however, that the provisions of this section in relation to the hours of employment shall not apply to, nor affect, females employed in harvesting, packing, curing, canning or drying any variety of perishable fruit or vegetable, nor to females employed in canning fish or shellfish. If it shall be adjudicated that the foregoing proviso and exception shall be unconstitutional and invalid for any reason, and adjudication of invalidity of said proviso or of any part of this act shall not affect the validity of the act as a whole or any other part thereof."

From an examination of the title, it appears that a saving clause will be found in the act limiting its general scope or operation. Looking to the body of the act, as contained in section 1, we find it provides that "no female shall be employed in any mechanical or mercantile establishment * * * more than eight hours during any day." Then follows the proviso which is: "That the provisions of this section * * * shall not apply to nor affect females employed in canning fish or shellfish." The argument is made that the proviso excepts establishments from the operation of the statute which are engaged in the canning of fish. Whether or not this contention is correct must be determined from the language used. The end of all statutory interpretation is to ascertain the legislative intent, and, when the legislative intent is to be determined, the title of the act is a proper subject for consideration. In *State ex rel. Swan v. Taylor*, 21 Wash. 672, 59 Pac. 489, it is said: "The end of all interpretation is to ascertain the legislative intent, and, in the ascertainment of it, the title which has been given to an enactment is always a proper subject for consideration."

The title of the act in question does not show a legislative intent absolute to exempt establishments engaged in the canning of fish. The title itself refers to a saving clause as to the exception. It follows that the saving clause in the body of the act must determine the scope of the exemption. This proviso by its language does not exempt, from the eight-hour restriction, establishments engaged in canning fish, but it does exempt females employed in the canning of fish. The statute unquestionably was passed in the interest of females employed in the establishments mentioned. The limitation as to its operation contained in the proviso was for the purpose of permitting females to labor more than eight hours in one day when engaged in preserving the perishable products therein mentioned. If female labor is employed in canning fish, it comes within the exemption in the statute; but if employed in establishments engaged in canning fish, but not in the canning of fish, then such labor does not come within the exemption. Applying this rule to the information charging the defendant with employing a female more than eight hours in one day, it charges a crime within the meaning of the statute.

[3] 2. The trial court submitted to the jury the question of fact as to whether Mrs. E. B. Scrimsher on the 20th day of October, while engaged in lacquering the cans, was employed in canning fish, as the process was then used by the defendant. In other words, submitted to the jury the question whether or not lacquering was a part of the canning. It is vigorously contended that there is no evidence in the record showing, or tending to show, that the lacquering was not a part of the canning, but that the undisputed evidence shows that a person employed in lacquering the cans was engaged in canning fish. Without setting out in detail the evidence upon this question, it may be said that, while the evidence tending to show that lacquering was not a part of the canning may not be of the most convincing character, yet there is sufficient evidence to raise a question of fact for the jury to pass upon. As was said in *State v. Ripley*, 32 Wash. 184, 72 Pac. 1036: "This court has heretofore announced that it will not disturb verdicts of this character, on the ground of alleged insufficiency of evidence, where there is evidence to support the verdict, although it may not be of the most convincing kind."

[4] 3. After submitting to the jury the question whether the lacquering was a part of the canning, as the process was then employed by the appellant, and directing the jury to find the appellant not guilty unless they found from the evidence that the lacquering was not a part of the canning, the trial court gave an instruction as follows: "If you find from the evidence, beyond a reasonable doubt, that the lacquering of the

cans containing the canned salmon, done at defendant's cannery at the time charged in the information, was not a part of the canning of the salmon then canned there, that the process of canning the salmon then employed by defendant was complete without the lacquering, but that the lacquering of the cans containing the canned salmon was done after the canning to prevent the cans from tarnishing or rusting or decaying and to preserve the cans during the time reasonably required for the disposition and consumption of the salmon contained in same, when disposed of in the ordinary and usual manner in which canned salmon is sold on the market, and by which it reaches the consumer, and you further find from the evidence, beyond a reasonable doubt, that it was not necessary to so preserve the cans containing the canned salmon canned by the process employed by the defendant that the same should be lacquered immediately after the fish were sealed therein, but that under all of the conditions then existing, as you may find the same to have then existed, from all the evidence, the lacquering could have been done thereafter in the usual course of business by the employment of females in doing the same for not more than eight hours per day, or by other labor as might suit the pleasure of the defendant, in such time as would have safely preserved the cans from damage by reason of tarnishing or rusting, then and in such case you would find the defendant guilty as charged." This instruction is based upon the hypothesis that the jury should find that the lacquering was not a part of the canning, and after telling the jury that if they should find that the lacquering was not a part of the canning, and if they should find certain other things specified in the instruction, then they should find the defendant guilty. While this instruction goes further than is necessary in embodying elements necessary for the jury to find before they could find the defendant guilty, it is more favorable to the defendant than it would be had the irrelevant matter been eliminated. The giving of it was not prejudicial as against the appellant.

[5] 4. Finally, it is urged that the prosecuting attorney, during the trial, and in the presence of the jury, was guilty of misconduct in making statements not sustained by the evidence. While the traveling outside of the record on the part of counsel is always to be condemned, it does not necessarily follow that to do so is always prejudicial error. The record shows that, when complaint was made of the conduct of the prosecuting officer by counsel for the defendant, the trial court promptly and specifically instructed the jury to disregard the statements which were not borne out by the evidence. The statements complained of were not of that flagrant character which would bring to the minds of the jury matters, the prejudicial effect of which

could not be removed by the promptitude of the trial court.

The judgment will therefore be affirmed.

ELLIS and FULLERTON, JJ., concur.

MOUNT and MORRIS, JJ. It is our opinion that the lacquering of cans is as much a part of canning fish as soldering or putting fish into the cans. The act expressly excepts such employment. We therefore dissent.

SUTHERLAND & BREWER v. LEWIS RIVER BOOM & LOGGING CO.

(Supreme Court of Washington. April 16, 1913.)

1. LOGS AND LOGGING (§ 19*)—BOOMS—NEGLECT—EVIDENCE.

Where the issue was whether one contracting to drive logs and deliver them in his boom was negligent in failing to properly construct, maintain, and operate the boom, evidence that the boom was not properly constructed and was of insufficient strength to securely retain the logs, and that the boom broke and the logs escaped, was admissible.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 50-52; Dec. Dig. § 19.*]

2. APPEAL AND ERROR (§ 1002*)—VERDICT—REVIEW.

It is within the province of the jury to pass upon the credibility of the witnesses and to weigh conflicting evidence and determine the damages sustained by plaintiff; and a verdict within the issues and evidence, rendered under proper instructions, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Department 1. Appeal from Superior Court, Cowlitz County; H. E. McKenney, Judge.

Action by Sutherland & Brewer, copartners consisting of T. D. Sutherland and another, against the Lewis River Boom & Logging Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Miller, Crass & Wilkinson, of Vancouver, for appellant. W. G. Drowley, of Vancouver, and R. Sleight, of Portland, Or., for respondents.

PER CURIAM. Action by Sutherland & Brewer Logging Company, a copartnership consisting of T. D. Sutherland and W. D. Brewer, against the Lewis River Boom & Logging Company, a corporation, to recover damages for loss of logs. From a verdict and judgment for \$4,737.50 in plaintiffs' favor, the defendant has appealed.

Respondents are engaged in cutting timber into logs and procuring them to be driven to market. Appellant is a public service corporation, organized under the laws of this state, for the purpose of clearing the North fork of Lewis river, in Cowlitz county, and driving, sacking, sorting, rafting, and boom-

ing logs and other timber products. On September 14, 1908, appellant and respondents entered into a written contract, whereby appellant, for a stipulated consideration, agreed to sack and drive all logs then in Lewis river owned by the respondents, or which respondents might place in the river prior to November 15, 1908, and by August 1, 1909, deliver the same in appellant's boom at the mouth of the river. By the contract it was further stipulated and agreed that if respondents should place additional logs in the river after November 15, 1908, they were to be marked with a different brand from those placed in the river prior to that date. Respondents alleged that in pursuance to this contract they placed a large quantity of logs in the river prior to November 15, 1908, marked with a foot as a brand, and that such logs were known as the "foot logs"; that they placed in the river after November 15, 1908, additional logs, marked "7 UP" as a brand, and that such logs were known as the "seven up logs"; that by reason of appellant's failure to properly construct and maintain its boom, and also by reason of its negligence in failing to have a sufficient number of employes to drive the logs at proper seasons of the year, the boom broke, and respondents' logs were thereby permitted to escape and be lost; that only a small portion of them were recovered; and that respondents were thereby damaged.

Appellant denied negligence upon its part, alleged that the logs were properly driven to its boom, where they were held ready for rafting; that respondents were to furnish appellant with boom sticks and swifters to be used in rafting the logs, which respondents, after repeated demands, neglected to do; that as a result a delay occurred in rafting the logs, until an unusual flood of high water brought a large quantity of logs and other timber products down the river; that by reason of respondents' failure to furnish boom sticks and swifters to properly raft their logs, and by reason of the extreme high water and the unusual quantities of timber products coming down the stream, the boom broke; that had it not been for respondents' logs stored in the boom, and which had remained for a long time after they should have been rafted, the boom would not have broken, as it was safely constructed and of ample strength to hold timber products ordinarily carried by the floods; that many of respondents' logs which thus escaped were recovered by respondents and not accounted for by them to the appellant, while others were recovered by employes of the appellant and accounted for to respondents. Appellant, by counterclaim, demanded judgment for unpaid driving and booming charges alleged to be due from respondents.

[1] The issues presented are whether the boom broke by reason of appellant's negli-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gence, and, if so, what was the quantity and value of logs which may have been lost. Respondents introduced evidence tending to show that the boom was not properly constructed; that it was of insufficient strength to securely retain the logs, which caused it to break and the logs to escape. Appellant assigns error on the ruling of the trial court in admitting this evidence. One of the issues was whether appellant was guilty of negligence in failing to properly construct, maintain, and operate its boom. The evidence was therefore admissible and competent.

[2] Appellant further insists that excessive damages have been awarded. The evidence is sufficient to sustain the verdict. It was within the exclusive province of the jury to pass upon the credibility of witnesses, to weigh the conflicting evidence, and to determine the damages. This they did under proper instructions, and their verdict, which is well within the issues and evidence, cannot be disturbed on this appeal.

The judgment is affirmed.

CITY OF SEATTLE v. GOLDSMITH.

(Supreme Court of Washington. April 15, 1913.)

1. WEIGHTS AND MEASURES (§ 1*) — POWER TO REGULATE.

Laws providing for the detection and prevention of imposition and fraud on the public in the sale and purchase of food and other commodities of general and necessary use by securing honest weights and measures are as much within the general police power as the regulation of public health, safety, and welfare.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. WEIGHTS AND MEASURES (§ 1*) — POWER TO REGULATE.

Under Const. art. 11, § 10, authorizing cities of the first class to frame their own charters, consistent with and subject to the Constitution and laws of the state, section 11, authorizing counties, cities, towns, or townships to make and enforce such local police, sanitary and other regulations as are not in conflict with general laws, Rem. & Bal. Code, § 7507, subd. 36, authorizing cities of the first class to make all regulations necessary for the preservation of public morality, health, business, and good order, and subdivision 16, conferring power to provide for the weighing and measuring and inspection of all articles of food and drink offered for sale and to enforce the keeping of proper legal weights and measures by all vendors and to provide for the inspection thereof, the state's power to regulate weights and measures is delegated to such cities.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. WEIGHTS AND MEASURES (§ 1*) — POWER TO REGULATE.

Under Rem. & Bal. Code, § 7507, subd. 16, authorizing cities of the first class to provide for the weighing, measuring, and inspection of all articles of food and drink, the power to require the true weight or measure to be stated on the package or other container in which such articles are sold is implied as incident to

the power expressly granted and essential to its accomplishment.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—SUBJECTS AND TITLES.

A provision of a city ordinance making it unlawful to sell or have for sale in packages, boxes, etc., any commodity ordinarily or usually sold in bulk by weight or measure, unless the true net weight or measure is plainly and legibly stamped or printed on the package or other container, was germane to the title reciting that it related to the weighing, measuring, and inspecting of commodities sold or offered for sale by weight or measure and the keeping of proper legal weights and measures by all vendors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.*]

5. WEIGHTS AND MEASURES (§ 1*)—MUNICIPAL ORDINANCES—VALIDITY.

A city ordinance making it unlawful to sell or have for sale commodities in packages, boxes, etc., unless the true net weight or measure is stamped or printed thereon, is not unreasonable and invalid because it makes no allowance for the loss of weight by evaporation, since it is not unreasonable to require the packer or manufacturer to ascertain this loss and overcome it by increasing the size of the package or the weight of the commodity, to withhold his goods from the market until it is possible to ascertain the true net weight or to adopt some other plan to enable the container to correctly indicate the weight.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

J. S. Goldsmith was convicted of violating an ordinance of the City of Seattle. On appeal to the Superior Court the action was dismissed, and the City appeals. Reversed.

Jas. E. Bradford and Ralph S. Pierce, both of Seattle, for appellant. Preston & Thorgrimson, of Seattle, for respondent.

MORRIS, J. This appeal submits the validity of an ordinance of the appellant, requiring the true net weight or measure of commodities sold in containers to be stamped or printed on the container. The ordinance is attacked: (1) As not within the power of the city; (2) that the submitted provision is not within the title; and (3) that the provision is unreasonable. The title is: "An ordinance relating to weighing, measuring and inspecting of commodities sold or offered for sale by weight or measure within the city of Seattle; to enforce the keeping of proper legal weights and measures by all vendors in the city; to provide for the inspection thereof, inspection fees therefor, and the issuance of licenses therefor; and providing penalties for violation thereof." The attacked provision is found in section 11 of the ordinance, and reads as follows: "That from and after March 31, 1911, it shall be unlawful for any vendor in the city of Seattle, or his agent, clerk, or other em-

ployé, to sell, offer for sale or have in his possession with the intent to sell in original packages, boxes, crates, bottles, cartons, cases, bags, sacks, or other receptacles, any commodity ordinarily or usually sold or offered for sale in bulk or otherwise, by weight or measure, unless the true net weight or measure of the commodity so contained shall be plainly and legibly stamped or printed on the face of each such package, box, crate, bottle, carton, case, bag, sack or other receptacle, and unless the commodity so sold or offered for sale is actually sold or offered for sale as of such true net weight or measure."

It is contended by the city that its authority to pass an ordinance of this character is given: First, in the general delegation of police powers to cities of the first class as found in subdivision 36 of section 7507, Rem. & Bal. Code, "to make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits"; and, second, in subdivision 16 of the same section, conferring power "to establish and regulate markets, and to provide for the weighing, measuring, and inspection of all articles of food and drink offered for sale thereat, or at any other place within its limits, by proper penalties and to enforce the keeping of proper legal weights and measures by all vendors in such city, and to provide for the inspection thereof." These provisions have both been incorporated into the city charter in language identical with that contained in the general statute, except that the provision of subdivision 16 is enlarged to include the erection and maintenance of city scales, the weighing thereon of such commodities as the city may designate, and requiring the delivery of an official certificate of such weight.

[1] It is apparent from the title of the ordinance that its purpose is to prevent fraud in the securing of honest weights and measures. That laws providing for the detection and prevention of imposition and fraud upon the people in the sale and purchase of food and other commodities of general and necessary use are as much within the general police power as the regulation of public health, safety, and welfare, seems to us too well established to be doubted. *People v. Wagner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141; *Chicago v. Schmidinger*, 243 Ill. 167, 90 N. E. 369, 17 Ann. Cas. 614; *State v. McCool*, 83 Kan. 428, 111 Pac. 477; *Chicago v. Bartels*, 146 Ill. App. 187; *O'Maley v. Freepport*, 96 Pa. 24, 42 Am. Rep. 527.

The power to legislate upon all subjects affecting the interests of a whole community must be conceded to exist by whatever name that power may be called. *Munn v. People*, 69 Ill. 80. In *Freadrich v. State*, 89 Neb. 343, 131 N. W. 618, 34 L. R. A. (N. S.) 650, a conviction was sustained for selling a pail of lard not having the net weight of the con-

tents, exclusive of the container, stated on the outside of the pail, under the requirement of the Nebraska pure food law, and the law was upheld as within the police power. A similar ruling was made in *State v. Co-Operative Store Co.*, 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248, sustaining an indictment for selling corn meal in packages containing less than the weight required by statute; the court saying that the prevention of fraud in the enactment of such statutes has always been recognized as well within the police power. Many cases are here cited to the effect that legislation for the prevention of deception and fraud in weights and measures, especially in the sale of food and other essentials of life, is well within the police power. Freund on Police Power, § 272, in referring to the protection against deception and fraud afforded by the police power, says: "The police power attempts to give an ampler protection, both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud. It does not in the first instance punish fraud, but prescribes regulations and punishes their violation. The intervention of the law proceeds upon the theory that every one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension." Tiedeman's Limitations of Police Power, in section 89, states the same rule.

[2] Respondent does not question but that the ordinance is within the police power of the state; but his main argument is that any portion of this power delegated to the city is by implication only and not an express delegation. If it be conceded that the state has the power to pass a law of this character, we cannot see how the conclusion can be escaped that cities of the first class have that power. Under our Constitution, art. 11, § 10, such cities are permitted to frame their own charters consistent with and subject to the Constitution and laws of the state. Section 11 of the same article of the Constitution provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." These sections delegate the police power of the state to cities of the first class, restricting the exercise of the power to conformity with the Constitution and general laws of the state. If it be admitted then that the passage of this ordinance is within the police power of the state, it must also be admitted that it is within the police power of the city, unless it can be said to be in conflict with some general law, and no conflict is suggested. We have then the conferring of the power by the state in its Constitution and statutes, and the acceptance and assertion of the

power by the city in its charter. The objection that the ordinance is not justified and cannot be sustained as a valid exercise of the police power must then fail. *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647; *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661.

[3] Another objection by respondent is that, if the power be held to exist under the general grant of police power, subdivision 16 of section 7507, as incorporated in the city charter, is a special power "to establish and regulate markets and to provide for the weighing, measuring and inspection of all articles of food and drink," and the extent of the power is to be found in the specific enumeration of the power rather than in the general power. In other words, that the general grant is restricted and limited by the special enumeration, and since the power to compel the net weight to be stamped upon containers is not included within the specific enumeration, it does not exist by expression, nor is it included by implication. It will, of course, be admitted that, if the power can be fairly implied as incident to power expressly granted, or as an essential to its accomplishment, it must be held to be included. The purpose of these provisions being to prevent fraud and deception, the state, in delegating to the city the power to regulate the weighing, measuring, and inspection of food products, must have had in mind that the city would exercise that power in such a way as to reach the object sought, and that in addition to weighing and measuring, it might provide regulations essential to the accomplishment of the purpose that could be necessarily or fairly implied in regulating weights and measures. If the city has power to regulate weights and measures, it has the power to provide what that regulation shall be, how the true weight and measure shall be ascertained; and it is going but a step further to say how it shall be made known or disclosed to the consumer. The power to require the true weight or measure to be stated on the container is, it seems to us, so fairly implied in and incident to the power to regulate that it must be held to exist. In *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566, it was held that an ordinance requiring coal dealers to furnish to consumers certificates showing official weights of the coal sold, which certificates the dealers were required to purchase from the city, was valid under the power to provide for the inspection and weighing of coal and the regulation of standard weights, the court reasoning that the purpose of the ordinance was plainly the protection of the citizen from imposition and fraud by false weights; and the requirement of the ordinance was a necessary incident to that purpose. In *St. Charles v. Elsner*, 155 Mo. 671, 56 S. W. 291, power to provide for the public weighing of coal was held to include the power to maintain public scales

and fixing the scale of prices for such weighing. In *State v. Namias*, 49 Ia. Ann. 618, 21 South. 852, 62 Am. St. Rep. 657, the power to locate public markets is said to imply the power to prohibit sales of food for daily consumption at other places. In *Scudder v. Hinshaw*, 134 Ind. 56, 33 N. E. 791, the power to license hacks was sustained as a necessary incident to the power to regulate the use of the public streets. The power to remove or confine persons suffering from infectious and pestilential diseases is held by implication to authorize the renting and leasing of a house in which to confine smallpox patients. *City of Anderson v. O'Conner*, 98 Ind. 168. Authorizing cities to contract for lighting and a supply of water, by implication confers authority to employ the usual and necessary means to put in motion the power granted. *State ex rel. Miller v. Missouri, K. & T. Ry. Co.*, 164 Mo. 208, 64 S. W. 187. The power to levy and collect taxes conferred on cities is held by necessary implication to authorize a provision that, if the taxes were not paid, the property should be sold and conveyed by the city, and that deeds so executed shall be prima facie evidence of the regularity of all proceedings. *Howe v. Barto*, 12 Wash. 627, 41 Pac. 908. In *Davison v. Walla Walla*, 52 Wash. 453, 100 Pac. 981, 21 L. R. A. (N. S.) 454, 132 Am. St. Rep. 983, under a charter provision authorizing the city to prohibit within fire limits the erection of any wooden buildings, the power of the city to prohibit the repair of any wooden buildings damaged by fire to the extent of 80 per cent. of their value was sustained. These are not exceptional cases. Many other like rulings might be cited to the effect that what the law will imply as a necessary incident is as much within a legislative enactment, whether state or municipal, as though specifically set forth in terms. And it is not a departure from such a rule to say that a requirement to stamp the net weight on a container is implied from the power to regulate weights. It is a regulation and one of the most effective in so regulating weights and measures as to reduce the opportunities for fraud and deception to the consumer to a minimum.

[4] This also disposes of the contention that the provisions of section 11 are outside the title of the ordinance. It only need be added on this point that, being incident to the special power conferred and implied from the language conferring the special power, as used in the title of the ordinance, it is germane thereto, and hence, under many of our decisions holding this to be the test, it is sufficiently embraced within the title.

[5] The next contention of respondent goes to the reasonableness of the ordinance in failing to make allowances for the loss of weight by evaporation, stating in support of his theory that California salt packed in sacks, and raisins packed in cartons, the two commodities embraced in the complaint, will lose weight by evaporation, and that the

true weight, if stated on the container at the time of packing, would not be the true weight at the time of delivery to the consumer, and hence the dealer would be liable for a violation of the federal act requiring that, if the weight be stamped on the package, it must be the true weight. This would mean, assuming respondent's contention as to loss of weight by evaporation to be true, that the loss must fall on the consumer. It does not appear to us that a law is unreasonable because compliance with its requirements shifts this loss of the original packer or manufacturer. It is not unreasonable to require that the packer and manufacturer shall ascertain this loss by evaporation as he is best in position to do, and overcome the loss by increasing the size of the package or the weight of the commodity packed therein, or withhold his goods from the market until it is possible to ascertain the true net weight. Whatever may be the necessary course to adopt to enable the container to correctly indicate the weight of the commodity it contains, it is not unreasonable to place that burden upon the one who puts the article before the public as a sale commodity, and compel him, if he wishes to retain his trade, to so pack his commodities that the consumer may know the true quantity of the thing he buys, and thus protect himself in paying the value of the thing he buys. At all events, we apprehend that there will be little likelihood of the honest merchant subjecting himself to a penalty under this ordinance if he is able to show that, in an honest endeavor to comply therewith, the nature of the article is such that an absolute compliance with its terms is impossible. The power of the city to pass the ordinance being sustained, it will be a simple matter to so amend it, if found to be necessary, as to conform to all natural and uncontrollable conditions.

The judgment is reversed.

CROW, C. J., and FULLERTON, MOUNT,
and ELLIS, JJ., concur.

CHOLOKOVITCH v. PORCUPINE GOLD MINING CO.

(Supreme Court of Washington. April 15, 1913.)

1. CUSTOMS AND USAGES (§ 15*)—CONTRACTS OF HIRING—DEFINITENESS.

Where defendant hired plaintiff to work in its Alaska mine during the season of 1911, plaintiff may, in case of breach, recover damages for his loss during the entire mining season; for, while a contract of employment must be reasonably certain as to the length of employment, yet, as it appeared that in Alaska there was a well-defined mining season, this was sufficient—the indefiniteness of the season depending solely upon the weather.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

2. MASTER AND SERVANT (§ 39*)—PLEADING—PROOF—VARIANCE.

Under Rem. & Bal. Code, § 299, providing that no variance shall be deemed material, unless it shall have actually misled the adverse party, and whenever he has been so misled that fact shall be proven, the variance between an allegation in a complaint, seeking a recovery for breach of contract of employment, that the contract was oral, and was entered into on April 24, 1911, and proof that the actual contract was made prior to that time, and that on that date plaintiff was informed by letter that defendant was ready for him to begin work, must be disregarded; no actual prejudice being shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45, 46; Dec. Dig. § 39.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Pete Cholokovitch against the Porcupine Gold Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. R. Clise and C. K. Poe, both of Seattle, for appellant. Jackson Silbaugh, of Seattle, for respondent.

PARKER, J. This is an action to recover damages which the plaintiff claims resulted to him from a breach of contract of employment, by which he was to work for the defendant at its mine in Alaska during the season of 1911. A trial before the court, without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

Respondent is a resident of Seattle. Appellant is a corporation engaged in working a mine at Porcupine in Alaska. F. C. Hunter is the president of appellant, and George Charlton is a clerk in charge of the office of appellant at Porcupine. In the winter or early spring of 1911 Hunter was in Seattle, where he had a conversation with respondent, resulting in an agreement between them that respondent should go to Porcupine and work for the appellant as a pick and shovel man in its mine during the season of 1911, his wages to be \$3 per day and board, and that he would be notified by letter from Porcupine when to go there to commence work; the beginning of the season depending upon weather conditions in the spring. Soon thereafter Hunter went to Porcupine, and on April 24, 1911, caused the following letter to be sent to respondent:

"Porcupine, Alaska, April 24, 1911.

"Mr. Pete Cholokovitch, Seattle, Wash.—Dear Sir: Mr. Hunter directs us to write you that you may leave Seattle about May 15th, and that will get you here in time to begin work at the mines.

"Yours truly,

"Porcupine Gold Mining Company,
"By George A. Charlton."

Respondent, in response to this letter, went from Seattle to Porcupine, paying his own

way, and thereafter offered his services in compliance with the agreement had with Hunter while in Seattle. Respondent was then refused employment by appellant. He thereupon returned to Seattle, and during the period covered by the mining season of 1911 at Porcupine made reasonable efforts to obtain employment, but was unable to earn during that period near as much as he would have earned had appellant employed him at Porcupine in compliance with the agreement. He was awarded judgment against the appellant for the amount he would have earned had he worked for it at Porcupine during the season of 1911, less the amount of his earnings at Seattle during that period. There is a well-recognized mining season at Porcupine during the spring, summer, and fall months; its length being controlled by the coming of spring and winter. This is the only uncertainty as to its length. When the conversation occurred between Hunter and respondent in Seattle, it is evident that appellant then intended to and thereafter did carry on its mining operations at Porcupine for the entire season of 1911, so that the amount respondent would have earned could be determined with reasonable certainty. While the evidence is in conflict, especially upon the question of employment for the whole of the season, we think the foregoing is a fair summary of the facts which the trial court was warranted in believing from the evidence, and which it evidently did believe in arriving at its decision.

[1] The principal contention of counsel for appellant is, in substance, that the contract of employment was too indefinite and uncertain as to time to bind appellant for the entire mining season of 1911, or to bind appellant in any event, except from day to day; the agreed wages of respondent being by the day. Counsel invoke the general rule of law that, in order to bind an employer for a particular term of employment, the contract of employment must be reasonably certain as to the length of such term. While this is the general rule, we do not think it follows that the length of the term of employment may not be made sufficiently certain by contract by reference to events, which are sure to occur, in the future, contingent only as to the time of their occurrence. It seems to us that the duration of the prospective employment, under this agreement, was even more certain than that involved in the case of *Prescott v. Puget Sound Bridge & Dredging Co.*, 31 Wash. 177, 71 Pac. 772, and 40 Wash. 354, 82 Pac. 606, looking alone to the terms of the respective contracts. In that case the contract was, in substance, that the plaintiff should be employed "for the time the work undertaken by the defendant at Manila should last;" and it was there held that the contract was

not, in law, so uncertain as to exclude testimony as to the duration of the work, notwithstanding, as was said in the dissenting opinion in that case in 40 Wash. 357, "it might continue for months or for years." In this case we have less uncertainty than that, since the term of employment in no event could last beyond the mining season of 1911, and this, we think, would go a long way towards removing the objections urged in the dissenting opinion in that case. The principle upon which that case was decided in favor of the plaintiff is stated in the opinion in 31 Wash. 180, 71 Pac. 773, as follows: "The contract was one which, if it did not give the appellant the right to enter at once into the service of the respondent, gave him the right to enter therein within a reasonable time after its execution, and was broken, within either view, when the respondent wrongfully, and without cause, refused to permit the appellant to enter into the service at all. It was not, therefore, so indefinite and uncertain as to the time of the commencement of the service as to render it void. Nor was it so indefinite and uncertain as to its duration as to render it void. While its duration was uncertain in the sense that it was not shown how long the work undertaken by the respondent at Manila would last, yet it was not a contract of employment for an indefinite period in the sense that either party could terminate it at will. It was a contract to serve on the one part and to employ on the other, obligatory upon each until the happening of a particular event, and until that event happened neither party could terminate the contract without committing a breach thereof." We conclude that appellant cannot escape liability because the duration of the employment was dependent upon the length of the mining season of 1911, even though the length of that period was in a measure dependent upon contingent events.

[2] Some contention is made by counsel for appellant resting upon the theory of variance between the proof and allegations of the amended complaint. The amended complaint alleges that the contract was oral, and entered into on or about the 24th day of April, 1911. This, it will be noticed, is the date of the letter sent from Alaska to respondent in Seattle, and at that time Hunter was in Alaska. The conversation which constituted the making of the contract necessarily occurred some time prior. It seems clear to us that this is not such a variance as worked to the prejudice of appellant upon the trial of the case; neither do we find in the record of the trial any claim of prejudice by reason of the proof of the conversation, which was claimed to constitute the contract, occurring some time before the date alleged in the complaint. It seems to us that it would be a clear violation of the spirit of section 299, Rem. & Bal. Code, re-

lating to variance, to recognize appellant's contention upon this ground as well taken.

The judgment is affirmed.

CROW, C. J., and MOUNT, GOSE, and CHADWICK, JJ., concur.

GANTENBEIN et al. v. CITY OF PASCO et al.

(Supreme Court of Washington. April 15, 1913.)

MUNICIPAL CORPORATIONS (§ 341*)—CONTRACT FOR IMPROVEMENT—INVALID ORDINANCE.

Laws 1911, cc. 98, 111, grant to cities the power to construct a system for the distribution of water by the creation of assessment districts, provided the mayor and council shall adopt plans therefor by ordinance or resolution. *Held* that, where a contract between a city and a reclamation company providing for the construction of a distribution system was held invalid because the councilmen passing the ordinance were improperly interested, such determination did not necessarily invalidate a contract let by the city to L. under the same ordinance for the construction of the system, in which contract it was not shown that the council had any interest.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 874; Dec. Dig. § 341.*]

On rehearing. Modified.

For former opinion, see 129 Pac. 374.

PER CURIAM. One of the questions raised in this case was that the contract let by the city of Pasco to the defendant Lund was invalid, for the reason that it was not let to the lowest bidder. It was our conclusion that the evidence brought the case within the rule announced in *Stern v. City of Spokane*, 60 Wash. 325, 111 Pac. 231. We are asked to restate or modify our opinion, inasmuch as the parties are not certain whether our holding would deprive Lund of the benefit of his contract. The ordinance we held to be invalid provided for the letting of a contract for the piping or distribution system, as well as for the purchase of water from the Pasco Reclamation Company. Under chapter 98, Laws 1911, p. 441, and chapter 111, Laws 1911, p. 510, the power is granted to the city to construct "a piping system for the distribution of water * * * by the establishment and creation of assessment districts," provided that the mayor and council shall by ordinance or resolution adopt plans therefor. The record does not disclose any objection to Lund's contract, other than that it was let under the same ordinance that we held to be invalid in so far as the Pasco reclamation contract was concerned. It is not shown that the council, or any of them, had any interest in the contract of Lund. We did not intend to hold that the contract with Lund was invalid, for the reasons urged against the Pasco reclamation contract. It seems to us that our opinion

inferentially holds just the contrary. This court has habitually set itself against any interference with the discretion of the legislative bodies of the state, and has gone so far as to hold that, if the illegal can be separated from the legal, we will sustain that which is good and reject that which is bad. We feel warranted in applying that rule in this case. We think the case falls within the spirit if not the letter of *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735. To hold otherwise would be to hold that the city is bound to let a contract for its distributing system at the same time it acquires water and as a part of the same general scheme; whereas the rule, as we understand it to be, is that the city can pass one or separate ordinances and let separate contracts for all or any part of the work, or may, if not otherwise restrained, do the work or any part of it itself. Our holding, therefore, is that the contract of the city of Pasco with the defendant Lund does not come within the rule announced in the case against the Pasco Reclamation Company.

With the petition for rehearing and re-statement of our opinion an affidavit is offered tending to show that one of the council had an interest in Lund's contract. The affidavit is made by a third party, and is not certified as a part of the record, and will not be considered.

PHILLIPS et al. v. TOMPSON et al.
(Supreme Court of Washington. April 16, 1913.)

1. MORTGAGES (§ 587*)—FORECLOSURE—PERSONS INCLUDED.

A mortgage foreclosure and sale in a suit brought by the mortgagee and defended by the administrator of the mortgagor did not divest the title of the mortgagor's nonresident heir.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1685, 1685½, 1687, 1688; Dec. Dig. § 587.*]

2. JUDGMENT (§ 479*)—COLLATERAL ATTACK.

A decree quieting title, regular upon its face, cannot be collaterally attacked.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 913-915; Dec. Dig. § 479.*]

3. QUIETING TITLE (§ 31*)—PROCESS—SERVICE BY PUBLICATION—JURISDICTION.

The provision of Rem. & Bal. Code, §§ 229-232, that unknown heirs, proper parties to an action relating to real property, may be proceeded against by service by publication, is valid, and where complied with in an action to quiet title, a proceeding in rem, the court having jurisdiction of the realty may adjudicate and quiet title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 67; Dec. Dig. § 31.*]

4. QUIETING TITLE (§ 31*)—PROCESS BY PUBLICATION—"UNKNOWN HEIRS."

The term "unknown heirs," as used in statutes providing for service by publication in actions relating to real property, has been liberally construed to effect the purpose of the statute to bind all unknown heirs and unknown persons or parties who had an inter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

est in the property at the time of the commencement of the action, so that in contemplation of such a statute grandchildren may be considered the heirs at law of their deceased grandmother, as well as the heirs at law of their deceased father, her son and heir at law.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 67; Dec. Dig. § 81.*]

5. LIS PENDENS (§ 3*)—REVIEW—PRESUMPTIONS—MATTERS NOT ALLEGED.

In an action attacking the decree in an action to quiet title against unknown heirs, it will be presumed, in the absence of any allegation that a *lis pendens* was not filed therein, that the proceedings were regular and that a *lis pendens* was filed as required by Rem. & Bal. Code, § 232.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 3-8; Dec. Dig. § 3.*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Annie B. Phillips and others against Louise A. Tompson and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Bell & McNeil and Roney & Loveless, all of Seattle, for appellants. Hastings & Stedman and Thomas H. Bain, all of Seattle, for respondents.

CROW, C. J. This action was commenced by Annie B. Phillips, Charles G. Phillips, Jr., and Josephine R. Ker, heirs at law of Charles G. Phillips, deceased, against Louise A. Tompson and other defendants, to quiet title to 80 acres of land in King county and redeem the same from a mortgage lien. A demurrer to their third amended complaint was sustained. They declined to plead further, and have appealed from an order of dismissal.

The single question presented is whether the third amended complaint states a cause of action. It is voluminous, details at length judicial proceedings hereinafter mentioned, and in substance states the following facts: On April 21, 1891, one Annie M. Phillips, a widow, now deceased, became the owner in fee simple of the 80 acres of land in the third amended complaint described, which she mortgaged to respondent Louise A. Tompson. On October 15, 1900, Annie M. Phillips died intestate leaving Charles G. Phillips, a son who resided in the state of Ohio, as her only heir at law. On October 1, 1904, Louise A. Tompson commenced cause No. 44,558 in the superior court of King county against Annie M. Phillips to foreclose the mortgage deed. The pleadings indicate that at the date of the commencement of the foreclosure action Louise A. Tompson was ignorant of the previous death of Annie M. Phillips. On or about May 11, 1905, C. H. Rollins was appointed and qualified by the superior court of King county as administrator of the estate of Annie M. Phillips, deceased, and on May 13, 1905, was substituted as defendant in the

foreclosure action, which thereafter was entitled "Louise A. Tompson, Plaintiff, v. C. H. Rollins, Administrator of the Estate of Annie M. Phillips, deceased, substituted for Annie M. Phillips, defendant." The administrator appeared, filed an answer, a decree of foreclosure was entered, sale was made by the sheriff of King county, and on July 9, 1906, a sheriff's deed for the land was executed and delivered to Louise A. Tompson. On August 1, 1906, Louise A. Tompson, claiming title to the land, instituted in the superior court of King county a second action, cause No. 62,411, to quiet her title. In this action she was plaintiff, while Charles G. Phillips, the unknown heirs of Annie M. Phillips, deceased, and all other persons unknown claiming any right, title, claim, or interest in or to the real estate were named as defendants. She alleged that at all times in her complaint mentioned, and prior to June 28, 1907, she was the owner of the land; that on June 26, 1907, she had sold and by warranty deed had conveyed a portion of the land; that Charles G. Phillips and the unknown defendants claimed some right, title, or interest in or to the premises, but that their claim, if any, was subordinate to her title. She asked a decree quieting her title as of the date of June 28, 1907, and further asked that the defendants known and unknown, and each and all of them, be forever barred and foreclosed from any right, title, or interest in or to the land. Service by publication was had; the first publication being made on August 7, 1908. On that date Charles G. Phillips, the known and named defendant, died intestate leaving the appellants and plaintiffs herein, Annie B. Phillips his widow, Charles G. Phillips, Jr., and Josephine R. Ker, his children, as his sole heirs at law. There is no suggestion that Louise A. Tompson was aware of the death of Charles G. Phillips, or that she knew of the existence of appellants as his heirs at law at any time prior to the final decree in the action to quiet title, or at any time prior to April, 1910. On November 4, 1908, after entry of default, findings of fact and conclusions of law were made and entered in cause No. 62,411, upon which final decree was entered quieting the title of Louise A. Tompson in and to all of the real estate as prayed in her complaint, and further decreeing that the defendants, Charles G. Phillips, the unknown heirs of Annie M. Phillips, deceased, and all other persons unknown, had no right, title, interest, claim, lien, or estate in or to the land, or any part thereof. The appellants herein had no knowledge of the pendency of the action to quiet the title, commenced by Louise A. Tompson, until after entry of the decree in her favor.

The complaint in the instant case further shows that the respondents herein, Roscoe C. Nisonger, Minnie Olive Barton, James C.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Barton (her husband), Maggie Hiltman, Charles J. Hiltman (her husband), and Hewitt-Lea Lumber Company, a corporation, have acquired title and interests in and to portions of the land, having deraigned the same from Louise A. Tompson subsequent to the foreclosure and sale. The land is vacant, unimproved, and unoccupied. Appellants, who are nonresidents of this state, first learned of the foreclosure decree and sale, and the action to quiet title, in March, 1910. They then secured the services of an attorney to represent them, and on or about April 25, 1910, through their attorney, instituted an action in ejectment in the superior court of King county in the name of Annie M. Phillips, the original owner and mortgagor then deceased, as plaintiff, to recover the land. Appellants claim that they were ignorant of the law, that they knew nothing of court procedure, and that they relied upon the advice of their attorney. Afterwards, in October, 1910, appellants discharged their attorney who had commenced the action in ejectment, and employed their present attorneys, who on April 5, 1911, instituted the present action. Appellants claim title as widow, children, and sole heirs at law of Charles G. Phillips, deceased, the son and sole heir at law of the original owner and mortgagor, Annie M. Phillips, deceased. They contend that as to them the foreclosure was void; that Charles G. Phillips, who at the time of the foreclosure was the sole heir at law of Annie M. Phillips, deceased, was a necessary party to the foreclosure action; that he was not made a party, was not served with process; that his title was never divested; that appellants hold title as his heirs at law; that the decree in cause No. 62,411, purporting to quiet title in Louise A. Tompson, is void as to appellants, for the reason that they were not made parties defendant, and were not served with process; that they still hold title to the real estate subject to the mortgage lien; that they are entitled to redeem; and that they have tendered to respondent Louise A. Tompson the amount due on her mortgage.

[1] It may be conceded without any citation of authority that the foreclosure and sale did not divest the title of Charles G. Phillips, of whom appellants are the heirs at law; yet the respondent held an interest in and to the land, did obtain color of title by the sheriff's deed, and claimed the fee-simple title as alleged in her complaint.

[2] The controlling question on this appeal is whether the fee-simple title was legally adjudged to, quieted and vested in, her and her grantees by virtue of the final decree entered in cause No. 62,411. Her complaint therein, which stated a cause of action and alleged title in her, made no mention of the foreclosure and sale; and the decree, which is regular upon its face, is valid if the court had jurisdiction to enter the same, and is

not subject to impeachment in this collateral action. 23 Cyc. 1055, 1056.

[3] The action to quiet title was a proceeding in rem, to which Charles G. Phillips, the unknown heirs of Annie M. Phillips, deceased, and all other persons unknown claiming any interest in the real estate, were made defendants, under sections 229-232, Rem. & Bal. Code. From necessity, statutes of the character of the sections cited have been enacted in many states, in order that titles may be quieted, when clouded by adverse claims of unknown heirs, and unknown parties, who may be without the jurisdiction of the state in which the real estate is located. The essential purpose of such statutes is to provide that unknown heirs and claimants may be served by publication without alleging their names, in order that they may receive the most effective notice possible, that they may appear and plead their claims, and that the court having jurisdiction of the real estate may determine and quiet the title. The state has power to thus provide for an adjudication of adverse rights or claims of persons in or to real estate situate within its borders, even though such claimants may be unknown and are without the jurisdiction of the court. Titles to real estate should not be subjected to continuous clouds. A state is under no compulsion to suffer titles to real estate situated within its borders to remain clouded for an indefinite period for the want of a proper method of serving process upon unknown claimants, or a proper procedure to quiet the same. Statutes similar to ours have been sustained with marked uniformity. The substance of appellants' objection to the decree quieting title is the want of service upon, or jurisdiction over, them. Jurisdictional objections to actions to quiet title against unknown heirs and unknown parties, where service is made by publication, have frequently been made upon the ground that actions *quia timet* in respect to land are equitable in their nature, that equity acts in personam, and that personal jurisdiction of defendants cannot be obtained by publication.

In *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212, the court, in passing upon a statute providing for constructive service upon unknown claimants to land, said: "It is conceded that constructive or substituted service may be authorized by the state, and resorted to in all actions or proceedings touching real property which are properly denominated actions or proceedings in rem. Such are actions to partition real estate, proceedings to enforce the collection of taxes against lands, and for the condemnation of land. *Pennoyer v. Neff*, 95 U. S. 714, 727 [24 L. Ed. 565]. Actions *quia timet* in respect to land, to remove a cloud, or to determine adverse claims, are equitable in their nature, and, strictly speaking, equity acts upon the person, and not upon the prop-

erty; and in these actions the judgment affects the claim or title to the land, and they are not strictly actions in rem. But they concern real estate lying within the jurisdiction of the court, and the state may clothe the court with full power to inquire and adjudicate as to its status, title, and ownership; and it is now well settled, that, as respects the procedure provided, and the constructive service of notice, by publication, upon nonresident defendants at least, actions of this kind are to be classed with actions in rem. *Arndt v. Griggs*, 134 U. S. 316, 322-326 [10 Sup. Ct. 557, 33 L. Ed. 918]; *Lane v. Innes*, 43 Minn. 137 [45 S. W. 4]. The question is, not what a court of equity, under its general powers as such, may do, but what the state may authorize in actions to adjudicate the title to real estate. Thus it is said in *Boswell v. Otis*, 9 How. 336, 348, 350 [13 L. Ed. 164]: "It is immaterial whether the proceeding against the property be by attachment or by bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but when such a proceeding is authorized by statute, on publication, without personal service of process, it is substantially of that character." And the inquiry should be: Have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court? and is such judgment limited to the property named in the bill? The judgment can affect the property only, and the defendant is not personally bound beyond it. And such, in substance, is the character of this action. Its object is an adjudication of the state of the title, and the judgment goes no further. And by the procedure under consideration, the proceedings are instituted by filing the complaint, and recording the *lis pendens* against the property, and followed by the publication provided for." See, also, *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; *State v. Westfall*, 85 Minn. 437, 444, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571; *Title, etc., Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

In *Arndt v. Griggs*, *supra*, the Supreme Court of the United States, in discussing the question whether a state has the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication, said: " * * * A cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits;

and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the state, in this respect, is binding upon the federal courts."

A valuable discussion of the purpose and validity of such statutes may be found in *McClymond v. Noble*, reported in 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354, and in Mr. Freeman's note at page 358 et seq. The superior court in the action to quiet title had jurisdiction of the real estate which is in King county. Service was made upon the unknown defendants in compliance with the statute; the complaint stated a cause of action; the decree was regular upon its face; and the court having jurisdiction of the land adjudicated and determined the ownership of the title.

[4, 5] Appellants further contend that, when Louise A. Thompson instituted the action to quiet title, she had knowledge of Charles G. Phillips, who was made a known defendant; that she attempted to serve him by publication; that she must be presumed to have also known of his heirs at law after his death; that she made no attempt to serve them either as such heirs at law, or as unknown parties claiming an interest; that they were neither unknown heirs, nor unknown parties or claimants within the contemplation of the statute; and that as to them the decree quieting respondents' title is void. Appellants' contention seems to be that the only unknown heirs named as defendants were the unknown heirs of Annie M. Phillips, deceased, and that appellants being the heirs of Charles G. Phillips, who died after the commencement of the action, were not the unknown heirs of Annie M. Phillips, but were his heirs. Strictly speaking this may be true, but the term "unknown

heirs," as used in statutes of this character, has been so liberally construed by the courts that appellants, in contemplation of the statute, can be considered the heirs at law of Annie M. Phillips, deceased, as well as the heirs at law of Charles G. Phillips, deceased.

In *Howell v. Garton*, 82 Kan. 495, 108 Pac. 844, the syllabus, which states the substance of the opinion, reads as follows: "The term 'unknown heirs,' as used in the sections of the Code providing for service by publication in cases relating to real property and where the relief demanded is to exclude defendants from any interest, title or estate in real property, means all kinds of heirs, including heirs of heirs of such defendants as well as the legatees of heirs."

The statute of this state (section 232, Rem. & Bal. Code) provides: " * * * Any such unknown heirs or unknown persons or parties who have or claim any right, estate, lien, or interest in the said real property in controversy, at the time of the commencement of the action, duly served as aforesaid, shall be bound and concluded by the judgment in such action, if the same is in favor of the plaintiff therein as effectually as if the action was brought against such defendant by his or her name and constructive service of summons obtained: Provided, however, that such judgments shall not bind such unknown heirs, or unknown persons or parties, defendant, unless the plaintiff shall file a notice of *lis pendens* in the office of the auditor of each county in which said real estate is located, in the manner provided by law, before commencing the publication of said summons."

The third amended complaint in the instant case does not allege that a *lis pendens* notice of the action to quiet title was not filed in the office of the auditor of King county, and in the absence of such an allegation we must assume the proceedings were regular and that it was filed. The evident purpose of the statute is to bind all unknown heirs, and unknown persons or parties who had an interest in the real estate at the time of the commencement of the action; and, under the doctrine of *lis pendens*, to also bind all persons who may thereafter acquire an interest or title through them, whether such subsequent interest or title be acquired by voluntary conveyance or by inheritance. If in an action, under such a statute after a complaint stating a cause of action has been filed, and publication of summons against unknown heirs and unknown parties has been made, a final decree may be avoided for the sole reason that some one of the defendants, known or unknown, dies without the plaintiff's knowledge during the pendency of the action leaving unknown parties as his heirs at law, the very purpose of the statute would be annulled.

In *Inglee v. Welles*, 53 Minn. 197, 55 N. W. 117, an action affecting real estate was
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brought to determine adverse claims of Henry T. Welles, Della Godding, and other persons and parties unknown. Service by publication was made, but subsequent to the decree it appeared that Della Godding was dead at the time the action was commenced. Her heirs attacked the validity of the proceedings, but the Supreme Court of Minnesota in sustaining the decree said: "We are of the opinion that the proof of publication of the notice of *lis pendens* with the summons is sufficient; also, that the nature of the action, and the nonresidence of the named defendant, Della W. Godding, sufficiently appeared from the affidavit for publication. We are also of opinion that the mere fact that the named defendant was dead before the action was brought did not prevent the court from acquiring jurisdiction to determine the right of 'persons or parties unknown' claiming an interest in the land described in the complaint. These being all the objections to the judgment that are urged by the appellants, the order appealed from must be affirmed."

In *Howell v. Garton*, supra, a case to which we have already alluded, as involving the meaning of the term "unknown heirs," an action was brought on July 1, 1905, to quiet title against one Abbie A. Little if living, or if dead against her unknown heirs. Unknown to the plaintiff, Abbie A. Little had died intestate in 1893, leaving one Hattie A. Davis as her sole heir at law. It also appeared that, unknown to plaintiff, Hattie A. Davis had died testate in 1903, previous to the commencement of the action to quiet title. The Supreme Court held that a decree entered upon the service of summons by publication as against Abbie A. Little if living, or if dead as against her unknown heirs, was binding upon the legatees of her then deceased daughter, Hattie A. Davis. These cases show that the courts sustain decrees in such actions upon the theory that the actions are proceedings in rem, and that a court having jurisdiction of the real estate may adjudicate titles thereto after service by publication upon all persons known and unknown claiming any title or interest.

Other questions affecting the procedure in the foreclosure action and also in the action to quiet title have been raised by appellants, but we regard such questions as immaterial, for, as heretofore stated, the vital question on this appeal is whether the decree quieting title was valid or void. Upon the allegations of the third amended complaint we conclude that the decree quieting title was valid; that the court had jurisdiction to render the same; that the fee-simple title was adjudged to be in the respondent Louise A. Tompson; and that the third amended complaint did not state a cause of action.

The judgment is affirmed.

GOSE, CHADWICK, and PARKER, JJ., concur.

EBEY SHINGLE CO. v. SNOHOMISH RIVER BOOM CO.

(Supreme Court of Washington. April 15, 1913.)

DAMAGES (§ 208*)—OBSTRUCTIONS—DAMAGES—LIABILITY.

A defendant obstructed navigable waters, and rendered it impossible for plaintiff, operating a shingle mill, to bring shingle bolts to its mill. Plaintiff acquired shingle bolts from the neighborhood within hauling distance by wagons, but could not procure a sufficient supply. The bringing of shingle bolts through other navigable water was attained with considerable risk and possible loss of the bolts by reason of currents and snags. *Held*, that the question of the reasonableness of the efforts of plaintiff to supply its mill with bolts from other sources was for the jury, who could award substantial damages resulting from loss of profits which he could have earned in the operation of the mill.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 538, 534; Dec. Dig. § 208.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by the Ebey Shingle Company, a copartnership, against the Snohomish River Boom Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hathaway & Alston, of Everett, for appellant. Stiger & Dally, of Everett, for respondent.

PARKER, J. The plaintiffs commenced this action in the superior court of Snohomish county to recover damages, which they claim resulted to them from the obstruction by the defendant of navigation in Ebey slough in Snohomish county, preventing the plaintiffs from bringing shingle bolts to their shingle mill situated thereon. A trial before the court and a jury resulted in judgment in favor of the plaintiffs, from which the defendant has appealed.

Ebey slough forms one of the navigable mouths of the Snohomish river, flowing into the sound in Snohomish county. Some five miles below where the slough leaves the main channel of the river appellant maintains a trap across the slough for the purpose of catching and holding logs. This trap is capable of being opened so as to permit the passage of logs and boats. About halfway between where the slough leaves the main channel of the river and this trap respondents maintain a shingle mill, which they supply with bolts for the most part by towing from the sound directly up the slough to their mill. During the period from December 1, 1909, to January 31, 1911, appellant on different occasions kept its trap closed for periods of ten days or more, causing logs and debris to accumulate in the slough above the trap so as to completely obstruct navigation therein, rendering it impossible for respondents to bring shingle bolts from the sound up the slough to their mill. This, they claim,

resulted in their damage, measured by the loss of profits which they would have earned in the operation of their mill during the period they were thus deprived of a sufficient supply of shingle bolts.

The questions involved in the contentions of counsel for appellant are, as we view them, wholly questions of fact. It is first contended that respondents did not make proper efforts to procure a sufficient supply of shingle bolts to continuously operate their mill during these periods. There was evidence tending to show, and warranting the jury in believing, that the mill was operated during portions of these periods by consumption of shingle bolts acquired by respondents from the neighborhood within hauling distance by wagon; but that the roads during these periods were very bad, and it was impossible to get a sufficient supply in this manner. It is also contended by counsel for appellant that, even assuming that respondents did make proper effort to get bolts in this manner, they did not make proper effort to bring bolts from the sound up the main channel of the river and down the slough, the river and slough in these portions being navigable; and also that their damage, in no event, would be more than the excess cost of getting bolts to their mill in this manner over that of getting them there directly up the slough from the sound, it appearing in the evidence that the verdict awarded was more than this excess cost would have amounted to. We think, however, the jury were warranted in believing from the evidence that this manner of bringing bolts from the sound to respondents' mill was attended with some considerable risk in the possible loss of bolts by reason of currents and snags in the river. We conclude that, in view of the evidence tending to show these facts, the question of the reasonableness of the efforts made by respondents to supply their mill with bolts from sources other than their usual source of supply on the sound, and also the question of the extent of the efforts and risks respondents should have incurred in bringing bolts from the sound to their mill during these periods by way of the main channel of the river and down the slough, were questions for the jury.

The judgment is affirmed.

CROW, C. J., and GOSE, MOUNT, and CHADWICK, JJ., concur.

STATE ex rel. CHICAGO, M. & P. S. RY. v. SUPERIOR COURT FOR KING COUNTY.

(Supreme Court of Washington. April 15, 1913.)

JUSTICES OF THE PEACE (§ 194*)—REMEDY BY APPEAL—"AMOUNT IN CONTROVERSY."

The \$25 which Rem. & Bal. Code, § 6562, provides shall, in case of judgment for plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in an action on a paper issued for wages, be awarded him as damages for being compelled to sue, provided it is not shown defendant had a sufficient excuse for refusal to pay the claim, being demanded by the complaint and awarded by the justice, becomes a part of the "amount in controversy," within section 1910, authorizing an appeal from a judgment of a justice where the amount in controversy, exclusive of costs, exceeds \$20, so that certiorari, which under section 1002 will not be granted where there is a remedy by appeal, will not lie to the justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

For other definitions, see Words and Phrases, vol. 1, pp. 376, 377; vol. 8, p. 7574.]

Department 2. Original application by the State on the relation of the Chicago, Milwaukee & Puget Sound Railway for mandamus to the Superior Court for King County. Writ refused.

Geo. W. Korte and F. M. Dudley, both of Seattle, for appellant. C. Dell Floyd, of Seattle, for respondent.

MAIN, J. This is an original application in this court for a writ of mandamus. On December 15, 1911, an action was begun by one John Hill in the justice court of King county. Relator in this proceeding, Chicago, Milwaukee & Puget Sound Railway Company, was defendant therein. The complaint in that action in part alleged as follows: "(2) That heretofore, to wit, during the month of November, 1911, this plaintiff was employed by defendant to work for defendant as a common laborer on the coast division of said road at the rate of two dollars (\$2.00) per day. (3) That, in pursuance of said contract, plaintiff worked for defendant for seven (7) days, making a total of fourteen (\$14.00) dollars due him for labor; that a credit of \$4.50 was deducted for board, leaving a balance due plaintiff of nine dollars and fifty cents (\$9.50). (4) That plaintiff ceased to work for defendant, and defendant issued to plaintiff, as evidence for said labor, an identification card in words and figures as follows, to wit: 'Form 45. Chicago, Milwaukee & Puget Sound Ry. Co., Coast Division. Identification Card. Number 13. Month, November. M. Stenson, Foreman.'"

There was a further allegation that the identification card, a copy of which is set out in the excerpt from the complaint above quoted, had been presented to the defendant at its office in Seattle, and that payment had been refused. Then followed a prayer for: (1) \$9.50, the amount alleged to be due as wages; (2) damages in the sum of \$25; and (3) an attorney's fee of \$20. The defendant in that action answered, admitting liability for the sum of \$9.50, the amount due for wages, and denying further liability. It also pleaded that the statute (Rem. & Bal. Code, § 6562), under which the damages and attorney's fees were claimed, was unconstitutional

and void. The trial resulted in a judgment in favor of the plaintiff for: (1) \$9.50 the wages due; (2) \$25 damages; and (3) \$10 attorney's fee. On December 26, 1911, the defendant in an action in the justice court, the relator here, made an application to the superior court of King county for a writ of certiorari. This application was granted and the writ issued commanding the justice of the peace, before whom the cause had been tried, to certify to the superior court a true and correct transcript of the records and proceedings in the cause. On December 28, 1911, the respondent in the certiorari proceeding served upon the adverse party and filed in the cause a motion to quash the writ of certiorari upon the ground that the superior court was without jurisdiction of the subject-matter of the action. Thereafter, and on February 3, 1912, and before the time expired within which a return was required to be made as commanded by the writ, the motion to quash the writ came on for hearing before the superior court, and on February 6, 1912, the court entered an order sustaining the motion to quash, apparently upon the ground that it was without jurisdiction over the subject-matter of the action. On February 14, 1912, the relator filed in this court its application praying that the superior court be directed by writ of mandamus "to take and exercise jurisdiction upon the said application for a writ of certiorari in which a writ of review was issued, and to hear and determine the said application for a writ of review upon issue joined therein."

The pivotal question presented by the facts above stated is the right or power of this court to direct the superior court to take jurisdiction in the certiorari proceeding and hear and determine the cause. But, before considering this question, it becomes necessary to determine the preliminary question as to whether or not the controversy could be brought before the superior court by writ of certiorari. A writ of certiorari will not be granted where there is a remedy by appeal. Section 1002, Rem. & Bal. Code, provides: "A writ of review shall be granted by any court, except a police or justice court, * * * to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." An appeal may be taken from the judgment of a justice of the peace where the amount in controversy, exclusive of costs, exceeds the sum of \$20. Rem. & Bal. Code, § 1910, provides: "Any person may appeal from a judgment or decision of a justice of the peace to the superior court where the amount in controversy, exclusive of costs, exceeds the sum of \$20." Where suit is brought for the purpose of recovering the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

face value of a check, memorandum, token, or evidence of indebtedness issued in payment of wages, and the plaintiff shall recover, it is provided by statute that the court shall tax the sum of \$25 to the judgment as damages. Section 6562, Rem. & Bal. Code, provides: "Whenever any person or persons, company or corporation, is compelled to sue for the recovery of the face value of check, memorandum, token or evidence of indebtedness, issued or circulated for the payment of wages for labor, by reason of the failure of any person, firm, company or person [corporation] issuing the same, failing or refusing to pay the same on demand, as provided by section 6560 of this chapter, then in such case, if judgment should be granted the plaintiff, the court shall tax an attorney's fee of not less than ten nor more than twenty-five dollars to said judgment, and the further sum of twenty-five dollars as damages to the plaintiff, suffered by the plaintiff by reason of being compelled to sue the said claim: Provided, that no plaintiff shall recover more than the face value of his said claim where the payment is refused by reason of a dispute as to the ownership of the said claim, or where it appears satisfactorily to the court or jury that the defendant had a sufficient excuse for the refusal of the payment of the said claim, the burden to prove the said sufficient excuse being on the defendant; and should the court or jury find such sufficient excuse, the same is to be specified in the judgment or verdict of said court or jury."

From the statutes quoted it will be seen that, under section 1002, a certiorari will not issue when there is a remedy by appeal. Section 1910 permits an appeal when the amount in controversy exceeds the sum of \$20. Section 6562 allows damages in the sum of \$25 and an attorney's fee when the action is brought upon a check, etc., issued for wages. The question whether the identification card upon which suit was brought in the justice court comes within the specifications of this section of the statute is not before us in this proceeding, and no opinion will be expressed thereon.

The concrete question now to be determined is, Does the \$25 damages provided for become a part of the amount in controversy? If it does, then there is a remedy by appeal from the judgment of the justice of the peace to the superior court. The amount of wages sued for was \$9.50. The complaint specifically demanded the \$25 allowed by the statute as damages. If the plaintiff prevailed, he would not only recover the wages due, but the statutory damages as well, unless the defendant was able to show sufficient excuse for not paying the claim. The plaintiff's right to recover damages depends upon whether or not the defendant had a sufficient excuse for refusing payment of the original

claim. This puts in issue a question of fact. The right to recover the \$25 as damages being an issue, it becomes a part of the amount in controversy. It follows, therefore, that there was a remedy by appeal from the judgment of the justice of the peace to the superior court. This remedy by appeal being open to the defendant, in no event was it entitled to the writ of certiorari.

The conclusion we have reached upon this preliminary question disposes of the present application for a writ of mandamus. We express no opinion upon any other question.

The writ of mandamus will be refused.

MOUNT, MORRIS, and ELLIS, JJ., concur. FULLERTON, J., concurs in the result.

STATE ex rel. CHICAGO, M. & P. S. RY. v.
SUPERIOR COURT FOR
KING COUNTY.

(Supreme Court of Washington. April 15, 1913.)

Department 2. Original application by the State on the relation of the Chicago, Milwaukee & Puget Sound Railway for mandamus to the Superior Court for King County. Writ denied.

Geo. W. Korte and F. M. Dudley, both of Seattle, for appellant. C. Dell Floyd, of Seattle, for respondent.

PER CURIAM. This is an application for a writ of mandamus, praying that the superior court of King county be directed to take and exercise jurisdiction upon an application for a writ of certiorari. The questions involved are identical with those presented in cause 10,186, 131 Pac. 466, decided on this date.

On the authority of the opinion in that action, the writ is denied.

JOHN LEE CLARKE, Inc., v. FIDELITY
& DEPOSIT CO. OF MARYLAND.

(Supreme Court of Washington. April 15, 1913.)

INSURANCE (§ 430*)—INDEMNITY POLICY—
"LARCENY."

"Larceny" is the taking of money or property of another with criminal intent to deprive the owner of its use and benefit, and a fidelity bond protecting against pecuniary loss by any act of "larceny or embezzlement" of plaintiff's employé would not include loss from poor business judgment exercised by the employé resulting in her becoming indebted to plaintiff beyond an agreed amount.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 430.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by John Lee Clarke, Incorporated, against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals. Reversed and remanded with instructions to dismiss.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

William W. Wilshire, of Seattle, for appellant. John P. Hartman, of Seattle, for respondent.

MORRIS, J. Appeal from a judgment upon a fidelity bond, protecting respondent against pecuniary loss "by any act of larceny or embezzlement" of Bessie Luella Churchill, as an employé of respondent. Many issues are raised by the briefs as to liability or nonliability because of certain issues incorporated into the trial below and submitted here, but we find no reason for determining these questions; since there is one conclusion that we reach from the record, that no liability was ever established upon the bond, in that the record fails to establish any larceny or embezzlement on the part of the one whose honesty the bond insured.

Respondent is a New Mexico corporation dealing in Indian curios, blankets, rugs, and other like merchandise. Prior to May 1, 1910, it had a stock of merchandise in a store on Third avenue, Seattle, valued at \$2,500. About that time it entered into an arrangement with Miss Churchill, consigning these goods to her at 25 per cent. above the invoice, and agreeing to furnish other merchandise of the same character as desired upon the same terms; Miss Churchill to pay all expenses of sale, remit for all goods consigned and sold, "often enough so that the amount due" respondent upon such consigned account should never exceed \$100, and the balance arising from the sale of such merchandise to be retained by Miss Churchill as commissions. There is much controversy as to the appellant's knowledge of this contract, which seems to have been entered into after the bond was written; and the first one not being satisfactory to respondent, it prepared a second one and forwarded it to Miss Churchill for her signature and delivery to appellant, some four months after the bond was written. Whatever may have been the contract between respondent and Miss Churchill, the liability of appellant is to be determined by its contract; assuming that it knew all about these changed contracts and consented thereto, its liability was still in the language of its bond against pecuniary loss to respondent by the larceny or embezzlement of Miss Churchill. Some time in July, Miss Churchill became dissatisfied with business conditions on Third avenue and sought a location on Second avenue. She succeeded in leasing one-half of a store at \$250 a month. At this time she was indebted to respondent in about \$250. She wrote, informing respondent of her contemplated move, and saying, unless she received notice to the contrary, she would spend that money in making contemplated changes in the new store. On July 14th she wrote that, if respondent could let her have \$350, she could "move and get settled with what she had" and pay for contemplated changes and re-

pairs. On July 8th, respondent wrote that it thought her judgment was good as to the new location, but it did not wish at that time to assume any additional financial burdens by itself taking up the proposition. On July 29th, respondent writes, congratulating her on her "nerve" in moving to the new location with its added burden of expense. These letters are referred to as showing that respondent had full knowledge of the move to Second avenue, and consented thereto, so long as it was not asked to assume any burdens of the new lease. This move was not a success, and the business began to lose money. The added rent, the amount paid out in changing the new location to meet the demands of the business, put it on the rock, and it virtually failed. On August 18th, respondent writes Miss Churchill: "I feel that you have been very careful in your expenditures as shown by the reports we have on file, and I trust you have been just as careful and have used the very best judgment in those new arrangements you are making." In this letter Mr. Clarke says he did not receive her letter in regard to the \$250, and hence had not answered. On September 1st, seeing she could not make it in the new location, a second move was made to a room in the Butler Hotel. Business seemed to improve in this new location and during September a remittance of \$90 was made to respondent. Respondent, however, became dissatisfied, and sent a representative to close up the business. This representative, with representatives of the appellant, took an inventory of the merchandise Miss Churchill had received from respondent, gave her credit for payments and other items they thought her entitled to, and found a balance due respondent of \$1,454.47, which amount was reduced \$12 by the lower court and interest added, making the judgment \$1,500.17.

It is not disputed that the rock that wrecked this business was the move to Second avenue, with its enlarged rental and amount expended in making store changes. Miss Churchill may have used poor business judgment in making this move, but it is another thing to say that, because she lost money in attempting to put the business on a better paying basis, she was guilty of larceny or embezzlement. She appropriated the money to what she deemed to be the demands of the business for the mutual benefit of herself and respondent. She did not misappropriate it to her own use, or make such a conversion of it as to subject her to a charge of larceny. "Larceny" is to take the money or property of another, with criminal intent, to deprive the true owner of its use and benefit. There is nothing of that kind disclosed in this record, and this bond covers nothing else. It does not cover the indebtedness of Miss Churchill to respondent, or the balance due it on its consigned account. It protects respondent against the dishonesty of Miss

Churchill, but not against her lack of business acumen. Nor does it guarantee the success of her adventure. The lower court seemed impressed with the view that the appellant was an insurer that Miss Churchill would pay respondent for all goods at its invoice price to her. This is not the obligation of the bond and, while these compensated sureties have been held strictly to their contracts and not permitted to escape liability, because of some technical breach of the bond that did not operate to their prejudice, still, like every other litigant, they have a right to stand upon the condition of their liability as fixed in the bond. That is the contract and the only one that can be enforced; and when, as here, we find its condition has not been broken, we cannot break it in order to compensate respondent for one kind of loss it has sustained, because it has paid a premium to appellant to compensate it for another kind of loss it might sustain, any more than we could permit a recovery under a policy covering a dwelling, when the insured had lost his barn by fire. Larceny and embezzlement are terms well defined in law, and any obligation insuring against the commission of these offenses cannot be extended to cover pecuniary losses occurring from other causes. The bond as written was a fidelity risk, insuring the honesty of Miss Churchill, and not a financial risk guaranteeing her ability to pay her indebtedness as assumed or contemplated as a liability under her contract with respondent.

The judgment is reversed and remanded with instructions to dismiss.

CROW, C. J., and FULLERTON, ELLIS, and MAIN, JJ., concur.

AUMILLER et al. v. CITY OF NORTH YAKIMA.

(Supreme Court of Washington. April 18, 1913.)

MUNICIPAL CORPORATIONS (§ 474*)—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICT—BENEFITS—OMITTED PROPERTY.

Under Rem. & Bal. Code, § 7707, providing that the cost of a municipal improvement shall be assessed on all the property in a local improvement district in proportion to the benefits derived by the improvement, an assessment for the construction of a subsewer was not erroneous because certain lots within the district were not assessed, in the absence of a showing that they were benefited, or that the assessing officers acted arbitrarily or fraudulently.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1122-1124; Dec. Dig. § 474.*]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by W. J. Aumiller and others against the City of North Yakima. Judgment for defendant, and plaintiffs appeal. Affirmed.

Lee C. Della, of North Yakima, for appellants. Guy O. Shumate, of North Yakima, for respondent.

MOUNT, J. This action was brought to set aside an assessment upon plaintiffs' lots for the construction of a sewer in front thereof by the defendant city. The cause was tried without a jury upon stipulated facts. The action was dismissed, and plaintiffs appeal.

It is only necessary to notice one point in this case. It appears that the defendant city declared its intention to construct a subsewer along certain streets in front of plaintiffs' property in said city. A resolution was thereupon passed estimating the cost of the improvement at the sum of \$4,000, and providing that the costs should be assessed and levied upon certain described lots. Thereafter the city council passed an ordinance providing for the construction of the sewer; also, that the expense thereof should be assessed to and levied upon the property included in the improvement district created and provided for in the ordinance. Afterwards the sewer was constructed. After the construction thereof the "committee on streets and ditches" filed its report with the city clerk. By this report it was found that the expense to be borne by the property benefited was the sum of \$3,209.30. Thereupon the city by resolution directed the "committee on streets and ditches" to prepare an assessment roll including all property located in said improvement district, and to file the same as required by law. Such roll was subsequently made. Twenty-six lots which were named as being within the assessment district were not assessed for any part of the cost of the subsewer.

The contention of the appellants is that it was incumbent upon the city, having created the assessment district, to assess each lot within the district, and that, because these omitted lots were not assessed, all the remaining lots were compelled to bear a greater proportion of the cost of the sewer than if the lots so omitted had been assessed. This latter statement, of course, is manifest. The statute provides (section 7707, Rem. & Bal. Code): " * * * That such improvement shall be made, and that the cost and expense thereof shall be taxed and assessed upon all the property in such local improvement district, which cost shall be assessed in proportion to the benefits derived by said improvement. * * * " It is plain from this provision, and the general rule is, that in an assessment district property which is not benefited by the improvement is not liable to assessment. Dillon on Municipal Corporations (5th Ed.) § 1458.

There is no showing, either in the pleadings or in the agreed statement of facts, to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r; Indexes

the effect that these 26 lots which were omitted from the assessment roll were benefited by the construction of the sewer. If they are not benefited, they are not liable to assessment. It is not alleged in the complaint, and there is no showing to the effect, that the property which was assessed within the district was not benefited to the extent of the assessment. The presumption, of course, is that the officers who made the assessment did their duty and assessed all of the property according to the benefits received. "Every reasonable presumption is made in favor of the regularity and propriety of the action of public officers. Accordingly, a property owner who complains of the omission of land from a local assessment must show affirmatively that such land was benefited by such improvement and that the omission thereof was improper. The mere fact that certain land was omitted from the assessment is not sufficient to invalidate the assessment, unless the complainant further shows that such property should have been included. The fact that, after an assessment has been levied, the city confesses in court that certain property is not benefited thereby, and the court accordingly sets aside such assessment as to such property does not, in the absence of fraud or of a showing that the omitted property was in fact benefited, invalidate the assessment as to the remaining property. The mere fact that contiguous property is not assessed does not invalidate the assessment in the absence of a showing that such property is benefited, where the assessment is to be levied on property benefited and there has been no determination that contiguous property has been benefited." Section 643, 1 Page & Jones, Taxation and Assessment.

Under this rule, it is quite clear that the mere fact of omission of certain property within the district does not invalidate the assessment upon the other property, especially where there is no showing that the assessing officers acted arbitrarily or fraudulently. The court therefore properly refused to set aside the assessment.

The judgment is affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

INDEPENDENT ASPHALT PAVING CO. v.
HEIN et al.

(Supreme Court of Washington. April 19,
1913.)

1. APPEAL AND ERROR (§ 999*)—REVIEW—VERDICT.

The verdict of a jury upon an issue correctly submitted is controlling on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.*]

2. APPEAL AND ERROR (§ 702*)—TRIAL (§ 295*)—REVIEW—INSTRUCTIONS.

Where all of the instructions given were not brought up to the appellate court, objections to disconnected portions cannot be sustained; for instructions must be read as a whole, and it will not do to pick out mere excerpts and say they did not correctly state the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2936-2938; Dec. Dig. § 702.* Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

3. BOUNDARIES (§ 41*)—ACTIONS—INSTRUCTIONS.

In an action involving the boundary of land, an instruction that if original government monuments, known as the initial point, can be definitely ascertained then the jury must ascertain from the evidence as to whether or not the measurements as testified to by the witnesses for the plaintiff are correct, and if so found the verdict should be for plaintiff, is not improper.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

4. APPEAL AND ERROR (§ 702*)—REVIEW—INSTRUCTIONS.

An instruction that if, from the preponderance of the evidence, the jury found the fences of the defendant were on the property of plaintiff verdict should be for the plaintiff, cannot be held redundant, where the instructions as a whole are not presented on appeal; for it must be presumed that the jury were properly instructed as to the rules for determining to whom the land belonged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2936-2938; Dec. Dig. § 702.*]

5. APPEAL AND ERROR (§ 206*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where an answer was objected to as not responsive to a question, the error in allowing it cannot be reviewed, where there was no motion to strike and no request for an instruction for the jury to disregard it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1283-1289; Dec. Dig. § 206.*]

Department 2. Appeal from Superior Court, Kitsap County; W. P. Bell, Judge.

Action by the Independent Asphalt Paving Company against Joseph N. Hein and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Frank A. Paul and Addison W. Hastie, both of Seattle, for appellants. Jas. W. Carr, of Bremerton, for respondent.

MORRIS, J. This action involves the ownership and right of possession of a strip of land 120 feet in width by about 2,500 feet in length. Respondent, alleging the ownership and right of possession in itself, brought the action, alleging the claim of appellants to the ownership, and that under this claim they were intending to take possession and deprive respondent of its use and occupancy, and praying for a decree putting it in possession of the strip and enjoining the appellants from asserting any claim thereto. The appellants, by answer, asserted their title and ownership of the strip, and prayed a dismissal of the action. A temporary restraining or-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

der was issued by the court, enjoining appellants from taking any steps to assert their claim, and the cause proceeded to trial. Appellants asked the court to submit the issues to a jury, which was done, and a verdict returned in favor of respondent as to all issues. Appellants then moved for judgment notwithstanding verdict, which was denied. The court there entered judgment on the verdict, and this appeal follows.

[1] The first error assigned is the denial of these motions. We can find no error in these denials. The evidence was of such a character that the jury could determine that the respondent was right in its contention, and it is not for us to say that, under these circumstances, the verdict should have been otherwise. It has so often been held that the verdict of a jury upon an issue correctly submitted to it is controlling on appeal that we will seek no other reason for overruling this assignment.

[2] It is next contended that two instructions were erroneous. The instructions given by the court are not sent up. The two complained of are printed in the brief. This is not sufficient to raise any question of error. We have, in connection with other courts, often said that instructions must be read as a whole. It will not do to pick out excerpts from the whole body of instructions and say "this does not correctly state the law." Standing alone perhaps it does not, yet when read in connection with other instructions and fitted into its proper place no error could be found.

[3] One of these complained-of instructions was as follows: "If you find from the evidence that such original government monuments, commonly known as the initial point, can be definitely ascertained, then in this case you will ascertain from the evidence as to whether or not the measurements as testified to by the witnesses for the plaintiff are correct, and if you so find then your verdict will be for the plaintiff." Appellants attack the instruction as not being consistent with the two preceding instructions, and thus confusing the jury; but we do not know what these two preceding instructions were, and hence we cannot say there is any inconsistency or confusion. As it stands alone, we can see no error in it. If, knowing the true initial point, the measurements submitted by plaintiff were correct and established its contention, manifestly it was entitled to a verdict, and that is all the instruction says.

[4] The next instruction complained of is: "You are further instructed that if you find from a preponderance of the evidence that the fences of the defendants Hein or Weldlich, or either of them, are upon the property of the plaintiff or any part thereof, your verdict will be for the plaintiff." This instruction was evidently intended to cover a disputed point in the evidence as to whether

these fences were on plaintiff's or defendants' lands. We must assume the jury were properly instructed as to the proper rules for determining to whom the land belonged, and this being done it would follow that, so far as the claim of ownership or possession was represented by the fences, plaintiff would be entitled to a verdict if defendants' fences were on plaintiff's lands. The objection is that the instruction is redundant and surplusage, but for the reasons heretofore given we cannot say whether it is or not; and hence we find no error in it.

[5] The next error assigned is to the ruling of the court upon an objection made during the examination of a civil engineer, who was detailing a survey made by him. A question was asked to which no objection was made, and the witness answered. Counsel for appellants then said: "We object to the use of legal propositions. The Court: Objection overruled. Mr. Hastie: It is incompetent, immaterial, and not responsive to the question. I think that is not a question for the surveyor to settle. Mr. Carr: I want to know what he runs his line by. The Court: Objection overruled." The first objection called for no ruling by the court, since it was not asked to strike the answer. Under our practice, if an answer contains improper matter, the court should be asked to strike it. In his second objection counsel makes it plain that the objection was based upon the answer as not being responsive to the question. If he so considered, he should again have asked the court to strike it, and requested an instruction to the jury to disregard it. Not having done so, we cannot say it was error, since, if the answer was improper, counsel neglected to make use of ample opportunity afforded him at the time to correct the error.

The judgment is affirmed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

CITY CAB, CARRIAGE & TRANSFER CO.
v. HAYDEN, Commissioner of Public
Safety, et al.

(Supreme Court of Washington. April 14,
1913.)

1. APPEAL AND ERROR (§ 154*)—PROCEEDINGS
PENDING APPEAL — ACCEPTANCE OF JUDG-
MENT.

Where officers of a city, prosecuting with diligence an appeal from a decree restraining the enforcement of rules regulating hackmen while at a passenger depot in the city, sought unsuccessfully to supersede the effect of the decree pending the appeal, the mere fact that, pending the appeal, they made other regulations for hackmen at the depot did not show an acceptance of the decree and did not authorize a dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957-969; Dec. Dig. § 154.*]

2. INJUNCTION (§ 85*)—ENFORCEMENT OF POLICE REGULATIONS — INADEQUACY OF REMEDY AT LAW.

Injunction lies to test the validity of police regulations and ordinances governing hackmen while at a passenger depot in a city, since the legal remedies of submitting to an arrest or bringing an action in damages are inadequate.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

3. MUNICIPAL CORPORATIONS (§ 614*)—POLICE REGULATIONS—REGULATING HACKMEN—VALIDITY.

A city has power, in the interest of good order, public peace, and safety, to regulate the conduct of hackmen and others soliciting the privilege of carrying travelers from railroad depots in the city to their destination.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1350-1352; Dec. Dig. § 614.*]

4. MUNICIPAL CORPORATIONS (§ 625*)—REGULATION OF HACKMEN—REASONABLENESS.

A regulation of a city governing the conduct of hackmen and others soliciting the privilege of carrying travelers from depots in the city to their destination, which require hackmen to keep themselves and their vehicles within an assigned place while soliciting for patronage, is not unreasonable, and the mere fact that the places assigned are not of equal value for solicitation does not render the regulation invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.*]

Department 2. Appeal from Superior Court, Spokane County; E. K. Pendergast, Judge.

Action by the City Cab, Carriage & Transfer Company against Z. E. Hayden, as Commissioner of Public Safety of the City of Spokane, and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with instructions.

H. M. Stephens and Ernest E. Sargeant, both of Spokane (Alex. M. Winston, of Spokane, of counsel), for appellants. John M. Gleason and A. G. Gray, both of Spokane, for respondent.

FULLERTON, J. The respondent, who was plaintiff below, brought this action, against the appellants to enjoin them from enforcing certain rules and regulations promulgated by the respondent Hayden, as commissioner of public safety of the city of Spokane, intended for the regulation and control of hacks, omnibuses, and other vehicles, and persons in charge of the same, while attending upon the arrival of trains at the depot of the Northern Pacific Railway Company in that city. The respondent had a decree in the court below, and this appeal is prosecuted therefrom.

The tracks of the Northern Pacific Railway Company extend through the city of Spokane in an easterly and westerly direction. Its depot grounds are practically in the heart of the city, perhaps a little to the easterly thereof. The exit gates for passengers

therefrom open into a street called First avenue, which also extends easterly and westerly, practically paralleling the railway tracks; the exit gates opening into First avenue at a point opposite the junction of Bernard street therewith. Passengers leaving the depot grounds through these gates for the hotels of the city usually turn west along First avenue, using the sidewalk on the south side of the street. On April 23, 1912, the city of Spokane by ordinance empowered its commissioner of public safety to make and establish rules and regulations for the control of hacks, omnibuses, cabs, express wagons, and other vehicles, and persons in charge of the same, while attending at and near the several railway stations in that city to meet passengers on the incoming trains, especially empowering him to designate "the place or places at which hacks, omnibuses, cabs, express wagons, and other vehicles, and each and every vehicle aforesaid shall be allowed to stand at or near such railway stations, and also make such other rules and regulations as may be necessary for the regulation and control by the police department of all hacks, omnibuses, cabs, express wagons, and other vehicles, and persons in charge of the same, at and near railway stations in the city of Spokane."

Acting pursuant to the authority vested in him by the ordinance, the commissioner of public safety prepared and put into effect for the control of vehicles at the depot of the Northern Pacific Railway Company the following regulations: "Northern Pacific Depot Traffic Regulations. To be enforced from and after midnight, April 28th, 1912. All busses and other vehicles exclusively for hotel passenger service shall stand back to the curb on the south side of First avenue, and west of the west side of the exit gate, such space reserved to extend one hundred (100) feet west on said curb line. All such conveyances to conspicuously display a card giving names of hotels which they are representing, and stating, 'For hotel passenger service only.' Each vehicle shall have eight feet space on curb line, spaces to be numbered from one up, commencing at east end. No hotel shall be represented in this space by more than one carrier. The assignment to positions shall be as follows: (1) Spokane Hotel. (2) Pacific Hotel. (3) Pedicord Hotel. (4) Ridpath Hotel. (5) Victoria Hotel. (6) Halliday Hotel. (7) Empire Hotel. (8) Cœur d'Alene Hotel. (9) Fairmont Hotel. (10) Majestic-St. Nicholas. (11) Calumet Hotel. Each of the above represented by individual bus or taxicab. Any other hotel wishing space in this reserve shall be assigned to the west end in the order of their application. Nothing in these rules shall be construed as a concession to a common carrier and bona fide contract with hotel or hotels must be had to entitle representatives to po-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sition in this reserve. Persons in charge to stand immediately at the rear of their vehicle and soliciting in an ordinary tone of voice to be allowed in this space. All vehicles carrying passengers for rooming houses and hotels not regularly employed and also catering to regular passenger traffic shall stand back to the curb line and occupy a position on the east side of Bernard street north of the north line of First avenue and immediately to the rear of vehicles not over three feet from curb line. No loud or boisterous calling to be permitted. * * * No express wagons, drays, hacks, automobiles, private carriages, taxicabs, transfer wagons or any kind of vehicle will be permitted on south side of First avenue east of the west line of the west exit gate except the transfer bus and to load or unload baggage or passengers, and no soliciting of business shall be done while loading or unloading baggage or passengers. Expressmen when calling for baggage at the baggage room door, first in, first out, system, will first secure the baggage at the baggage room door and then drive up with their vehicle and load such baggage as soon as possible and drive away. It shall not be permitted for any driver of such express wagon, his assistant or any one accompanying him, to solicit any new business while at or on the depot platform. Z. B. Hayden, Commissioner of Public Safety."

The trial court found that, when regulations were first promulgated for the control of vehicles attending at the depot, the Hotel Spokane was the only hotel in the city then operating an omnibus, and that it was then assigned to the position it now occupies, and that thereafter, as the hotels named installed such omnibuses, they were accorded spaces to the westward of the space assigned the Hotel Spokane in the order of their applications. After the promulgation of the order by the commissioner of public safety, the respondent obtained a contract from a number of hotels in the city of Spokane, not listed in the order of the commissioner, granting it the exclusive right to carry passengers to and from such hotels to the depot named, and, on its making this fact known to the commissioner, was assigned a space immediately to the west of the space last assigned in the commissioner's order before quoted. The evidence demonstrated, and it was found by the court, that the pecuniary value of these spaces as locations decrease rapidly as they proceed westward. It was found that travelers from the arriving trains, desiring a hotel, usually found a satisfactory one before they reached the end of the line of carriages, and that, while the first place occupied by the omnibus of the Hotel Spokane was an extremely desirable space, the one to the extreme westward was of little or no value for picking up stray guests who had no definite hotel selected before their arrival at the depot.

The respondent refused to recognize the commissioner's authority in the premises and sought to place its omnibus in any vacant space it found on arriving at the depot grounds, regardless of the fact that such space had been assigned to the use of the vehicle from another hotel. On its driver being forced to withdraw from such space and being threatened with arrest if he persisted in placing his vehicle in any assigned space other than his own, this action was brought for an injunction as before stated. The trial court found the regulation unreasonable and void and entered a decree setting it aside.

[1] On perfecting their appeal, the appellants sought to supersede the effect of the decree pending the hearing in this court, making application both to the lower court and this court. They were denied the right and thereupon promulgated a new order in which the omnibuses representing the several hotels named were assigned spaces as before, but for limited times only; the one at the head of the line being required to drop to the foot thereof at the end of every month and the others moving one space easterly. The respondent, showing the foregoing facts by affidavit, moves to dismiss this appeal on the ground that there has been a cessation of the controversy. But manifestly the motion is not well taken. The appellants have prosecuted their appeal with diligence, and all that has been done, looking to the regulation of the vehicles attending the arrival of trains at the depot in question, has been done through necessity, because of the inability of the appellants to supersede the decree and thus keep in force the regulations theretofore in force. This does not amount to an acceptance of the decree, and, unless there has been such an acceptance, there is no cessation of the controversy. The motion to dismiss is denied.

[2] The appellants first contend that this action will not lie, since injunction is not the proper remedy to test the validity of police regulations and police ordinances. It may be that the weight of authority in other jurisdictions sustains this view, but we have heretofore felt constrained to adopt the opposing rule. The legal remedies of submitting to an arrest or bringing an action in damages are generally inadequate, since judgments obtained thereon are incapable of being made operative against future repetitions of the acts giving rise to the action, while the remedy by injunction is operative throughout all future time. *Carl v. West Aberdeen Land, etc., Co.*, 13 Wash. 616, 43 Pac. 890; *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; *Hillman v. Seattle*, 33 Wash. 14, 73 Pac. 791; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; *Wilcox v. Henry*, 35 Wash. 597, 77 Pac. 1055; *Dempsey v. Darling*, 39 Wash. 129, 81 Pac. 152. The more important question is

whether the regulations promulgated by the commissioner of public safety are valid.

[3] The general power of municipalities to regulate and control the conduct of hackmen and others soliciting the privilege of carrying travelers from railroad depots to their place of destination cannot, we think, be successfully questioned. This the city must do in the interest of good order, public peace, and safety. It is a matter of common knowledge that not only are passengers themselves subjected to unnecessary and disagreeable annoyances at such places if hackmen are left to pursue their calling unrestrained, but that disorderly brawling and breaches of the peace often occur among the hackmen themselves, and sometimes between a hackman and a traveler who declines to submit quietly to some particularly vicious insult. The power, therefore, arises from the necessities of the case, and the only debatable question is whether the particular regulation is reasonable.

[4] Whether or not it is a reasonable regulation to require hackmen to keep themselves and their vehicles within an assigned space while soliciting for hotel patronage and passenger traffic at a depot on the incoming of a passenger train seems not to have been submitted to many courts, but those passing upon the question are unanimous in the conclusion that such regulations are, generally speaking, reasonable. Thus, in Minnesota, the common council of a municipality passed an ordinance providing that "no owner or driver of any * * * hack * * * shall make any stand or stopping place, with or without his vehicle, while waiting for employment at any place on any street or public ground adjacent to any railroad or railway depot, * * * except in the place or places designated by the police officer on duty, from time to time, at such railway depot or station." The court held the ordinances reasonable, saying that the "assigning of a particular place to each hackman would appear to be peculiarly and happily adapted to the preservation of order. By this practice every one is informed exactly where his proper place is, so that the strife and contention for particular places which would otherwise ensue is measurably, at any rate, prevented." *City of St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296.

So in Indiana the city of Evansville passed an ordinance authorizing the depot marshal to designate the places where hacks and other vehicles should stand while waiting for passengers at the railroad depots. The validity of the ordinance was called in question by a hack driver who had been arrested for violating the marshal's orders, and the case brought to the Supreme Court of that state. Passing upon the question, the court said: "There can be no question but that the ordinances authorizing the depot

marshal to prescribe the places where omnibuses, hacks, and other vehicles should stand at the railroad depot, and requiring drivers to obey the directions of police officers in regard to the places which their respective vehicles should occupy, was a proper regulation, and one which the municipal authorities had the power to pass." *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100.

In Massachusetts the city of Boston passed an ordinance providing that: "No owner, driver, or other person having charge of any hackney carriage shall stand with such carriage to solicit passengers in any street, square, lane, alley, or public place within the city, other than the place assigned to such carriage by the board of aldermen, under a penalty not exceeding twenty dollars for each offense." One Matthews was accused and convicted of having violated the ordinance by soliciting in the depot away from the place assigned to him, and on appeal the court held the ordinance valid. *Commonwealth v. Matthews*, 122 Mass. 60.

In Kansas, under an ordinance of the city of Ottawa, the city marshal designated the positions to be occupied by each vehicle while the drivers were waiting for passengers. One Bodley, a licensed hackman, ignored the order, and was convicted of a violation of the ordinance. On appeal the court affirmed the conviction, using this language: "A regulation of hackmen and others who solicit passengers at railway stations is in the interest of peace and good order, and obviously essential to the convenience and comfort of travelers. The placing of them under the direction and control of the city marshal is a reasonable and practical method of regulation. The power to designate the position for hackmen and solicitors of passengers must be placed in some one, and no reason is seen why it may not be properly given to the marshal, a peace officer, whose duty it is to preserve order throughout the city. We think there was power to regulate hackmen, and that it has been exercised in a reasonable and valid way." *City of Ottawa v. Bodley*, 67 Kan. 178, 72 Pac. 545.

These cases make it clear that the mere fact that the regulations provide for the assignment of each vehicle to a particular place does not render them unreasonable; hence that result can follow in the present case only because the places assigned are not of equal value as positions for the solicitation among the incoming passengers for patronage of the hotel they represent. But it has seemed to us that this is not sufficient to condemn the regulation. The solicitation of incoming passengers for this purpose has nothing to do with the public weal, nor with the duty of hackmen as common carriers. The solicitation is a purely private business pertaining solely to the private emolument of the solicitor or his employer, in which

neither the traveler, the municipality, nor the general public has any interest. It would seem to follow that a regulation for the public interests, concededly reasonable in so far as public rights are concerned, should not be rendered unreasonable simply because it confers upon one person the advantage over another in the prosecution of a private business. We do not think it does so, and are constrained to hold that the regulations complained of are within the power of the city authorities.

The respondent, in support of the decree of the trial court, cites and relies upon the cases holding that railroad companies may not grant to one person, or company of persons, the exclusive privilege of going onto its depot grounds to solicit from passengers the right to convey them from the depot to their point of destination. But it has seemed to us that these cases are not in point on the question before us, except, perhaps, only remotely by way of analogy. If, however, the fact were otherwise, we could not follow the principle announced by them, as in our judgment they do not represent either the weight of authority or the better reasoning on the question discussed; the cases pro and con on the subject will be found collected in the opinion of Frick, J., in the case of Oregon Short Line R. Co. v. Davidson et al., 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489.

These considerations require that the judgment of the trial court be reversed, and the cause remanded, with instructions to enter a judgment in favor of the appellants, defendants below, to the effect that the plaintiff take nothing by its action, and for costs. It is so ordered.

MOUNT, MAIN, and MORRIS, JJ., concur.

STERN et ux. v. CITY OF SPOKANE.

(Supreme Court of Washington. April 18, 1913.)

1. MUNICIPAL CORPORATIONS (§ 335*) — STREETS—LOCATION—GRADE.

An abutting owner, being bound by the intent and purpose of the original dedicant, cannot claim damages resulting from the original grade of the street in front of his property, the dedication implying an agreement of the dedicant and his successors in interest that the city may establish grades and improve streets in aid of such use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 925-928; Dec. Dig. § 385.*]

2. MUNICIPAL CORPORATIONS (§ 387*) — IMPROVEMENT OF STREETS—BRIDGES.

The power to establish grades and improve streets in a city imposes a duty on its administrative officers to keep them in proper repair to build and repair bridges, and to remove them and build others in their places when necessary, and hence the city is not liable for resulting

injuries to abutting property not caused by an entry thereon or negligence in doing the work. [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 930; Dec. Dig. § 387.*]

3. APPEAL AND ERROR (§ 562*)—AFFIDAVIT—STATEMENT OF FACTS.

Where an affidavit is filed in support of a motion for a new trial for alleged misconduct of a juror, it should be made a part of the statement of facts, if it is to be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495-2499; Dec. Dig. § 562.*]

Department 1. Appeal from Superior Court, Spokane County; E. K. Pendergast, Judge.

Action by Samuel R. Stern and wife against the City of Spokane. Judgment for defendant, and plaintiffs appeal. Affirmed.

Robertson & Miller and J. W. Hancox, all of Spokane, for appellants. H. M. Stephens and William E. Richardson, both of Spokane, for respondent.

CHADWICK, J. Plaintiffs are the owners of a three-story brick building and an adjoining frame structure in the city of Spokane. The lower floor of these buildings is devoted to business uses, and the upper floors are used as a hotel and lodging house. The city of Spokane is built on either side of the Spokane river, and the city has for a long time maintained a steel bridge on Monroe street; it being the principal connecting street between the north and south sides. The old bridge being adjudged to be insecure, the city closed it for traffic on January 1, 1909, and immediately began the work of constructing a new concrete bridge, the main span of the new structure being, as we are informed, the longest arch of like construction in the world. In order to facilitate the work of dismantling the old and erecting the new bridge, the city erected two high towers in the street in front of plaintiff's property. Over these towers cables were run to and over like towers to the opposite side of the river. These cables were used as an aerial tramway, over which the old material was removed, and the false work and new material was carried. The city also erected a house in the street and installed an engine. This engine furnished power to run the tramway. The free use of plaintiffs' property was interrupted, and this action was brought to recover damages alleged to have been suffered in the way of lost rents, etc.

Without indulging in unnecessary detail, it may be said that the plaintiffs base their right of recovery upon the allegations: That the act of the city is a damaging within the meaning of section 16, art. 1, of the Constitution, and that they are entitled to have their damages assessed in money; that, if the right of the city be sustained, the work

was negligently and carelessly done; that the plans were defective; and, finally, if it be held to be otherwise, an unreasonable time was consumed in finishing the work. The case was tried to a jury and a general verdict was returned in favor of the city.

The following interrogatories were submitted to and answered by the jury:

"No. 1. Was there unreasonable delay in the construction of the bridge, and, if so, what was the excess of time over and above a reasonable time? A. No.

"No. 2. Did the plaintiffs suffer any loss of rentals by reason of the wrongful construction or placing of any of the structures, machinery or appliances used in building the bridge, and, if so, what was the amount of such loss? A. No.

"No. 3. Did the plaintiffs suffer any loss of rental on account of any negligence in the use or operation of any of the machinery or appliances used in building the bridge, and, if so, how much? A. No."

The trial was a long one, and the testimony took a wide range. It was conflicting upon all the material issues, and in consequence we feel bound by the verdicts, general and special, and hold without further discussion that the work was not negligently done, and that the city did the work within a reasonable time. It follows then that there can be no damage unless it be under the bill of rights. Appellants state their position in broad terms. It is that an owner of land abutting a street is given a cause of action for any invasion of his property or right of occupation, or for any act that may injure the rental value of his property; and, if the occupation of a street interferes with the owner's use and enjoyment of property in greater degree than is suffered by the public generally, that he is entitled to compensation for such use or taking irrespective of any negligence or omission arising in or growing out of the prosecution of the work. Appellants rely on the following cases: *Smith v. St. Paul, etc., R. Co.*, 39 Wash. 355, 81 Pac. 840, 70 L. R. A. 1018, 109 Am. St. Rep. 889; *Lund v. Idaho-Wash. Nor. Ry.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. Rep. 916; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Farnandis v. Gt. Nor. Ry. Co.*, 41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Rigney v. Taylor*, 102 Ill. 67; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638.

[1] This court has held in common with the majority of the courts in this country that the individual is bound by the intent and purpose of the original dedicator, and that an abutting owner cannot claim damages resulting from an original grade. *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843; *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061. And that "the

dedication of streets and alleys to the public use implies an agreement of the dedicator and his successors in interest that the city may establish grades and improve streets thereto in aid of such use." *Wood v. Tacoma*, 66 Wash. 268, 119 Pac. 859.

[2] The power to establish grades and improve streets imposes a duty on the administrative officers of a city to keep them in proper repair, to pave and repave, to take out worn material and to replace it with new, to build and repair bridges, to remove them, and to build others in their place. It is a duty imposed by statute, and, if omitted, subjects the city to resultant damages. It has never been held that a municipality was liable for damages consequent upon a performance of a duty. The intent of the dedicator to submit his property to the city for the establishment of grades and the building of streets and bridges being established, it follows by the same intent that the city may as occasion requires occupy the streets for the purpose of making or maintaining an open and passable highway in front of the abutting property. The cases cited by appellants are not in point. In all of them the act complained of was such that it permanently changed a physical condition, either destroyed the use of the street or added an additional servitude, as, for instance, in the case of *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843, which is relied on by appellants. Although not indicated in the opinion, the damage there sought to be recovered arose out of a regrade of Pine street in the city of Seattle. In such cases damages are recoverable. In doing its work, the city left a permanent obstruction at the end of an alley, which was essential to the use of the plaintiff's property. If the testimony had shown a temporary obstruction incident to the repair of the street, no recovery would have been allowed. The logic of that case is that all property suffering a direct damage on account of a regrade is entitled to compensation.

[3] Appellants charge counsel with misconduct, and a juror with interest. The motion for a new trial was filed May 18th, and a supporting affidavit was filed May 31st. The affidavit is not made a part of the statement of facts. Although not properly before us (*Spoar v. Spokane Turnverein Co.*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Kelley*, 66 Wash. 172, 119 Pac. 190), we have examined the affidavit and find that it does not warrant a new trial.

Counsel asks why verdicts in personal injury cases growing out of the work complained of have been returned and sustained upon the theory that the city negligently constructed an arch which fell causing an unforeseen and unexpected delay. We cannot answer. The fact that one jury will decide a question of fact one way, and another will decide it in a contrary way, does not raise

a question of law, nor is the verdict in one case reviewable or to be considered as evidence in another.

Affirmed.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

HIEBER v. CITY OF SPOKANE.

(Supreme Court of Washington. April 18, 1913.)

1. MUNICIPAL CORPORATIONS (§ 387*)—PUBLIC IMPROVEMENTS — CONSTRUCTION OF BRIDGE—INJURIES TO ADJOINING PROPERTY — NATURE OF LIABILITY.

Where a city in constructing a bridge to carry a street over a river operated a hoisting engine from which smoke, soot, grease, cinders, and other substances were thrown on plaintiff's adjoining premises, destroying the paint, paper, plastering, etc., and causing the tenants to move away, but there was no physical invasion of the property by the city beyond the street line or a physical projection of the instrumentalities used to carry on the work over such adjoining property, plaintiff could only recover damages on proof that the work was negligently accomplished.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 930; Dec. Dig. § 387.*]

2. MUNICIPAL CORPORATIONS (§ 404*)—PUBLIC IMPROVEMENTS—INJURY TO ADJOINING PROPERTY—LIMITATIONS.

Where an adjoining property owner sustains damage by a physical invasion of his property beyond the street line, or by a physical projection over his adjoining property of the instrumentalities used by the city to carry on the work of constructing a bridge, he may restrain the prosecution of the work or permit it to continue and recover damages at law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 989-991, 993-999; Dec. Dig. § 404.*]

3. MUNICIPAL CORPORATIONS (§ 396*)—TAKING OR DAMAGING PROPERTY — OFFSET OF BENEFITS.

Where property of an adjoining owner is damaged by physical invasion by a city in the work of constructing a bridge, the amount of damage sustained is subject to a set-off for benefits as provided by Const. art. 1, § 16.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 949-951, 1058, 1059; Dec. Dig. § 396.*]

4. MUNICIPAL CORPORATIONS (§ 404*)—CLAIMS — INJURIES TO PROPERTY—NOTICE OF CLAIM.

Rem. & Bal. Code, § 7995, and Spokane City Charter, art. 12, § 115, requiring notice to the city of claims for damages, did not prevent plaintiff from filing a claim for damages to his property by the construction of a bridge before the work was finished, since, though plaintiff could not recover more than the amount stated in his claim, such rule did not preclude him from anticipating his damages where the trespass was certain to continue until the work was completed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 989-991, 993-999; Dec. Dig. § 404.*]

Department 1. Appeal from Superior Court, Spokane County; William A. Huneke, Judge.

Action by John G. F. Hieber against the City of Spokane. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. M. Stephens, Wm. E. Richardson, and Bruce Blake, all of Spokane, for appellant. E. O. Connor, of Spokane, for respondent.

CHADWICK, J. This case grows out of the same state of facts as the case of Stern v. Spokane, 131 Pac. 476. In this case, however, damages are not claimed because of the occupation of the street, but "only for physical injuries to the building, the reasonable cost of repairing the same, and loss of rental value, only in the decrease in the fair rental values caused by the casting of smoke, cinders or grease or other substances on plaintiff's property." Appellant further says: "This is a case for damages to the respondent's building caused by the appellant in carrying on the work of constructing the bridge so negligently, carelessly, and recklessly, and without due care operating the engine, machinery, cables, buckets, etc., whereby soot, smoke, grease, cinders, and other substances were thrown in and upon the building. The paint, paper, plastering, etc., of the building were destroyed and tenants driven from the building. It was an invasion of property rights for which the city must respond in actual damages." It is the contention of the city, as it was in the Stern Case, that it is not liable for such damages as are necessarily incident to the work, and can only be held to answer for such damages as may result from its negligence, and that the case was not submitted to the jury upon this theory of the law. The city undertook by an appropriate motion to have the issue defined more clearly. Its motion was overruled; and, while the ruling was probably technically correct, it might well have been allowed in the interest of clarity.

[1] The court in its instructions properly excluded damages for occupying the street, but evidently proceeded upon the theory that the city was liable in any event for any physical injury to the abutting property. The jury were told:

"(4) This right in the city to occupy Monroe street to place machinery and to do work upon is limited to the street, and does not extend to adjacent private property, so that if in the progress of the work the city caused any substance to be thrown or cast upon the property of plaintiff, injuring it, the city would be liable to the plaintiff for any damage done thereby. Hence if you find by the preponderance of the evidence that in the progress of the work the city caused smoke or cinders or grease, or water, or other substances to be thrown or cast upon plaintiff's property, and you further find that plaintiff's property was there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by damaged, then the city would be liable for the damage so done.

"(5) Plaintiff also claims damage by reason of alleged vibration of his building, causing damage and lessening its rental value. Before the plaintiff will be entitled to compensation on this account, he must show by the preponderance of the evidence that the work done by the city in the construction of the bridge caused plaintiff's building to vibrate, and injured it physically, or decreased its rental value, and, if you find, then the defendant would be liable for such damage so done, as shown by the preponderance of the evidence."

The court refused to give all instructions predicated upon the theory of negligence, and, as will be seen, directed the minds of the jury away from it with great care. The effect of the instructions was that, although the city might occupy the street, it could not use it or the appliances necessary to carry on its work without being liable in any event. The court held the city to such damages as might be incident to a lawful performance of duty, whereas the law is that it is liable only for its negligence. We may assume that the erection of a structure of the magnitude of the Monroe street bridge would call for cables, tramways, falsework, and engines (they are all referred to in the testimony). While such work is in progress, there is a certain annoyance and deprivation of property right. But, if the work is done with due care, there can be no recovery, for cables and trams cannot be operated without vibration, and engines cannot be operated without throwing clinders, soot, and steam. Whether these things could have been avoided by the exercise of due care depends upon the facts and circumstances of the particular case. It is the duty of a city to maintain streets and bridges, and such inconveniences as necessarily follow the performance of that duty are a burden the property owner must bear. As in the Stern Case, respondent relies upon Smith v. St. P. & M. Ry. Co., 39 Wash. 361, 81 Pac. 840, 70 L. R. A. 1018, 109 Am. St. Rep. 889, and kindred cases. Those cases, as explained in Clute v. North Yakima & Valley Ry. Co., 62 Wash. 531, 114 Pac. 513, and De Kay v. North Yakima & Valley R. Co., 129 Pac. 574, do not deny, but rather affirm, the right of the city. It is only when there has been an actual taking or a damaging that is not consequent upon the exercise of reasonable care in the performance of the work that the city will be held liable.

[2] Of course, the city would be liable for any damage resulting from a physical invasion of the property beyond the street line, or a physical projection of the instrumentalities used to carry on the work over the adjoining property. If it should appear that an owner will suffer such damages, he may restrain the prosecution of the work, or he

may permit it to go on, claiming his damages in an action at law. Lund v. Idaho & Wash. N. R. Co., 50 Wash. 574, 97 Pac. 865, 126 Am. St. Rep. 916; Kell v. Grays Harbor & P. S. Ry. Co, 127 Pac. 1113.

[3] The rule of damages in either event is the same, and a taking or damaging by a municipality is subject to an offset for benefits, under section 16, art. 1, of the Constitution. Lincoln County v. Brock, 37 Wash. 14, 79 Pac. 477.

[4] Plaintiff filed a claim for damages on June 17, 1911. The bridge was not finished and the work progressed for some months thereafter. The city contends that no claim was filed for the damages, if any, which must have accrued after June 17th. The claim, although introduced and marked as an exhibit, is not to be found in the record. Assuming that it recites a claim for continuing damages, as asserted in respondent's brief, we think it sufficiently complies with the requirements of the ordinance. It is probably true that respondent could not have maintained a suit for more than the amount stated in the claim. Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149. But this rule should not preclude him from anticipating his damages, where the trespass was certain to continue until the work was completed. The notice must have met the requirement of the statute. Rem. & Bal. Code, § 7995; Spokane Charter, art. 12, § 115. "This court, in common with all other courts, has uniformly held that the object of these ordinances, and the theory upon which they were sustained, was notice so that the city might be able to prepare for the trial of the cause if it was deemed expedient not to settle the claim." Hase v. Seattle, 51 Wash. 174, 93 Pac. 370, 20 L. R. A. (N. S.) 938. While not within the facts, this case falls within the logic of Falldin v. Seattle, 57 Wash. 307, 106 Pac. 914.

Reversed and remanded for a new trial.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

SIEGLEY v. SIMPSON et al.

(Supreme Court of Washington. April 15, 1913.)

WILLS (§ 489*)—DESIGNATION OF LEGATEE—PAROL EVIDENCE.

In construing a bequest to "my friend Richard H. Simpson," parol evidence is admissible to show that testator intended to make the bequest to "Hamilton Ross Simpson," though testator had an acquaintance named "Richard H. Simpson."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. § 489.*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Petition by E. E. Siegley, executor and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trustee of the estate of M. J. Heney, deceased, against Hamilton Ross Simpson and another. From the judgment, defendant Richard H. Simpson appeals. Affirmed.

Solon T. Williams, of Seattle, for appellant. Dorr & Hadley, of Seattle, for respondent.

MOUNT, J. The question in this case is whether parol evidence is admissible in the construction of a will which devises "unto my friend Richard H. Simpson the sum of six thousand dollars," where the legacy is claimed by each of two persons, one named "Richard H. Simpson" and the other "Hamilton Ross Simpson." The facts are briefly as follows: M. J. Heney, a bachelor, died on October 11, 1910, in San Francisco, Cal., leaving an estate valued at between \$750,000 and \$1,000,000. Prior to his death he made a will by which he left his estate to certain relatives and friends. The sixteenth clause thereof provided as follows: "I give, devise and bequeath unto my friend Richard H. Simpson the sum of six thousand dollars, and I direct that my executors and trustees hereinafter named pay the same to him as soon after my death as the condition of my estate in the discretion and judgment of my executors will permit." Thereafter the will was duly probated in King county, in this state. Executors and trustees were appointed, and one Richard H. Simpson and one Hamilton Ross Simpson each claimed the legacy mentioned in the section of the will above quoted. The executor then filed a petition, asking the court to bring the said claimants in and determine the disputed claims. This was accordingly done under the statute. Each of the claimants appeared and set up his claim. The lower court thereupon heard evidence, and determined that Hamilton Ross Simpson was intended as the beneficiary under the will, and directed the executor to pay the legacy to him. Richard H. Simpson has appealed from that order.

He argues that parol evidence is not admissible to prove that the testator when he used the name Richard H. Simpson meant Hamilton Ross Simpson, when there is a Richard H. Simpson in existence who claims under the will. "It is well settled that parol evidence is not admissible to add to, vary, or contradict the words of a written will, not only because the will itself is the best evidence of the testator's intention, but also because wills are required by the statute of frauds to be in writing." 30 Am. & Eng. Ency. Law (2d Ed.) p. 673. "It may be stated generally that, where the beneficiary under a will is not designated with precision, parol evidence is admissible to show who was intended. Thus, where a latent ambiguity results from the fact that the description of the legatee or devisee is perfectly answered by two or more persons, or is applicable in part to two or more persons, parol evidence

to identify the person intended is admissible. But where there is no ambiguity, and the object of the testator's bounty is sufficiently designated by plain language, so that it is clear who was intended, the construction is for the court, and parol evidence is inadmissible, although it might be thereby shown that the testator's intention was entirely different from that expressed in the will." 30 Am. & Eng. Ency. Law (2d Ed.) pp. 682, 683. "Where the language of a will is doubtful or ambiguous, parol or extrinsic evidence is admissible for the purpose of assisting the court in ascertaining its meaning. * * * Thus, where there are two things or persons both answering exactly to the thing or person described in the will, or where the person or thing does not answer precisely the description given, parol evidence may be received in order to ascertain which person or thing was intended. * * *" 40 Cyc. pp. 1429, 1430. "In cases of equivocation, as where the will or a provision thereof applies equally as well to two or more objects or persons, evidence of statements or declarations made by the testator at the time of the execution or about the time of the execution of his will is admissible for the purpose of identifying the person. * * *" 40 Cyc. p. 1435. Necessarily extrinsic evidence is admissible to prove the identity of the beneficiary named in a will, especially when two or more persons are claiming to be beneficially named—not for the purpose of varying the terms of the will, but to determine the person meant by the testator. *Connolly v. Pardon*, 1 Paige's Ch. (N. Y.) 291, 19 Am. Dec. 433; *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903; *Collins v. Capps*, 235 Ill. 560, 85 N. E. 934, 126 Am. St. Rep. 232.

In *Acton v. Lloyd*, 37 N. J. Eq. 5, the court, after hearing extrinsic evidence as to the identity of the devisee, held that a bequest to Dickey Lloyd was intended for David S. Lloyd. In *Camoys v. Blundell*, 1 H. L. C. 77, 9 Eng. Rep. 969, the court, after examining extrinsic evidence, concluded that Thomas Weld Blundell was entitled to a legacy by a will which named Edward Weld, his brother, as legatee. The court there said: "For if it be clear, upon the due construction of the will with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator as expressed by the will was that the person described, and not the person named, was to take, the description will prevail over the name. * * *" In *Woman's Foreign Missionary Society v. Mitchell*, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711, the court said: "It is the identity of the individual, natural or artificial, that is material, and not the name, for that is simply one of the numerous means by which the identity is ascertained.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in Kansas Reports.

The identity being established, the name is of no importance." In *Hockensmith v. Slusher*, 26 Mo. 237, the court said: "The general rule is that parol evidence cannot be admitted to supply or contradict, enlarge, or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) Where there is a latent ambiguity, arising dehors the will, as to the person or subject meant to be described; and (2) to rebut a resulting trust." See, also, *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

In this case if there had been two different persons by the name of Richard H. Simpson, and who in other respects answered the description in the will, and these two persons were claiming as legatees, clearly extrinsic evidence would be admissible to determine the identity of the person named in the will. For the same reason and upon the same principle, where there are two persons each claiming to be the beneficiary because they are each described in the will, the court must decide from extrinsic evidence if need be which is the person intended. And that is what was done in this case. The evidence is plain that by the words, "I give * * * unto my friend Richard H. Simpson the sum of six thousand dollars," the testator referred to his friend Hamilton Ross Simpson, the respondent here, for the latter was his employé, and had been so for several years in Alaska, and assisted the testator in railway work where the testator accumulated his estate. Hamilton Ross Simpson was the testator's personal associate much of the time in Alaska, and the testator had told different persons that he had made provision for him in his will. The testator, while he was intimate with H. R. Simpson, the respondent, did not in fact know his given name or the order of his initials, and always addressed him as "Mr. Simpson" or "Bill" or "Rotary Bill," as he was commonly known on account of his ability to handle a railroad rotary snowplow. Richard H. Simpson, the appellant, was not a friend of the testator, had met him only once in 20 years, and then merely spoke to him as they passed by. These and other facts not necessary to recount led the trial court to conclude that the testator used the name Richard H. Simpson when he referred to and really intended the person and name of Hamilton Ross Simpson as his beneficiary. Under the rule as above stated, where the beneficiary is not precisely described, extrinsic evidence was proper, and we are satisfied that the trial court correctly interpreted the intent of the testator and the meaning of the will.

The judgment is therefore affirmed.

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CROW, C. J., and PARKER and GOSE, JJ., concur.

CHADWICK, J. A most familiar rule of interpretation of wills is that effect should be given to every word contained therein. The testator, Heney, undertook to designate an object of his bounty. He did not do it by name alone. He said, "I give to my friend." The word "friend" is a word of weight and meaning. In the light of all the evidence it fits Hamilton Ross Simpson, and it does not fit Richard H. Simpson. The record shows, as is said in the majority opinion, that Richard H. Simpson was never the friend of the testator. It is not shown that he was more than a casual acquaintance, and there is no independent evidence of that fact. Hamilton Ross Simpson was Heney's friend. They had occupied the same tent; they had met the hardships incident to pioneering a railway line into the wilds of Alaska together; they had enjoyed the familiar fellowship of the camp. Hamilton Ross Simpson had been one of a few familiars whom Mr. Heney was accustomed to refer to as his "staff." Heney did not, as other intimates did not, know that Simpson's name was Hamilton Ross; they knew him by the nickname of "Bill" or "Rotary Bill." Mr. Heney addressed his letters to Hamilton Ross Simpson either as "R. H. Simpson" or "H. R. Simpson." It is evident from the whole record that in seeking to use formality in the preparation of a will, as men will do, Mr. Heney, instead of using as he had theretofore the initials "H. R." or "R. H.," supplied a name that may have been in his mind because of his former acquaintanceship with Richard H. Simpson. If the record went no further than the name, we could say that the rights of the parties claimant are equally balanced. It goes further. There is in Hamilton Ross Simpson's favor the fact that he was the friend of Mr. Heney. This creates an uncertainty or ambiguity, and parol testimony is admissible to clear the doubt. It was admitted and shown beyond peradventure that Mr. Heney had said to various friends that he intended to reward all those who had stood by him and helped him to do the work out of which he had realized his fortune, and it is significant and to my mind a controlling circumstance that he did remember all of them by name and by bequest. If there had been no qualifying word, there might be no room for construction; but when it is shown that Mr. Heney had but one friend Simpson, and that friend was known to him as "H. R." or "R. H." and by no familiar name other than "Bill," I have no hesitancy in holding that this case falls without the general rule quoted in the majority opinion.

STATE ex rel. LANGLEY et al. v. SUPERIOR COURT IN AND FOR SPOKANE COUNTY et al.

(Supreme Court of Washington. April 18, 1913.)

CERTIORARI (§ 16*)—NATURE OF PROCEEDING—INTERLOCUTORY ORDERS.

In a suit to recover certain corporate stock, it developed that certain persons other than the parties to the action apparently had interests adverse to both the plaintiffs and defendants. The court directed findings for plaintiffs for only such shares as the evidence showed the third persons had no interest in, but on motion for a new trial and to reopen the cause the court directed that the persons adversely interested be brought in, that their interests might be adjudicated. Before the order was entered, plaintiffs filed written disclaimers of interest by certain of such interested persons, sought to show that others were estopped, and claimed that only one who had instituted an independent action was a necessary additional party, and asked for a consolidation. This was denied, and the court allowed further time to bring in such additional parties. *Held*, that such orders were interlocutory, made during the progress of the cause, and were not reviewable on a writ of review prior to final judgment.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 31, 32; Dec. Dig. § 16.*]

Chadwick and Gose, JJ., dissenting.

En Banc. Original application for writ of review by the State, on the relation of W. L. Langley and another, against the Superior Court in and for the County of Spokane and William A. Huneke, Judge. Writ denied.

Cannon, Ferris & Swan, of Spokane, for relators. Post. Avery & Higgins, of Spokane, for respondents.

FULLERTON, J. This is an original application for a writ of review. In January, 1912, the applicants for the writ as plaintiffs began an action in the superior court of Spokane county against one A. J. Devlin and one Alfred Page as defendants to recover certain shares of corporate stock of the Corbin Coal & Coke Company, which they alleged they had been wrongfully deprived of by the fraudulent acts of the defendants. Issue was taken upon the allegations of the complaint, and a trial had before the court sitting without a jury.

The evidence taken at the trial developed the fact that certain persons other than the parties to the action had, or apparently had, interests in the shares of stock in question adverse to both the plaintiffs and the defendants, and the court, after taking the case under advisement, filed an opinion in which he directed findings to be made for the plaintiffs, but for the shares of stock only which the evidence developed the third persons named had no interest.

The defendants thereupon filed a motion for a new trial, and later on filed another motion, supported by affidavits, asking the court to reopen the cause for the introduc-

tion of further testimony. These motions were duly brought on for hearing, after which the court by an opinion in writing modified its first opinion to the effect that the plaintiffs were entitled to judgment, and directed that the persons having interests in the shares of stock adverse to the plaintiffs be brought into the action by the plaintiffs that their interests might be adjudicated and the rights of all persons interested be finally and conclusively determined. Before the formal order was entered, the plaintiffs filed in the proceedings written disclaimers of interest in the subject-matter of the action, executed by certain of the persons whom the court thought to be necessary parties, and sought to show that certain of the others were estopped by their acts from making claim to the stock, and that only one, a certain Galbraith, who had brought an independent action against the defendants for a share of the stock, was the only necessary additional party, and asked that the court enter an order directing a consolidation of his action with the action in suit. The court, however, adhered to its original opinion, and entered a formal order directing that the plaintiff make parties to the action all persons having or who appeared to have an interest in the shares of stock, notwithstanding their disclaimers, or the facts thought to work an estoppel against them. A further attempt was made to have this order modified, but the court declined to accede to the request further than to allow the same to show more fully the exceptions taken by the plaintiffs to the order; the order finally entered being in the following words: "The above matter coming on to be heard before me this 4th day of December, 1912, upon motion of the plaintiffs herein that this court amend and change its order entered in the above-entitled action on the 13th day of November, 1912, directing that certain additional parties be brought in, and that the action of R. L. T. Galbraith, against the defendants above named, be consolidated with this action, and now, after hearing arguments upon the motion, it is hereby ordered that the same be denied, except that plaintiffs herein are given an exception to said order wherein A. W. Vowell, Anna L. Gordon, and George N. Judd are required to be brought into this case as additional parties, and an exception to the said order wherein said R. L. T. Galbraith is directed to be brought in as an additional party, and an exception to the said order wherein L. W. Patmore and W. R. Hibbard are required to be brought in, either as plaintiffs or defendants, as additional parties, and an exception to said order wherein it is directed that upon failure of said plaintiffs to comply therewith within ninety (90) days from the date thereof, unless the time therefor is extended by order of court, and judgment shall be entered dismissing this action, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an exception also to said order wherein it is directed that the case entitled R. L. T. Galbraith, Plaintiff, v. A. J. Devlin and Alfred Page, Defendants, be consolidated with this action. Plaintiffs are given thirty (30) days additional time to bring in said additional parties, or to take such other action as they may be advised—that is, they are given one hundred and twenty (120) days, instead of ninety (90) days from the said 13th day of November, 1912—and plaintiffs are further allowed an exception to each and every part of this order."

This writ is sought to review these several orders. The applicants for the writ contend that they are erroneous and deprive them of substantial rights which cannot be reviewed by an appeal from the final judgment in the cause, and consequently they are entitled to review the same in advance of such final judgment. But we cannot accept this view of the case. The orders differ in no respect from interlocutory orders generally; they are merely orders made during the progress of the cause deemed necessary by the court to a proper determination of the case. As such they are not reviewable in this court in advance of the final judgment entered in the cause, but must be reviewed here, if reviewed at all, on an appeal or writ of review taken from the final judgment. This we have held in a long line of cases: State ex rel. Coplen v. Superior Court, 66 Wash. 225, 119 Pac. 383; State ex rel. Seattle, etc., C. Co. v. Superior Court, 56 Wash. 649, 106 Pac. 150, 28 L. R. A. (N. S.) 516; Jones v. Paul, 56 Wash. 355, 105 Pac. 625; State ex rel. Mohr v. Superior Court, 54 Wash. 225, 103 Pac. 17; State ex rel. Wilkeson Coal, etc., Co. v. Superior Court, 49 Wash. 203, 94 Pac. 920; State ex rel. Korsstrom v. Superior Court, 48 Wash. 671, 94 Pac. 472; State ex rel. Smith v. Superior Court, 47 Wash. 508, 92 Pac. 349; State ex rel. Young v. Denney, 34 Wash. 56, 74 Pac. 1021; State ex rel. Harris v. Superior Court, 34 Wash. 248, 75 Pac. 809; State ex rel. Nelson v. Superior Court, 31 Wash. 33, 71 Pac. 601; State ex rel. Carrau v. Superior Court, 30 Wash. 700, 71 Pac. 648; State ex rel. Oudin v. Superior Court, 28 Wash. 584, 68 Pac. 1052.

The application for the writ is denied.

CROW, C. J., and MORRIS, MAIN, ELLIS, PARKER, and MOUNT, JJ., concur.

CHADWICK, J. (dissenting). It was the boast of the common law that it gave a remedy for every wrong. So thoroughly was this principle impressed upon the English people that, where the remedy offered by the common law was inadequate, they found a way to grant full and adequate relief through courts of equity. That the relators have been grossly wronged is, I believe, admitted by most every member of this court. They have earned a judgment after a fair

and full trial. The court announced a decision in their behalf, yet for no reason apparent in the record, and for no reason made to appear sufficient on the oral argument, it has upon the demand of the defendants ordered new parties to be brought in. The parties ordered in were all before the court, or their interests determined as between the parties. Three of the parties were the grantors of the defendants who claim through them their title to the property involved. The defendants assert absolute ownership; therefore they cannot set up a title in the new parties without defeating their own. Defendants do not contend that these three have any interest; and, furthermore, they were witnesses upon the trial, and have filed a complete disclaimer of any interest whatsoever in the subject-matter of this controversy.

As to the remaining parties, their interest, if any, is against the plaintiffs and the defendants can have no interest therein; and, as in the case of the other new parties, these were witnesses at the trial, and if they had or claimed any interest they might have intervened, or defendants might have then asked that they be made parties. The so-called new parties, having been before the court and with full knowledge of the subject-matter of the controversy, would be estopped to maintain an independent action, and therefore could not set up a right in this proceeding. Murne v. Schwabacher Bros. & Co., 2 Wash. T. 191, 3 Pac. 270; Shoemaker v. Finlayson, 22 Wash. 12, 60 Pac. 50; American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282. The court also ordered one Galbraith brought in. Galbraith is maintaining an independent action against the same defendants, in which these relators can have no possible interest; and besides Galbraith appeared at the trial and in open court offered to be a party and to be bound by the decree, *but upon the objection of the defendants* the court refused to allow him to come in, and just why defendants should be permitted to use the name of Galbraith to get a new trial is beyond me. If this recital is not sufficient, it appears further that the court found that Galbraith was entitled to one-fifth of the fund in litigation; therefore, he can be in no way prejudiced by the judgment in this case.

This disposes of the new parties; five have disclaimed or are estopped; the sixth has an independent suit against defendants in which relators can have no possible interest. The court has found defendants guilty of fraud and deceit. To avoid the entry of a formal judgment, defendants made an application to have new parties brought in, and as before stated the court, for no apparent and certainly no reason in law, granted the motion and ordered an amendment complaint filed. I shall not discuss the wrong. That is apparent. Let us come to the remedy.

Relators are denied a writ of certiorari because the error may be reviewed on appeal. Of course, it never will be so reviewed; such errors never are, for they do not go to the merits of the case, and we have a convenient way of passing them over. Aside from this, and granting that the argument of the majority is well founded, it has ignored the prayer of the relators entirely. They say in their brief: "In considering the application of the relators herein for writ of review, it may be, in view of all the circumstances shown by said application, that this court should reach the conclusion that a writ of mandamus would be the proper remedy. If this conclusion is reached, * * * this court has ample power to grant the writ of mandamus, even though the relators' application is for a writ of review." There can be no question that relators are entitled to a judgment, either in their favor as the court announced in his memorandum decision, or against them, so that they can appeal in an orderly way. And upon the present showing, if the application had been for a mandamus, I doubt not that the writ would have issued. They have asked for alternative relief, and the real question for us to decide, although it is ignored by the majority, is whether a writ of certiorari being denied, the writ of mandamus shall issue. The special proceedings, as provided in the act of 1895, are civil actions under the Code, and are governed by the same rules of pleading and practice. *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501, and the many cases cited therein. This court has often held that an aggrieved party shall not be turned out of court because he has misconceived his cause of action; that his complaint is not demurrable if it states a cause of action upon any theory. *Smith v. Wingard*, 8 Wash. T. 291, 13 Pac. 717; *Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Damon v. Leque*, 14 Wash. 253, 44 Pac. 261; *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516; *Dormitzer v. German S. & L. Soc.*, 23 Wash. 132, 62 Pac. 862; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123; *Brown v. Calloway*, 34 Wash. 175, 75 Pac. 630; *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629; *Lawrence v. Halverson*, 41 Wash. 534, 83 Pac. 889; *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797; *Pomeroy's Code Remedies*, § 71. In *Widrin v. Superior Court*, 17 Cal. App. 93, 118 Pac. 550, the petitioner asked for a writ of review to correct an error of the superior court based on its refusal to entertain jurisdiction of an appeal. It was held that, although the writ of review would not issue, nevertheless the court's ac-

tion was "tantamount to a refusal to hear and determine the cause and that the aggrieved party's remedy is by a writ of mandate to compel the court to do so." A writ of mandate was issued, although not prayed for. See, also, *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 Pac. 978.

It may be argued that relators could not pray for alternative relief, but are bound by their first prayer. To so hold would violate the principle of the many cases cited above, the spirit of which has been carried into more than one application for a writ. The cases cited apply the rule of equity to all cases. This rule is set out and discussed in *Lawrence v. Halverson*, supra, where the court said: "The complaint is a plain and concise statement of facts constituting a cause of action, with a demand for the relief which the plaintiff claims. But it does not necessarily follow that, if the plaintiff demands relief it is not entitled to under the statement of facts set out in the complaint, it will not be awarded any relief at all. Whatever relief it is entitled to under the facts stated, the court will award." In *State ex rel. Dyer v. Middle Kittitas Irrigation Dist.*, 56 Wash. 488, 106 Pac. 203, the court held that, although the remedy by mandamus was not pursued in the first instance, it was not waived by the filing of a former complaint in an action that had gone to judgment.

Upon the merits, the case of *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844, is in point. There an application was made for a writ to compel the entry of judgment upon a verdict. In this case the court announced in a formal opinion that he would decide in favor of the relators. We said in the *Gabe Case*: "Can it be said that the remedy by appeal is adequate where the absolute right to instant relief is shown by the admitted facts, and where, under those facts, there was no room for discretion on the part of the court? * * * The relatrix was acquitted by the jury, and the real matter of controversy, and every part of it, was ended in her favor. * * * Such a remedy would be neither adequate nor in keeping with the spirit of the law. The relatrix, having stood her trial, and having been found not guilty, was entitled without any delay to the full fruits of the verdict."

It is my judgment that the petition of the relators states a cause of action, and that, if not entitled to a writ of certiorari, they are entitled to a writ of mandamus to compel the court to enter a formal judgment upon the pleadings, evidence, and conclusions of the court, as prayed for in their brief and oral argument.

GOSE, J., concurs with CHADWICK, J.

BERGMAN CLAY MFG. CO. v. BERGMAN
et ux.

(Supreme Court of Washington. April 21, 1913.)

1. RECEIVERS (§ 1*) — GROUND OF APPOINTMENT.

The power to appoint a receiver should always be exercised with caution.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. RECEIVERS (§ 6*) — GROUND OF APPOINTMENT—INADEQUACY OF REMEDY.

A receiver should not be appointed if there is any other adequate remedy.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 12; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 393*) — MANAGEMENT—POWER OF STOCKHOLDERS AND TRUSTEES.

A majority of the stockholders, or in the interim between the stockholders' meetings the trustees, are entitled to manage and control the affairs of a corporation; and the courts will not interfere merely to settle disputes between stockholders, or to substitute its judgment for that of the majority of the trustees, unless some controlling equity warrants interposition.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1574, 1575; Dec. Dig. § 393.*]

4. CORPORATIONS (§ 553*)—COLLECTION OF UNPAID STOCK SUBSCRIPTIONS—RECEIVERSHIP.

While the first object of a receivership is to preserve the assets, the appointment of a receiver to collect unpaid stock subscriptions of a solvent corporation is unauthorized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

5. CORPORATIONS (§ 227*) — DEBTS—LIABILITY OF STOCKHOLDERS.

Where capital stock is issued in proportion to the cash payments by the several subscribers, each stockholder is bound for the corporate debts in proportion to his holding.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 875, 881, 882, 886, 892; Dec. Dig. § 227.*]

6. CORPORATIONS (§ 614*)—WINDING UP—RIGHTS OF MAJORITY OF STOCKHOLDERS.

A majority of stockholders can wind up a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2435, 2437-2444; Dec. Dig. § 614.*]

7. CORPORATIONS (§ 240*) — SUBSCRIBERS — SUIT BY STOCKHOLDER FOR UNPAID SUBSCRIPTIONS.

Under Rem. & Bal. Code, § 3694, providing that stockholders of a corporation may, by by-laws, prescribe the times and amounts in which subscriptions to stock shall be made, and that in case such payments are not made the trustees may demand the amounts subscribed, it is the duty of trustees of a corporation in need of funds to carry on its business to make a call for unpaid subscriptions within a reasonable time, and to exercise good faith to all the stockholders; and where they refuse to do this for an unreasonably long time equity will permit a holder of paid-up stock to enforce the call for unpaid subscriptions in the name of and for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 934-942, 1069-1100½; Dec. Dig. § 240.*]

8. CORPORATIONS (§ 181*)—RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

A minority stockholder has the right to inspect and examine the books and records of the corporation at all reasonable times.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 674-682, 685; Dec. Dig. § 181.*]

9. CORPORATIONS (§ 206*)—SUING ON BEHALF OF CORPORATION—REFUSAL OF TRUSTEE.

A paid-up stockholder, knowing of a debt due to the corporation other than upon stock or subscriptions, and showing a refusal of the officers of the corporation to bring suit upon demand, may maintain an action therefor without resort to a receivership.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. § 206.*]

10. CORPORATIONS (§ 320*)—LIABILITY OF TRUSTEES—INJUNCTION AGAINST SELLING PROPERTY OF CORPORATION.

A court of equity will enjoin the trustees of the corporation from selling its property, where it appears that a fraud is contemplated, or about to be perpetrated, on the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

11. CORPORATIONS (§ 557*)—SALE OF PROPERTY—RECEIVERSHIP.

In an action by a corporation to restrain a stockholder from interfering with its business, in which defendant asked for a receiver, the fact that another corporation controlled by other stockholders of plaintiff corporation is its competitor does not establish that a sale of the property of plaintiff corporation would be in fraud of the defendant stockholder, so as to warrant the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.*]

12. CORPORATIONS (§ 553*) — REMEDIES OF STOCKHOLDERS—RECEIVERS.

One who was president of a corporation is charged with a knowledge of its business affairs, and after six years the court, on his allegations of a conspiracy on the part of other stockholders to sell the property for less than its value and to render his stock worthless, is not warranted in taking the property out of the hands of the trustees and administering it through a receivership; there being no substantial change in the business condition of the company since the beginning of his own administration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the Bergman Clay Manufacturing Company against M. L. Bergman and wife, with answer by defendants asking the appointment of a receiver. From an order appointing a receiver, plaintiff appeals. Reversed, with instructions to discharge the receiver.

Twitchell & Wentworth, of Spokane, for appellant. L. J. Birdseye, of Spokane, for respondents.

CHADWICK, J. The Bergman Clay Manufacturing Company, a corporation, was organized in the year 1905. The capital stock was fixed at \$25,000. The subscribers, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amount subscribed, and the amount unpaid on subscriptions are as follows:

M. L. Bergman.....\$6,500	\$ 258 (tendered on the trial)
C. A. Johnson..... 2,335	
J. H. Evans..... 6,500	4,250
J. N. Hurd..... 6,000	3,750
J. T. Davie..... 2,000	1,000
Peter Erickson.. 1,665	665

Stock was issued to each stockholder to the extent of the payment. M. L. Bergman was elected president, and so continued until 1911. The company borrowed money upon its organization, and has since been indebted to the bank. Another corporation, the Idaho Lime Company, in which J. H. Evans and J. H. Hurd are active factors, has been marketing the products of the Bergman Company, and claims a debt against the Bergman Company of about \$6,000. The evidence is not entirely clear, but we take it that the indebtedness, including the claim of the Idaho Lime Company, was at the time of the trial about \$10,000. The value of the property of the Bergman Company is admitted to be considerably in excess of this sum. Defendants say, in their brief, that the assets of the corporation amount to \$30,000, and that the debts do not exceed \$4,000. They do not admit the \$6,000 alleged to be due the Idaho Lime Company. After M. L. Bergman was ousted as president, this action was begun by the corporation to restrain him from interfering with and interrupting plaintiff's business. Defendants Bergman answered, setting up the facts we have here epitomized, and alleged further that the Idaho Lime Company was indebted to the plaintiff in a sum in excess of \$19,000; that Hurd and Evans, together with the other stockholders, were conspiring to sell the property of plaintiff at less than its value to pay the sum owing the bank and the amount they alleged to be due the Lime Company, and to render defendants' stock worthless. They asked that the delinquent subscribers be compelled to pay the amounts unpaid on their subscriptions; that a receiver be appointed to bring such suits as might be necessary to collect these subscriptions and the amount alleged to be due from the Idaho Lime Company; and for general relief. After a trial the court appointed a receiver. Plaintiff has appealed.

A receivership in this case must be sustained, if at all, by reference to some one or more of the following propositions: That a receiver is necessary: (1) To recover the unpaid stock subscriptions; (2) to take charge of the property pending the litigation; (3) to expert the books and to compel an accounting with the Idaho Lime Company and to bring action for the amount found to be due; (4) to prevent the trustees from selling the property at less than its value and from winding up the affairs of the company; (5) to prevent the elimination of the plaintiff as a competitor of the Idaho Lime Company.

[1, 2] The power to appoint a receiver is a delicate one, and should always be exercised with caution. *Roberts v. National Bank*, 9 Wash. 12, 37 Pac. 26; *Wales v. Dennis*, 9 Wash. 308, 37 Pac. 450; *Brundage v. Home Sav. & Loan Ass'n*, 11 Wash. 277, 39 Pac. 666; *Sengfelder v. Hill*, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep. 36; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81, 50 Pac. 1088; *Ridpath v. San Poll Transp. Co.*, 26 Wash. 427, 67 Pac. 229; *High on Receivers* (4th Ed.) 289, 294. This is the first rule confronting a chancellor upon an application, and the second is that a receiver should not be appointed if there is any other adequate remedy. *Secord v. Wheeler Gold Mining Co.*, 53 Wash. 620, 102 Pac. 654, 17 Ann. Cas. 914; 34 Cyc. 21, 23. It has never been the purpose of the law to subject matters of purely private right to the uncontrolled and arbitrary action of the courts. *Hutchinson v. American Palace-Car Co.* (C. C.) 104 Fed. 182.

[3] A court will not interfere merely to settle disputes between stockholders, or to substitute its judgment for that of the majority of the trustees. Men differ in their judgment, and the law is that a majority of the stockholders, or in the interim between stockholders' meetings the trustees, shall manage and control the affairs of the corporation. Some controlling equity must intervene to warrant the interposition of the court. In the case of *Theis v. Spokane Falls Gaslight Co.*, 49 Wash. 477, 95 Pac. 1074, this court recognized and adopted the rule just stated. The court there quoted the text, 2 Cook on Corporations (5th Ed.) p. 684, a part of which is as follows: "The discretion of the directors or a majority of the stockholders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved. * * * A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. * * * A court of equity cannot, however, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders show that sound business discretion and judgment would dictate a different policy." See, also, *Elliott v. Puget Sound Wood Products Co.*, 52 Wash. 637, 101 Pac. 228.

Proceeding, therefore, with that caution which the law imposes, the inquiry must be, Have the respondents an adequate remedy at law or in equity for the wrongs enumerated in their cross-complaint? We will take up and discuss the several propositions above stated in their order.

[4-6] 1. Is a receiver necessary to recover the unpaid stock subscriptions? We know of

no rule, nor has any been brought to our notice, that would justify the appointment of a receiver to collect unpaid stock subscriptions where a corporation is solvent. The first object of all receiverships is to preserve the assets. High on Receivers (4th Ed.) 344. Primarily the debts of a corporation are not to be paid out of the capital stock. If the assets of the corporation are sufficient, no one can complain if the debts are paid out of them. This is especially so in this case. The stock was issued in proportion to the amount paid in money by the several subscribers, and theoretically each stockholder is bound for the corporate debts in proportion to his holding. A majority of the stockholders can wind up the corporation if they so will. If in so doing one or more of the stockholders have suffered a wrong, an action for an accounting and for contribution will afford the aggrieved stockholder ample remedy. *Lee v. Steinhart Lbr. Co.*, 66 Wash. 572, 119 Pac. 1117.

[7] A subscriber to the capital stock of a corporation is in virtue of his promise a debtor, and the same principle that sustains the right of a stockholder to bring an action for the benefit of the corporation will sustain the suit of a stockholder to compel the payment of unpaid subscriptions. In fact, the right of a receiver to sue for unpaid subscriptions has been put on the ground that in so doing he is doing only that which the stockholder might have done. In *Lathrop, Receiver, v. Knapp*, 37 Wis. 307, the right of a receiver to maintain an action for unpaid subscriptions was challenged. In meeting the objection of the defendant, Chief Justice Dixon said: "The other subscribers might have maintained an action against him upon it [the subscription]; and as they might, so, I think, the receiver may." The statute (Rem. & Bal. Code, § 3694) provides that the stockholders of a corporation may, in the by-laws of the company, prescribe the times, manner, and amounts in which payments of the sums subscribed by them, respectively, shall be made. " * * * But in case the same shall not be so prescribed, the trustees shall have the power to demand and call in from the stockholders the sums by them subscribed, at such time and in such manner, payments or installments, as they may deem proper." The statute does not confer autocratic powers. The power here conferred is one that must be reasonably exercised for the benefit of the corporation and its stockholders. The directors could not continue from 1905 to 1912 to borrow money and pay interest, making the same a charge against the corporation, to the prejudice of the respondents who had paid their subscriptions. When it became evident to the directors that the corporation was in need of funds to carry on its business, and after a reasonable time had elapsed, it became their duty to make the call upon the stockholders for their un-

paid subscription, and, if the call was not complied with, to enforce payment in the manner provided by law. In short, it was their duty to exercise good faith to all the stockholders. Having failed to do this for so long a period of time, the principles of equity will permit the respondents to make and enforce the call in the name of and for the benefit of the corporation.

2. The second proposition, that a receiver should be appointed to take charge of the property pending the suit to recover the stock subscriptions, is covered by our discussion of the first proposition.

[8] 3. That a receiver is necessary to expert the books and compel an accounting with the Idaho Lime Company. We think that the remedy of the respondents is ample. It was held in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208, after a thorough review of the authorities, that a minority stockholder has a right to inspect and examine the books and records of the corporation at all reasonable times. The court said: "Corporations, owing to the ease with which they can be formed under the liberal provisions of the statute, and affording as they do a limited liability for investors, have become a favorite means for the combination of capital, and are now engaged in almost every variety and character of business. In fact, they have largely superseded partnerships. Not having behind them the personal responsibility and fortunes of the promoters, or that of those who may have invested in their capital stock, the interests of the public at large require, and especially that part of the public dealing with them, that the courts adopt the rule which will most largely conduce to honesty in their management. We believe that these interests will be better protected by holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation, so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted, and his examination is made in the interests of the corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation; and, when it is charged to be otherwise, the burden should be on the officers refusing such request, or the corporation, to establish it. The argument that, under this rule, the managers of a rival concern may acquire stock in the corporation and use the privilege for the purpose of benefiting the rival concern, to the detriment of the corporation, is not more forceful than the other that, under the restricted rule, a combination can be made by persons holding the majority of the stock, by which the corporation is managed for their own interests, to the exclusion and

detriment of the minority holders and injury to the public dealing with it."

See, also, *Frost v. Puget Sound Realty Associates*, 57 Wash. 629, 107 Pac. 1029.

[9] If the respondents know of a debt due and owing from the Idaho Lime Company to the Bergman Clay Company, or it can be shown by competent evidence, and the officers of the corporation refuse to bring suit upon demand, it is within the power of the respondents to maintain an action without resort to a receivership. Such suits are common. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 Pac. 647, Ann. Cas. 1912C, 859; *Wright v. Tacoma Gas & Elec. Co.*, 53 Wash. 262, 101 Pac. 865; *Williams v. Erie Mt. Consol. Min. Co.*, 47 Wash. 360, 91 Pac. 1091; *Elliott v. Puget Sound W. P. Co.*, 52 Wash. 637, 101 Pac. 228.

[10] 4. A court of equity will enjoin the trustees from selling the property of a corporation if it be made to appear that a fraud is contemplated, or about to be perpetrated, on the stockholders.

"It is to be observed, at the outset, that the general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. And courts of equity will not, ordinarily, by virtue of their general equitable jurisdiction, or of their visitatorial powers over corporate bodies, sequester the effects of the corporation, or take the management of its affairs from the hands of its own officers and intrust it to the control of a receiver of the court, upon the application either of creditors or shareholders. And while equity may properly compel officers of corporations to account for any breach of trust in their official capacity, yet, in the absence of statutes extending its jurisdiction, it will usually decline to assume control over the management of the affairs of a corporation, upon a bill filed by a stockholder alleging fraud, mismanagement, and collusion on the part of the corporate authorities, since such interference would necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly. The remedial power exercised by courts of equity, in such cases, ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officer; and, although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers, and placing them in the hands of a receiver." *High on Receivers* (4th Ed.) 288.

"A court of equity will enjoin, on behalf of the stockholders, any improper alienation or disposition of the property for other than

corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises, as well as the improper management of the business of the corporation, or a wrongful diversion of its funds. And in such cases equity may grant relief at the suit of a single stockholder." *Waterman on Corporations*, § 319; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; 10 Cyc. 983-985.

[11] 5. It is not entirely clear that the Idaho Lime Company is in fact a competitor of the plaintiff company; but assuming that it is so, it does not follow that, because Evans and Hurd are stockholders in the Bergman Clay Company and control the Idaho Lime Company, the sale of the property would be in fraud of the rights of the respondents. And here, again, equity will enjoin if a case be made out.

[12] For six years M. L. Bergman was president of the corporation. He insists that he knew nothing of its business affairs. Of the meetings at which he is shown to have been present his recollection is not distinct; his answer being, as a rule, "I do not remember." Nevertheless the law charges him with the knowledge he now disclaims. The business condition of the company has not materially changed since the beginning, and without being understood as holding that the respondents are to be denied any remedy which is in law or equity open to them, we must hold, upon the showing made, that respondents have waited too long to warrant the court in taking the property out of the hands of the trustees and administering it through a receivership. We are not satisfied that the rights of all parties will be best served by such procedure. *High, Receivers* (4th Ed.) § 295a. "The tendency to appoint receivers at the instance of those who have, for the hope of greater gain, put their money to speculative uses should be checked rather than encouraged." *Frost v. Puget Sound Realty Associates*, supra.

Both sides rely upon the case of *Secord v. Wheeler Gold Mining Co.*, 53 Wash. 620, 102 Pac. 654, 17 Ann. Cas. 914. We think that decision clearly sustains our view that this is not a proper case for a receiver. We have said no more in this case than is contained in the one sentence in that opinion: "Courts will not interfere, except in case of fraud or the infringement of legal acts which cannot be otherwise redressed." It is not enough that there is a wrong. It must be made to appear also that there is no adequate remedy. The cases of *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004, and *Boothe v. Summit Coal Mining Co.*, 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255, are also relied on. The question of a receivership was not involved in the *Theis* Case, while the *Boothe* Case is as is said therein, "sui generis." The case was resolved by reference to the law of partnership.

Whipple v. Lee, 46 Wash. 266, 89 Pac. 712. Because the parties were equal in right, and because there was "no control of the corporation by a board of trustees, sustained by a majority of the stock," and because the equities of the case did "violence to the elementary idea that a corporation is to be controlled by a governing board representing a majority of the stock," we find nothing in these cases or in others cited by respondents to warrant us in excepting this case from the general rules.

The case will be reversed, with instructions to discharge the receiver.

CROW, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

STATE v. EAKER.

(Supreme Court of New Mexico. March 4, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 1158, 1159*)—APPEAL—SUFFICIENCY OF EVIDENCE.

Ordinarily neither the verdict of a jury nor the finding of fact of a trial court will be disturbed in this court when they are supported by any substantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074-3088; Dec. Dig. §§ 1158, 1159.*]

2. CRIMINAL LAW (§ 1064*)—APPEAL—EXCLUSION OF EVIDENCE—MOTION FOR NEW TRIAL.

Where a party complains of an alleged erroneous decision of the court trying the cause, either in the exclusion or admission of evidence, he must point out in his motion for a new trial with reasonable certainty the particular evidence admitted or excluded; otherwise the court below need not, and the Supreme Court will not, consider such alleged erroneous decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.*]

3. CRIMINAL LAW (§ 1056*)—INSTRUCTIONS—REVIEW ON APPEAL.

The correctness of instructions given by the trial court will not be reviewed by the Supreme Court, unless objection is interposed to the giving of such instruction and an exception saved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

Appeal from District Court, Lincoln County; E. L. Medler, Judge.

George Eaker was convicted of assault with intent to rob, and appeals. Affirmed.

Prichard & Howard, of Santa Fé, for appellant. H. S. Clancy, Asst. Atty. Gen., for the State.

ROBERTS, C. J. Appellant was jointly indicted with one Daniel Bullion, by the grand jury of Lincoln county, charged with making assault upon one William D. Wilson with intent to rob and take from him, said Wilson, his money, goods, etc. The cause was

tried on the 20th day of May, and the jury returned a verdict finding both defendants guilty as charged. A motion for a new trial was filed by the appellant, which was overruled by the court, and appellant was sentenced to the state penitentiary for a term of not less than two, nor more than three, years. From such judgment this appeal is prosecuted.

[1] The principal contention urged by the appellant, in support of a reversal, is that the verdict of the jury was contrary to the evidence. It has been repeatedly held by the territorial Supreme Court that "ordinarily neither the verdict of a jury nor the finding of fact of a trial court will be disturbed in this court when they are supported by any substantial evidence." Territory v. Sals, 15 N. M. 171, 103 Pac. 980; Territory v. Trapp, 16 N. M. 700, 120 Pac. 702. We have carefully read the record and find facts and circumstances in evidence from which the jury might properly have drawn the conclusion that the defendant was guilty, that he was acting in concert with his codefendant; and therefore we cannot disturb the verdict. The insufficiency of the evidence was called to the attention of the trial court in the motion for a new trial. The lower court and the jury heard the witnesses on the stand, were able to observe their appearance and demeanor while testifying, and were thus enabled more nearly to arrive at the truth than could the appellate court by reading the record. If the trial judge entertained a reasonable doubt as to the guilt of the defendant, he should, and doubtless would, have granted him a new trial. The verdict is supported by substantial evidence, and we cannot therefore set it aside.

[2] It is next urged that the court erred "in permitting the district attorney to inquire into the financial condition of the appellant prior to the alleged offense over the objection of the appellant." The record discloses that the district attorney, over appellant's objection, asked the prosecuting witness the following question: "During the afternoon, at any time, did you have any conversation with these defendants, or either of them, relative to their financial condition, or whether they needed money?" The witness answered that he had conversed with them about the matter but did not detail the conversation, stating that he had forgotten it. He testified to no fact that would lead to the conclusion that the men were either rich or poor. Even if there had been error in overruling the objection to the question, the appellant, having failed to point out such alleged error in his motion for a new trial, cannot avail himself of it here. The motion for a new trial alleged that "the court erred in overruling defendant's objections to the various matters and things testified about by the witnesses for the state to which ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jections were interposed, and in rejecting defendant's offers of evidence and not allowing the same to go to the jury on the trial." The territorial Supreme Court has, in several decisions, quoted with approval the rule laid down by the Supreme Court of Indiana, in the case of *Grant v. Westfall*, 57 Ind. 128, as follows: "It has been repeatedly held by this court that when a party complains of an alleged erroneous decision of the court trying the cause, either in the exclusion or admission of evidence, he must point out in his motion for a new trial with reasonable certainty the particular evidence admitted or excluded; otherwise the court below need not, and this court will not, consider such alleged erroneous decision." See *Territory v. Anderson*, 4 N. M. (Gild.) 213, 13 Pac. 21; *Mogollon Gold Copper Co. v. Stout*, 14 N. M. 245, 91 Pac. 724.

[3] It is finally urged that the court erred in one of the instructions given the jury. We need not, however, consider whether or not this instruction is correct, for the record before us fails to show that it was excepted to, and indeed it does not appear that exceptions were interposed to any of the instructions given by the court. It is well settled in this state, by a long line of authorities, that the correctness of instructions given by the trial court will not be reviewed by this court, unless exceptions to the giving of such instructions are saved and an opportunity given to the trial court to correct the mistake. See *U. S. v. Cook*, 15 N. M. 124, 103 Pac. 305, where the authorities are collected. If this instruction was objectionable to the defendant, the court's attention should have been called to it at the time it was given, so that the court could, in case it was pointed out wherein it was erroneous, have corrected the same. Courts are not infallible, and it is the duty of attorneys to call attention to errors at the time of their commission, so that they may be corrected.

Finding no available error in the record, the judgment of the lower court is affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

MEDLER et al. v. CHILDERS.

(Supreme Court of New Mexico. March 20, 1913.)

(Syllabus by the Court.)

1. PLEDGES (§ 58*)—COLLATERAL SECURITY—RIGHT OF ACTION.

The holder of collateral paper may sue and recover upon it of the maker, without regard to any defense which the pledgor has upon the debt for which the paper was pledged as security, unless the maker is deprived of some equitable defense which he might have against the payee.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. §§ 186-194; Dec. Dig. § 58.*]

2. ASSIGNMENTS (§ 78*)—CONSTRUCTION—SECURITIES.

The assignment of any particular claim is considered as an equitable assignment of all securities held by the assignor to assure it.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 145; Dec. Dig. § 78.*]

3. APPEAL AND ERROR (§ 193*)—OBJECTION BELOW—NECESSITY—JOINDER OF INCONSISTENT CAUSES.

The question of the joinder of inconsistent causes of action must be raised in the lower court, and if not so raised this court will not consider the question on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

Appeal from District Court, Bernalillo County; G. W. Reynolds, Judge.

Action by E. L. Medler against Carrie M. Childers, executrix, and T. N. Wilkerson intervened. From the judgment, defendant appeals. Affirmed.

On October 26, 1901, William B. Childers was indebted to appellee Wilkerson in the sum of \$1,878.22, represented by a promissory note, secured by a chattel mortgage on a law library, in Childers' office, in Albuquerque, N. M. The note had been past due for some time, and the interest had accumulated, and Wilkerson desired a new note and mortgage. Childers demurred to the giving of a new chattel mortgage on his library, claiming that he was unable to carry insurance upon it while covered by a mortgage. He suggested that he would have E. L. Medler, who occupied offices with Childers, execute his individual note for the indebtedness to Wilkerson; that he would give to Medler his note for the amount, securing the payment of the same by a bill of sale of his library; and that Medler could indorse his note to Wilkerson, as collateral security for the payment of Medler's note. Wilkerson agreed to the arrangement, conditioned upon Childers' delivering possession of the library to Medler, under the bill of sale, and Medler's indorsing over to Wilkerson the bill of sale. The arrangement was carried out as agreed, except the bill of sale was not assigned to Wilkerson, but was delivered to him, but, at the request of Childers, Wilkerson returned the bill of sale to Medler, so that he would have it in his possession in case a levy should be made upon the library, under an execution, to show to the officers. Childers made some payments upon his note to Wilkerson, which were credited upon the note; he also executed two promissory notes to Wilkerson, in payment of installments of interest upon his note, the principal of which was credited, at his request, upon the note, signed by him and held by Wilkerson as collateral security. The note was due one year from October 26, 1901. Mr. Childers died on the 3d of March, 1908, testate, and his wife, the appellant, was appointed executrix of his will and duly qualified. It appears that Wilkerson, within the time re-

quired by law, filed the note as a claim against his estate, and it was duly allowed by the probate court. No payments had been made upon the Medler note, except some interest appears to have been credited upon this note in October, 1902. Medler instituted this action for an accounting upon the amount owing by Childers, upon the indebtedness for which he executed his note, and to have the bill of sale decreed to be a mortgage, and foreclosed, and the property sold and the proceeds applied upon the indebtedness. Later Wilkerson intervened, adopted as his own the allegations of the complaint filed by Medler, and asked for the same relief. To the complaint and intervening complaint, a general denial was filed by the executrix. By demurrer the executrix attempted to raise the question of the statute of limitations, claiming that the note executed by Medler was barred by the statute and that because of such fact Wilkerson could not enforce the payment of the collateral note signed by Childers. The demurrer was overruled, evidence heard, which fully supported the above facts, and a decree was entered by the court decreeing the bill of sale to be an equitable mortgage, foreclosing it, and directing that the property be sold for the satisfaction of the note signed by Childers. From the judgment this appeal is prosecuted.

E. W. Dobson, of Albuquerque, for appellant. Edward A. Mann and T. N. Wilkerson, both of Albuquerque, for appellees.

ROBERTS, C. J. (after stating the facts as above). In her brief, appellant discussed four propositions upon which she relies for a reversal of the judgment. Other questions are raised by the assignment of errors, but, as they are not discussed in the brief, they will be deemed to have been waived.

[1] The first contention relied upon is that the statute of limitations barred the action on the note executed by Medler, and therefore, the Childers note being collateral security for the payment of that note, payment thereof could not be enforced. Admitting that appellant's construction of the relation of the parties is sound, which under the facts need not be determined, still there is no merit in the position taken. The holder of collateral paper may sue and recover upon it of the maker, without regard to any defenses which the pledgor has upon the debt for which the paper was pledged as security, unless the maker is deprived of some equitable defense which he might have against the payee. Jones on Collateral Security (3d Ed.) § 671. This being a true statement of the rule, it necessarily follows that Childers, or his representative, having set forth no defense against the note executed by him, and claiming none, is not in a position to interpose the statute of limitation as to the principal debt, which his note is held to secure.

So long as he owes the debt represented by the note, it is immaterial to him to whom he makes payment, and he is not called upon to litigate and question as to the validity of the debt for which the note executed by him was pledged as collateral security.

[2] Appellant's second proposition, as we understand it, is that the court erred in holding that the transfer of the note carried with it the mortgage securing its payment. There was evidence from which the court might have found that the bill of sale was transferred to Wilkerson at the same time that the note was indorsed over. However, the rule is, as stated in Coolebrooke on Collateral Securities, p. 260: "The transfer of a negotiable promissory note, by indorsement and delivery merely, where indorsed in blank or payable to bearer, the payment of which is secured by a mortgage or deed of trust, carries with it, in equity, the mortgage or deed of trust securities. The indorsee of the promissory note is entitled to the benefits of such mortgage, whether an assignment of the same is made or not." Daniels, in his work on Negotiable Instruments (volume 1, p. 558), says: "The assignment of any particular claim is considered an equitable assignment of all securities held by the assignor to assure it." See, also, Jones on Chattel Mortgages, p. 449. So that even though it be held that Medler did not transfer the bill of sale to Wilkerson, under the rule above stated, Wilkerson was entitled to the benefit of all the securities held by Medler to assure the payment of the note.

[3] The third point discussed is that there were joined in the complaint inconsistent causes of action. However, no advantage was sought to be taken, in the lower court, of such fact, if it existed, and it is too late to raise it for the first time on appeal.

It is lastly urged that the decree rendered in the lower court is inconsistent; but appellant has failed to point out in his brief any injury suffered by reason of such inconsistency, if it exists.

Finding no error in the record warranting a reversal, the judgment of the lower court is affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

STATE v. LUCERO.

(Supreme Court of New Mexico. March 4, 1913. Rehearing Denied April 16, 1913.)

(Syllabus by the Court.)

1. LARCENY (§ 32*) — INDICTMENT — OWNERSHIP.

The ownership of an animal, alleged to have been stolen, may be laid either in the true owner or the person in lawful possession of the animal, as bailee or special owner.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 81-92, 99; Dec. Dig. § 32.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. LARCENY (§ 31*) — INDICTMENT — ALLEGATION OF VALUE.

Where, under a larceny statute, value of the thing or article stolen is not made material, it need not be alleged, and, if averred, it need not be proved.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 76-80; Dec. Dig. § 31.*]

3. CRIMINAL LAW (§ 956*) — NEW TRIAL — MISCONDUCT OF JUROR—AFFIDAVIT.

An affidavit, in support of a motion for a new trial on the ground of misconduct of a juror, should clearly identify the juror guilty of the alleged misconduct, and should clearly specify the facts alleged to constitute such misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.*]

4. CRIMINAL LAW (§ 1159*) — APPEAL — REVIEW—EVIDENCE.

Where there is substantial evidence supporting the verdict, the Supreme Court will not undertake to weigh the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

5. CRIMINAL LAW (§ 1056*) — APPEAL — REVIEW OF INSTRUCTION.

The correctness of an instruction given by the trial court will not be reviewed by the Supreme Court unless exceptions are saved and an opportunity given the trial court to correct the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668-2670; Dec. Dig. § 1056.*]

Appeal from District Court, Guadalupe County; D. J. Leahy, Judge.

Liborio Lucero was convicted of larceny, and appeals. Affirmed.

M. R. Baker, of Santa Fé, for appellant.
F. W. Clancy, Atty. Gen., for the State.

ROBERTS, C. J. Appellant was indicted by the grand jury of Guadalupe county for larceny of one head of neat cattle of the value of \$25, was tried before a jury in the district court of that county, adjudged to be guilty, and sentenced by the court to imprisonment in the state penitentiary for not less than two years nor more than four years. From such judgment, this appeal is prosecuted.

[1] The first ground relied upon for reversal is that there is a fatal variance between the allegation in the indictment and the proof as to the ownership of the animal. The indictment charged that the appellant unlawfully and feloniously did take, steal, and knowingly drive away one head of neat cattle of the value of \$25 of the property of Victoriano Tafoya, and it developed upon the trial of the case that the animal in question had been given to the wife of Tafoya by her mother. It further appeared, however, that Victoriano Tafoya, at the time the animal was stolen, had the lawful possession of the same, as bailee or special owner. This being true, the ownership of the ani-

mal, at the option of the pleader, could have been laid either in Victoriano Tafoya or in his wife. See 2 Bishop's Criminal Procedure (4th Ed.) § 721.

[2] The second proposition urged as error is that there was no proof of the value of the animal. Under the statute upon which the indictment was predicated, value is not material. It is not mentioned in the statute. In Bishop's Criminal Proc. § 713, the rule is stated as follows: "In statutory horse stealing and other like larcenies of specific things, where the punishment in no degree depends on the value, it need not be averred; or, if averred, it need not be proved." See, also, Davis v. State, 40 Tex. 134.

[3] The third contention is that there was misconduct on the part of one of the jurors, prejudicial to the rights of the defendant. In the affidavit filed, in support of the motion for a new trial, and in such motion, the name of the juror, whose conduct is said to have been prejudicial, is not given; nor is the name of the party cognizant of the same disclosed. This was clearly insufficient. People v. Williams, 24 Cal. 31; Achey v. State, 64 Ind. 56.

It is next urged that the evidence fails to sustain the verdict. We have carefully gone over the record and find sufficient evidence which, if true, would sustain the verdict. The jury evidently believed it to be true and were satisfied therefrom, to the required degree, that the defendant stole the cow in question. The defendant testified in the case, but the jury, as it had a right to do, evidently concluded that his version of the affair was not true.

[4] This court cannot be called upon to exercise the functions of jury. Territory v. O'Donnell, 4 N. M. (Gild.) 196, 12 Pac. 743; Territory v. Maxwell, 2 N. M. 250; Cunningham v. Springer, 13 N. M. 259, 82 Pac. 232.

[5] The fifth question raised is as to the correctness of the instruction No. 14, given to the jury by the court, of its own motion, to the effect that it was proper for the jury to consider the character of the accused. The record before us nowhere discloses that this was excepted to, and it is well settled in this state that the correctness of instructions given by the trial court will not be reviewed by this court, unless exceptions are saved and an opportunity given the trial court to correct the error. The New Mexico cases sustaining this proposition are set out in the case of United States v. Cook, 15 N. M. 124, 103 Pac. 305, and need not be cited here.

Finding no error in the record the judgment of the lower court is affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

CANAVAN v. CANAVAN et al.
(Supreme Court of New Mexico. March 8, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 888*) — PLEADING (§ 237*)—AMENDMENT.

Where a material, even jurisdictional, fact, omitted from the complaint, is as fully litigated, without objection, as if said fact had been put in issue by the pleadings, it is the duty of the trial court and of this court on appeal to amend the complaint in aid of the judgment so as to allege the omitted fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3617-3619; Dec. Dig. § 888; Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

2. CONTEMPT (§ 66*)—APPEAL AND ERROR—JUDGMENT AFTER DECREE.

A judgment in a contempt proceeding, originating subsequent to the final decree, is not reviewable upon appeal from such final decree.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

(Additional Syllabus by Editorial Staff.)

3. DIVORCE (§ 179*)—APPEAL—FUNDAMENTAL ERROR—PRESENTATION FOR REVIEW—COMPLAINT.

An objection that the complaint in a divorce suit fails to state that the plaintiff has resided in the state the required length of time presents fundamental error and must be reviewed, though presented for the first time in appellant's brief.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 566; Dec. Dig. § 179.*]

Appeal from District Court, McKinley County; H. W. Reynolds, Judge.

Action by Kate Canavan against Stephen Canavan and others. From decree for plaintiff, defendants appeal. Affirmed.

E. W. Dobson, of Albuquerque, Charles Spiess, of East Las Vegas, and Mann & Venable, of Albuquerque, for appellants. A. T. Hannett, of Gallup, and Vigil & Jamison, of Albuquerque, for appellee.

PARKER, J. This is an appeal from a final decree for divorce and awarding judgment to the appellee for a sum of money as her just share of the community estate of the parties, and ordering execution. Appellant does not complain of the justness of the decree except to say that it was not justified by the evidence. A reading of the record shows no merit in the suggestion.

[1] 1. Appellant, however, questions the decree on the ground of want of jurisdiction of the subject-matter. The proposition is founded on the fact that the complaint fails to allege residence of the appellee, plaintiff below, for one year next prior to the filing of the complaint, which residence is required by the Act of Congress of May 25, 1896, c. 241, 29 Stat. 136, 2 Fed. Stat. Ann. 838, and section 1432, C. L. N. M. 1897. It appears from the evidence in the case that the parties, ever since their marriage, with one exception for a short time, have lived in Gal-

lup, in the county of McKinley, in this state, and that appellee had lived continuously in the same house in Gallup where she lived, when she testified in the case, for nine years prior to the time she testified. Appellant expressly admits in his testimony the required residence of the wife. No objection to the complaint was interposed in the court below on this ground, and no motion in arrest of the judgment was interposed.

We have, then, a case where the complaint in a divorce case is defective in failing to allege a material fact, which in truth exists and is undisputed, but where the defendant fails to object to the same in the court below and presents the proposition here for the first time. Under such circumstances, is the objection available? It may be stated preliminarily that such an objection does not meet with favor in any appellate court. To consider the same antagonizes the rule requiring all questions to be submitted to the trial court and to be decided by it before they will be considered on appeal. And, speaking broadly, it presents a case where a litigant has litigated with his antagonist every fact material or relevant to the cause of action, and, having failed, he now seeks by the mere forms of law to defeat his antagonist and deprive her of the result of the litigation.

[3] But the objection is of such nature that this court must notice it, notwithstanding there is no assignment of error presenting it, and it is mentioned for the first time in the briefs of counsel. This is so for the reason that the fact omitted from the pleadings, viz., residence of plaintiff in the state the required length of time prior to bringing her action is a fundamental fact which lies at the foundation of the right to institute and maintain the action, and is, in a sense at least, jurisdictional. The fact of residence is not strictly a part of the cause of action between the parties for divorce. It bears no relation to the fact of marriage or to the facts authorizing its dissolution. It is an arbitrary provision of law, founded upon wise considerations of public policy, which requires residence of the plaintiff for a given time before right of action arises. But whether classed as a part of the cause of action, or a fact giving rise to the right of action, it is equally important, and the question must be considered.

It is to be admitted, without argument, that the objection that a complaint fails to state facts sufficient to constitute a cause of action may be successfully interposed at any stage of the proceedings, and may be so interposed for the first time in an appellate court. 2 Cyc. 680; Nichols v. Board of Co. Com., 13 Wyo. 1, 76 Pac. 681, 3 Ann. Cas. 543, and note. This is necessarily so because parties, while they may submit their persons to the jurisdiction of the court, can by no act of theirs confer upon the court jurisdiction

*For other cases see same topic and section—NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the subject-matter. Ordinarily the subject-matter of a cause of action is determined exclusively by the complaint, which enumerates and states all of its different elements. If a material element is omitted, no legal cause of action is stated, and no jurisdiction to render a judgment arises. A direct attack upon the judgment, therefore, must ordinarily be successful. But the omitted element of the cause of action may be brought into the record otherwise than by the complaint. In the case at bar, the omitted element, viz., the required residence of the plaintiff, was brought into the record by the proofs in the case, which are undisputed, and the fact is admitted by the defendant himself. The proofs are before us as a part of the record, from which we have a right to find, and we do find, that the required residence prior to the institution of the action existed. The vicious consequences of the general doctrine just stated have led to the formulation of various rules, both statutory and of decision, calculated to curtail its effect. Thus the doctrine of "express alder" (i. e., where the omitted fact is supplied by the pleading of the opposite party) was known to the common law. 1 Chitty's Pldgs. 671. So the doctrine of alder by verdict to the effect that a fact, though of substance, if it be such that, without proving it, plaintiff could not have a verdict, will be supplied by the verdict, although not alleged. Tidd, Pr. 919. "So when the omitted fact is admitted in the evidence on an argument by the opposing party, he cannot complain of the defect in the appellate court." Bang v. McAvoy, 52 App. Div. 501, 65 N. Y. Supp. 467; Town of Schaghticoke v. Fitchburg R. Co., 53 App. Div. 16, 65 N. Y. Supp. 498.

In all of the Codes of Civil Procedure, ample provisions for amendment of pleadings are made for the purpose of avoiding the consequences of the doctrine above mentioned, and ours is quite similar in language and scope with one exception to be noted. The pertinent provisions of our Code are as follows:

Section 2685, C. L. 1897, subsec. 39: "When any of the matters enumerated in subsection thirty-five of this act, do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the complaint does not state facts sufficient to constitute a cause of action."

Subsection 82: "The court may, at any time before final judgment in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return, or other proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by in-

serting other allegations, material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Subsection 85: "The court shall, in every state of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

Subsection 86: "After the final judgment rendered in any cause, the court may, in furtherance of justice, and on such terms as may be just, amend in affirmance of such judgments, any record, pleading, process, entry, return or other proceedings in such cause, by adding or striking out the name of a party or a mistake in any other respect or by rectifying defects or imperfections in matters of form; and such judgment shall not be reversed or annulled therefor."

Subsection 94: "All omissions, imperfections, defects and variances, not being against the right and justice of the matter of the action, and not altering the issue between the parties on the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error or appeal."

Subsection 39, above quoted, expressly excepts the defect complained of here, and has no application to this discussion except that it shows that the objection is available at any stage of the proceedings. Subsection 82 refers to amendment prior to judgment. Subsection 85 lays down the general principle that defects which do not affect the substantial rights of the parties shall be disregarded. Subsection 86 refers to amendment as to matters of form, which may be made after judgment. Subsection 94, however, introduces a new feature into the law, and, so far as we are advised, this section is unique. The imperative form of expression is used, and it seems that the duty is imposed upon the court, both of original and appellate jurisdiction, and with or without application by the parties, to supply and amend all omissions, imperfections, defects, and variances proper under the restrictions contained in the remaining clauses of the section. The omissions or defects are not limited to formal, as distinguished from substantial, ones, but all omissions and defects are included. The only limitation on the duty of the court is that the amendment shall not be against the right and justice of the matter of the action, and shall not alter the issues between the parties on the trial. It is readily seen that in the case at bar an amendment of the complaint, showing the required residence of the plaintiff, would in no manner antagonize the restriction imposed by the section. It would certainly not be against the right and justice of the matter; nor would it alter the

issues which were between the parties on the trial. They voluntarily litigated the issue of residence of the plaintiff, and they both, and other witnesses, testified that the fact existed, and there was no evidence to the contrary.

It may be admitted that in a strict and technical sense the fact of the residence of the plaintiff was not in issue; those facts being determined, as a rule, by the affirmation of them on one side, and a denial of the same on the other in the pleadings. But, in the connection used in the statute, the word "issue" is deemed to include any fact litigated in the same manner, and to the same extent as if it had been affirmed and denied in the pleadings. It therefore becomes our duty to amend the complaint so as to allege the required residence of the plaintiff. The actual amendment, we assume, need not be made, but the complaint will be treated as amended. In this connection it is to be observed that had the parties failed to litigate the omitted fact, or if the fact were left in doubt by the evidence, or if objection to the proof of the fact had been interposed, or if, in any way, the sufficiency of the complaint had been questioned, and the plaintiff had still elected to stand upon it, a different question would be presented.

We are aware that in Missouri, whence our Code provisions came, it is uniformly held in divorce cases that a failure to allege residence of the plaintiff for the required statutory time is jurisdictional and requires a reversal of the case. *Stansbury v. Stansbury*, 118 Mo. App. 427, 94 S. W. 566. In that state, while they have a section like subsection 94, its scope of application is expressly limited to certain enumerated omissions and defects. The adoption of the section of our Legislature, without the limitation, would seem to indicate an intention to enlarge the scope of the application of the section beyond that applied in Missouri.

[2] 2. The most serious question in the case arises out of a judgment committing the appellant to jail for a period of two years for having violated a preliminary injunction issued in the cause. The facts concerning the contempt proceedings were before this court in a habeas corpus proceeding, and the writ was discharged and the petitioner remanded for custody. See *In re Canavan*, 130 Pac. 248, decided March 28, 1912.

It appears that the bill of complaint in this case was filed on the 3d day of August, 1910, and on the same day a preliminary injunction was issued restraining the appellant from "incumbering, charging, selling, or otherwise disposing of, or from attempting to incumber, charge, sell or otherwise dispose of, any of the real or personal estate of the said Stephen Canavan, until the further order of the court." The issues were made up between the parties, the testimony taken before an examiner, and the cause brought on for final decree on March 9, 1911. It ap-

pears from an order made on that date that the court found that there was reason to believe that the appellant had violated the injunction, and a rule to show cause why he should not be punished as for contempt was issued, and the further hearing of the cause was continued until March 18, 1911. This order to show cause was not personally served upon the defendant; he then being absent from the jurisdiction, but was served by leaving a copy of the same with a person over the age of 15 years, residing at the usual place of abode of the appellant. On the 14th of June, 1911, the appellant having made no return to the rule to show cause, appellee filed a petition praying that the court take up and dispose of the case upon the proofs already presented; the continuance having theretofore been taken for the purpose of allowing the appellant to be brought in with his books and vouchers to show what had become of the money he was known to have received from a sale of the community property. On June 21, 1911, the final decree was entered in favor of appellee for absolute divorce, the custody of a minor child, certain allowances for attorney's fees, and \$20,000 as her fair share of the acquiet property of the marriage community, and awarding execution. Nothing further was done in the case until February 27, 1912, when an affidavit by one of the counsel for appellee was filed, stating that appellant had never turned over to the appellee the amount of said judgment, and that the appellant had betaken himself out of New Mexico for the purpose of avoiding service of process upon him, but that he was then temporarily within the jurisdiction and could be apprehended. On the same date an order for an attachment was issued, returnable forthwith, which was served. On the 6th of March, a further affidavit and petition was filed by the appellee, stating that the appellant had never paid any part of the decree, and that, prior to the entering of the decree, he had departed from the jurisdiction and took with him all of his property, to the extent of about \$50,000. She prayed that the court take cognizance of the contempt committed by the appellant, and that he might be committed to jail until he paid over the amount awarded to her in the final decree.

On the 21st of May, 1912, appellant answered the petition, giving an account of himself from about February 8, 1911, at various parts of New Mexico, and at El Paso, Tex., and Mexico, and alleging that he did not have the money with which to pay the decree. He further alleged that he had committed no act in violation of the injunction, but, carefully or otherwise, he refrained from specifically denying that he had taken the proceeds of the estate out of the jurisdiction. Appellee moved for judgment upon the petition, and answer in the contempt proceedings, and thereupon the court found that the

appellant had been guilty of contempt in disposing of practically all of his property in direct violation of the restraining order and injunction heretofore mentioned; that he had taken and carried away out of New Mexico practically all of his property with the intent of violating the said restraining order, and with the intent of defrauding the jurisdiction of the court; that he had not complied with the final decree which ordered him to turn over to plaintiff the sums of money mentioned, although he had adequate legal knowledge of said decree and of the mandate of the court. The court thereupon committed the appellant to jail in the county of Bernalillo "for the period of two years, or until said defendant, Stephen Canavan, shall purge himself of said contempt by turning over to the plaintiff the \$19,000 which the court decreed to be her fair share of the acquest property, and the \$1,500 decreed to her as attorney's fees, together with the costs incurred in this cause, or until the further order of the court."

The order to show cause, issued prior to the final decree, was never acted upon in any way by the court, and no return was ever made thereto by the appellant. The contempt proceeding of which the appellant complains was begun on February 27, 1912, by the filing of an affidavit by the counsel for appellee, and which was nearly eight months subsequent to the final decree, and resulted in a judgment a month later.

It thus appears that a contempt proceeding originating subsequent to a final decree is sought to be reviewed in this case upon an appeal from the final decree. Appellee argues that such a judgment is not reviewable in this court at all, or under any circumstances, and also suggests in the brief that, the judgment being subsequent to the final decree from which alone the appeal is taken, it certainly cannot be reviewed upon such appeal. The question is not whether such a judgment is reviewable at all, but whether the judgment is before us for review upon this appeal.

It may be stated generally, that, upon an appeal from a final decree, all interlocutory orders and decrees connected with it are reviewable. This must be so because, while not in form, they are in effect carried forward and become a part of the final determination. But orders made subsequent to the final decree bear no relation to the determination of the court therein, and are in no sense involved in the consideration of the correctness of the judgment. The question, on appeal from a decree, is whether the decree is correct or erroneous under the circumstances shown by the record. We know of no principle nor authority to the contrary, and counsel have cited none. In the case at bar the appellant was committed for the contempt many months after the court had determined and fixed all of the rights of the

parties by the decree; and even were it true that the contempt proceeding was pending prior to the final decree, as seems to be argued by appellee, it culminated long afterward, was collateral to it, and bore no relation to the findings and conclusions of the court in the decree. It was more in the nature of an execution to enforce the decree than otherwise. It thus appears that the contempt judgment is not reviewable on this appeal. 3 Cyc. 229; Kellogg v. Hamilton, 43 Mich. 269, 5 N. W. 315; Latimer v. Morrain, 48 Wis. 107; Morris v. Niles, 67 Wis. 341, 30 N. W. 353; Chouquette v. McCarthy (Tex. Civ. App.) 56 S. W. 957; Aultman & Co. v. Becker, 10 S. D. 58, 71 N. W. 753; Diedrichs v. Stronach, 9 Wis. 548; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897; Bank v. Larson, 80 Wis. 469, 50 N. W. 499.

In the case of Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853, the distinction above pointed out is made to appear. The court said: "We have jurisdiction to review the final decree in the suit, and all the interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawlessness or propriety of this direction. But the fines were, in fact, measured by the damages plaintiff has sustained and the expenses he had incurred. They were incidents of his claims in the suit." The fines in that case were all imposed prior to the final decree and were awarded to the plaintiff as a part of his recovery against the defendant for having infringed a patent. They were consequently necessarily involved in determining the rights of the parties as fixed in the decree.

In the case of Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the Supreme Court of the United States entertained an appeal taken directly from the judgment in contempt, committing the parties to a term of imprisonment. The judgment was reversed upon the ground that it was really a criminal contempt, which it sought to punish in a civil proceeding; and, the rights of the defendants having in various ways been invaded on the trial, the judgment could not be allowed to stand.

In Clay v. Waters, supra, the court says: "A judgment against the party to a suit in equity for a civil contempt, committed therein before final decree, is reviewable by appeal from the decree only. * * * A judgment against a party in a suit in equity for a civil contempt, committed after the decree, is reviewable by appeal."

These expressions would seem to indicate that the court held that the time when the contempt is committed is determinative of the question as to whether the judgment can be reviewed on appeal from the final decree, or whether it must be reviewed on the direct appeal from the judgment itself. An

examination of the authorities cited in support of these two propositions, however, would indicate that the time when the proceeding and judgment in contempt occurred is determinative of the former proceeding for review of the judgment. We so interpret the decision. It is not appropriate to say, in this connection, that we know of no reason why judgments in contempt should not be reviewable the same as any other judgment. They often, and in fact usually, involve some of the highest rights of the citizen. Our conclusion in this case is therefore not controlled in any degree by desire to curtail the right of review in such cases.

The judgment in contempt not being before us, and finding no error in the decree in the case, the judgment of the lower court will be affirmed, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

STATE v. GRANADO.

(Supreme Court of New Mexico. March 20, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 253*)—MURDER—EVIDENCE.

Evidence reviewed, and *held* to warrant a verdict of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

2. HOMICIDE (§ 308*)—INSTRUCTIONS.

Where, in the trial of a person charged with murder in the first degree, there are no facts or circumstances in evidence tending to reduce the offense to murder in the second degree, but such facts and circumstances all show that the crime was in the first degree, the court is not required or authorized to instruct as to murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.*]

Appeal from District Court, Socorro County; Merritt C. Mechem, Judge.

Francisco Granado was convicted of murder, and appeals. Affirmed.

J. A. Lowe, of Socorro, for appellant. Frank W. Clancy, Atty. Gen., for the State.

ROBERTS, C. J. The defendant was tried by a jury, in the district court of Socorro county, for the crime of murder, adjudged to be guilty of murder in the first degree, and by the court duly sentenced to death. From the judgment an appeal was prosecuted to this court, a transcript of record filed as required by law, but no brief was filed on behalf of appellant. Had the case not been of such a grave character, we would have affirmed the same because of such default, but, in view of the gravity of the punishment, we decided to carefully review the record and evidence and ascertain whether or not error had intervened by which defendant had been deprived of any of his legal rights.

The undisputed facts disclosed by the rec-

ord are, in substance, as follows: About 7:30 o'clock on the evening of the 19th day of February, 1912, the defendant, in company with one Juan Taranga, entered the store of the Mogollon Mercantile Company, at Mogollon, Socorro county, N. M., armed with Winchester rifles, and demanded that William S. Clark (for the killing of whom the defendant was prosecuted), Eugene F. Burns, and Freeman, the manager of the store, should throw up their hands and deliver to them the money in the store. Freeman and Clark started toward the defendant and Taranga, ordering them out of the store, neither Freeman nor Clark being armed; thereupon Taranga shot and killed Freeman, and the defendant shot Clark, who died almost instantly. The rifles were then leveled at Burns, and he was compelled to open the safe in the office, from which the defendant and Taranga took \$3,710 and made their escape. It further appears from the evidence that it had been the custom of the Mogollon Mercantile Company to pay its employes, of whom it had quite a number, on the 20th day of the month, the money for which was sent in by the banks usually on the 18th or 19th, and that the defendant was familiar with such custom and knew the company had, at the time of the robbery, the money for the pay roll in the office safe.

After securing the money from the safe, the defendant and Taranga kept the witness Burns covered with their rifles and backed out of the store and fled. They were followed by the sheriff and a deputy, and within two or three days were located in a house some 50 or 100 miles from the scene of the crime. After locating them, the sheriff sent his deputy some 200 or 300 yards to get additional help, and was watching the house in company with a farmer, who had accompanied the sheriff and his deputy, from the adjoining house. Suddenly the two bandits sprang from the door of the house and opened fire on the sheriff and his companion. In the battle which ensued Taranga was killed and the defendant retreated inside the house, and was later persuaded to surrender. Upon searching Taranga something over \$2,000 was found on his person, and the remainder of the booty was found on the person of the defendant and secreted in the house where they had taken refuge. All the above facts were fully established by the evidence, and upon no proposition material to the establishment of the guilt of the defendant was there left the slightest doubt. The defendant did not testify, and the only evidence offered on his behalf was the testimony of two witnesses to the effect that he had, before the commission of the crime, been a hard-working, industrious man. This fact, however, would not excuse or exculpate the crime or save the defendant from the punishment prescribed by the law.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 181 P.—82

[1] From the careful examination, which we felt compelled to make of the evidence in the record, in view of the gravity of the penalty, and defendant's lack of legal assistance in this court, we are satisfied that the evidence fully justified the verdict; indeed, no other verdict could have been returned by the jurors without violating their oaths.

We find no error in the record prejudicial to the rights of the defendant. Seldom has a transcript of record been filed in this court which was so free from grounds upon which error might be predicated. It appears that the lower court gave to the defendant the benefit of every doubtful proposition that arose in the case, and was far more favorable to him in the matter of excluding testimony to which objection was interposed than required by the law. In the lower court a motion for a new trial was filed which was overruled by the court. In this motion two specific grounds were assigned, which we will discuss, as these are the propositions which would doubtless have been argued in this court.

[2] The first ground is that the court erred in failing to charge the jury as to murder in the second degree. Under the facts, there was no error in this. Indeed, the court would have committed error had it so instructed. There were no facts or circumstances shown tending in any degree to reduce the grade of the offense. As was said by Justice Laughlin in the case of *Sandoval v. Territory*, 8 N. M. 573, 45 Pac. 1125: "It is plain, therefore, that this court has held in effect, if not in direct words, that it is the duty of the trial court to confine the attention of the jury to the issues involved by the evidence, and the court, at its peril, must instruct on all the law applicable to all the evidence, and then confine the jury to those issues alone." It is settled law in this state that the court, under an indictment charging murder in the first degree, is not required to instruct in any of the lower degrees, when there is no evidence warranting such an instruction. All murder which is committed in the perpetration of, or attempt to perpetrate, any felony, is murder in the first degree. Section 1, c. 36, S. L. 1907. Certainly there could be no doubt, under the facts, but that all the elements of the crime of murder in the first degree were clearly established.

The second ground assigned in the motion for new trial was as follows: "Because the court erred in admitting the testimony of Amos E. Green, justice of the peace of precinct No. 1, Socorro county, N. M., as to a voluntary statement made to him by defendant at his preliminary hearing before said justice of the peace, for the reason that, by the testimony of the justice, it plainly appears that defendant was not properly warned that his said voluntary statement might or would be used against him in his

trial, but was led to believe that it might be used in his favor, and thereby said voluntary statement was obtained by fraud and deceit, as no self-serving declaration of defendant could possibly have been admitted in his favor." The evidence of the justice of the peace discloses the want of merit in this contention, and shows that the defendant was fully advised as to his rights in the premises.

We quote the testimony of the justice of the peace: "Q. Was there any promises made of mercy or any inducement put up to him? A. Not at all that I know of. Q. Any threats made? A. No, sir. Q. Any statement made as to whatever he might say; didn't have to answer if he wanted to; that he had a constitutional right not to incriminate himself? A. He was advised to that effect. Q. What did he say? A. When I read the complaint I told him he didn't have to answer any questions; any evidence would be against him or for him; that it would be brought up before in other hearing; that he could make any statement he felt; do it voluntarily. Q. Did you tell him what he said might be used against or for him? A. It might, I said. Q. Go ahead and state what he said. A. When I read the complaint to him afterwards he pleaded guilty to the charge for the killing of Clark. He said, 'Yea, I killed him.' Q. William S. Clark? A. He claimed one of the clerks there; didn't know what his name was, only Clark. Q. And at the time charged in the complaint that was before you at the time? A. Yes, sir." From the above it is very apparent that the court committed no error in permitting this evidence to go to the jury.

Finding no error in the record, the judgment of the lower court is affirmed, and the judgment and sentence of the court shall be executed on Friday, April 25, 1913.

HANNA and PARKER, JJ., concur.

TIETZEL v. TIETZEL.

(Supreme Court of New Mexico. March 4, 1913.)

DIVORCE (§ 186*)—FINDINGS—REVIEW—INVALIDITY OF DECREE.

Where appellee asserts that the findings were inadvertently made by the trial court without notice to his counsel, and that they do not correctly represent the actual facts, the decree, the validity of which is in doubt in view of the findings, will be reversed and the cause remanded for further proceedings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 574; Dec. Dig. § 186.*]

Appeal from District Court, Bernalillo County; Raynolds, Judge.

Action by Ella Haines Tietzel against George R. Tietzel. From a decree of dismissal, plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Thomas N. Wilkerson, of Albuquerque, for appellant. Wilson & Lewis, of Albuquerque, for appellee.

PARKER, J. This is an appeal from the district court of Bernalillo county dismissing a bill of complaint for divorce. The court made findings of fact which would seem to present a serious question as to the correctness of the decree. Appellee claims, however, that the findings were inadvertently made by the court without notice to his counsel, and that they do not correctly represent the actual state of facts proved.

Under the circumstances, the validity of the decree being in doubt, we deem it advisable to reverse the decree and remand the cause, with instructions to proceed further; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

GOLDENBERG v. LAW.†

(Supreme Court of New Mexico. March 24, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE.

The verdict of the jury will not be disturbed in this court where it is supported by any substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. APPEAL AND ERROR (§§ 1026, 1032*)—PRESENTATION OF ERROR — PREJUDICE — EVIDENCE.

Where a party claims that the lower court permitted a witness, over objection, to answer an improper question, he must point out wherein his rights have been prejudiced thereby. The Supreme Court will disregard errors committed by the lower court, not prejudicial to the substantial rights of a party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030, 4047-4051; Dec. Dig. §§ 1026, 1032.*]

3. APPEAL AND ERROR (§ 758*) — PRESENTATION OF ERROR — SPECIFIC OBJECTION — BRIEF—INSTRUCTION.

Where a party claims to be aggrieved by a claimed erroneous instruction, it is his duty to clearly point out his objection to such instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

4. ATTORNEY AND CLIENT (§ 143*)—COMPENSATION—RIGHT—ADMISSION TO PRACTICE.

A party may contract to render legal services for a party, after he has been admitted to practice, and, in an action to recover for the value of such services, the test as to his right to recover is, was he admitted to practice at the time of the rendition of such services, and not whether he was so licensed at the time of the making of the contract for future services.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331; Dec. Dig. § 143.*]

5. APPEAL AND ERROR (§ 216*)—OBJECTION BELOW—NECESSITY—INSTRUCTIONS.

Where the trial court fails to mark on the margin of an instruction the words "given" or

"refused," as required by statute, it is the duty of a party, desiring to have the question reviewed as to such failure, to interpose objection and save exceptions to such failure, and, failing so to do, such alleged error will not be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

6. APPEAL AND ERROR (§ 216*) — OBJECTION BELOW—NECESSITY.

Where the trial court inadvertently handed to the jury, at the conclusion of the giving of the instructions, two instructions requested by plaintiff, but which the court refused to give, and so indicated on the margin thereof, and the jurors took such refused instructions with them to their jury room, but it appears that appellant's attorney was present in the courtroom at the time, and knew that the judge had handed such refused instruction to the jury, and failed to call the matter to the attention of the court, or to object or except thereto, the alleged error will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

7. NEW TRIAL (§ 143*) — PROCEEDINGS TO PROCURE—AFFIDAVIT OF JURORS.

It has been settled upon sound consideration of public policy that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of misconduct of the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

Appeal from District Court, Union County; T. D. Lieb, Judge.

Action by Charles A. Law against Alexander D. Goldenberg. From judgment for plaintiff, defendant appeals. Affirmed.

O. P. Easterwood, of Clayton, and Henry Swan, of Tucumcari, for appellant. W. J. Lucas, of East Las Vegas, and John A. Pace, of Clayton, for appellee.

ROBERTS, C. J. Appellee instituted this action in assumpsit, in the court below, to recover the alleged value of services rendered as an attorney at law, in the sum of \$1,500. The cause being at issue was submitted to a jury, which returned a verdict in appellee's favor, and fixed his damages at \$750. A motion for a new trial was filed and overruled, and the judgment was entered upon the verdict. From the judgment and the action of the court, in overruling the motion for a new trial, this appeal is prosecuted. Thirty-two alleged errors were assigned to the proceedings which led up to the judgment, eleven of which are not discussed by appellant and will therefore not be considered. The remaining assignments will be considered in the order presented.

[1] Assignments two, three, and four allege error in that the verdict was against the law, was excessive, and was not supported or justified by the evidence. Appellant argues that there is not sufficient evidence in the record to sustain the verdict. The testimony of the appellee, however, shows that he was employed by appellant to represent him in procuring title from the United

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

States government for 80 acres of land within the limits of the town of Tucumcari, or at least immediately adjoining said town. A portion of the land had been platted into town lots and sold to various parties by appellant. It appears that appellant had located scrip upon the land, which location had afterwards been vacated by order of the commissioner of the General Land Office and a homestead entry had been made upon the land. Appellee was employed to procure the cancellation of the homestead entry and the reinstatement of the scrip location, and was successful, and appellant finally secured patent to the land. Appellee testified that no definite arrangement had been made as to his compensation; that appellant paid him a retainer of fifty dollars and told him that if he succeeded in procuring a patent to the land he would be rewarded "handsomely for his services." There was ample evidence submitted as to the rendition of the services and the value thereof, which, if believed by the jury, fully justified the verdict. This court cannot undertake to weigh the evidence on appeal. Our only concern is as to whether the verdict is supported by substantial evidence. The rule was stated succinctly by Mr. Justice Parker, for the territorial Supreme Court, in the case of *Candelaria v. Miera*, 13 N. M. 362, 84 Pac. 1021, as follows: "Ordinarily, neither the verdict of a jury nor the findings of fact of a trial court will be disturbed in this court when they are supported by substantial evidence." There being substantial evidence, supporting the verdict of the jury, it will not be disturbed by this court.

[2] It is next urged that the court erred in permitting appellee, over objections, to answer the following question: "Was the land covered by the homestead entry of Dr. Tomlinson and the scrip selection of Mr. Goldenberg of the same character as to value and location as the original homestead entry in the land office?" The claim is made that there is no evidence to show that the witness was acquainted with the values of property, or that he had any information concerning this land or lands of like character in this vicinity. Admitting that the question was improper, appellant has failed to point out wherein he was prejudiced thereby. It is elementary that this court will disregard any error not prejudicial to the substantial rights of a party, and the burden of showing such prejudices rests upon the party asserting it. The court permitted, over objection, the following question to be propounded to E. W. Fox, registrar of the Clayton Land Office, viz., "In general, what did Mr. Law do as attorney for Mr. Goldenberg?" To which the witness answered: "He represented Mr. Goldenberg and Mr. Lowe in the reinstatement of this case." Appellant claims that the court violated the rule which re-

quires that the truth shall be established by the best evidence in permitting the above and similar questions to go to the jury. He insists that the facts should have been established by the records of the land offices. There is no merit in this contention and it need not be further considered.

Appellants claim that the court erred in permitting the witness Fox to testify as to the skill, knowledge, and experience required of an attorney to handle litigation in the United States Land Office, because such witness was not qualified to give such an opinion. It is sufficient answer to this contention to say that no such ground of objection was interposed in the court below. "Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if it is adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it." *Thompson on Trials* (2d Ed.) § 693. And it has been held that an objection that evidence is "irrelevant, immaterial, and improper" will not be sufficient to raise the question of the competency of the witness, even where he is clearly incompetent, by express statute. *Cornell v. Barnes*, 26 Wis. 473; *Hammond v. Decker*, 46 Tex. Civ. App. 232, 102 S. W. 453.

Appellant next complains that the court erred in permitting appellee to propound certain hypothetical questions to certain witnesses, which questions he claims materially exaggerated the services rendered by appellee. We have carefully read the evidence and are of the opinion that the hypothetical question submitted did not materially exaggerate such services, and therefore need not further consider this objection.

[3] Appellant also assigns as error the giving by the court of its own motion of instruction No. 5, but he fails to point out in his brief any specific objection to this instruction, and it will not be considered by the court. Where a party claims to be aggrieved by a claimed erroneous instruction, it is his duty to clearly point out his objection to such instruction.

[4] The twenty-seventh assignment of error relates to the refusal of the court to instruct the jury, as requested by appellant, that if, at the time of the making and entering into of the contract between appellant and appellee, appellee was not a licensed attorney that such fact should be considered by the jury in arriving at their verdict. Counsel for appellant failed to state in their brief why such fact should be so considered by the jury. Appellant, at the time of making the contract, had not been admitted to practice in the courts of New Mexico, or before the land office. He was, however, admitted within a few weeks after making the contract, and was a regularly licensed attorney at the

time of the rendition of all services sued for. The rule is, as laid down in 3 A. & Eng. Ency. of Law, 415, that "No one is entitled to recover compensation for services as an attorney at law, unless he has been duly admitted to practice before the court, or within the jurisdiction where the services were rendered, and is an attorney in good standing at the time." Under the rule there is no limitation upon the right of a party to contract to render services after he has been admitted to practice. The test is, was he admitted to practice at the time of the rendition of the services, and not whether he was so licensed at the time of the making of the contract for future service. The court properly refused the instruction.

[5] The twenty-ninth and thirtieth assignments relate to alleged error committed by the district court in failing to mark, on the margin thereof, as "given" or "refused," two instructions requested by the plaintiff. No objection, however, was interposed to the action of the court, and the failure of the judge to so indicate, on the margin of the instructions, was in no manner called to his attention, nor were any exceptions saved to the failure to so indicate. Had the matter been called, in any manner, to the attention of the court, the error would have been doubtless corrected. But appellant having failed to except to the failure of the court to indicate upon the margin of the instruction whether "given" or "refused," as required by the statute, such alleged error cannot be considered. See *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919, and *Territory v. Baker*, 4 N. M. (Gild.) 236, 13 Pac. 30.

[6] From the record it appears that appellee requested the court to give to the jury two instructions, numbered respectively 10 and 11, which were refused by the court, and the court indicated such refusal by writing on the margin thereof the word "refused," together with the initials of the judge. These instructions were not read to the jury, but the attorney for appellant filed in the lower court, in support of appellant's motion for a new trial, an affidavit, which stated that the judge permitted the jury to take to the jury room, along with the other instructions given by the court, the two instructions which had been refused. The affidavit recites that the attorney for appellant was present in the courtroom at the time the instructions were handed to the jury, and it appears that said attorney was fully cognizant of the action of the court in permitting said instructions to be taken by the jury to the jury room—a fact which doubtless escaped the attention of the court. But the record fails to disclose that the appellant called the matter to the attention of the court in any manner, or objected or saved exceptions thereto. He consciously and knowingly permitted the court to do an act, which he claims now to

have been prejudicial, without in any manner calling the attention of the court thereto or saving any exceptions. This being true, he is not in a position to complain of the action of the court, or to take advantage here of the alleged error. Again, the alleged error is shown only by affidavit, and, for aught that appears, the judge might have known, of his own knowledge, that the facts set forth therein were not true. Proper practice requires that such questions should be presented by bills of exception. *Choen v. State*, 85 Ind. 209; *Thompson on Trials* (2d Ed.) § 2776.

[7] In his motion for a new trial appellant sets up the fact that the jury, in arriving at a verdict in the cause, tossed up a coin, it having been agreed that if one side of the coin should fall face upward the verdict should be for \$850, and, if the reverse, it should be for \$750. We are of the opinion that the district court did not err in refusing to grant a new trial upon the ground of misconduct of the jury. The only evidence of the facts set forth in the motion for a new trial, in this regard, was the affidavit of three of the jurors. It may be conceded that the alleged misconduct in the manner of arriving at the verdict would have been good ground for setting aside the verdict, if such fact had been established by admissible and sufficient testimony; but the question is whether the testimony of the jurors was admissible to prove such facts.

The early English cases were conflicting and unsettled upon the proposition, and some of them, notably *Phillips v. Fowler*, *Barnes*, 441, and *Millish v. Arnold*, *Bund. R.* 51, held that the testimony of jurors was admissible to impeach their verdict, while the case of *Prior v. Powers*, 1 *Keb. R.* 811, held the contrary. But in *Vaise v. Delaval*, 1 *T. R.* 11, which is considered a leading case upon the subject, Lord Mansfield said: "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such misconduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source." This case was followed by the case of *Owen v. Warburton*, 4 *Bos. & Pul.* 326, in which Sir James Mansfield, Ch. J., said: "We have conversed with the other judges upon this subject, and we are all of opinion that the affidavit of a jurymen cannot be received. It is singular, indeed, that almost the only evidence of which the case admits should be shut out; but in considering the arts which might be used, if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a

decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him." These two cases appear to have firmly settled the question in England, and the practice has never since been changed.

In the United States there appears to be a contrariety of opinion entertained by the courts. The majority of the states, however, adhere to the rule announced and followed by the English courts, and will not receive the affidavits of jurors to impeach their verdicts. An investigation of the cases following the rule that such evidence will be received discloses that in many instances such holding is predicated upon statute, changing the general rule and requiring the courts to receive such affidavits and evidence. Such statutes usually limit the questions upon which such evidence will be received. It would be a useless and burdensome undertaking to attempt to review the cases, and we shall content ourselves by referring to 29 A. & E. Ency. of Law, p. 1008, where the cases will be found collected. A very instructive note will also be found appended to the case of *Crawford v. State* (Tenn.) 24 Am. Dec. 467, where the authorities are collected. The author says that the great weight of modern authority is opposed to the admission of affidavits of jurors in any case to show such misconduct on their part as will vitiate their verdict, and numerous cases are cited in support of the rule. The rule we believe to be correct, and to be founded upon considerations of public policy, and it should not be departed from to afford relief in supposed hard cases. The reason for the rule is stated as follows, in *Graham & Waterman on New Trials*, vol. 3, p. 1428, and quoted in the note to the above case: "(1) Because they would defeat their own solemn acts under oath. (2) Because their admission would open the door to tamper with jurymen after they had given their verdict. (3) Because they would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it." Appellant claims that the Supreme Court of the territory considered the conduct of jurors, as set out in the affidavit of such jurors in two cases, viz., *United States v. Biena*, 8 N. M. 102, 42 Pac. 70, and *United States v. Spencer*, 8 N. M. 671, 47 Pac. 715; but in neither of the cases does the question appear to have been squarely presented, and is not directly decided. We believe it much preferable to follow the rule generally prevalent, and which the experience of ages has demonstrated best preserves and protects the rights of litigants.

Finding no error in the record, the judgment of the lower court is affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

STATE v. FRAZIER.

(Supreme Court of New Mexico. March 20, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—EVIDENCE.

It is for the jury to pass upon conflicting testimony and determine where the weight and credit lay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 1159*)—NEW TRIAL—GROUNDS.

A new trial may be granted the accused where he is convicted on insufficient evidence; but the verdict of the jury will always be entitled to great weight with the court, and will not be set aside because the court is not satisfied beyond all reasonable doubt of the guilt of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§§ 1158, 1159*)—APPEAL—VERDICT—EVIDENCE.

Ordinarily, neither the verdict of a jury, nor the findings of fact of a trial court, will be disturbed in this court when they are supported by any substantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074-3083; Dec. Dig. §§ 1158, 1159.*]

4. CRIMINAL LAW (§§ 954, 1064*)—NEW TRIAL—MOTION—APPEAL.

A matter outside the record, to be available as ground for motion for new trial, should be clearly pointed out in the motion for new trial; otherwise this court will not give consideration to the objections.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2341, 2363-2367, 2676-2684; Dec. Dig. §§ 954, 1064.*]

Appeal from District Court, Socorro County; Merritt C. Mechem, Judge.

Irvin Frazier, alias John Gates, was convicted of murder in the first degree, and he appeals. Affirmed.

This was an indictment for murder, resulting in a conviction of murder in the first degree with the death penalty affixed. Defendant appeals.

In August, 1911, the appellant was arrested and confined in the county jail of Luna county, at Deming, N. M., to await the action of the grand jury under a charge of burglary. While thus detained, on November 7th, he was delivered from jail by John and Reynold Greer, two former companions, who held up the sheriff, compelling the officers to unlock appellant's cell, after which the two Greers and appellant procured horses and attempted to make their escape, apparently starting for the Black Range country.

The sheriff of Luna county enrolled a posse, which included Thomas Hall, Al Smithers, and a number of others, who were changed from time to time. This posse trailed the fugitives for about 100 miles, finally overtaking them at the Adobe ranch in the southern part of Socorro county. When the posse arrived at the ranch, it divided its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

force and surrounded the place. The sheriff stationed Hall and Smithers at a point overlooking the main gate of the ranch and at a distance therefrom about 200 to 300 yards, after which he circled about the ranchhouse, bringing up nearly opposite the point where he had stationed Hall and Smithers.

When the sheriff arrived at the last-mentioned point, he discovered that the three fugitives were leading their horses toward a gate in the fence, and that they seemed to be in a hurry. The sheriff then hastened back to join Hall and Smithers, and when he came out on top of a little mesa he saw Hall and Smithers standing by their horses where he left them, and the three fugitives riding from the gate toward where Hall and Smithers were standing; all of the fugitives being mounted, and one leading a pack horse. The sheriff testified that he recognized the man, identifying the defendant, the appellant, Gates, as one of the three; that when the men approached Hall and Smithers they rode abreast; that when the three fugitives arrived at a point between 40 and 50 yards from Hall and Smithers all three jumped from their horses and commenced firing with Winchester rifles, Hall and Smithers firing at the same time, at which time the sheriff also jumped from his horse and commenced firing from his position, the result of this battle being that Hall and Smithers, two members of the posse, and John Greer, one of the fugitives, were killed, the appellant and Reynold Greer making their escape from the place. The appellant made his way to El Paso, Tex., where he was recaptured a few weeks later.

The appellant's testimony briefly is as follows: After the attempt to deliver him from jail by his companions, the Greers, and their flight, covering the period of 11 or 12 days, arriving at the Adobe ranchhouse, and believing that they had escaped from the officers, having eaten their dinner at the ranchhouse, they decided to leave the place and saddled their horses, at which time they saw a rider down by the corner of the fence a quarter of a mile away; that when they started from the gate they saw Hall and Smithers standing by their horses and looking toward them; that appellant thought they might be cowboys; that they rode out from the gate in the direction of the two men they had seen, John Greer taking the lead, the other Greer with the pack horse next, and the appellant bringing up the rear; that when they rode up to within possibly 75 or 100 yards the three rode abreast; that the two men were standing behind their horses, but that one of them stepped out from behind his horse, raised his gun, and shot at appellant, who tried to get off his horse, but his foot caught in the bridle rein or rope at the side of his horse, resulting in his falling from his horse and being "drug" eight or ten steps; that the shooting

continued all this time and possibly 50 seconds; that when appellant got loose from his horse he commenced crawling toward a ditch about 30 steps behind his position; that he later raised up and ran rapidly to the arroyo; that he did not go to the corral, or near it, and that after he had gotten about 200 yards from the scene of the battle he sat down and pulled off his spurs, throwing them away, rolled a cigarette and smoked it, and then came back to the scene of the battle, where he saw a dead man, John Greer by name, but did not see anybody else; that he saw the two horses Hall and Smithers had ridden standing on a point; that he at first thought he would attempt to get one of them, but changed his mind, as it was too high up, and he did not wish to expose himself; that he made a little circle about the place, walked back up the canyon around the mountain to a point a mile away, where he sat down behind a rock, looking at his watch, finding that it was 20 minutes after 4 o'clock; that he smoked another cigarette, and stayed the rest of the night on the other side of the mountains at a little spring, remaining in that vicinity, within five miles of the house, during the following day, after which he proceeded out of the country, by stages described by him, going to El Paso, Tex., where he pawned a pistol which he had taken from the sheriff at the time of his escape from jail.

Sheriff Stephens further testified that he saw the appellant after the battle running toward the corral on the ranch and shot at him; that at about this time he heard four shots from the direction of the house. The witness Simpson, who was a member of the posse, testified that he had seen the appellant frequently before the time of the shooting and knew him; that immediately after the firing commenced, during which Hall, Smithers, and Greer were killed, he, with another member of the posse, Mr. James, rode to the house, and upon arriving at the corral saw the appellant in the corral and shot at him, but missed him; that he believed he had hit him, as the appellant dropped at the time, but shortly afterwards he saw and recognized him "running off across the flats" and shot at him again four times; that while the appellant was in the corral, from the movements he was making, the witness was satisfied that he was reloading his rifle.

Capt. Fred Fornoff, of the mounted police, testified, in rebuttal, that he took the appellant from the penitentiary to Albuquerque, where he delivered him to the officers of Socorro county, and that while in the company of appellant appellant stated to him, in substance, that he said to Greer at the time of the battle, "We are surrounded, and we had better stay in the house," and Greer said, "We will go out and have it over with," and that they did, as a matter of fact, go

out to where the parties were immediately afterwards. This witness also testified that the appellant informed him that he told Greer that the parties were officers.

Milton J. Helmick, of Socorro, and Prichard & Howard, of Santa Fé, for appellant. Frank W. Clancy, Atty. Gen., and H. S. Clancy, Asst. Atty. Gen., for the State.

HANNA, J. (after stating the facts as above). Counsel for appellant contend that the verdict below was contrary to the evidence.

[1] This appeal, involving the life of a human being, places a heavy responsibility upon us, and in our effort to fulfill our duty in the matter we have carefully read the entire record. After our deliberate examination of this record we cannot agree with the first contention of appellant. We think it fully and sufficiently sustains the verdict. It is for the jury to pass upon conflicting testimony and determine where the weight and credit lay. *Territory v. De Gutman*, 8 N. M. 92, 42 Pac. 68.

[2, 3] We fully agree with the authorities that hold that a new trial may be granted the accused, where he is convicted on insufficient evidence; but the verdict of the jury will always be entitled to great weight with the court, and will not be set aside because the court is not satisfied beyond all reasonable doubt of the guilt of the defendant. It has been held by our territorial Supreme Court in the case of *Territory v. West*, 14 N. M. 546, at page 559, 99 Pac. 343, at page 348, quoting from the case of *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020, that "ordinarily neither the verdict of a jury, nor the findings of fact of a trial court, will be disturbed in this court when they are supported by any substantial evidence." See, also, *Territory v. Trapp*, 16 N. M. 700, 120 Pac. 702.

The evidence in this case was substantial, and we cannot disturb the verdict upon the ground assigned. To disturb the verdict of the jury in a criminal case upon the ground of insufficiency of the evidence, the injustice should be manifest. *U. S. v. Daubner* (D. C.) 17 Fed. 793.

The next ground relied upon for reversal is that the record displays throughout the entire trial an obvious attempt on the part of the state to lay improper matters before the jury whenever possible by insinuating other offenses and crimes committed by the appellant, not connected with the issue of the case. It is admitted by the appellant that all such matters were objected to, and all save two or three such objections were sustained by the court—it being contended by appellant that the constant repetition of the irrelevant matters must have influenced the jury to return a verdict in the first degree; that this in itself is reason for a new trial, citing *People v. Bergen*, 17 N. Y. Supp.

293,¹ where the rule is laid down that "a new trial will be granted for want of sufficient evidence, where a conviction was had on defendant's confession of a crime previously committed, and evidence properly excluded, but plainly presented to the minds of the jury in various ways by the prosecution."

We do not quarrel with the rule quoted, but cannot hold it applicable to the case at bar. Were it apparent to us that the jury was influenced by the matters complained of, and were there not other sufficient evidence of a substantial character upon which the verdict could well be based, we would unhesitatingly grant a new trial. There was some useless repetition indulged in by the state, which is to be discouraged by an appellate court, and a disposition to wander from the issue, but we cannot say it was such as to raise doubt as to the justice of the verdict in this case.

We find no merit in the several assignments of error discussed under the second ground for reversal.

The third assignment of error relied upon is based upon the testimony of Sheriff Stephens, when called as a witness for the defense, who gave damaging testimony as to the conduct of appellant at the time of a previous arrest, and who enlarged upon his testimony while under cross-examination by the state, over the objection of the defense. The appellant contends that the testimony of this witness, while under cross-examination, was an elaboration of incompetent matter tending to confuse and mislead the jury. Appellant cites no authority in support of his position, and we cannot permit him to take advantage of a condition set in motion by himself. It is admitted that the matter brought out was responsive, but it is urged that the state was permitted to unduly profit by defendant's mistake. We find no merit in appellant's position in this respect.

[4] It is also urged by appellant that the district attorney was permitted to state to the jury that the court would probably instruct the jury that if the appellant was riding a horse taken from the Adobe ranch at the time the battle took place the jury would then find the appellant guilty of murder in the first degree. It is admitted that no such instruction was given, and it does not appear from the record that the defense made any attempt to correct any erroneous impression of the jury arising by reason of the statement complained of. The objection to the alleged conduct of the district attorney appears solely from an affidavit by counsel for defendant, filed some weeks after the trial of the case. The record is silent as to any objections by defendant at the time of trial. The attention of the district court was called to the matter in a very general

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 625.

way in the motion for a new trial, filed April 8, 1912. The particular statement of the district attorney which was criticised was first pointed out in the affidavit, filed July 20, 1912.

Our territorial Supreme Court held, in the case of *Territory v. Anderson*, 4 N. M. 218, that a party complaining of errors in admitting and excluding evidence must, in his motion for new trial, point out specifically and with reasonable certainty the particular evidence complained of; otherwise the trial court need not, and the appellate court will not, consider such objections. The reason for this rule is quite apparent, and applies with much greater emphasis to this case. A matter outside the record, to be available of as ground for motion for new trial, should be clearly pointed out in the motion for new trial; otherwise this court will not give consideration to the objection.

For reasons heretofore given, we are satisfied that the errors complained of did not injuriously affect the rights of the defendant, and did not cause an unfair trial.

The judgment of the district court is therefore in all things affirmed, and the judgment and sentence of the court shall be executed on Friday, April 25, 1913.

ROBERTS, C. J., and PARKER, J., concur.

MARIEN v. M. J. WALSH & CO.

(Supreme Court of Oregon. April 8, 1913.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE—REPAIRS.

While evidence of subsequent repairs to a machine which caused injury to a servant is inadmissible to show negligence, nevertheless, where the jury viewed the machine, evidence of changes since the accident is admissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

2. DAMAGES (§ 158*)—INJURY TO SERVANT—EVIDENCE.

In an action by a servant for personal injuries, where the complaint which alleged that he was permanently disabled from working at his trade and that his earning capacity was greatly lessened was denied by the answer, evidence that plaintiff could only do farm chores after the injury, and could do very little work, is admissible.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-444; Dec. Dig. § 158.*]

3. TRIAL (§ 63*)—RECEPTION OF EVIDENCE—REBUTTAL.

In an action by a servant who was injured while using a polisher, testimony by a witness, who was not present when the servant closed his case, that he worked with the same machine and that it was wabby, the boxing being worn and loose, is properly admitted where no specific objection was made and the court treated a blanket objection as one that the evidence was not rebuttal; it appearing that no question was raised as to when the witness worked with the machine in question.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 151-153; Dec. Dig. § 63.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action by an injured servant, evidence of the master's negligence held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by John Marien against M. J. Walsh & Co., a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought under the factory act of 1907 (sections 5040-5057, L. O. L.) to recover for personal injuries received by plaintiff while operating a polishing machine used in the business of the defendant, who is a manufacturer of electric fixtures and supplies; plaintiff being in the act of polishing the fender of an electric fan by holding it against the buffing wheel, when the fan was caught by the wheel and plaintiff's thumb was drawn into the wheel and badly injured. The machine is alleged to have been defective in that the shaft thereof was held in place by a bracket, the boxing of which was worn and loose, permitting the wheel to jump and vibrate violently, rendering it hazardous to operate, and thereby causing the injury complained of. The cause of action was not properly alleged in the first complaint, but at the trial the complaint was amended to bring the case within the act above named. The defense alleged is that the machine was not defective nor out of repair, and that the defendant had no notice of any defect therein; that the injury was caused by the negligence of the plaintiff and was the result of a defect in the electric fan, and not in the machine. The cause was tried before a jury, which rendered a verdict for the plaintiff. From a judgment thereon, defendant appeals.

Sam White, of Portland (Manning & White and Robert E. Hitch, all of Portland, on the brief), for appellant. Fred L. Everson, of Portland (Everson & Pierce, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). There are many assignments of error, but they are treated in appellant's brief as involving only four principal questions.

[1] At the commencement of the trial, a jury was sent to view the machine. On resuming the trial, plaintiff, as a witness on his own behalf, was asked to explain to the jury the changes in the machine when the jury saw it from its condition when the accident occurred, and he testified to certain changes made since the injury complained of in bracing the machine and in changing its position and the position of the shaft and pulley. After he gave this testimony, the defendant stated: "All of this is objected to as incom-

petent, irrelevant, and immaterial and not having been alleged that the machine was not properly braced. They allege that the defect was in the play, in the boxing, and anything in regard to the bracing of the machine is incompetent. * * * I want to urge that objection." There was no suggestion at the trial that evidence of repairs of the machinery after the injury was incompetent to show previous negligence. In fact, the apparent purpose of the evidence was to explain to the jury the condition of the machine at the time of the injury, and no other purpose was considered by the attorneys or by the court. This was made plain by what took place at the close of plaintiff's case, when plaintiff's attorney stated to the court that he wished to call other witnesses "in regard to the condition of the machine over there now, as it is now and as it was at the time of the accident"; and the court said, the jury being present: "That is not admissible; clearly inadmissible. You have no right to show a machine has been made better, as showing negligence in any way. A man may improve a machine, because his experience has taught him to do so, and because the machine has been changed would not be any evidence to show that it was not in good condition before"—thus showing that that was the first time the matter was directly raised, and that it was promptly decided by the court in favor of the defendant. The law is well settled that evidence of additional precautions or of subsequent repairs is not competent for the purpose of proving antecedent negligence. This is well stated by Mr. Justice Lord in the case of *Skottowe v. O. S. L., etc., Ry. Co.*, 22 Or. 438, 30 Pac. 224, 16 L. R. A. 596; but it is also held in that case that evidence of such repairs is competent for the purpose of showing that the place where the injury was received was under the control of the defendant. Other exceptions suggest themselves, such as in the present case, to explain to the jury, who have viewed the premises, the condition of the machine at the time of the injury. This question is also discussed by Mr. Chief Justice McBride in *Love v. Chambers Lumber Co.*, 129 Pac. 492, recognizing the exceptions to the rule, and suggesting that the effect of the evidence should be limited by the instructions to the jury.

[2] Defendant also assigns as error the fact that the witness Learned was permitted to testify to the effect that after the injury plaintiff had no means, but was dependent upon his own labor for his living; that plaintiff could do very little farm work; and that he could only do chores. It was alleged in the complaint that he was permanently disabled for working at his trade as a polisher,

and that his earning capacity in any employment was greatly lessened. This allegation was denied by the answer; and, the evidence being in support of that issue, it was not error to admit it. See *Ferrari v. Beaver Hill Coal Co.*, 54 Or. 223, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1020.

[3] Error is also assigned in the admission of the evidence of witness Marts to the effect that he worked with the same machine, and that it was "wabbly" and the boxing worn and loose, and that the wheel jumped around and kicked. The objection was that the evidence was incompetent, irrelevant, and immaterial, and not rebuttal. The witness was also a polisher, working for defendant at the time plaintiff received his injury. He had worked on the same machine. No specific objection was made, and the court treated it as an objection that the evidence was not rebuttal, and overruled it because the witness was not present when plaintiff closed his case. No question was raised as to just when he worked with the machine, and we may assume it was approximately near the time referred to when plaintiff received the injury; and it was not error to admit the evidence.

[4] At the close of plaintiff's testimony, defendant moved for a nonsuit for the reason that the testimony was not sufficient to be submitted to the jury. First, he insists that as section 8 of the Factory Act of 1907 provides that the owner of the machinery shall be liable for injuries sustained, provided the proximate cause of such injury is the defective condition of the machine, it is not shown that the proximate cause of the injury was the defect in the machine, but rather the defective electric fan guard being polished, in that a spoke or wire of the fender was loose, and an upper spoke was caught by the buffing wheel. The plaintiff as a witness, in describing the accident, says: "When the wire (on the guard) gave, by the kicking of the wheel taking hold of the upper wire, that was the cause of it drawing it into the machine. * * * The giving of the wire would give the wheel more of a show to catch this upper wire. * * * When it gave, the kicking of the wheel would become longer; * * * it would take another hold; it would take a larger hold by kicking. * * * When the wire gave, it gave the wheel a show to go back and kick forward." Much testimony was given to the effect that the shaft of the wheel was loose and gave it play, which caused it to jump and vibrate, and this was sufficient to go to the jury as to whether it was the proximate cause of the injury.

We find no error in the trial. The judgment of the trial court is affirmed.

MONTGOMERY v. SOUTHERN PAC. CO.
(Supreme Court of Oregon. April 15, 1913.)

1. COURTS (§ 97*)—CONTROLLING DECISIONS—DECISIONS OF FEDERAL COURTS ON FEDERAL QUESTIONS.

The decisions of federal courts construing and applying the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) will be followed by the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.*]

2. COMMERCE (§ 27*)—INTERSTATE COMMERCE—REGULATION—STATUTES—CONSTRUCTION.

A member of a switching crew, engaged in moving oil from an oil car to provide fuel for engines used in interstate commerce, is within the protection of the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

3. COMMERCE (§ 27*)—INTERSTATE COMMERCE—STATUTES—CONSTRUCTION.

The members of a switching crew engaged in switching and spotting cars to be loaded and loaded with interstate commodities, and in hauling cars up the mountains to a station from which they may conveniently be taken by a regular interstate train passing over an interstate railroad, are within the protection of the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

4. COMMERCE (§ 27*)—"ENGAGED IN INTERSTATE COMMERCE"—STATUTES—CONSTRUCTION.

All employes who participate in the maintenance or operation of the instrumentalities for the general use of an interstate railroad, thereby enhancing the utility of interstate commerce, are engaged in interstate commerce within the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

5. COMMERCE (§ 27*)—INTERSTATE COMMERCE—STATUTES—CONSTRUCTION.

In an action under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for injuries to a member of a switching crew engaged in moving oil from an oil car to provide fuel for engines used in interstate commerce, evidence of the general duties of the employe and the other members of the crew during the time the employe had been employed by the railroad company was material to show the employe's general duties and the kind of business in which the car of oil was to be used.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Samuel M. Montgomery against the Southern Pacific Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

This is an action for damages. From a judgment of nonsuit in favor of defendant, plaintiff appeals.

The action is brought under the act of Congress of April 22, 1908, c. 149, 35 Stat.

65 (U. S. Comp. St. Supp. 1911, p. 1322), generally known as the Employer's Liability Act. The principal question involved in this case is whether or not plaintiff was engaged in interstate commerce, at the time he was injured, so as to bring him within the terms of that act. At the time of the accident complained of, plaintiff was employed by the defendant as a brakeman in one of its switching crews, engaged in making up trains between Weed, Cal., and Pioneer, in the same state. The defendant company was engaged in interstate commerce, operating a main line of railroad between Portland, Or., and San Francisco, Cal., and also a branch line extending from the main line at the station of Weed, and running up into Oregon to Klamath Falls. Its principal business was in carrying freight and passengers from state to state. The duties of the switching crew were to assist in making up trains, setting cars in and out, and keeping the road clear and ready for traffic. Their section of road extended from Weed south to Pioneer, a distance of about 14 miles. This part of the road was situated in a lumber region. There were many large mills and factories at the different places, from which large shipments of lumber, box material, etc., were made to all parts of the United States, and also to local California points. Empty cars would be left at these switches by regular trains, and it was the duty of the switching crew to set them in for loading, and, when loaded, to pick them up and set them out upon a side track next to the main line in such a position that they could be conveniently taken up by the regular trains. It was also the duty of the switching crew to collect these cars at different stations and carry them over the mountains to Sisson, from which place they could be more easily transported by the regular trains; the grade going south being too steep for heavily loaded trains to attach the cars at Weed and other points north. The evidence tended to show that the shipments from Weed were largely interstate shipments, and that all this interstate traffic was necessarily moved every day by the switching crew; that the interstate freight, and also the intrastate freight, was carried at times in foreign cars which came from roads in the East and Middle West, and sometimes in cars belonging to the defendant company.

On the morning of the 16th of May, 1909, plaintiff started out with the switching crew for the purpose of moving any interstate commerce, and also of handling any local business, that there might be along the road. During the day they switched and moved cars, destined to points outside of the state, around the yard that they might be taken up by the regular trains in the usual course of business. On this day they went down as far as Sisson. Defendant claims that all

cars handled by this train on this day were from and destined to points within the state of California. Plaintiff testified on this point as follows: "Q. What are the facts as to whether during that time you were or were not handling cars for points out of the state of California, both loaded and unloaded, and to what extent? A. We were handling cars going out of the state of California, quite a number of them, day after day—every day." On the way back from Sisson, before putting up their engine for the night, they undertook to move an oil car at the station of Weed. This car had come from the oil fields of California, and was being moved, primarily, for the purpose of providing fuel for the engine which was to run up into Oregon on the interstate road on its regular trip, and also for the purpose of providing their own switch engine with oil in order that they might continue on the morrow in the handling of articles of interstate, as well as state, commerce. From this car they pumped oil into the tank of the engine. While engaged in moving the oil car in the regular course of business, by some miscalculation it was left standing on the point of the frog at the intersection of the wye of the main line running into Oregon. In order to clear the track for the incoming passenger from Oregon on this branch line, and to get the car to the point where it was to be left for the purpose of supplying oil, it was necessary to move the car from the frog. It was thought necessary to move the car by chaining it to the engine and by moving the latter forward on one branch of the wye, thereby throwing the car farther along the other track, which was nearly parallel at this point, until it passed the frog so that the engine could get by. While at this wye, plaintiff was standing near the car attending the chain, when the engineer suddenly and violently started up his engine in such a way that it threw the chain suddenly around and caught plaintiff's hand. Then the engineer continued to start and stop violently several times, causing the plaintiff's hand to be entirely torn off.

Upon the trial of the cause it appeared that plaintiff had been at work in the employ of the defendant from May 9 to May 16, 1909. Counsel for plaintiff inquired of the witnesses in regard to the setting of cars loaded by one of the lumber companies at that place, during the above-mentioned time, that were to be shipped beyond the California line. Objection was made by counsel for defendant for the reason that the evidence was confined to the day and time of the accident. The court sustained the objection, whereupon plaintiff offered to prove the following facts: "That the business in which the plaintiff was engaged was generally that of handling both interstate and state traffic; that they would start out in the morning to find what work was to be

done, with the intention and instructions to switch whatever cars were ready to be switched, whether interstate or state, and to ascertain whether there were any interstate cars to be switched, and to switch them if there were; that the oil car which they were engaged in moving at the particular time contained oil which was being removed to another point in the yard of the company for the purpose of getting it off the track and out of the way of traffic on the main line up to Klamath Falls, and also for the purpose of placing it where the oil in the car could be distributed and used; that the oil in the car was some of it to be distributed to engines of the defendant running out of the state of California and into the state of Oregon, and other portions of it were to be used by the plaintiff and the train crew, of which he was a member, and was placed up there that night, partly that they might get oil for their engine on the morrow for the purpose of going out on their regular trip to switch and distribute interstate and state commerce alike, and to be used by them on other succeeding days in the same way; and there was no other crew doing that kind of switching or any switching at Weed and other stations within that district during the time that plaintiff was so employed; and that their crew did all the switching, both state and interstate." The trial court sustained the defendant's objection to this offer of proof, and ruled that before the plaintiff would be engaged in interstate commerce, within the meaning of the act of Congress, he must have been engaged at the time in handling a car which either came from out of the state or was bound outside of the state, or was passing through the state. There was testimony tending to show the negligence of the engineer and the resulting injury.

A. S. Bennett, of The Dalles (Bennett & Sinnott, of The Dalles, and C. B. Watson, of Ashland, on the brief), for appellant. Ralph E. Moody, of Portland (Ben C. Dey, W. D. Fenton, and Kenneth L. Fenton, all of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It is contended by counsel for plaintiff that the work plaintiff Montgomery was doing at the time of the injury complained of was incidental to the movement of interstate commerce, and that he was acting partly as an agent of interstate commerce at the time, and was therefore "engaged in interstate commerce" within the meaning of the act. Counsel for defendant contend: (1) That neither the engine, caboose, nor tank car was an instrument of interstate commerce; (2) that, while moving this tank car, defendant was not engaged in interstate commerce, nor was plaintiff employed therein. The "Employer's Liability Act" provides: "That every common carrier by railroad while en-

gaging in commerce between any of the several states or territories, or between any of the states and territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The first and main question is, Did the work in which the plaintiff and his associates were engaged at the time of the injury have a real or substantial connection with interstate commerce, so as to bring plaintiff within the protection of the act? The question is not an entirely new one.

[1] The federal courts have blazed the way to be followed in determining most, if not all, of the questions involved in this action.

[2] As will be noticed, the evidence tended to show that the plaintiff was engaged in moving the oil for the purpose of providing fuel for the engines used in transmitting freight and passengers from California into Oregon. The oil was to be used principally for the engine and crew with which plaintiff was engaged in his general work of switching interstate cars and spotting, setting out, and moving them from station to station. It appears that about two-thirds of the work of plaintiff, of switch crew, and engine was the moving of cars used in the transportation of interstate commodities, although all of plaintiff's work was done in the state of California.

Mr. Thornton, in his work on the Federal Employer's Liability and Safety Appliance Acts (2d Ed.) § 38, says: "It is beyond debate that the statute embraces all engineers, firemen, brakemen and conductors employed at the time of their injuries upon an interstate train. In one case it is said that the statute covers a telegraph operator dispatching trains, and in that same case it is said that Congress meant to include everybody whom it could include. * * * It includes a car repairer in a switching yard repairing interstate cars. * * * No doubt, it is believed, but what a freight handler of interstate freight in loading and unloading cars in which it is to be or has been carried is covered by the terms of the statute. So are mechanics or repairmen, while engaged upon interstate cars, engines or other interstate instrumentalities, and even while passing over the railroad for the purpose of repairing such cars, engines or instrumentalities. Likewise the members of an emergency crew while at work upon any interstate train or any railroad track that is a highway of interstate commerce. Linemen fall within its terms. Not only are track re-

pairers within its terms but also those who construct or repair the signal wires used by an interstate railroad, even though they be used without discrimination between the local or interstate character of its traffic.

* * * In the case of yardmen engaged in making up an interstate train, under the liberal construction given these federal statutes by the courts, there is no doubt but what they will be held within the terms of this Employer's Liability Act."

In the case of *Mondou v. N. Y., N. H. & Hartford R. R. Co.*, and the other cases decided therewith, 223 U. S. 1, at page 48 of the opinion, 32 Sup. Ct. 169, at page 174 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), Mr. Justice Van Devanter said: "Congress, of course, can do anything which in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted. * * * The part of the opinion on page 52 of 223 U. S., on page 176 of 32 Sup. Ct. (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), is peculiarly applicable to the case at bar. It is there said: "It is true that the liability which the act creates * * * is imposed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains. * * * Digressing from the main question, this language, to our minds, indicates that the ruling of the circuit court sought and obtained by the learned counsel for defendant, to the effect that, before plaintiff would be engaged in interstate commerce within the meaning of the act of Congress, he must be engaged at the time in handling a car which either came from out of the state, or was bound outside of the state, or was passing through the state, restricts the matter within too narrow limits.

In *Doherty on Liability of Railroads to Interstate Employes*, § 17, pp. 88, 89, it is said: "But what rule may be laid down for the determination of the question, 'When is an employe engaged in interstate commerce?' The crew of an interstate train is of course included. A switchman engaged in duty, as such, for an interstate train, a freight handler while employed in handling interstate or foreign freight, and mechanics or car repairmen while engaged in work upon interstate cars or other interstate instrumentalities, and while passing over the road for the purpose of making repairs upon cars or engines

of an interstate train, are also included, and emergency or wrecking crews, while at work upon any train on an interstate highway, may reasonably be included. In other words, all who are at the time of injury engaged in duty which has direct relation to the interstate business of the carrier are entitled to the protection of the act." And on page 229, *Id.*, it is said: "All who participate in the maintenance of the instrumentalities for the general use of the road, even in the maintenance of such instrumentalities as are used on purely local branches, necessarily participate in the work of interstate commerce, because interstate commerce is carried on over every part, branch, section, and division of the entire system of such interstate road."

In *Southern Ry. Co. v. United States*, 222 U. S. 20, at page 27, 32 Sup. Ct. 2, at page 4 (56 L. Ed. 72), we find the following: "Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employes, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains."

In *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, at page 48 of the opinion, 30 Sup. Ct. 676, 54 L. Ed. 921, the court said: "A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operation of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad."

In the case of *Zikos v. O. R. & N. Co.* (C. C.) 179 Fed. 893, the plaintiff was engaged in repairing a track used incidentally in both classes of traffic. It was held that his employment came within the law; the court saying at page 898: "But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other." See, also, *Colasurdo v. Central R. R. Co.* (C. C.) 180 Fed. 832, which is a strong case and very much in point.

As stated in the brief of the late Solicitor General, and quoted in the *Mondou Case*, 223 U. S. at page 48, 32 Sup. Ct. at page 174 (56 Ed. 327, 38 L. R. A. [N. S.] 44), "Interstate

commerce (if not always, at any rate when the commerce is transportation) is an act." Let us then determine whether or not the act in which plaintiff was engaged at the time of the injury was one relating in a substantial way to interstate commerce.

[3] A large part of the general duties of plaintiff, with his associates, was in switching and spotting cars to be loaded, and cars loaded, with interstate commerce commodities. In order to aid and accelerate such interstate business, the plaintiff, with the other members of the crew, by means of the engine, hauled cars up the mountains to a station from which they could conveniently be taken by a regular, through, or interstate train passing over an interstate railroad. Loading freight and making preparation for the same to be shipped by switching the cars and attaching them to the regular train, and especially in transporting the cars a portion of the distance, would seem to be as much a part of the interstate traffic of a railroad as the actual transportation across the state line; so, also, would be the furnishing and pumping of oil for the engines to be used in such interstate business. Was not the act which plaintiff was performing at the time of the accident just as essential to interstate commerce as the repairing or the pulling of the throttle of an engine used in such traffic? It was a necessary act in the transmission of interstate freight, and all who co-operated in the work were engaged in interstate commerce within the meaning of the act of Congress. It was closely connected with his general duties. Oil is the food that gives life and strength to the engine, furnishing the motive power for the transportation of interstate freight, and by the aid of which a stream of commerce flows from state to state and from state to foreign nations. To illustrate, draw a line to represent the boundary between two states; draw another line, crossing the first, to represent the stream of interstate commerce. Whatever act in a substantial manner aids, accelerates, or increases the amount of, or furnishes a part of the supply for, such stream, and is connected therewith, to the same extent may be said to aid, support, and maintain the act of interstate commerce. Such labor makes interstate commerce more secure, more reliable and more effective. Suppose that all the agents engaged in providing oil to be used as fuel in interstate commerce upon a railroad, as this oil was destined to be used, should cease to act, for instance, on account of a boycott or by reason of an injunction order issued by a state court for some purpose conceived to be good (a violent assumption), and there were a failure of the supply of fuel and both the switch and interstate engines were compelled to stop, the stream of interstate commerce would also stop or be lessened to the same extent. What court or lawyer would say that under these circumstances there was

not a substantial interference with interstate commerce?

[4] In the business of an interstate railroad, the interstate and intrastate traffic is intermingled and usually handled indiscriminately. It would be practically impossible to name any servant of an interstate road who is employed exclusively in the furtherance of purely interstate traffic. All employees who participate in the maintenance or operation of the instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce, within the meaning of the act. The fact that a portion of plaintiff's work pertained to local traffic would not change the character of his labor in the performance of acts reasonably proximate and essential to the moving of interstate freight, and in assistance thereof. *Doherty*, § 58; *Thornton*, § 37.

The evidence introduced and offered upon the trial in the case at bar tended to show that the defendant railroad company, and the plaintiff, its employee, were, at the time of the injury complained of, engaged in interstate commerce by railroad, within the meaning of the act of Congress. It follows, if this be true, that plaintiff was entitled to the protection of the act, and the case should have been submitted to the jury. This conclusion is, we think, in harmony with the act of Congress, the above authorities, and *Darr v. B. & O. R. Co.* (D. C.) 197 Fed. 665; *Lampshire v. O. R. & N. Co.*, 196 Fed. 336, 116 C. O. A. 156; *Horton v. O. W. R. & N. Co.* (Mar. 21, 1913) 130 Pac. 897; *Jones v. Chesapeake & O. Ry. Co.*, 149 Ky. 566, 149 S. W. 951; *Breske v. M. & St. L. Ry. Co.*, 115 Minn. 386, 132 N. W. 337.

[5] The evidence tendered by plaintiff, relating to the general duties of the plaintiff and of the other members of the switching crew during the time plaintiff had been employed by the railroad company, was, in our opinion, material for the purpose of showing plaintiff's general duties and the kind of business in which the car of oil was to be used. The trial court erred in rejecting the evidence. The position of counsel for defendant is that it is immaterial what plaintiff's general duties were, or what he may have been engaged in at any other time than that of the accident, and they cite therefor, among other authorities, *Doherty*, § 17, pp. 87, 88, and *Thornton* (2d Ed.) § 37. But we do not so read these authorities. They are to the effect that it is not enough to show that an employee was engaged generally by an interstate railroad company in order to come within the provisions of the act, but that he must go further and show that he received his injury while engaged in interstate commerce for the company. This does not necessarily indicate that testimony as to his general duties would be immaterial.

The judgment of the lower court will therefore be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

MARTIN et al. v. NATIONAL LIVE STOCK INS. ASS'N.

(Supreme Court of Oregon. April 22, 1913.)

1. INSURANCE (§ 633*)—ACTIONS—PLEADING—INSURABLE INTEREST.

In an action on an insurance policy upon a horse, an averment in the complaint that plaintiffs were at all times owners and in possession of the horse from a period over nine months before the date of the issuance of the policy until the death is a sufficient allegation of an insurable interest at the date of the contract and at the time of the loss.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1594; Dec. Dig. § 633.*]

2. INSURANCE (§ 639*)—ACTIONS—PLEADING—ANTICIPATING DEFENSES.

In an action upon an insurance policy indemnifying plaintiffs from loss of a horse by death from disease and every other casualty, a complaint merely averring that the horse died from disease is sufficient, even though the policy contained a stipulation exempting the insurer from liability where the animal is killed by civil authority, and the state statutes authorized the killing of certain diseased animals, for this is only a defense which a plaintiff is not bound to anticipate.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1554, 1593, 1598; Dec. Dig. § 639.*]

Appeal from Circuit Court, Polk County; Henry L. Benson, Judge.

Action by John E. Martin and Mark Blodgett, copartners doing business under the firm name of Martin & Blodgett, against the National Live Stock Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action by John E. Martin and Mark Blodgett, partners as Martin & Blodgett, against the National Live Stock Insurance Association, an Oregon corporation, to recover the amount of an insurance policy issued November 11, 1910, in consideration of the payment of \$90, and indemnifying plaintiffs in the sum of \$1,000 against loss by death within a year of a black stallion, nine years old, named Priam, "from disease, fire, lightning, tornadoes, cyclones and every other casualty which necessitates the death of any animal upon which insurance is herein provided, when in the event all due care shall have been taken to save the life of such animal and nothing shall have been done to endanger the same by the insured, his agents or employees." Nearly all the averments of the complaint are admitted by the answer which latter pleading sets forth facts as a separate defense. The allegations of new matter in the answer were denied by the reply, whereupon the cause was tried resulting in a verdict and judgment, for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiffs as demanded in the complaint, and the defendant appeals.

E. O. Stadter, of Portland, for appellant. Oscar Hayter, of Dallas, and John A. Carson, of Salem, for respondents.

MOORE, J. (after stating the facts as above). The only error assigned is that the complaint does not state facts sufficient to constitute a cause of action, and hence no judgment could be based thereon. It is argued that the plaintiffs failed to allege a right of action in themselves.

[1] The complaint in this particular reads as follows: "That at all times between the 9th day of February, 1910, and the death of the stallion hereinafter mentioned, and at said time, the plaintiffs were the owners of a certain stallion named 'Priam,' and that during all of said time said stallion was in the possession of said plaintiffs in Polk county, state of Oregon." When it is remembered that the policy was issued November 11, 1910, or nine months and two days after the complaint impliedly stated that the plaintiffs became the owners of the animal, the primary pleading conclusively indicates a right of action in the parties who maintain it. The complaint sufficiently shows that the plaintiffs had an insurable interest in the property when the contract of indemnity was made, and also at the time of the death of the horse, and such averment was sufficient. *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840.

[2] It is insisted that the complaint fails to aver that the death of the animal resulted from one of the particular perils against which the assured were indemnified. The initiatory pleading in this particular reads as follows: "That on the 14th day of November, 1910, in Polk county, state of Oregon, the said stallion died from disease." It will be kept in mind that the indemnity guaranteed by the policy was against loss by death *inter alia* "from disease." This was one of the hazards enumerated. The averment last quoted brought the case within the specifications, and the complaint in that particular was sufficient. A stipulation on the back of the policy, as far as material herein, reads: "This association will not indemnify or incur any liability for loss of any animal caused directly or indirectly by invasion, insurrection, riot, war or any uprising necessitating martial law, or any other usurpation or order of any civil authority, or when such animal is killed or destroyed by an officer or by order of any civil officer or civil authority."

The statute provides generally that in all cases of contagious, infectious or communicable diseases of a dangerous or incurable type that may exist in this state among domestic animals, excepting sheep, it is the

duty of the state or county veterinarian to cause the destruction of such animals. L. O. L. § 5649. Any animal that is thus affected shall possess no property value, and may be condemned and destroyed by the state or county veterinarian without compensation to its owner. Id. § 5652. Relying upon these provisions, the defendant's counsel contend that it was incumbent upon the plaintiff to aver in the complaint that the death of the stallion did not result from any of the causes specified in the policy or the statute; but, having failed to do so, the initiatory pleading did not state facts sufficient to constitute a cause of action. The plaintiffs were under no obligation to anticipate a possible defense by alleging in the complaint that the death of the animal did not result from any of the causes specified. *Little Nestucca Road Co. v. Tillamook County*, 31 Or. 1, 48 Pac. 465, 65 Am. St. Rep. 802. It is not averred even in the answer that the loss of the property was occasioned by any of the causes to which reference has been made.

The complaint was adequate in all particulars; and, this being so, the judgment is affirmed.

MARTIN v. CITY OF BROWNSVILLE et al. (Supreme Court of Oregon. April 22, 1913.)
APPEAL AND ERROR (§ 655*)—ERRORS IN MAKING TRANSCRIPT OF RETURN.

Where the transcript of the testimony filed by the appellant in a suit in equity which was to be tried anew on the testimony in the Supreme Court contained 26 pages substituted in lieu of pages contained in the transcript as furnished appellant's attorney by the stenographer who took the testimony on the trial, the purported transcript will be stricken, and, the burden being on appellant to furnish a correct transcript, she will not be permitted to have the case tried on the correct copy of the stenographer's transcript furnished by appellee's attorney for purpose of comparison.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.*]

Appeal from Circuit Court, Linn County; William Galloway, Judge.

Action by Elva M. Martin against the city of Brownsville and others. Judgment for defendants, and plaintiff appeals. On motion to strike from the files of the court a purported transcript of the testimony. Motion granted.

Weatherford & Weatherford, of Albany, and B. S. Martin, of Brownsville, for appellant. Hewitt & Sox, of Albany, and A. A. Tussing, of Brownsville, for respondents.

MOORE, J. This is a motion to strike from the files of this court a purported transcript of testimony. Elva M. Martin commenced a suit against the city of Brownsville and its street commissioner A. W. Standish to enjoin the opening through her premises

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of alleged streets. Thereafter she commenced another suit against the same parties to restrain interference with the fences inclosing her land. Issues were joined, and, as we understand, both causes were jointly tried, resulting in decrees denying the relief which the plaintiff sought, and she severally appealed. The testimony given at the trial was taken in shorthand by B. T. Yates, and from affidavits submitted herewith it appears that much difficulty was encountered in securing from him a transcript of his extended stenographic notes. However, on September 23, 1912, he completed on an Underwood typewriting machine one ribbon and at the same time two duplicate carbon copies of the testimony, to which were attached his certificates to the effect that the transcript was an accurate extension of all the shorthand notes so taken by him, including objections of counsel, the rulings of the court thereon, and the exceptions taken thereto. Yates personally delivered to B. S. Martin, the plaintiff's husband, and one of her attorneys, the original and one duplicate copy of the testimony. The remaining copy was sent to the defendants' counsel. What purported to be the ribbon copy of the testimony was filed in this court December 23, 1912. Upon a subsequent comparison of the transcript so filed with the duplicate copy furnished to defendants' attorneys, it was discovered that 24 pages of the original typewriting had been withdrawn and 26 pages of carbon copy substituted in lieu thereof, showing material changes in the testimony; pages 201 and 320 of the original transcript were not withdrawn, although two other pages were put in evidently intended to supply their respective places in the record. In the original transcript and in the carbon duplicate thereof furnished to the defendants' attorneys, which latter copy has been left with our clerk as a supplement to this motion, the paper used by the court reporter has impressed therein the watermark "Berkshire Bond U. S. A." and "Bond Textile W.," while in the substituted pages the watermark "Edinample" appears in 23 instances and "Capitol Extra Fine" once, and two pages in which no water lines are discerned.

As illustrating the changes made in parts of the transcript filed in this court, a page of testimony as appears from the duplicate copy prepared by the official reporter and as shown by the corresponding page of the substituted transcript will be respectively set forth, to wit:

A. When we bought that tract of land from Mr. Kay, I think the distances,—it starts from the northwest corner and runs a certain distance east, I think sixty-eight rods, and then three hundred feet south, then sixty-eight rods west and three hundred—

Q. I will ask you this question: That plat you executed didn't give the distances of the lots and along Center Street that carried the plat clear over to Center Street?

A. I think not.

Q. Do you know what those distances were?

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A. How far we were off of Center Street?

Q. Do you remember what the distances—do you remember the distances given on the plat of the length of the east line of block five that the plaintiff owns in this case?

A. The plat called for one hundred feet.

Q. The plat you filed?

A. Yes, sir.

Q. The plat you filed instead of calling for one hundred feet called for one hundred and thirty-three feet, which would carry it over to Center Street?

A. Yes, sir.

Q. Now then, on the other end of that strip from the plat you filed called for one hundred and five feet, it was one hundred feet which carried it over to Center Street?

A. Yes, sir, some where about five or eight, couldn't say exactly.

Q. That would be block eight wouldn't it?

A. Yes, block eight.

Q. When you filed that plat you intended to adopt that street didn't you?

A. Yes, sir.

Q. And the lots that you sold off of that was sold according to that plat were they not?

A. Yes, sir.

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A. When we bought that tract of land from Mr. Kay, I think the distances—it starts from the northwest corner and runs a certain distance east, I think sixty-eight rods, and three hundred and forty feet south, then sixty-eight rods west and then three hundred and forty feet north.

Q. I will ask you this question: That plat you executed didn't give the distances of the lots and along Center Street that carried the plat clear over to Center Street?

A. It did not.

Q. Do you know what those distances were?

A. How far we were off of Center Street?

Q. Do you know what the distances—do you remember the distances given on the plat of the length of the east line of block five that the plaintiff owns in this case?

A. The plat called for one hundred feet.

Q. The plat you filed?

A. Yes, sir.

Q. The plat you filed instead of calling for one hundred feet called for one hundred and thirty-three feet which would carry it over to Center Street?

A. No, sir. One hundred feet and it did not extend to Center Street.

Q. Now then on the other end of this strip it was five feet wide? which was the distance the land covered by your plat was from Center Street at that point—west end of the strip?

A. Yes, sir. Somewhere about five or eight feet, couldn't say exactly.

Q. That would be block eight wouldn't it?

A. Yes, block eight.

Q. When you filed that plat you intended to adopt that street didn't you?

A. We didn't adopt any street.

Q. And the lots you sold off of that was sold according to that plat were they not?

A. It was our intention always to sell according to our original plat. We did not know how it appeared on the record, but supposed it was all right.

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The affidavit of B. S. Martin is to the effect that he did not know who substituted the pages in the transcript of the testimony filed in this court. The affidavits of J. K. Weatherford and of Mark Weatherford show that, though their names appeared on the briefs with that of Mr. Martin as attorneys for the plaintiff, they never had possession of the original transcript. B. S. Martin files a counter motion to substitute for the original transcript, as filed, the duplicate carbon

copy submitted with the defendant's motion herein. It was incumbent upon the plaintiff as appellant in suits in equity to be tried anew on the testimony to file in this court a correct transcript of such testimony. L. O. L. § 554. This she did not do, but there was left with our clerk a transcript mutilated by the withdrawal of the number of pages mentioned and the substitution of other pages in their stead. Who is responsible for the changed condition of the record we do not attempt to state. As these are civil suits and the burden was imposed by law upon the plaintiff as appellant to file with our clerk a correct transcript of the entire testimony, she must suffer the consequence of a neglect to discharge the obligation thus placed upon her. A judicial record is supposed to impute absolute verity, and it is strange, when by means of duplicating on a typewriter so many checks against the alteration of a public record exist, that an attempt should be made to foist upon this court a spurious transcript.

The motion of plaintiff's counsel to try these cases on the duplicate carbon copy is denied, and the motion to strike from our files the purported original copy is allowed.

BURNETT, J., took no part in the consideration of this motion.

HUTCHINGS v. ROYAL BAKERY & CONFECTIONERY CO.

(Supreme Court of Oregon. April 22, 1913.)
LIMITATION OF ACTIONS (§ 130*)—PERIOD—STAT.

Where plaintiff was permitted to take a nonsuit and the defendant appealed, the time up to and including the affirmance of the nonsuit on appeal must, under L. O. L. § 20, providing that when the commencement of an action is stayed by a statutory prohibition the time of its continuance shall not be a part of the time limited for commencement, be deducted from the time allowed for the commencement of such action, since L. O. L. §§ 68, 71, provide that the pendency of another action between the parties for the same cause shall be ground for demurrer or plea in abatement; and until the appeal from the nonsuit was disposed of such an action was pending.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130.*]

Burnett, J., dissenting.

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by George Hutchings against the Royal Bakery & Confectionery Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for personal injuries received by the plaintiff on the 3d day of May, 1909. The action was first commenced on September 27, 1909. The case was put at issue and trial commenced, when plaintiff moved for a judgment of non-

suit, which was, on January 10, 1910, allowed by the court. Thereafter, on January 18, 1910, plaintiff commenced a second action for the same cause, to which the defendant filed a plea in abatement, alleging that there was another action pending between the same parties and for the same cause. On April 5, 1910, the defendant appealed from the judgment of nonsuit in the first action, and on May 5, 1910, the court sustained the plea in abatement and dismissed the second action. On October 10, 1911, the judgment of nonsuit in the first case was affirmed in the Supreme Court. *Hutchings v. Royal Bakery*, 60 Or. 48, 118 Pac. 185. On December 4, 1911, plaintiff commenced the present action, alleging in the complaint the above history of the former actions, to which complaint the defendant demurred, on the ground that the action was not commenced within two years after the injury complained of by plaintiff; that being the time limited by law within which an action for personal injuries must be commenced. The demurrer was overruled. The defendant declined to plead further, and a jury was called to assess the damages sustained by plaintiff, which returned a verdict in plaintiff's favor for the sum of \$8,600, and judgment being rendered for plaintiff in that amount the defendant appeals.

S. C. Spencer, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. Chas. Stout, of Portland (T. J. Hewitt and Johnson & Stout, all of Portland, on the brief), for respondent.

BAKIN, J. (after stating the facts as above). Plaintiff relies upon section 20, L. O. L., which provides, "When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action," contending that the second action could not be maintained pending the appeal from the judgment of nonsuit, and that the time said appeal was pending "shall not be a part of the time limited for the commencement of the action." We think this is the only question involved. By sections 68, 71, L. O. L., another action cannot be maintained while a former one is pending between the same parties for the same cause. *Hopwood v. Patterson*, 2 Or. 51; *Crane v. Larsen*, 15 Or. 848, 15 Pac. 328. Those sections constitute a statutory prohibition against the commencement of a second action until the first is disposed of, and arrest the running of the statute, under section 20, supra. Even after the judgment of nonsuit was affirmed, plaintiff could not have proceeded with the second action, since it was prematurely commenced, as held by the circuit court. He had no alternative but to wait until the action pending on appeal was disposed of, and the time

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that he was so delayed cannot be a part of the time limited for the commencement of the action. The action in which the appeal was pending was commenced September 27, 1909, and was disposed of October 10, 1911, which period by section 20, supra, "shall not be a part of the time limited for the commencement of the action." Therefore the present action was not barred by the statute.

The judgment is affirmed.

BURNETT, J. (dissenting). In this case the cause of action accrued May 3, 1909. An action was commenced thereon September 27th of the same year. A demurrer to the complaint having been overruled, the case was put at issue, and after the jury had been impaneled and the taking of testimony begun the plaintiff moved for a voluntary nonsuit, which was granted over the objection of the defendant. On January 18, 1910, the plaintiff commenced a second action for the same cause. This proceeding having been instituted within the six months allowed for appeal from the judgment of nonsuit, the defendant contended that under section 528, L. O. L., the former action was deemed to be pending from the commencement thereof until the final determination upon appeal, or until the expiration of the period allowed in which to take an appeal, and so filed a plea in abatement on the ground of the pendency of the first action. The circuit court sustained the plea and dismissed the second action. The defendant appealed from the judgment of nonsuit in the first action, contending that the plaintiff had no right to take a voluntary nonsuit after a trial of the issue of law on the demurrer, or after the commencement of the trial on the merits. In an opinion by Mr. Justice Bean, Mr. Justice McBride dissenting, the court held (80 Or. 48, 118 Pac. 185) that, although under such circumstances a plaintiff could not of right take a judgment of voluntary nonsuit, yet it was within the discretion of the court to allow him that privilege, and so affirmed the judgment. After the determination of the cause upon appeal and more than two years after the cause of action accrued, the plaintiff, for the third time, commenced an action by filing the complaint herein, alleging the history of the former actions, to which complaint the defendant demurred, upon the ground that the latest action was not commenced within two years after the injury complained of by the plaintiff. The demurrer was overruled. The defendant declined to plead further, a jury was called to assess the damages sustained by the plaintiff, and upon a verdict in his favor judgment was rendered for plaintiff, and the defendant appealed.

This being an action for personal injury, the statute (section 8, L. O. L.) requires that an action for the same shall be brought within two years after the cause of action shall have accrued. The defendant contends that it

appears upon the face of the complaint "that the action has not been commenced within the time limited by this Code." Section 68, L. O. L. Section 20, L. O. L., reads thus: "When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action." The circumstances mentioned in this section constitute a statutory disability preventing a plaintiff from commencing an action. But section 22, L. O. L., says: "No person shall avail himself of a disability unless it actually existed when his right of action accrued." True enough, if it appears upon the face of the complaint, the pendency of a former action for the same cause is ground for demurrer, under section 68, L. O. L., and by virtue of section 71 is a basis for a plea in abatement, if the objection does not appear on the face of the complaint. These sections, however, do not themselves constitute a statutory prohibition. They only declare certain advantages which a defendant may take of the situation created by the plaintiff. We have no statute extending the limitation in cases where the action has failed otherwise than upon the merits. Even in states having such a statute, the weight of authority is that the benefit thereof is not extended to cases where the litigant voluntarily discontinues or abandons his action on motion for voluntary nonsuit. The following precedents are instructive on this point; *Lawrence v. Winifriede Coal Co.*, 48 W. Va. 139, 35 S. E. 925; *Pardey v. Mechanicsville*, 112 Iowa, 68, 83 N. W. 828; *Shields v. Boone*, 22 Tex. 193; *Barino v. McGee*, 3 McCord (S. C.) 452; *Manuel v. Norfolk, etc., Ry.*, 99 Va. 188, 37 S. E. 957; *Koch v. Shepard*, 223 Ill. 172, 79 N. E. 52; *Archer v. Chicago, etc., Ry.*, 65 Iowa, 611, 22 N. W. 894. It is a state of affairs produced by plaintiff's own voluntary action, and not a statutory prohibition which prevents his third action being instituted after the expiration of the two years' limitation. Having of his own accord dismissed his actions, he must bear the resulting burdens attending upon that course. If the plaintiff can begin and dismiss three actions in succession and so piece out the statute of limitations, he can extend that process indefinitely until the defendant's witnesses have disappeared, or its condition has otherwise changed to its disadvantage. The statute would be thus subordinated to the pleasure of the plaintiff, or possibly to the discretion of the court, a state of affairs the legislative power has not seen fit to countenance.

But even if we should construe a pending action to be a statutory prohibition, the plaintiff could not avail himself of that disability to extend the statute of limitations, because it did not exist when his right of action accrued. Section 22, L. O. L.

The judgment should be reversed and the cause remanded, with directions to the circuit court to sustain the demurrer to the complaint.

CITY OF WOODBURN v. APLIN et al.
(Supreme Court of Oregon. April 15, 1913.)

1. INTOXICATING LIQUORS (§ 45*)—BONDS—SUFFICIENCY IN NUMBER OF SURETIES—SURETY COMPANIES—STATUTES.

Since, in amending by initiative the charter of the city of Woodburn on April 27, 1909, chapter 10, § 2, of the charter, as amended by the Legislature February 7, 1899 (Sp. Laws 1899, p. 526), requiring "two or more sufficient sureties" on liquor bonds, was copied without change, it is not to be regarded as a new statement of the law, and is controlled by Laws 1899, p. 193, enacted February 20, 1899, providing that where a surety company executes a bond there is a full compliance with any law, charter, or ordinance, demanding that such bond be signed by one or more sureties.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 47; Dec. Dig. § 45.*]

2. INTOXICATING LIQUORS (§ 88*)—ADMISSIONS—ACTION ON LIQUOR BOND—PROCEEDINGS IN CRIMINAL ACTION.

In an action on the bond of a liquor dealer, proceedings in the recorder's court where-in the defendant pleaded guilty to the charge on a statement of the same facts assigned as a breach of the bond, except that the place of such breach, which was a sale to a minor, was only charged to have been within the city limits, and not at defendant's place of business, are competent evidence to show at least that a sale was made to a minor, on the same footing as any other oral admission.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 91-95; Dec. Dig. § 88.*]

3. INTOXICATING LIQUORS (§ 87*)—LIQUOR DEALERS' BONDS—PLACE OF BREACH.

In an action on a liquor dealer's bond, given in connection with a license to do business at a place named, and conditioned for the keeping of an orderly house and for compliance with law, etc., violations of law at that particular place must be shown to render the surety liable.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 90; Dec. Dig. § 87.*]

4. APPEAL AND ERROR (§ 882*)—INVITED ERROR—EVIDENCE.

Where a recorder was testifying as to what a defendant in an action on a liquor dealer's bond had said in making a plea in a criminal action concerning the same breach, and defendant objected that the record was the best evidence, he cannot complain if plaintiff introduces such record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

5. INTOXICATING LIQUORS (§ 88*)—BONDS—PLACE OF BREACH—EVIDENCE.

In an action on a liquor dealer's bond given in connection with a license to do business in a certain place, evidence *held* to warrant a finding that the breach complained of was committed at such place.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 91-95; Dec. Dig. § 88.*]

6. JUDGMENT (§ 648*)—RES JUDICATA—NATURE OF JUDGMENT—CRIMINAL PROSECUTION.

In an action to forfeit a liquor dealer's bond for a violation of law, the plaintiff was

bound to prove the breach as a new proposition, without reference to a prior conviction for the same violation in the recorder's court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 648.*]

7. WITNESSES (§ 380*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

In an action on a liquor bond, plaintiff can introduce affidavits of two of its witnesses made in a criminal action in regard to the same violation of law to explain the apparent inconsistency of using such witnesses who gave evidence palpably adverse to the plaintiff.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.*]

8. WITNESSES (§ 248*)—RESPONSIVENESS OF ANSWERS—MOTION TO STRIKE.

Where the court had ruled that testimony should be confined to or about a certain time, and a witness was asked what a person was doing about the date given, a motion to strike the answer unless the witness specified the time was properly denied.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

9. PLEADING (§ 193*)—OBJECTIONS TO EVIDENCE AS NOT WITHIN PLEADING.

In an action to forfeit a liquor dealer's bond given in connection with a license to do business at a certain place, it is too late on appeal to urge for the first time that a breach, regarding which there was testimony, was not alleged to have occurred in the place named in the bond.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

10. INTOXICATING LIQUORS (§ 88*)—DEALER'S BONDS—ALLOWING MINORS TO LOITER—EVIDENCE.

In an action to forfeit a liquor dealer's bond, evidence *held* to warrant a finding that defendant allowed a minor to loiter in his place of business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 91-95; Dec. Dig. § 88.*]

11. INTOXICATING LIQUORS (§ 88*)—HARMLESS ERROR—EVIDENCE—ISSUES—PLEADING.

In a suit on a liquor dealer's bond, the admission of the records of the common council declaring a forfeiture of the bond was not erroneous, where such forfeiture had been alleged in the complaint and admitted by the answer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 91-95; Dec. Dig. § 88.*]

Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by the City of Woodburn against Gilbert Aplin and another. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action by the city of Woodburn, a municipal corporation, against Gilbert Aplin and the United States Fidelity & Guaranty Company, a private corporation, to recover money. The admitted facts are that Aplin made a written application to the mayor and the common council of Woodburn for a license to sell spirituous, vinous, fermented, and malt liquors in quantities less than a gallon within that city for the term of one year from January 1, 1910; the business to be conducted in a building situated on the south half of lot 3 of block 2 of that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

city. With the application, Aplin tendered the sum of \$800 in payment of the license and also offered a bond in the sum of \$1,000, executed by himself as principal and the United States Fidelity & Guaranty Company as surety. The condition of the undertaking recites that, pursuant to the written application therefor, a license had been issued to Aplin as requested, stating the term of the privilege and the place of business, and provides as follows: "Now, therefore, if said Gilbert Aplin shall keep an orderly house, will comply with all the laws of the state of Oregon, and with all the requirements of the city charter and of the ordinances of the city of Woodburn, then this obligation shall be void, otherwise to remain in full force and virtue." The complainant alleges the corporate character of the plaintiff and of the surety on the bond, states the facts hereinbefore set forth, and avers, in effect: That on January 4, 1910, the bond so tendered was accepted and approved by the common council of Woodburn, whereupon the license applied for was issued to Aplin pursuant to which he immediately engaged in business at the place designated; that Aplin, in disregard of the provisions of ordinance No. 161 of the city of Woodburn, a copy of which is made a part of the complaint, in disobedience of certain statutes of Oregon, and in violation of the terms and conditions of the bond, "did on or about the 16th day of November, 1910, in the said place of business wrongfully and unlawfully give, sell, furnish, and supply one Kenneth Sylvester with spirituous, malt, and vinous liquors, to wit, whisky, beer, brandy, and wines, the said Kenneth Sylvester then and there being a minor under the age of 21 years, to wit, of the age of 18 years." That the common council of Woodburn on December 6, 1910, duly declared the defendant's bond forfeited and directed the city attorney to collect the sum named therein. That by reason of the premises, and in violation of such ordinance and of the statutes of Oregon referred to, the condition of the bond and such undertaking became forfeited to the plaintiff, and the defendants became liable to it in the sum of \$1,000. For a second cause of action the complaint alleges the facts relating to the application for the license, the giving of the bond, the payment of the fee, and the issuing of the license, etc., as hereinbefore stated, and avers that Aplin in violation of such ordinance and of certain statutes of Oregon, and in disregard of the terms and conditions of the bond, "did on or about the 16th day of November, 1910, in the said place of business, wrongfully and unlawfully permit and suffer Kenneth Sylvester, a minor, under the age of 21 years, and of the age of 18 years, to loiter and remain in said room and said place of business where the said defendant, Gilbert Aplin, was then and there engaged in the

sale of vinous, malt, and spirituous and intoxicating liquors." The remaining averments of the second cause of action are the same as set forth in the first cause. For a third cause of action the complaint alleges the same facts as are set forth in the first cause, and contains an averment as follows: "That the said Gilbert Aplin, in disregard of and in violation of the provisions of section 10 of said ordinance 161, and in disregard and in violation of the terms and conditions of said bond, did on or about the 5th day of December, 1910, sell, give to, and furnish spirituous, vinous, fermented, and malt liquors to one A. Emmet Austin; the said A. Emmet Austin at the said time and then and there being in an intoxicated condition." Judgment was demanded for the sum of \$1,000. These so-called separate causes of action are nothing else than allegations of different breaches of the same obligation, and, as there can be but one recovery on the same bond in a case of this kind, all the violations of its terms could and should have been united in one statement of a single cause of action. On that basis the matters involved will be discussed in this opinion. A general demurrer to the complaint was overruled. The answer admitted the whole complaint, except the alleged unlawful sales to the minor and to the intoxicated person and the minor's permitted loitering in the saloon, which latter averments were denied. At the trial, after the evidence was taken, the defendants moved for a verdict for the reason urged in the demurrer, and because there was no evidence to show that the alleged breaches of the bond occurred in the building named therein. This motion was denied and the jury returned a verdict in favor of the plaintiff for \$1,000. The defendants appeal from the resulting judgment.

John Bayne, of Salem, for appellants.
George G. Bingham, of Salem, and H. Overton, of Woodburn, for respondent.

PER CURIAM. [1] It is maintained by defendant's counsel that May 8, 1905, the city of Woodburn duly enacted ordinance No. 161, section 2 of which provides generally that an applicant for a liquor license shall with his petition tender a good and sufficient bond therefor in the sum of \$1,000, executed to the city of Woodburn with two or more sufficient sureties, the bond to be conditioned that the applicant will keep an orderly house, and that he will comply with all the requirements of the charter and ordinances of that city and with the laws of the state of Oregon, and since it appeared from an inspection of the copy of the obligation attached to the complaint as an exhibit that the name of only one surety was subscribed to the undertaking, the complaint did not state facts sufficient to constitute a cause of action, and, such being the case, errors were committed in overruling the de-

murrer and in refusing to direct a verdict for the defendant.

A statute was approved February 20, 1899 (Laws Or. 1899, p. 193) authorizing surety companies to transact business in Oregon. Section 6 of that enactment provided generally that, whenever any bond was required by the charter or ordinance of any municipality with surety or sureties, such bond might be executed by a surety company qualified to transact business within this state, and that an execution by a surety company of a bond should be in all respects a full and complete compliance with every requirement of the law, charter, or ordinance demanding that such bond should be executed by one surety or by one or more sureties, or that such sureties should be residents, or householders, or freeholders, or possess any other qualifications, and all municipalities should accept and treat such a bond, when so executed by a surety company, as conforming to and fully and completely complying with any requirement of the charter, ordinance, rule, or regulation, and that no justification on the part of the surety company should be required. The latter clause was amended February 24, 1903 (Laws Or. 1903, p. 222), so as to compel a surety company to justify when so required. L. O. L. § 4677.

It is argued by defendant's counsel that, while the section of the statute referred to authorizes the execution of a bond by a surety company in cases where a city charter or a municipal ordinance requires "one surety or one or more sureties" as specified in the act, the statute does not empower a surety company to execute a valid bond where "two or more sufficient sureties" are required as in ordinance No. 161 of the city of Woodburn; that such an ordinance was enacted May 8, 1905, and subsequent to the amendment of section 6 of the act adverted to; and that the ordinance, being the latest legislation upon that subject, is therefore controlling.

In support of the legal principle thus insisted upon, attention has been called to the case of *Hillman v. Mayher*, 38 Tex. Civ. App. 377, 85 S. W. 818, where, in construing the statute which demanded that the bond of a retail liquor dealer should be executed with "at least two good, lawful and sufficient sureties," it was held that such bond with only one surety was not a valid undertaking, and that a recovery of the penalties for a breach of its conditions could not be had against the principal or the surety.

In a later decision, however, by the same court there was interpreted a statute of Texas enacted in 1897 (Acts 25th Leg. c. 158), providing that a bond required by law, other than state and county official bonds, might be made by surety companies permitted to do business within that state, and such execution of a bond should constitute a compli-

ance with the law requiring two sureties on a bond. In 1901 (Acts 27th Leg. c. 136) an earlier statute of that state was re-enacted, requiring liquor dealer's bonds to have "at least two good, lawful and sufficient sureties"; the enactment being the same in the original statute, except as to a clause relating to habitual drunkards, but not changing the number of bondsmen. In construing these statutes together, it was held that the re-enactment did not operate to repeal the act of 1897, in so far as it affected sureties on liquor dealers' bonds, requiring two sureties, etc., and that a liquor dealer's bond executed by a bonding company as sole surety was sufficient. *Taggart v. Hillman*, 42 Tex. Civ. App. 71, 93 S. W. 245. In that case a writ of error was denied by the Supreme Court of that state.

The city of Woodburn was originally incorporated February 20, 1889. Sp. Laws Or. 1889, p. 303. The charter of that city was amended February 19, 1891 (Sp. Laws Or. 1891, p. 861); February 6, 1895 (Sp. Laws 1895, p. 153); and February 7, 1899 (Sp. Laws 1899, p. 526). Section 2 of chapter 10 of the enactment last mentioned provided that a petitioner for a liquor license should with his application present to the common council a good and sufficient bond in the sum of \$1,000, "with two or more sufficient sureties, to be approved by the council, conditioned," etc. This alteration of the charter having been made February 7, 1899, and the statute authorizing surety companies to execute bonds enacted February 20, 1899, the latter statute became applicable, making a surety company on a bond equal to "two or more sufficient sureties," which phrase, prior to February 20, 1899, evidently meant two or more persons. The latter enactment, therefore, superseded the amendment of the charter of February 7, 1899, permitting a surety company to execute a valid bond, as effectually as two or more sufficient individual sureties. *Taggart v. Hillman*, supra. The charter of Woodburn was again altered by the legal voters of that city April 27, 1909, under an exercise of the initiative power, but no change was made in section 2 of chapter 10 as amended February 7, 1899, and "two or more sufficient sureties" are now required on a bond executed in that city.

The amendment of the charter by the legal voters not having made any alteration in that part of the enactment of February 7, 1899, relating to the number of sureties on a bond executed in the city of Woodburn, the parts of the earlier charter that were copied without change into the amendment which was adopted April 27, 1909, are not to be regarded as a new statement of the law, but are to be read as a portion of the earlier charter, and hence subject to, and controlled by, the provisions of section 6 of the act of February 20, 1899, authorizing a surety company to execute to a municipal corporation a

valid bond. *Eddich*, Int. Stat. § 194; *Stingle v. Nevel*, 9 Or. 62; *Eddy v. Kincaid*, 28 Or. 537, 41 Pac. 156, 655; *Small v. Lutz*, 41 Or. 570, 67 Pac. 421, 69 Pac. 825; *Hall v. Dunn*, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; *State ex rel. v. Malheur County Court*, 54 Or. 255, 101 Pac. 907, 103 Pac. 446; *Allison v. Hatton*, 46 Or. 370, 80 Pac. 101; *Renshaw v. Lane County Court*, 49 Or. 526, 89 Pac. 147; *State v. Cochran*, 55 Or. 157, 104 Pac. 419, 105 Pac. 884; *State v. McGinnis*, 56 Or. 163, 108 Pac. 182; *State v. Schluer*, 59 Or. 18, 115 Pac. 1057.

The bond in the case being sufficient, when executed by the defendant the United States Fidelity & Guaranty Company, as surety, no error was committed in overruling the demurrer to the complaint, or in refusing to instruct the jury to return a verdict for the defendant on that ground. *Capital Lumbering Co. v. Learned*, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792; *Aldrich v. Columbia Co.*, 39 Or. 263, 64 Pac. 455.

[2] It is maintained that errors were committed in admitting in evidence, over objection and exception, a copy of a criminal complaint wherein the city of Woodburn was plaintiff and Gilbert Aplin defendant, charging that the latter on November 16, 1910, unlawfully sold, within the corporate limits of that city, spirituous, vinous, malt, and fermented liquors to K. Sylvester, a minor; in permitting J. J. Stangle, the city recorder of Woodburn, to detail statements which were made to him by Aplin as to changing his plea of not guilty to such charge to a plea of guilty thereof; and in allowing the introduction as testimony of a copy of the journal of such recorder's court imposing upon Aplin a fine in pursuance of his amended plea. It is argued by the defendant's counsel that the surety company would not be liable on the bond unless Aplin unlawfully sold liquors at his place of business, and that, as the complaint before the recorder did not charge the sale to have been made there, an error was committed.

[3] In view of the strictness with which the law construes the obligations of a surety, it may be conceded that, on account of this bond having been given in connection with a business which was required to be conducted in a certain place, it would be only violations of law at that particular place that would render the surety liable on the bond. *Clement v. Smith*, 128 App. Div. 859, 113 N. Y. Supp. 55; *County of Montebau v. Lewis*, 123 Mo. App. 673, 100 S. W. 1107. The substance of the first breach assigned in the complaint is that on November 16, 1910, at the place of business of the defendant in question, he sold to a minor, Kenneth Sylvester, certain intoxicating liquors. The proceedings in the recorder's court wherein the defendant pleaded guilty to the charge on a statement of the same facts as are herein assigned as a breach were competent to prove

one element on that breach, namely, the sale of liquor to a minor. It is admitted on the same basis as any other admission of that fact at any other time or place would be considered in evidence. It was not admitted in the character of a judgment binding conclusively upon the defendant because it was a judicial decision rendered between other parties. It stands on the same footing as an admission orally made to some other person who could have come upon the stand as a witness and testified to the same.

[4] Moreover, when the recorder before whom the plea of guilty was entered was testifying, as well he might, to what the defendant said about pleading guilty on that occasion, the latter's counsel objected on the ground that the record of the plea was the best evidence. Thereupon in deference to the objection the record in question was introduced, and if it was error it was invited error of which the defendants have no right to complain.

[5] It remains to be seen whether there is any testimony tending to prove the other elements of the first breach assigned, namely, that the sale to the minor occurred in the place for which the security was given. The bill of exceptions discloses that K. Sylvester, the minor in question, testified that he was in Aplin's saloon, the place involved, on the day mentioned in the charge before the recorder. He is corroborated in this by Lester Kendall, another minor with him at the time. It is also disclosed that soon afterwards they were both drunk. These circumstances, which the jury was entitled to consider in evidence as tending to prove the place in which occurred the furnishing of the liquor to the minor, were admitted by the defendant Aplin in his plea of guilty. Restrained by section 3 of article 7 of the Constitution of the state, as it now stands, we cannot affirmatively say that there is no evidence to support the verdict on this point, and hence cannot reverse the case on that assignment of error. The fact sought to be established under the first breach assigned was that the defendant Aplin had violated the law in his place of business for which the bond was given by furnishing liquor to a minor.

[6] The plaintiff was bound to prove this as a new proposition without reference to the conviction in the recorder's court; but, with all these circumstances disclosed in plaintiff's case, the court could not have properly directed a nonsuit on the breach involved. On that point the plaintiff made a case sufficient to be submitted to the jury.

It is true the bill of exceptions discloses that the defendant Aplin and his bartenders all unite in saying that no liquor was sold to the minor Sylvester on the occasion mentioned, and Aplin himself explains his plea of guilty on the ground that it was cheaper for him to pay a fine than to go to the expense of defending the case in the recorder's

court and run the risk of a greater fine besides the expense of his resistance. With these matters we have nothing to do. They were all before the jury, which is the only tribunal to pass upon the weight of the testimony.

[7] Kendall and Sylvester themselves both denied on the witness stand that liquor had been furnished to them in the defendant's saloon. The plaintiff, by whom they were called, then exhibited the affidavits which they had subscribed before the recorder on November 16, 1910, to the effect that they had on that day purchased whisky and beer in the defendant Aplin's saloon in Woodburn. Kendall and Sylvester both admitted making these affidavits, but they said they were untrue, whereupon, over the objection of the defendant's counsel, plaintiff introduced them in evidence. As stated by counsel for plaintiff and explained by the court at the time, these declarations were not admitted as substantive evidence, but only to show that these witnesses had made at other times statements inconsistent with their present testimony. The plaintiff was entitled to use these declarations to explain the apparent inconsistency of using witnesses who gave evidence so palpably adverse to the party calling them. L. O. L. §§ 861, 864. Under such circumstances no error was committed in receiving in evidence the affidavits mentioned.

[8, 9] It will be remembered that the charge of selling liquor to Austin, an intoxicated person, is not alleged to have occurred in the place of business for which the bond was given. One witness testified that about November 25, 1910, he saw Austin, who was then so drunk he could hardly get up the street, in the saloon of the defendant Aplin buying whisky. Another witness testified that about December 5, 1910, he saw Austin getting liquor in the defendant's place of business and that he was drunk at the time. These witnesses testified somewhat at length, but the only objection made by the defendant's counsel to their testimony which was not sustained by the court occurred in this wise: The court had ruled that the testimony should be confined to the time on or about the 5th day of December, 1910, the date named in the complaint assigning this breach and on motion of defendants' counsel the court struck out all that was said about Austin at any other time that the witness was in there drinking if he was drinking. The witness then on the stand, one of the two mentioned, was then asked: "State to the court and the jury, when he was in there in this condition about the date given, what was he doing in reference to purchasing a drink? A. He was in there buying a drink. Q. What was he buying? A. Buying whisky as a general thing." The defend-

ants' counsel then objected to the answer unless the witness said when and moved to strike it out unless confined to the time. In view of the ruling of the court confining the time to the date mentioned in the complaint and the form of the question thus restricted, and to which the answer was responsive, we think there was no material error to be predicated upon this objection. If the defendant intended to rely upon the objection that this breach is not alleged to have occurred in the place named in the bond, it should have been brought to the attention of the court below. It cannot be urged here for the first time under the form of objection appearing in the record.

[10] The second breach was to the effect that on November 16, 1910, in said place of business, the defendant Aplin allowed Kenneth Sylvester, a minor under the age of 21 years, to loiter in said room and place of business. On this point C. B. Aplin, who at the time kept a lunch counter in the back part of the saloon, testified for defendant as follows: "They (referring to Kendall and Sylvester) came in as near as I can tell about 6 o'clock. Kendall came in, somewhat of a little fellow. He was drunk. He offered me a drink out of a bottle over the counter. He says: 'My partner has fallen down in the alley; I guess he is asleep.' He walked into the back room, and in a few minutes came the other fellow. They went into the barroom. The fellow behind the bar told my other brother. He said: 'They have just come in; you had better put them out.' He told him to put them out. He went in and put them out the back way the same way they came in. I didn't see them any more. That is the last time I saw them." This of itself, in addition to the testimony which has already been made, is sufficient to go to the jury in support of the breach just mentioned as tending to show that the minor loitered in the saloon an appreciable length of time, by the tacit permission of Aplin the defendant here.

[11] It is insisted that an error was committed in receiving in evidence over objection a copy of the records of the common council of Woodburn declaring a forfeiture of Aplin's bond; but, as this forfeiture was alleged in the complaint and admitted by the answer, proving the same does not constitute material error. In short, there was competent testimony for the jury to consider in support of the two breaches assigned as having occurred in the place of business of the defendant. No material error is assigned respecting the testimony concerning the breach alleged to have taken place in the saloon.

Proof of either one of the breaches which are assigned would be sufficient to sustain the judgment, which is therefore affirmed.

PATTON v. WOMEN OF WOODCRAFT.

(Supreme Court of Oregon. April 22, 1913.)

1. APPEAL AND ERROR (§ 866*)—REVIEW—DENIAL OF NONSUIT.

Where, after the denial of a nonsuit, defendant introduced evidence and the court directed a verdict for plaintiff, the Supreme Court, in determining whether the nonsuit was properly denied, could examine the whole of the evidence contained in the bill of exceptions, even if insufficient to be submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

2. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on a benefit insurance certificate, defended on the ground that the member was suspended for nonpayment of assessments and not reinstated, the grand clerk of the order testified that in the local clerk's report for March the member was returned as delinquent; that subsequent assessments were returned by him because of such delinquency until the local clerk furnished an affidavit that the March assessment was paid, but that she failed to remit it with the report, whereupon the assessments were accepted and retained. Defendant offered a letter written by the local clerk, stating that she received the assessment for January and February through the clerk of an affiliated organization; that before making her report for March she telephoned the clerk of such organization, asking him if he intended remitting for the member, and was told that he would be reported delinquent; that the member was entitled, under the by-laws, to have his assessment for March paid by the local circle, but that this was not done because members became delinquent as soon as suspended by the other organization; and that when she learned that such member was not suspended the affidavit was made to straighten up the matter. *Held*, that the exclusion of such letter was not prejudicial to defendant, since it merely explained the matter more thoroughly and did not tend to show that the affidavit was false, and defendant might have called the local clerk as a witness, or have taken her deposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

3. INSURANCE (§ 817*)—ACTION ON POLICIES—BURDEN OF PROOF.

In an action on a benefit certificate, where defendant pleaded that the member was suspended for the nonpayment of certain assessments and not reinstated, defendant assumed the burden of showing that such assessments were not paid prior to the member's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.*]

4. INSURANCE (§ 825*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.

In an action on a benefit insurance certificate, where the undisputed facts showed that the assessments, the nonpayment of which was claimed to have resulted in suspension, were, after being sent back and forth several times between the Grand Clerk and the local clerk, accepted prior to the member's death, there was no question for the jury, and a verdict for plaintiff was properly directed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

5. INSURANCE (§ 755*)—NONPAYMENT OF ASSESSMENTS—WAIVER.

An apparent default in the payment of assessments by a member was waived by a bene-

fit insurance society by the subsequent receipt and acceptance of such assessments and the collection and retention of subsequent assessments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.*]

6. INSURANCE (§ 695*)—MUTUAL BENEFIT INSURANCE—PAYMENT OF ASSESSMENTS—AGENCY OF LOCAL CLERK.

The clerk of the local circle of a benefit insurance society, in receiving and forwarding assessments from members, acted as the agent of the society; the character of the duties performed, rather than any declaration in the by-laws, determining the question whether she is the agent of the society or of the member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Harry L. Patton against the Women of Woodcraft. Judgment for plaintiff, and defendant appeals. *Affirmed*.

This is an appeal from a judgment in favor of plaintiff, Harry L. Patton, against the Women of Woodcraft. The action is based on a benefit certificate of insurance issued on March 21, 1906, by the defendant to James J. Patton, a member of Mystic Circle No. 24, at Baker, Or. The organization consists of a Grand Circle, and local circles. The supreme authority of the organization is exercised by the Grand Circle, sessions of which are held at certain periods. Its powers are vested in the Executive Council, which is authorized to transact all business which cannot reasonably be delayed until the Grand Circle session, provided, however, that the Council shall not alter or change the constitution. The membership of the organization consists of benefit and social members. Only the benefit members have any part in the insurance fund. The Grand Circle has no independent membership, but all who are in good standing in local circles are members of the organization. The benefit certificate provided that James J. Patton was entitled to have his beneficiaries participate in its benefit fund after his death, when in good standing, and not otherwise, in the amount of \$1,000, and no more, should his death occur within one year after the date of the certificate, and in the sum of \$2,000, should death occur after one year from the date of the certificate, or to the proceeds of one benefit assessment. The certificate was made expressly subject to all the conditions indorsed thereon, which were made a part thereof, and to all the conditions of the constitution of the association and the by-laws of the circle. It contained the clause that "It shall not be in force at any time when said James J. Patton stands suspended and is not in good standing. * * * Plaintiff, Harry L. Patton, a son, was named as a beneficiary to the amount of \$1,000.

The complaint sets forth the certificate given, with all the conditions indorsed thereon, and states that James J. Patton fully performed all the terms, covenants, and condi-

tions of the contract of insurance on his part; that he died on the 21st day of August, 1908; and that due proof of such death was made to the defendant, as prescribed by the certificate, rules, and by-laws of the defendant. The defendant answered, admitting the corporate character of the defendant, the issuance of the benefit certificate, the death of James J. Patton, and that due proof of such death was made, and denying that James J. Patton had fully complied with all the terms and conditions of the contract. The defendant further alleged "that on the 1st days of March, April, and May of the year 1908 there was due from said Patton said assessment of one dollar sixty cents (\$1.60), which said Patton wholly failed to pay prior to his death, whereby said Patton became suspended on the 28th day of April, and was never reinstated." The reply put in issue the new matter of the answer, and averred that all defaults, if any, in the payment of assessments on the 28th day of March, April, and May, 1908, and the failure of James J. Patton to sign and deliver a reinstatement blank, as required by the rules, were waived by defendant by receiving and accepting from James J. Patton, prior to his death, the full amount of the assessments for those months, and by demanding, receiving, and accepting his assessments for June, July, and August of that year, with full knowledge as to any prior default.

Frank S. Grant, of Portland (Lyman E. Latourette, of Portland, on the brief), for appellant. C. M. White, of Portland (Farrington & Farrington, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1] On the trial plaintiff introduced in evidence the benefit certificate issued by defendant, and rested. Thereupon defendant moved for a nonsuit, which was denied by the court. This ruling defendant assigns as error. Evidence was thereafter introduced by the defendant, and the court directed the jury to find a verdict in favor of plaintiff; therefore, in considering the error assigned, we are at liberty to examine the whole of the evidence which is contained in the bill of exceptions, even if the same were insufficient to be submitted to a jury. *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680; *Grindstaff v. Merchants' Inv. & Trust Co.*, 61 Or. 313, 122 Pac. 46; *Trickey v. Clark*, 50 Or. 516, 93 Pac. 457; *Crosby v. Portland Ry. Co.*, 53 Or. 496, 100 Pac. 300, 101 Pac. 204; *Hofer v. Smith*, 129 Pac. 761. The instructions of the court to the jury to return a verdict in favor of plaintiff is assigned as error by the defendant. This necessarily includes the question regarding the nonsuit.

[2] The defendant called J. L. Wright, Grand Clerk of the Women of Woodcraft during the time that James J. Patton held the certificate, as witness. A copy of the con-

stitution of the Women of Woodcraft was identified by him and introduced in evidence. He testified that he was the custodian of the records, and that Lillian C. White was clerk of Circle No. 24, at Baker, Or.; that she reported to him the assessments collected; that the March report was received April 10, 1908, and that after the name of James J. Patton the word "delinquent" was written; that with the report for April there were two assessments for James J. Patton, one for March and one for April, amounting to \$3.20; that these amounts were returned to the clerk of the local circle; that a similar report was made for May; that in the report for June the local clerk remitted three assessments, amounting to \$6.05, for the months of April, May, and June; that the Grand Clerk notified the local clerk by letter of July 25, 1908, in regard to the reinstatement, as follows: "I have received your affidavit on behalf of this neighbor, but the Grand Circle cannot accept this remittance, for the reason same is a partial payment and I have instructed the Grand Banker to return same to you." The witness further testified that the July report showed a remittance for James J. Patton of \$1.75, which was accompanied by an affidavit, dated July 9, 1908, made by Lillian C. White, circle clerk, to the effect that on March 28, 1908, James J. Patton paid his March assessments and dues, but that she failed to remit the same with the report for March, made by her on April 7th. He further stated that on August 11, 1908, the local clerk forwarded to the Grand Clerk a separate remittance report for James J. Patton for \$11.20; that this was credited to the account of James J. Patton, because the local clerk had sent an affidavit stating that James J. Patton had never been delinquent, and that she had made an error; that this \$11.20 was accepted and has since been retained by the defendant. The receipt from the local clerk of James J. Patton's dues for August was introduced.

Practically the whole controversy hinges on the acceptance of this \$11.20 for the assessments of the decedent. Defendant offered in evidence a letter, dated August 19, 1909, about a year after the death of James J. Patton, and written by Lillian C. White to Mrs. H. L. Patton, wife of plaintiff. This letter was rejected by the court. It is an explanation of the matter of the decedent's assessments, and of the action of Miss White, as local clerk. It states in part that she received Mr. James J. Patton's dues for January and February through Mr. Fie Damon, clerk of the Woodmen of the World; that on April 7th she telephoned to Mr. Damon and asked him if he intended remitting for Mr. Patton for March in the Woodmen of the World lodge, and he replied that he was going to report him delinquent; that James J. Patton was entitled, under the by-laws, to be carried, or to have his assessment for the month of March paid, by the local circle;

that this was not done, for the reason that any member becomes delinquent as soon as he is suspended in the Woodmen of the World camp; that when she learned that he had not been suspended she made the affidavit to straighten up the matter. In making the affidavit it appears that Miss White consulted a former organizer and obtained her advice in regard to it. The affidavit was rather general. Had it contained the same matters that are set forth in the letter, it would have been to the same legal effect, and would have explained the matter more thoroughly. In no way does the letter tend to show that the affidavit was false, and the rejection, therefore, was not prejudicial to the defendant, which should have called Lillian C. White as a witness, or have taken her deposition, had it desired her evidence.

[3] By its answer defendant assumed the burden of showing that the payment of the assessments of James J. Patton for the months of March, April, and May, 1908, were not made prior to his death. *Bathe v. Insurance Company*, 152 Mo. App. 87, 94, 132 S. W. 748; *Hart v. Knights of the Macca-bees of the World*, 83 Neb. 428, 427, 119 N. W. 679.

[4] There are no allegations of fraud, or facts showing a reason why the payments which were actually made to and accepted by the defendant should be annulled or avoided. The evidence of the defendant showed that the assessments were in fact paid. After being sent back and forth, the payments were accepted by the Grand Circle prior to the death of the assured. If the undisputed facts showed that the association was liable upon the benefit certificate, then there was nothing to submit to the jury, and the directed verdict in favor of plaintiff was proper.

[5] The apparent default in the payment of the assessments of James J. Patton was waived by the Grand Circle by the subsequent receipt and acceptance of such assessments, and by the collection and retention of subsequent assessments up to the time of the death of the holder of the certificate. *Knights of Pythias v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163; *Bailey v. Mutual Benefit Association*, 71 Iowa, 689, 27 N. W. 770; *United Workmen v. Smith*, 78 Kan. 509, 92 Pac. 710; *Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533. See, also, *Lathrop v. Modern Woodmen of America*, 126 Pac. 1002. It was held in *Bailey v. Mutual Benefit Association*, supra, that when the amount of such an assessment was received prior to the death of the assured by mistake, the real intention being to regard the certificate as forfeited, such mistake, if made, could not be regarded as material.

[6] In the case at bar the good faith of

the member in making the payments of his assessments after March, 1908, when it is claimed that there was a technical error, is not questioned. It is not strange that, in the important transactions of the local circle by the clerk, there were slight variations from the proceedings mapped out by the Grand Circle. In receiving and forwarding assessments from members of the local circle, however, the clerk acts as the agent of the Grand Circle. As to whose acts such clerk performs, or of whom she is agent, in the transaction, depends more upon the character of the duties performed, than upon any declaration in the by-laws. *Trotter v. Grand Lodge of Iowa Legion of Honor*, supra; *Whigham v. Independent Foresters*, 44 Or. 543, 553, 75 Pac. 1067, and cases there cited. The benefit certificate is admitted to have been regularly issued. The uncontradicted evidence shows that the rights thereunder had not been forfeited, and that James J. Patton, at the time of his death, was in good standing in the order. None of the evidence offered by defendant tended to show otherwise; therefore there was no error in the judgment of the lower court, which is affirmed.

BURNETT, J., concurs in the result.

MARQUAM v. RAY.

(Supreme Court of Oregon. April 22, 1913.)

1. PRINCIPAL AND AGENT (§ 81*)—POWER OF ATTORNEY—EXERCISE OF POWER—EFFECT.

Where under a power of attorney to sell certain real property, or, "if unable to sell, to mortgage the property for the purpose of raising money thereon," the property was mortgaged for the benefit of the grantor of the power, there was no subsequent power to convey the property.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 53; Dec. Dig. § 81.*]

2. PRINCIPAL AND AGENT (§ 28*)—POWER OF ATTORNEY—EXERCISE—TIME.

Where a power conferred on the attorney authority to sell, or, if unable to sell, to mortgage the property to raise money for the grantor without any limit as to time, he was required to exercise the power within a reasonable time, and a sale made more than 10 years after the expiration of the power was too late.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 50; Dec. Dig. § 28.*]

3. APPEAL AND ERROR (§ 877*)—RIGHT TO ALLEGE ERROR.

That verdict in ejectment was for defendant for possession only, and did not determine the question of title in compliance with L. O. L. § 329, was not prejudicial to plaintiff, nor an error of which he could complain on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by P. A. Marquam, Jr., against W. H. Ray. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action in ejectment to recover lots 14, 15, and 16, block 13, Willamette addition to East Portland. Plaintiff is claiming title from Anna, Tommie, and Georgia Riley, and defendant claims title as a purchaser at a sheriff's sale of the property for the collection of delinquent taxes. Plaintiff in establishing his title, after proving record title in the Rileys, offered in evidence copies of powers of attorney, executed by each of the Rileys to J. F. Sturgeon; the power of attorney by Georgia Riley being in the following language: "Know all men by these presents that I, Georgia Riley unmarried of the county of Los Angeles and state of California, have made, constituted and appointed and by these presents do make, constitute and appoint J. F. Sturgeon of the county of Woodford and the state of Illinois, my true and lawful attorney for me and in my name place and stead and for my use and benefit to sell and convey and to make, sign and execute a proper deed of conveyance, or if unable to sell and convey he shall have power to mortgage said property hereinafter described for the purpose of raising money thereon any or all interest or claim I may have in and to all of lot numbered fourteen (14), in block thirteen (13), in Willamette Addition to the city of East Portland, in Multnomah county, state of Oregon, as per map or plat on file in the Auditor's office of said county and state. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming. * * * " (Dated October 17, 1889. Signed and sealed.) Thereafter, on February 24, 1900, the said Sturgeon, as such attorney in fact, and by virtue of said powers of attorney, executed a mortgage upon the lots in favor of Isaac B. Hammers for the sum of \$75. On May 21, 1900, plaintiff purchased the lots from the attorney in fact for \$75, and with the deed received a cancellation of the said mortgage, bearing that date. When the deed from the attorney in fact to the plaintiff was offered in evidence, the defendant objected thereto for the reasons that "it was executed by an agent more than 10 years after the agency was created, and, further, there was nothing in the record to show that the power of attorney was not exhausted before the execution of the deed. * * * " At the close of plaintiff's evidence, defendant moved for a directed verdict in his favor, which was allowed; and from a judgment thereon plaintiff appeals.

H. H. Riddell, of Portland, for appellant.
W. L. Cooper, of Portland, for respondent.

EAKIN, J. (after stating the facts as above). There is but one question presented

on the appeal, namely: Are the powers of attorney sufficient to authorize the deed by Sturgeon as attorney in fact for the Rileys to the plaintiff? If not, the judgment must be affirmed.

There are two serious objections to the exercise by Sturgeon at this time of the power conferred: (1) The power granted seems to have been fully exercised by him in 1900; and (2), where the time within which the power is to be exercised is not fixed in the instrument, it must be exercised within a reasonable time. Mr. Chief Justice Strahan in the case of *Coulter v. Portland Trust Company*, 20 Or. 479, 26 Pac. 565, 27 Pac. 263, quoting from *Gouldy v. Metcalf*, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912, says: "The language used in the grant of general power is certainly very comprehensive, but the established rule of construction limits the authority derived by the general grant of power to the acts authorized by the terms employed in granting the special powers. When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to: (1) The meaning of the general words in the instrument will be restricted by the context, and construed accordingly. (2) The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect." *Elwell's Evans*, Ag. 204; *Reese v. Medlock*, 27 Tex. 120 [84 Am. Dec. 611]."

[1] The terms of this power must be construed in the light of the context as well as of the words creating the power. Omitting the qualifying words, the clause reads that the attorney is appointed "for me and in my name * * * and for my use and benefit to sell and convey * * * or (if unable to sell) * * * to mortgage said property * * * for the purpose of raising money thereon." This clearly means he is to sell or mortgage the lot in order to raise money for Georgia Riley. When he has raised the money, he has exhausted the power and his authority to sell is terminated. So far as appears here, the whole purpose of the power has been accomplished in the raising of the money on the mortgage. It is said in *Clark & Skyles on Agency*, p. 514: "All powers conferred upon an agent by a formal instrument are to receive a strict interpretation, and the authority is never extended by intendment or construction beyond that which is given in terms or is necessary for carrying the authority into effect, and the authority must be strictly construed. This rule has been well stated, as follows: 'A formal instrument delegating power is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to

carry into effect that which is expressly given.' * * * The guiding principle in the construction of powers is to be derived from a consideration of the result, which the agent or depository of power is appointed to accomplish. When a court is called upon to construe a written authority, its first duty is to ascertain what intention or purpose the principal had in view when he gave the authority to the agent; and, when that has been ascertained, the power is to be construed so as to effect that purpose, if possible, instead of defeating it." General words do not confer general power, but are limited to the purpose for which the authority is given, and are restricted to what is necessary for the proper performance of the particular act authorized. Also, this is a question for the court. It is said by the same authority (page 516): "When authority has been conferred upon an agent by a formal written instrument, it becomes a question of law for the court to decide what powers have thus been given to the agent; * * * and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are in such cases questions of law, and are properly decided by the judge." See, also, *Bowstead on Agency*, p. 68.

[2] The power of attorney does not limit the time within which the act may be done. Therefore it must be done within a reasonable time, where the act is but a single act or an alternative one. It is said in *Clark & Skyles on Agency*, p. 542: "If nothing is said in the power as to the time of sale, then the agent may, in good faith, exercise his discretion in selling at such time as he honestly believes will best subserve the interests of his principal. He cannot exercise such discretion, however, to sell at a very remote date from the time of his employment. * * *" In this case 10 years after the date of the creation of the agency is certainly too remote for its exercise when the power indicates that its purpose is to raise money speedily, and the attorney in fact had no authority to execute the deed offered in evidence in the name of his principals; and, as in ejectment cases the plaintiff must recover on the strength of his own title, verdict was properly directed for the defendant.

[3] Plaintiff, as an afterthought, suggests in this court for the first time that the form of verdict, being for defendant only, does not conform to section 329, L. O. L., and that it was reversible error; but this is not assigned as error, nor is it reversible on appeal by the plaintiff. Subdivision 2 of section 329, L. O. L., taken in connection with section 337, L. O. L., relates to the effect of the verdict and judgment thereon. Plaintiff is not prejudiced thereby. The judgment in this case cannot have the conclusive effect provided by these sections, but it is not an error from which plaintiff can appeal. See

Hoover v. King, 43 Or. 281, 72 Pac. 880, 65 L. R. A. 790, 99 Am. St. Rep. 754; *Sommer v. Compton*, 52 Or. 173, 96 Pac. 124, 1065. The judgment is affirmed.

RAHL v. MARLOW STATE BANK et al.
(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 113*) — APPEALABLE ORDER—SETTING ASIDE DEFAULT.

An order setting aside a judgment by default, and permitting the defendant to answer and make defense, is not appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

Commissioner's Opinion, Division No. 2. Error from Stephens County Court; W. H. Admire, Judge.

Action by John Rahl against the Marlow State Bank and O. R. McKinney, cashier. From an order vacating a default judgment against the defendants, plaintiff brings error. Dismissed.

E. E. Morris and Wilkinson & Morris, all of Duncan, for plaintiff in error. Burns & Sitton, of Duncan, for defendants in error.

ROSSER, C. John Rahl brought an action against the Marlow State Bank and others, and obtained judgment by default against the Marlow State Bank on the 4th of April, 1910. On the 13th of May, 1910, this proceeding was begun for the purpose of having the judgment set aside. On the 12th of July the judgment was set aside, and this appeal is from the judgment or order setting aside the former judgment in the case of Rahl against the Marlow State Bank.

This is not an appealable order. The question has been before this court a number of times, and the question is well settled. *Low & Byars v. Sprouls*, 24 Okl. 299, 103 Pac. 1038; *Moody v. Freeman & Williams*, 24 Okl. 701, 104 Pac. 30; *Maddle v. Beavers*, 24 Okl. 703, 104 Pac. 909; *Ætna Building & Loan Ass'n v. Williams*, 26 Okl. 191, 108 Pac. 1100; *Moody v. Freeman-Sipes Co.*, 29 Okl. 690, 118 Pac. 134. The order setting aside the former judgment merely reopened the case for the purpose of permitting the defendant to make its defense.

The appeal should therefore be dismissed.

PER CURIAM. Adopted in whole.

MISSOURI, K. & T. RY. CO. v. PETERS.
(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 228*)—LIVE STOCK SHIPMENT — NEGLIGENCE—PRESUMPTIONS.

In an action against a terminal carrier for damage to a shipment over connecting lines, the

rule "that proof that the shipment was in good condition when delivered to the initial carrier and in damaged condition when received from the terminal carrier, raises a presumption of negligence against such terminal carrier which places the burden on it to prove that such damage did not occur on its lines," does not apply in shipments of live stock where the shipper or his agent accompanies the shipment under a contract to look after and care for the stock. In such cases the shipper is in as good position as the carrier to know where the damage occurred, and the law places the burden upon him to show where it occurred.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

2. CARRIERS (§ 177*)—NEGLIGENCE OF INITIAL CARRIER—LIABILITY OF TERMINAL CARRIER.

In the absence of any joint traffic arrangement, whereby connecting carriers act in partnership or as the agent of one another in the handling of freight, the terminal carrier is not liable for damages sustained on the lines of the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

Commissioners' Opinion, Division No. 2. Error from Tulsa County Court; N. J. Gubser, Judge.

Action by Carrie M. Peters against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. J. S. Severson, of Broken Arrow, for defendant in error.

HARRISON, C. This was an action by Carrie M. Peters against the Missouri, Kansas & Texas Railway Company for damages done to a shipment of live stock and some vegetables and canned fruit shipped in the same car. The plaintiff sued for \$187 and obtained judgment for \$130. The items of damage were: Loss of one horse, \$125; 25 bushels of potatoes, valued at \$25; 25 cans of fruit, \$5; one overcoat, \$25; one gun, \$4. As to what items were covered by the other \$3 to make out \$187 does not appear from the bill of particulars. Plaintiff sued on a contract by which the defendant agreed to transport the goods in question from Kansas City, Mo., to Broken Arrow, Okl., at the rate of 41 cents per hundred, and alleged that defendant undertook said shipment as the connecting carrier of the initial carrier, Chicago & Northwestern Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company; that the goods were in good condition when delivered to the initial carrier, but that one of the horses was dead, the canned fruit and vegetables frozen, and overcoat and gun missing, when delivered to consignee at destination. The railway company appealed from the judgment upon 11 specifications of error which are discussed in the brief under four separate heads. It developed at the trial that the shipment in question started at McHenry, Ill., billed to

Broken Arrow, Okl., and was handled by three different carriers, namely, Chicago & Northwestern Railway Company, the initial carrier, from McHenry, Ill., to Council Bluffs, Iowa, and from Council Bluffs over the Burlington route to Kansas City. From Kansas City to Broken Arrow, Okl., by the Missouri, Kansas & Texas Railway Company. The initial contract was made at McHenry, Ill., with the Chicago & Northwestern, in which it was agreed that the goods would be delivered to the shipper at Broken Arrow, Okl. The shipment was received on the Burlington route at Council Bluffs and from there carried to Kansas City under the initial contract, but at Kansas City the Missouri, Kansas & Texas Railway Company made a new contract for the shipment over its lines from Kansas City to Broken Arrow, and the suit was brought on this last contract.

The evidence fails to show any violation of this contract on the part of the defendant carrier, and fails to show any negligence further than a possible concurring negligence as to some of the goods, on the part of defendant, from which the alleged damages resulted. The cause was tried and the verdict evidently rendered upon the theory that the goods being delivered in good order to the initial carrier, and being in a damaged condition when delivered to the consignee by the terminal carrier, raised a presumption that the damage was sustained on the lines of the terminal carrier, and placed the burden upon such carrier to overcome such presumption. The plaintiff contended that such was the rule of law, and the court, at plaintiff's request, instructed the jury to the effect that "the burden of proof is on such connecting carrier to rebut such prima facie presumption of delivery in good order or to show that the damages or loss occurred before it reached its line." As a general proposition of law, this instruction is correct in shipments over connecting lines where it is shown that there exists a partnership or joint undertaking on the part of such connecting lines to deliver freight received by either line; but in the case at bar there is nothing in the record which tends to show any agreement or partnership or contract to act jointly upon the part of defendant company with the initial carrier. In fact, the record shows conclusively that no such relation existed, and that, before the defendant company took charge of the shipment, it required the plaintiff to sign a new contract of shipment limiting its liability to its own lines.

[1] And, aside from this, there is a clear and well-defined exception to the general rule, as to which the authorities are practically in harmony, viz., that in a shipment of live stock accompanied by the shipper or by an agent, as was true in the case at bar, the presumption under the general rule is re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

moved, and the burden is upon the shipper to show which line was guilty of negligence. This rule is based upon the very sound theory that the shipper being with the stock, and having under definite contract assumed complete control over the management, watering and feeding of the stock and caring for them, is supposed to know where the negligence occurred, and the law places the burden upon him to show where it occurred. The rule is announced in 3 Hutchinson on Carriers, § 1357, as follows: "But where, as is frequently the case, the shipper accompanies his live stock for the purpose of caring for it during the transportation, the same rule as to the burden of proof is held not to apply. The stock is not in the carrier's exclusive control or custody, nor are his means of information superior to those of the shipper, who is in a position to know as well as the carrier of the causes which produced the injury. In order, therefore, that the shipper who accompanies his live stock may recover for injuries received by it during the transportation, he must not only show that he himself was free from negligence, but that the injuries were caused by a breach of duty on the part of the carrier." This rule is recognized and followed in *Bartelt v. Ore. R. & N. Co.* (1910) 57 Wash. 16, 106 Pac. 487, 135 Am. St. Rep. 959; *S. L. & S. F. Ry. Co. v. Wells* (1907) 81 Ark. 469, 99 S. W. 534; *Atl. Coast Line R. Co. v. Dexter* (1905) 50 Fla. 180, 39 South. 634, 111 Am. St. Rep. 116; *Wilke v. Illinois Central R. Co.* (1911) 153 Iowa, 695, 133 N. W. 746; by the same court in *Mosteller v. Iowa Central Ry. Co.* (1911) 153 Iowa, 390, 133 N. W. 749; *Illinois Central R. Co. v. Word* (1912) 149 Ky. 229, 147 S. W. 949; *Texas & Pac. Ry. Co. v. Scoggin & Brown* (1905) 40 Tex. Civ. App. 526, 90 S. W. 521. See, also, authorities cited in notes to *Atl. C. L. R. Co. v. Riverside Mills*, 31 L. R. A. (N. S.) 111, 112.

Aside from the rule in the foregoing authorities, the record in the case at bar shows conclusively that the horse in question was not in good condition, but had been severely injured before the shipment was received by defendant. When plaintiff made out a claim for the damages sustained to the shipment in question, her husband and appointed agent made affidavit, as to where and how the shipment was damaged, which in part is as follows: "At a point about 25 miles before reaching Council Bluffs, one horse got down, and affiant was unable to get him up. Affiant further states that the conductor of said train was duly notified and requested to stop said train, and allow him to get said horse up, all of which he refused to do. As a result of being down and trampled upon said horse died in transit, and was removed from said car at Muskogee. Affiant further states that while at Council Bluffs said car containing said goods was in a collision with another car and as a result the door of car No. 10602 was knocked off, and said door

was not replaced for a period of about two hours, thus exposing the contents of the car to the weather and allowing the same to freeze, resulting in a total loss of 25 bushels of potatoes of the value of \$25 and 25 cans of fruit of the value of \$5." This witness testified at the trial as follows: "Q. What did you do, didn't you swing him to the top of the car? A. Not until I reached Council Bluffs. Q. He couldn't stand up by himself, could he? A. No. Q. And he was in that condition when delivered to the M., K. & T. R. R.? A. Yes, sir. Q. And he died before he got to Muskogee? A. Died at Muskogee in the yards. Q. From injuries received on the Chicago Northwestern R. R.? A. Yes, sir." The testimony further shows that the weather was very cold during the route; that the car door was bursted open at Council Bluffs, and the contents of the car exposed to the weather for about two hours before the door was nailed up. As to what was done in reference to closing the car door, the same witness testified: "Q. Now, the trainman asked you if it would be satisfactory to nail the door on with the cleats the way he did? A. Yes, sir. Q. And you said it would be in order not to be delayed? A. Yes, for I didn't want to be delayed in the cold. Q. And you accepted the car the way they fixed it in order to go on? A. Yes, sir."

Under this undisputed testimony and under the provisions of the shipping contract between plaintiff and defendant which constituted the plaintiff's husband as her agent to accompany the shipment, giving him complete control and management of same, and under his own testimony that he had no complaint to make as to the treatment he received from the employes of the defendant company, it was error both under the law and the facts in this case for the court to instruct the jury that proof of the goods being delivered to the initial carrier in good condition raised the presumption which placed the burden upon the defendant to show that the damage did not occur on its lines. This is especially true of the damage done to the horse. As to just where the fruit and potatoes were frozen the evidence is not conclusive, nor is it conclusive as to whether they were damaged by concurring acts of negligence on the part of defendant. There might be possible grounds for conflicting inferences in this regard such as to justify the submission of such facts to the jury under proper instruction. But, as to the loss of the horse, the error is so clearly prejudicial that the judgment must be reversed. As to the value of the overcoat, the evidence being that it was not the property of plaintiff, the court very properly eliminated that from consideration.

[2] We are not justified in holding a terminal carrier liable for damages received on the lines of the initial carrier under the conditions involved in the case at bar; for the rule is well settled that in the absence of any

joint traffic arrangement, whereby connecting carriers act in partnership or as the agent of each other in the handling of freight, the terminal carrier is not liable for damages sustained on the lines of the initial carrier. And this rule is especially applicable where there is no pro rata sharing of freight charges made under the initial contract, and where the terminal carrier refuses to receive a shipment under the initial contract, but receives same under a new contract, whereby it makes its own rates and collects its own charges, and limits its liabilities to its own lines. See authorities cited in notes to *Atlantic C. L. R. Co. v. Riverside Mills*, 31 L. R. A. (N. S.) 94-98. See, also, *Carson v. Harris*, 4 G. Greene (Iowa) 516; *Anchor Line v. Dater*, 68 Ill. 369; also, *Roy v. Chesapeake & Ohio Ry. Co.*, 61 W. Va. 616, 57 S. E. 39, 31 L. R. A. (N. S.) 1; *Atl. C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; *Adams Express Co. v. Croninger*, decided by United States Supreme Court Jan. 6, 1913, and reported in 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —.

Under the facts in this case, the foregoing authorities, and the reasons herein given, the judgment is reversed and the cause remanded.

PER CURIAM. Adopted in whole.

BURCHAM v. EDWARDS et al.
(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

NEW TRIAL (§ 116*)—MOTION—TIME OF FILING.

The filing of a written motion for a new trial, containing the grounds therefor, with the clerk of the court in which a case has been tried, within three days after the verdict or decision was rendered, is a sufficient compliance with the statute as to the time within which an application for a new trial must be made without an actual presentation of such motion to the court within the three days.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238, 238½, 240, 241; Dec. Dig. § 116.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by Ulysses M. Burcham against W. F. Edwards and Nathaniel Peters. Judgment for plaintiff, and, from an order granting a new trial, plaintiff brings error. Affirmed.

Lex V. Deckard, of Okmulgee, and W. D. Bynum, of Indianapolis, Ind., for plaintiff in error. Z. I. J. Holt, of Broken Arrow, and Stuart, Cruce & Gilbert, of Oklahoma City, for defendants in error.

HARRISON, C. This action was brought by the plaintiff in error, as plaintiff below,

who obtained a judgment against defendants in error, as defendants below, October 24, 1910. At noon of October 27th, court adjourned for a few days, but not for the term. On the afternoon of October 27th, defendants filed motion for a new trial among the papers in the case with the clerk of the district court. The motion remained among the papers, but was never called up by the moving party, nor was the attention of opposing counsel nor the court called to it during the remainder of the term, but at a subsequent term, which was held by a different judge to the one who tried the case in February, 1911, the motion was called up and presented by defendant. Plaintiff filed motion to dismiss defendant's motion on the ground that the application for a new trial had not been made at the term and within three days after the judgment had been rendered. The court overruled plaintiff's motion to dismiss and sustained defendant's motion for a new trial. Both these assignments are involved in the question whether the mere filing of the motion for a new trial in the clerk's office, without calling the court's attention to such motion on that day or at any subsequent day during the term, was a sufficient compliance with section 5827, Comp. Laws 1909, which requires the application to be made at the term and within three days after judgment. Said section 5827 reads: "The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." Section 4198, Stat. 1893. Section 5828 reads: "The application must be by motion, upon written grounds, filed at the time of making the motion. The causes enumerated in subdivision two, three and seven of section 5825, must be sustained by affidavits, showing their truth, and may be controverted by affidavits." Section 4199, Stat. 1893.

Plaintiff in error contends that this statute requires more to be done at the term and within three days after judgment than the mere filing of a motion in the clerk's office. The gist of the contention is that the statute requires two things to be done: That it requires the filing of written grounds for the motion, either in open court or in the clerk's office, and then the presentation of such motion within the time and at the term, and that the mere filing of the written grounds in the clerk's office would not preserve the rights of the movant, unless the motion was formally made to the court or unless the court's attention was called to it in some way during the term and within the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time. This may have been, and we must concede in all probability was, the original intention of the lawmakers. A number of states have followed the view embodied in this contention, as, Montana, Indiana, New York, Kentucky. But this identical question was before the Court of Appeals of Kansas in the case of *Freelove v. Gould*, 3 Kan. App. 750, 45 Pac. 454, in which the court said: "The proposition, which is presented and argued with much skill and ability, is that it is not sufficient that the motion for a new trial be filed within three days after the verdict or decision complained of is rendered, but that the motion must have been actually presented to the court within that time. It is claimed that a written motion for a new trial is not required by the statute; that it may be a mere verbal application to the court, based upon written grounds on file at the time. So far as concerns this question, sections 308 and 309 (identical with sections 5827 and 5828, *supra*) of the Code provide that the application for a new trial must be made at the term the verdict or decision was rendered and within three days thereafter, upon written grounds filed at the time of making the motion. The contention is that the application must be made to the court; that the mere filing of a written application with the clerk, without its being actually called to the attention of the court, and thus presented to it within the three days, is not a compliance with the statute. The argument of counsel is plausible and not without force, and presents a question which, at an earlier period in the practice under the Code in this state, would challenge serious attention. It finds support in the following cases: *People v. Ah Sam*, 41 Cal. 650; *Buckner v. Conly*, 1 T. B. Mon. [Ky.] 3; *Ex parte Highland Ave. & Rld. Co.* [105 Ala. 221] 17 South. 182; *Wallace v. Lewis*, 9 Mont. 399 [24 Pac. 22]; *Emison v. Shepard*, 121 Ind. 184 [22 N. E. 883]. So far as we are informed, this question has never been raised or passed upon in this state. Occasion for it has been frequent, almost every volume of the reports containing cases wherein the Supreme Court has considered the manner and time of making a motion for a new trial. These sections of the Code have been considered and applied under almost every conceivable state of facts. It has been the uniform practice in this state, from the beginning, to recognize the filing of a written motion for a new trial, within three days, after a verdict or decision, as an application 'made' within the meaning of section 308, and as equivalent to the formal making and presentation of the motion to the court, which counsel for defendant in error claim to be essential. *Mitchell v. Milhoan*, 11 Kan. 617; *Nesbit v. Hines*, 17 Kan. 318; *Fowler v. Young*, 19 Kan. 150; *Clayton v. School District*, 20 Kan. 256; *Gruble v. Ryus*, 23

Kan. 195; *Pratt v. Kelley*, 24 Kan. 111; *Hover v. Tenney*, 27 Kan. 133; *Dyal v. City of Topeka*, 35 Kan. 62 [10 Pac. 161]; *Mercer v. Ringer*, 40 Kan. 189 [19 Pac. 670]; *Deford v. Orvis*, 52 Kan. 432 [34 Pac. 1044]; *Brewing Association v. Wolff*, 53 Kan. 323 [36 Pac. 711]. This construction of the statute has also been universally acquiesced in and acted upon by the courts and by the bar of the state, and has become a rule of practice as thoroughly established as if directed by the very letter of the law. The change of construction contended for would not only revolutionize the practice, but would inevitably result in the doing of grievous wrong to litigants who have acted in reliance upon the established rule."

It is true that the foregoing opinion was rendered after the adoption of our statute, and that we are not necessarily bound by the construction therein given to the statutes; yet, because the reasoning therein and the grounds upon which it is based are so identically in point with the facts in the case at bar and with the rule of practice existing in our state, we are persuaded to follow the rule therein stated. This identical question has never been before this court, at least so far as we have been able to find, but it has been the universal rule of practice in this jurisdiction, since the adoption of the Kansas Code, to treat the mere filing of the written grounds for a new trial at the term and within the time, as sufficient to preserve the movant's rights. For these reasons, and for the reasons stated in the opinion quoted from, the rule therein is followed.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

FRIEDMAN & CO. v. STATE

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. ACTION (§ 4*)—RIGHT OF ACTION—ILLEGAL TRANSACTIONS.

The doors of the court are closed to a litigant who founds his action on his own violation of the law.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 17-24; *Dec. Dig.* § 4.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The findings of the trial court on an issue of fact properly submitted to it will not be set aside by the Supreme Court, where the finding is supported by any substantial evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; *Dec. Dig.* § 1010.*]

Commissioners' Opinion, Division No. 2. Error from Pottawatomie County Court; Ross F. Lockridge, Judge.

Seizure by the state of Oklahoma of certain whisky, and Friedman & Co. petition to

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series & Rep'r Indexes* 131 P.—34

interplead. Petition denied, and from a judgment of confiscation Friedman & Co. bring error. Affirmed.

Lydick & Eggerman, of Shawnee, for plaintiff in error. C. P. Holt, of Shawnee, Hunter Johnson, of Holdenville, and Chas. W. Friend, of Shawnee, for the State.

BREWER, C. Forty-eight cases of whisky were seized by the sheriff of Pottawatomie county under a search and seizure warrant in the railroad freight house in the city of Shawnee. Friedman & Co. came into the case by interplea and claimed the whisky, and demanded a return thereof, on the ground that it was an undelivered interstate shipment, and that as such it was, at the time of seizure, not subject to the police power of the state. Upon a trial before the county judge the prayer of the interpleader was denied; the court finding from the agreed facts and other evidence that the shipments were made to a fictitious person; that under the arrangements and method of handling the shipments that a delivery into the warehouse of the carrier was a constructive delivery to the persons who were to actually handle and dispose of the whisky. Upon these findings of facts the court confiscated the whisky; from this judgment of confiscation Friedman & Co. appeal.

The record discloses that the 48 cases of whisky were shipped by appellants from Ft. Smith, Ark., in the names of J. Hall and Jno. Hall, 10 cases February 20, 20 cases February 22, and 20 cases February 24, 1911; that a case contains 3 gallons; that separate bills of lading were issued for each 2 cases. Thus when a shipment of 10 cases were made they would go under five bills of lading, etc. These five bills of lading were sent to a bank in Shawnee with a draft attached to cover the value of the entire 10 cases. Each of the bills of lading in a particular shipment would bear the same general shipment number, and accompanying would be inclosed an envelope addressed to shipper at Ft. Smith, with this general shipment number on the back of it, to be used in remitting the proceeds of the drafts.

It is admitted that 450 cases of whisky had been received in the name of John Hall at this depot within the period of 30 days next prior to the shipments in suit, and that no such person as John Hall had ever received personally a single case of the goods, but that a local transfer company uniformly presented the bill of lading and actually received the goods and hauled them away from the depot. As each bill of lading was presented, a statement purporting to be signed by John Hall was filed, stating that the liquor was solely for his and his family's use. These statements to the agent covered an average of 10 to 15 cases of whisky a day. The agent admitted that for a month or two he kept on hand in the freight warehouse an

average of 90 cases of whisky at all times to be hauled away as the bills of lading were presented by transfer company. A portion, but not all of these cases, of whisky were shipments from appellants. The shipments in suit had been in the depot from 13 to 17 days, but while there other shipments were being taken out and disposed of daily. The 450 cases of whisky handled by the transfer company within the 30 days prior to the seizure involved here "were all delivered in and about Shawnee to individuals." These deliveries of cases of whisky "were made * * * some of them in the early morning before daylight and some after daylight, and that some were made in the late evening before dark and some after dark."

The question here is: Were these liquors undelivered interstate shipments and protected by the federal laws as such; or were appellants, viewed from the circumstances of the case, the evidence, and inferences naturally flowing therefrom, themselves, through artifice and device, engaged in the unlawful sale of liquors in Shawnee?

[2] 1. The court found that John Hall was not a person, and that the consignments to him were to a fictitious consignee. The evidence warranted this finding. The sheriff and a deputy sheriff who had tried to learn of such a man and could find no trace of him testified that they knew of no such man. Likewise a newspaper man and others. The county judge of the county, who made the finding, lives there, and has lived there for years, ran, and been elected to office. It is inconceivable that a man could do so flourishing a liquor business as appellant claims John Hall was doing, and yet be unknown in a community. He was handling, if appellants' contentions are true, 450 cases of whisky a month; this is 1,350 gallons. It is more than a barrel a day. No such appellation as bootlegger could fit such a trader; he was a wholesaler. If he existed, he must have had numerous customers, some one could surely have been produced who had the doubtful honor of his acquaintance. The banker, who, if appellants' contention is true, received the cash on his drafts and delivered him numerous bills of lading every day, could have easily set the matter of his identity at rest. The transfer man who really received all the shipments and who the depot agent says introduced to him before the whisky enterprise was begun, a man he said was John Hall, could surely have cleared the matter up, but did not. Neither did anybody claiming to be identified with appellants say there was such a man. Had the learned and well-known attorney representing appellants stated to the court that he had positive knowledge of such a man as John Hall, his word without the formality of an oath would most likely have sufficed. Considering what was proved, and the significance of what could have been so easily proved, if true, and was not, the court

properly found there was no such man, and that appellants were shipping in a wholesale way these liquors to a fictitious name.

The appellants must have known how their business was being conducted; the remittances through the bank as their goods were taken out under waybills the bank surrendered afforded notice. Our common knowledge teaches us that these dealers would not ship such quantities of merchandise for so considerable a period of time to a fictitious name, and not know how they were being disposed of. The redemption of the waybills also gave notice that the warehouse of the railroad had been converted into and was being used as a place of storage for the liquors to suit the convenience of the trade. The only reasonable inference from all this is that appellants were either shipping these goods to the transfer company and marking them with a fictitious name for its protection, or they were shipping them there for their own delivery to Shawnee as a place of destination, until orders solicited by their agents could be filled with dispatch by the delivery of a bill of lading which could entitle the customer to a delivery of the goods. I say one of these explanations is to be legitimately inferred from the facts shown and the circumstances and situation presented. In either event the appellants were violating the law. If they were knowingly shipping in a fictitious name to shield the real consignee, they violated the laws of the United States. Section 240, Federal Criminal Code 1910. Act March 4, 1909, c. 321, 35 Stat. 1137 (U. S. Comp. St. Supp. 1911, p. 1662).

[1] If they were shipping for their own delivery, they were violating the state law against the sale of liquors, and in either event their cause of action (interplea) is founded upon and grows out of their own unlawful acts, and under well-settled rules the doors of the court are, as they ought to be, closed against them. *Haley & Co. v. State*, 125 Pac. 736; *Blunk v. Waugh*, 32 Okl. 616, 122 Pac. 717, 39 L. R. A. (N. S.) 1093, and cases cited. We are well aware of the holdings of this court relative to interstate shipments and the necessity for a delivery of the goods to customer (*State v. 18 Casks of Beer*, 24 Okl. 786, 104 Pac. 1093, 25 L. R. A. [N. S.] 492; *St. L. & S. F. Ry. Co. v. State*, 26 Okl. 300, 109 Pac. 230; *G., C. & S. F. Ry. Co. v. State ex rel. Caldwell*, 28 Okl. 754, 116 Pac. 176, 35 L. R. A. [N. S.] 456, following the Supreme Court of the United States in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, 1096; *Heymann v. So. Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130; *Adams Express Co. v. Kentucky*, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987, and other cases); but the case at bar is rested on the proposition that the evidence and natural inferences to

be drawn from it, and the surrounding circumstances, justify the conclusion that the appellants were through devices and artifice violating the laws of the state by selling liquors in the city of Shawnee, and of the United States by shipping liquors from out the state into it to a fictitious consignee.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

FOSTER et al. v. HOFF et al.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 131*) — CONTRACT FOR SALE OF LAND—MODIFICATION.

Where the purchaser owes the seller money as the purchase price of land under a written contract of sale theretofore made, a verbal direction from the seller to the purchaser to pay a part of the purchase price later to become due to third persons in discharge of obligations of the seller is an original undertaking, and does not add to or contradict the contract formerly entered into for the sale of lands, required by the statute to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

2. JUDGMENT (§ 204*) — DECREE — EQUITY — SCOPE OF RELIEF.

A court of equity, looking beyond the mere form of things to their substance, has power to decree such relief to the parties as appears just and right, and as best calculated to protect their rights under the situation presented by the record.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 376; Dec. Dig. § 204.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by John E. Harrison, Administrator, against J. G. Hoff and others, in which John W. Foster and others intervene. From the judgment, Foster and others bring error. Modified and affirmed.

Merwine & Newhouse, of Okmulgee, for plaintiffs in error. Owen & Stone, of Muskogee, for defendants in error.

BREWER, C. John Brown, a Creek Freedman, was allotted as surplus the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 13, township 13 north, range 13 east. The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section was allotted to him as homestead. Beginning in the year 1904, the allottee made various deeds of conveyance to all or parts of his allotment to various persons; viz., Bradley Realty Bank & Trust Company, Scott Yeatman, Continental Land Company, H. L. Braves, who later conveyed to Elmer E. Lowe, H. A. Leekley, and P. E. Heckman. These conveyances all appear to have been made prior to May 1, 1907, on which date the allottee executed and had recorded in the proper recording

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

district a disaffirmance of all deeds and conveyances executed prior thereto, on the claim of minority at the time of execution. This paper asserted that the allottee became of full age on the date of its filing, May 1, 1907. On May 2, 1907, John Brown conveyed, for an expressed consideration of \$1,500, the surplus land to Whitlow, Whitfield, Foster, and Taylor; Whitlow later, in May, having conveyed to Whitfield. On July 27, 1907, Whitfield, Foster, and Taylor conveyed by warranty deed to J. G. Hoff the said surplus allotment. Contemporaneous with this deed, these parties and Hoff entered into a written contract, the terms of which will be referred to later. The matters involved in this appeal revolve around this last-mentioned deed and the contemporaneous contract executed between these parties. In January, 1908, Brown conveyed the homestead to Hoff, who later quitclaimed it back. In January, 1908, Brown conveyed the surplus allotment to Hoff. In August, 1908, Brown conveyed his homestead to J. L. Peacock. Brown, the allottee, died about October 15, 1908. After the death of the allottee, his father, Sampson Brown, and his mother, Jane Brown, quitclaimed all the allotment to Hoff. On April 12, 1909, Sampson Brown deeded all the land to Morris Mannuel, who on August 6, 1909, mortgaged it to John B. Meserve.

This suit was brought by John E. Harrison, administrator of John Brown's estate, to have all the parties holding deeds to bring same into court for examination to determine who of the deed holders, if any, has title to the lands, and what sum of money may be due the estate of John Brown, and by whom due, and for cancellation of all invalid deeds, as clouds on the title, etc. Foster and Taylor, who had acquired the interest of Whitfield, intervened in the suit of the administrator and set up their claims of title through the deed of May 2, 1907, and their sale to Hoff, and asked that title be quieted and for a lien and foreclosure against Hoff for a balance of purchase price alleged to be due them.

Defendant Hoff filed answer to the plea of intervention and cross-petition of Foster and Taylor, admitting their deeds to him, but denying that they conveyed title, and then set up the contract executed contemporaneously with the deeds, and that under said contract interveners had bound themselves to convey a perfect title in fee simple, subject to the opinion of defendant's attorney. That his attorney had refused to pass the title tendered defendant, and had notified interveners that the various deeds and conveyances executed by the allottee were clouds on the title and would have to be removed by purchase or litigation. That interveners had acted on the opinion of such attorney and had authorized and directed defendant to buy the claims of the various deed holders, where it could be done for a reasonable

price, and to charge such sums expended in clearing the title against the balance of the purchase price due from defendant to interveners. Defendant claimed that he had so paid out sufficient to liquidate the entire balance of purchase price.

J. L. Peacock, being concerned only with the homestead allotment, admitted an indebtedness of \$405 and interest on the purchase price of the land, and paid it into court for the benefit of the party found entitled to it. The administrator claimed it, and likewise defendant Hoff claimed it on the ground that, through the various deeds, he should receive the sum under the doctrine of subrogation. On July 8, 1910, the court rendered judgment quieting the title of Peacock in and to the homestead and canceling all deeds appearing as clouds against his title. No exceptions were noted. The disposition of the funds he had paid into court was postponed until final trial. On July 7, 1910, the cause was by agreement and consent ordered referred to a referee to try the issues of law and fact, and to preserve and return the evidence taken and report his conclusions of both law and fact.

The referee filed his finding of fact, from which we summarize: (1) That John Brown became of full age May 1, 1907, and died about October 15, 1908. That he received the lands as stated in the pleadings as an allotment. (2) That John Brown had executed the various deeds mentioned in the pleadings and had on May 1, 1907, executed and filed a disaffirmance of all of his prior deeds. That on May 2, 1907, he conveyed his surplus allotment to interveners for a consideration of \$1,500, of which interveners actually paid \$800. That interveners conveyed the surplus allotment to defendant Hoff for consideration of \$3,600 July 2, 1907. (3) That, at the time of the execution of the deeds to Hoff by interveners, the parties executed a written contract relating to the sale, as set out in the record, and that the fact that John Brown had made these various prior deeds to other parties was well known, and that the question as to the precise time at which Brown attained his majority was in doubt. That, in consideration of such facts and knowledge, it was agreed between interveners and defendant that these conveyances should be removed as clouds on the title before the transaction was fully consummated, and defendant Hoff was given authority to buy out the holders of these outstanding deeds and to procure quitclaims or releases from them for such reasonable sums as might be necessary to procure same, but that such authority did not extend to any sums paid the allottee or to his heirs after his death. That, pursuant to such authority, defendant paid out various sums amounting to \$1,405. (4) That Hoff furnished the consideration to Brown for a deed dated January 6, 1908, which is included in the \$1,405. (5) That de-

fendant Hoff had paid to Brown at various times \$2,056, which he considered as payments on both the surplus and homestead, but that interveners had not authorized those payments on their account. (The referee allowed Hoff a credit, however, in the sum of \$700 on account of these payments; the same being the balance due Brown by interveners.) (6) "Your referee further finds that at no time since the execution of the deeds and contract mentioned as having been executed by and between Whitfield, Foster, and Taylor, upon the one hand, and the defendant Hoff on the other, on the 27th day of July, 1907, have either of the parties to that transaction, in any manner, expressed a desire to rescind the same, but all parties have by their acts and conduct indicated a desire to complete and carry out the transaction as a sale of the land." (7) That, after the sale by interveners to Hoff, possession of part of the land was not given for some time, and on this account Hoff was allowed a credit of \$120. These credits, \$1,405, \$700, and \$120, as the referee found left owing by Hoff \$1,375 of the original purchase price of \$3,600.

The referee concluded as a matter of law: (1) That the deeds from the allottee dated May 2, 1907, conveyed to interveners full title to the surplus allotment. (2) That the deeds from interveners to defendant Hoff conveyed to Hoff fee-simple title. (3) That, as interveners and defendant had by their acts and conduct indicated a desire and the intention to treat the transaction as an absolute sale of the property, defendant is entitled to credit in the accounting for the \$700 paid the allottee, and which was due him by interveners, and for the other sums paid interveners and paid others by their authority. (4) That the allottee, Johnnie Brown, having during lifetime been fully paid the consideration agreed to be paid by Foster and Taylor and their associates for said surplus allotment, the plaintiff (administrator) is not entitled to recover herein anything on that account. (5) That it would be inequitable to charge defendant Hoff interest prior to final decree. (6) That Hoff was not entitled to the money paid into court by Peacock on account of the homestead allotment, and that the same should be paid over to plaintiff as administrator of the deceased allottee.

On the facts found and conclusions of law reported, the referee recommended: (1) Decree for plaintiff administrator for the \$452.50 proceeds of the homestead, and that the clerk of court be directed to pay same over to him. (2) That judgment be rendered in favor of interveners against defendant Hoff in the sum of \$1,375, and that same be declared a lien on the surplus allotment, and providing for sale, etc.

The interveners, plaintiff in error here, moved to confirm the report of the referee

and for judgment according to the recommendations made in his report. The defendant Hoff objected to the rendering of a decree against him for the balance due on the purchase price of the lands mainly for the reason, as urged there and here, that interveners were not entitled to a present judgment, because defendant H. L. Graves and his grantee, Elmer E. Lowe, claimants under allottee's deed of April 9, 1907, had been brought into the case, and their deeds adjudged invalid on summons by publication; no personal service of summons being made on them. And that therefore they had the right under the law to appear, and by proper showing made (section 5617, Comp. L. 1909) have the case opened, and their rights under their deeds determined, within three years after the final decree. That therefore their deeds were still a menace and cast serious doubts on defendant's title, and that under the agreements made between the parties, as found by the master, interveners were not entitled to this balance of purchase price, at least until the running of the statute. The court took this view of this matter and dismissed the petition of interveners, from which order they appeal.

We have examined the evidence, which is voluminous and conflicting, and believe the finding of facts, made by the referee, to be supported by ample evidence, and that same should stand with the force and effect that special findings of fact by a jury should have. The recommendation of the referee for a present judgment in favor of interveners against the defendant Hoff, and for a lien and foreclosure thereof, we do not believe to have been sound under the facts found. It will be observed that these parties by their agreements and conduct, as found by the referee, have clothed this transaction with a different aspect than is usually presented where a vendor sues a vendee in possession for purchase money, and outstanding clouds or defects in the title are sought to be set up. The referee found: " * * * That at no time * * * have either of the parties to that transaction, in any manner, expressed a desire to rescind the same, but all parties have by their acts and conduct indicated a desire to complete and carry out the transaction as a sale of the land." And referring to the various outstanding deeds, including, of course, the conveyance to H. L. Graves and the one by him to Elmer E. Lowe, the referee further found: "It was agreed between the parties that said conveyances should be removed as clouds upon the title before the transaction was fully consummated." Under this finding of fact, the transaction was, under the agreement, not fully consummated, so as to entitle the interveners to the balance of the purchase price by execution in foreclosure on the land, if these deeds under the decree in the case were still clouds upon the title, rendering it

unmarketable, subject to doubt and to the danger of being defeated. *Williams v. Doolittle* (Iowa) 88 N. W. 350.

The deed from Brown to Graves was only 23 days prior to the deed held valid in this case; the determining fact was the date the allottee became of age. Should the grantee of Graves open up the decree in this case adjudging this deed invalid and convince the court that the allottee was in fact of full age on April 8, 1907, the effect would be to validate the Graves title and to destroy defendant's title delivered through interveners.

[1] Appellants, although they appeared at the time to be satisfied with the amount found due them in the accounting by the referee, now complain that error was committed in allowing proof of the verbal agreement and direction of interveners that Hoff buy releases from these deed holders and charge same against the purchase price on the ground that it varied the terms of the contract required to be in writing under the statute of frauds. We do not think this contention sound under the facts presented here. Under the contracts, interveners were under obligation to remove these clouds; they could employ any one to do this; Hoff desired that it be done; interveners must see that it be done before they would be entitled to payment of the purchase price. It was an original undertaking, merely a direction by the creditor to the debtor to pay third persons money in discharge of the creditor's obligations. This did not vary, add to, or contradict the written contract. 20 Cyc. 232, and cases cited; Cent. Dig. vol. 23, Stat. of Frauds, 29; Wood on Stat. of Frauds, p. 407, § 222, and cases cited; Smith on the Law of Frauds, 318. The facts of *Boncamp v. Starbuck*, 25 Okl. 483, 106 Pac. 839, are not similar and that case is not in point. The evidence was competent.

This brings us to a peculiar situation. The referee made a correct, equitable finding of the facts, on competent evidence, and erred only in recommending a present judgment and lien, because, under the peculiar situation created by the agreement and conduct of the parties, it would neither be lawful nor equitable to make the defendant pay the balance of purchase price until the menace of the Graves deed had been removed. The action of the court was correct in refusing to follow this recommendation for the same reason. Under this somewhat awkward situation, it is urged with force that we ought to simply affirm this case, because the interveners were not, at the time of trial, entitled to a present judgment of lien and foreclosure; this in our judgment should not be done in the present situation. Should this course be followed, and then, with the lapse of a short period of time, the title become perfect by the failure of the parties constructively summoned to come into the case and overturn

it, these interveners would then have to start over again and try out again the involved questions of fact as to the accounting, and be embarrassed with the question of just how far the decision of this court had concluded them. Such a result would not be to the interest of any of the parties. The title to the land ought to be set at rest and the parties allowed to have whatever they are entitled to as speedily as possible.

[2] And equity, looking beyond the mere form of things to their substance, has power to decree such relief to the parties as appears just and right and as best calculated to protect their rights under the situation presented. *Varner v. Rice*, 44 Ark. 251; *Texas v. Hardenberg*, 10 Wall. (U. S.) 89, 19 L. Ed. 839.

The judgment in this case was rendered December 31, 1910; unless the same is opened up by the holders of the Graves claim of title in a few months, it will cease to be longer any menace to or cloud on the title of Hoff; and, in such event, he should, at the expiration of such time, pay interveners the amount he owes them as found by the referee. And in such event, having had the possession of the land with its revenues, lawful interest should be added to the amount found due from the date of the decree in the trial court. Should the case be opened up and the Graves title prevail, Hoff could not be made to pay interveners anything. Or, in case it was opened up and the Graves title again defeated, it might be that Hoff would be entitled to credit on the amount due to interveners for such expenditures in defending the title as the law would permit to be charged against them.

Therefore, this being purely an equitable proceeding, we feel that, in the interest of all the parties, the case should be affirmed, save as to the action of the court in dismissing interveners' petition; that, as to this, his action be set aside; that the cause be remanded to stand open as to interveners and Hoff; and that, as to them, at the proper time final decree be entered in accordance with the views above stated.

This results in affirming the judgment as modified, with directions.

PER CURIAM. Adopted in whole.

ROESER v. PEASE.

(Supreme Court of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

A motion for new trial on the ground of newly discovered evidence should be sustained, when it appears that the evidence, if produced, would probably produce a different result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. NEW TRIAL (§ 99*)—NEWLY DISCOVERED EVIDENCE.

Where the newly discovered evidence is material and would probably produce a different result, and the losing party has not failed to produce it at the trial because of lack of diligence on his part, a motion for new trial on that ground should be sustained.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201-207; Dec. Dig. § 99.*]

3. WITNESSES (§ 219*)—COMPETENCY—PHYSICIANS.

The testimony of a physician or surgeon, concerning any communication made to him by his patient with reference to any physical disease, or any knowledge obtained by him from a physical examination of such patient, may be required, if the patient offers himself as a witness and testifies upon the same subject. Comp. Laws 1909, § 5842.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Minnie A. Pease, plaintiff below, defendant in error, against W. H. Roeser, defendant below, plaintiff in error, to recover damages for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Martin, Rice & Lyons, of Tulsa, for plaintiff in error. Randolph & Haver, of Tulsa, for defendant in error.

AMES, C. The plaintiff in this case was injured by being thrown from a carriage. The carriage was turned over by frightened horses running away. The horses took fright from defendant's automobile on one of the streets of Tulsa. The plaintiff and her child were sitting on the rear seat of the carriage, which was being driven south on Boulder avenue close to the intersection of Second street. When the carriage was about 150 feet from the corner, the automobile turned north on Boulder at a speed estimated by various witnesses of from 8 to 20 miles per hour. There was some evidence tending to show that the automobile went north about the center of the street, although the great majority of the witnesses testified that it was close to the east curb line. When the horses saw the automobile, they were frightened, but the driver did not lose control over them until the automobile had passed, when they ran away, throwing out the plaintiff and injuring her. The jury returned a verdict for the plaintiff for \$3,100.

Several errors are assigned and discussed, but it will only be necessary to examine the one growing out of the ruling of the court on a motion for new trial on the ground of newly discovered evidence.

The plaintiff alleged that she sustained numerous injuries by reason of the accident, and, among others, that she was injured internally, and that these internal injuries caused severe and acute pains in her back

and severe headaches and fevers, and that these injuries were permanent. Her testimony was to the effect that prior to the accident she was in good health, but that since the accident she had had poor health, had suffered a great deal with her back, and had had headaches, and was unable to work without the recurrence of these pains; that prior to this accident she had not had these backaches and headaches "to amount to anything at all." One of the witnesses offered by the plaintiff prior to the time she testified was Dr. Grosshart, who was one of the physicians called by the plaintiff immediately after the accident. His testimony in chief was confined to the condition in which he found the plaintiff at the time, and his cross-examination was likewise so confined. After the trial, the defendant's attorneys, while lunching with this doctor, were informed by him that some six or seven or eight months prior to the accident he had examined the plaintiff and found that at that time her uterus was enlarged and that its supports were flabby; that she complained of pains in her back and head; and that the condition in which he found her was one that would naturally produce headaches and pains in her back. The defendant thereupon filed a motion for new trial upon the ground of this newly discovered evidence, and upon this motion a hearing was had, at which it developed that Dr. Grosshart was bitterly hostile to the defendant; that he would not have disclosed these facts to the defendant's attorneys but for the reason that he thought the case was finally disposed of; that he yielded the information at the hearing reluctantly; that the facts which he had disclosed to the defendant's attorneys were substantially as testified to by him. The motion for new trial was overruled.

It seems apparent to us that this testimony was material. The only evidence on the subject introduced at the trial was the testimony of the plaintiff and her mother to the effect that prior to the accident she had not suffered with these backaches and headaches, while this testimony disclosed that she was afflicted with a physical disturbance which had caused similar pains, and which was of such a nature as to continue to cause them. If this testimony was true, if the plaintiff had, prior to the accident, had these same afflictions, if the accident was not the cause of all of them, and if the jury assessed damages as for a permanent injury caused by the accident, when in fact these injuries were not so caused, it is manifest that an injustice was committed. The nature of the testimony, the nature of the injuries alleged to be permanent, as well as the amount of the award, all demonstrate that the jury believed, as they had a right to believe, that there were permanent injuries caused by the accident. This new evidence, if believed by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury, would necessarily produce a different verdict. It might not necessarily produce a verdict for the defendant, but it would, if true, necessarily produce a smaller verdict. We are not unmindful of the rule established in this jurisdiction that, before a new trial should be granted on the ground of newly discovered evidence, it should appear that the evidence, if produced, would probably produce a different result, and that in passing upon such a motion a certain amount of discretion is vested in the trial court. *Eisminger v. Beman*, 32 Okl. 818, 124 Pac. 289; *Lookabaugh v. Bowmaker*, 30 Okl. 242, 122 Pac. 200; *Hobbs v. Smith*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Huster v. Winn*, 8 Okl. 569, 53 Pac. 736.

But for the reasons which we have already stated, it seems clear to us that this evidence, if true, would probably produce a materially different result. It is contended, however, that the defendant cannot avail himself of this evidence, because he did not exercise reasonable diligence to discover it prior to the trial. There is no specific statement in the motion that the defendant and his attorneys did not know of this evidence at the trial; but, if this objection had been lodged against the motion, there would have been no necessity for introducing evidence to support it. The fact that there was a hearing, that the evidence was offered, that a trial was had, indicates very clearly that the motion was treated as stating sufficient facts and being sufficient in form. It can be safely said that it appears from the record, taken as a whole, that neither defendant nor his attorneys had ever learned of this evidence until after the verdict; that the only reason that they then learned of it was from a chance remark by Dr. Grosshart, which would not have been made but for the fact that he thought the case was finally disposed of; that, after learning that the evidence would be material, he was very reluctant to give it; that he refused to make an affidavit setting up the facts which he had stated to the defendant's attorneys; and that he only testified upon the motion for new trial upon the requirement of the court. The plaintiff herself at the trial had testified that she had not suffered from these aches and pains "to amount to anything at all," and Dr. Grosshart testified only to the facts which he had ascertained upon the visit immediately after the accident. While, of course, we recognize the rule that, before a new trial will be granted on the ground of newly discovered evidence, it must affirmatively appear that the failure to discover the evidence was not due to negligence or lack of diligence on the part of the party making the application, yet we think the defendant brings himself well within this rule. He would have no way of knowing that the plaintiff had an enlarged uterus, which produced headaches and back-

aches. Naturally he could not make inquiry of her to ascertain this fact. He did not know that Dr. Grosshart had treated her before, and there was no reasonable way by which he could ascertain that fact, and Dr. Grosshart naturally would not disclose, voluntarily, her physical condition to strangers, and particularly to this defendant, whom he disliked. The plaintiff herself, upon the trial, testified that she had not suffered from these aches and pains, and at that time the defendant had no reason to believe otherwise.

[1,2] A somewhat similar situation was presented in *St. L. & S. F. Ry. Co. v. Hurley*, 30 Okl. 333, 120 Pac. 568, where it was held that it was not lack of diligence for the defendant to make inquiry of the plaintiff's physical condition from doctors who had treated the plaintiff, and who were subpoenaed as witnesses for the plaintiff, and that it had a right to rely upon the plaintiff's testimony as being true, and that subsequent facts ascertained from the doctors, which would probably have produced a different result on the trial, might be made the basis of a motion for new trial. Other similar cases cited by this court in that opinion are *Atlanta Consolidated Street Ry. Co. v. Beauchamp*, 93 Ga. 6, 19 S. E. 24; *First Nat. Bank of Shenandoah v. W. St. L. & P. Ry. Co.*, 61 Iowa, 700, 17 N. W. 48; *Stackpole v. Perkins*, 85 Me. 298, 27 Atl. 160. See, also, *St. L. & S. F. Ry. Co. v. Gaston*, 67 Kan. 217, 72 Pac. 777; *Continental Ins. Co. v. Hillmer*, 42 Kan. 275, 287, 21 Pac. 1044.

[3] Finally, the plaintiff argues that the new testimony sought to be elicited from Dr. Grosshart is incompetent, because the information was secured by the doctor while on a professional visit to the plaintiff, and that therefore it is privileged.

Sec. 5842 of Comp. Laws 1909 provides as follows: "The following persons shall be incompetent to testify: * * * A physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: Provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section."

Counsel for the plaintiff and defendant do not disagree as to the law. Both sides concede that the doctor's testimony is protected by the plaintiff's privilege, unless she has waived it by offering herself as a witness on the same subject; and whether or not she had testified on the same subject is the point at issue between counsel. The subject, of course, is the condition of her health some six or seven or eight months prior to the accident, at which time Dr. Grosshart testifies as to her condition. Did she testify on this subject at the trial? The substance of

her testimony is to the effect that she was in good health just before the accident; that for a year previous to that time she, as a rule, was a healthy woman; that she never had a headache to amount to anything at all. From this testimony it appears that she did testify generally as to the condition of her health prior to the accident, and specifically that she was not accustomed to having headaches before that time. Some authorities are cited by the plaintiff tending to show that one does not waive the privilege by giving testimony as to his general health or physical condition. But in the case at bar the plaintiff not only testified as to her general health, but she testified specifically with reference to headaches. Here the exact point at issue was whether or not these headaches and backaches, from which she testified that she was suffering at the time of the trial, were permanent injuries caused by the accident. The effect of her testimony was to lead the jury to believe that she had not suffered from these same afflictions prior to the accident. If she can go upon the witness stand and testify that she had not suffered from these afflictions prior to the accident, and then prevent the only available impeaching testimony from being disclosed, by a claim of privilege, it would seem that a mockery is being made of justice, and we do not think our statute contemplates such a condition. The theory upon which the privilege is based is that a person is entitled to have his physical disabilities protected from public curiosity. If, however, he goes into a court of justice and bases an action upon the existence of a physical disability, and testifies himself as to its existence or nonexistence, he, of course, is not entitled longer to claim a privilege for his condition, and the statute does not contemplate protecting him in such case. An interesting discussion of the subject is contained in the fourth volume of Wigmore on Evidence, § 2380 et seq.

We think the case should be reversed and remanded.

PER CURIAM. Adopted in whole.

BOOKER TOBACCO CO. v. WALKER.†
(Supreme Court of Oklahoma. March 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1041*)—REVIEW—AMENDMENTS—DISCRETION OF COURT.

To permit amendments when not changing the cause of action rests within the sound discretion of the trial court and will not be disturbed on appeal unless it affirmatively appears that its exercise has operated to the prejudice of the rights of the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

2. APPEAL AND ERROR (§ 1001*)—DIRECTING VERDICT.

It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff that the court is authorized to direct a verdict for defendant; and, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error from Canadian County Court; H. L. Fogg, Judge.

Action by N. L. Walker against the Booker Tobacco Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Wallace, of El Reno, for plaintiff in error. W. A. Maurer and H. L. Fogg, both of El Reno, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, upon a contract of employment. The plaintiff alleged that, by the terms of the contract, he was employed by the defendant as a traveling salesman for the period of one year at a specified salary and expenses, and that without cause he was discharged before the expiration of that time. The defendant contended, that by the terms of the contract, the employment was to be from month to month, and that it had the right to discharge the plaintiff at will or whenever his services proved unsatisfactory. Upon trial to a jury, there was a verdict for the plaintiff upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The first assignment of error is predicated upon the action of the court in permitting the plaintiff to amend his petition. The contention is that, after the parties had rested, the plaintiff was permitted to amend his petition by interlineation to the effect that the oral contract of employment set up by the plaintiff had been afterwards confirmed in writing. This was to obviate some objection raised by counsel as to whether the contract was governed by section 1089, Comp. Laws 1909, which provides that: "An agreement, that, by its terms, is not to be performed within a year from the making thereof, is void." We do not think that this was reversible error. In *Harris v. Palmer*, 25 Okl. 770, 108 Pac. 385, it was held: "The order of proof is largely a matter of discretion with the trial court, and hence evidence which is properly a part of plaintiff's case in chief may be permitted to be introduced out of its regular order, or the court, in the exercise of a sound discretion, may reopen the case for the introduction of relevant and material evidence, after both parties have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied April 22, 1913.

rested; and, in the absence of a showing of surprise or prejudice or an abuse of discretion, such action will not be subject to reversal."

[1] In *Alcorn v. Denniss*, 25 Okl. 135, 105 Pac. 1012, it was held: "To permit amendments when not changing the cause of the actions rests within the sound discretion of the trial court, and will not be disturbed on appeal unless it affirmatively appears that its exercise has operated to the prejudice of the rights of the complaining party."

Moreover, in our judgment the contract between the parties was to be performed within one year, and therefore not affected by the statute of frauds. The plaintiff's testimony was to the effect that he was employed upon the 10th day of March, 1909, for a period of one year from that date, and that he was discharged on the 16th day of October of the same year without cause, and that, although he made diligent effort to secure other employment, he was unable to do so. That he had been paid in full up to the date of his discharge, except the sum of \$20, which was due him for his last month's expenses.

[2] The evidence being sufficient to support the verdict of the jury, it follows that the defendant was not entitled to a directed verdict. "It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff, if a verdict in his favor is returned, that the court is authorized to direct a verdict for defendant; and, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions." *Fidelity Mut. Life Ins. Co. v. Stegall et al.*, 27 Okl. 151, 111 Pac. 389.

Counsel for defendant in error admits that all of the judgment above the sum of \$600 is excessive and offers to file a remittitur for all in excess of that sum. As the evidence is sufficient to support a verdict for \$600, upon doing so, the judgment will be affirmed.

Finding no error in the record, the judgment of the court below, as thus modified, is affirmed. All the Justices concur, except WILLIAMS and DUNN, JJ., absent.

SMITH v. GARDNER.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

PLEADING (§ 48*)—PETITION—SUFFICIENCY.

Where a petition contains an allegation of facts which show that the plaintiff has been wronged, shows of what such wrongs consist, and the damage plaintiff has sustained thereby, and shows that defendant perpetrated such wrongs and is liable therefor, and asks judgment for the amount of damage sustained by

reason thereof, such petition states a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*]

Commissioner's Opinion, Division No. 2. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by L. P. Smith against George E. Gardner. From a judgment sustaining demurrer to plaintiff's petition, he brings error. Reversed and remanded.

Wiley Jones, of Oklahoma City, for plaintiff in error.

HARRISON, C. In the early part of 1910 L. P. Smith brought this action against George E. Gardner, alleging, in substance: That on the 1st of October, 1909, the defendant, George E. Gardner, then doing a general mercantile business in what is known as the Lion Store in Oklahoma City, traded to E. P. Lea a certain line of goods, wares, merchandise, and fixtures, to be selected from his general stock, invoicing at \$2,295.24, but that because Gardner refused to allow Lea to be present when such goods were selected from the general stock, and because Gardner selected same himself in Lea's absence, and refused to allow Lea to open the boxes and examine and inspect the goods, Lea declined to accept them, and left them in Gardner's possession. The controversy between Lea and Gardner continued until November 17, 1909, when upon condition that the plaintiff herein would take such goods, Lea and Gardner agreed to settle their controversy. That on said date plaintiff, through his agent, agreed to take such goods, provided they were as represented, and provided Gardner would take out a certain line of goods invoicing \$240, and substitute other goods to a like amount. That Gardner agreed to do this, and did pretend to do so, but that instead of substituting goods to the amount of \$240, according to invoice, he substituted only \$174.68 worth, leaving a shortage of \$65.32, for which plaintiff asked judgment. Further, that defendant agreed with plaintiff to substitute goods in first-class marketable condition, whereas, in fact, the substituted goods were shoddy, old, out of date, out of style, shopworn, dirty, stained, faded, rusty, tarnished, broken, rat eaten, remnants, unsalable, and not worth more than 25 per cent. of their invoice value, or \$43.67, instead of \$174.68. That plaintiff was thereby damaged in the sum of \$121.01, for which he asked judgment. Also, that in said trade plaintiff bought and paid for certain fixtures invoiced at \$451, which defendant failed and refused to ship to plaintiff, but held same out at the time the other goods were shipped. That plaintiff had never received such fixtures, wherefore he was damaged in the sum of \$451, and asked judgment for same.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

Plaintiff further alleged: That defendant also refused to allow him to open the boxes and examine and inspect the goods on the ground that it would take too much time to open them up and examine them, but that he would guarantee them to be in first-class shape and all right, and that he had so guaranteed them. Whereupon plaintiff accepted such goods and paid for same relying upon defendant's representations and guaranty that the goods were in first-class condition, and upon his complying with the agreement. That said stock of goods less the fixtures invoiced at \$451, and less the substituted goods, invoiced as aforesaid, amounted according to invoice to \$1,604.24. That such goods instead of being first-class salable goods as represented and guaranteed by defendant were shoddy, old, out of style, out of date, shopworn, dirty, faded, colored, stained, tarnished, rusty, broken, torn, wrinkled, mashed, bent, rat eaten, moth eaten, scraps, remnants, not in pairs, not matched, odd and large numbers, unmarketable and wholly unsalable, and not worth over 25 per cent. of their invoice value, or \$401.06, instead of \$1,604.24, according to invoice. Wherefore plaintiff claimed to have been damaged in the sum of \$1,203.18, for which he asked judgment. Wherefore, plaintiff alleged his damage to be, and asked judgment for, a sum aggregating \$1,850.57.

Defendant demurred to this petition on the ground that it failed to state a cause of action, and the court sustained the demurrer. Whereupon plaintiff, refusing to plead further, brings the case here, alleging error on the part of the court in sustaining the demurrer. We think this contention should be sustained. Section 5627, Comp. Laws 1909, reads: "The petition must contain: 1st. The name of the court, and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word 'petition.' 2nd. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. 3rd. A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and, if interest thereon be claimed, the time from which interest is to be computed shall also be stated. (S. 1893, § 3965.)" We think the petition states a cause of action under the statute and under the rules of code pleading. Where a petition states facts which show that the plaintiff has been wronged, shows of what such wrongs consist, and the amount of damage plaintiff has sustained thereby, and further shows that defendant perpetrated such wrongs and is liable to plaintiff therefor, and prays judgment for the amount of damage sustained by reason of such wrongs, it states a cause of action. The plaintiff herein has brought himself clearly within

this rule of pleading. He has shown an agreement between himself and defendant, whereby he would pay a certain price for certain goods of a certain class. That defendant refused to allow him to inspect such goods for himself but for some reason persistently kept them concealed from inspection, both from plaintiff and from Lea, but that he warranted such goods to be of the class agreed upon; that such goods were not of the class they were represented to be, but were comparatively worthless. The petition shows what they were invoiced at, and what they were worth, and shows the difference between their real worth and the invoice price, and alleges that plaintiff was damaged in the sum of the difference, and also shows that the fixtures invoiced at \$451 were held out by defendant and never delivered to plaintiff, and that he was damaged in that amount; and while the petition may be defective, in that it might be made more definite and certain as to just what extent plaintiff believed and relied upon the representations of defendant as to the class of goods and of his guaranty that they were first-class, yet, taken as a whole, it is sufficiently definite and certain as to enable the court to readily see what the damages were, who caused them and who sustained them, and that such damages resulted from defendant's failure to do what he promised to do, and from his misrepresentations as to the class of the goods. The petition, if true, is sufficient upon which to base a judgment against defendant for the amount therein claimed.

Hence, the judgment sustaining the demurrer must be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

ROBERTS v. CONVERSE et al.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 159*) — APPEAL BOND—RIGHT TO AMEND.

Where a bond given on appeal from justice court is correct in every respect, except that the statutory words "to prosecute without delay" are omitted from the condition, it is error to refuse leave to correct the error by filing a new bond conditioned as required by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.*]

Commissioners' Opinion, Division No. 2. Error from Roger Mills County Court; E. E. Tracey, Judge.

Action by C. C. Roberts, Jr., against R. V. Converse and another. From a judgment of the county court refusing plaintiff leave to file an appeal bond on appeal from justice court, and from dismissal of the appeal, plaintiff brings error. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

T. L. Turner, of Cheyenne, for plaintiff in error.

ROSSER, O. This appeal is from an order of the county court dismissing an appeal for the reason that the appeal bond was defective.

The facts of this case are almost identical with the facts in the case of Spaulding Mfg. Co. v. Roff, 125 Pac. 727. It was held that it was the duty of the court to permit an appeal bond to be corrected or amended, as provided in section 6394, Comp. L. 1909. The decision in that case is controlling in the present case, and has been followed in a number of other cases in this court. See O., R. I. & P. R. Co. v. Moore, 124 Pac. 989; Spaulding Mfg. Co. v. Witter, 125 Pac. 729.

Upon the authority of those cases, this case must be reversed and remanded, with instructions to the county court of Roger Mills county to permit the plaintiff in error to file an amended appeal bond and to proceed with the trial of the case in regular course.

PER CURIAM. Adopted in whole.

BRAKEBILL v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 252*)—EMPLOYMENT CONTRACT—LIMITATION OF LIABILITY—VALIDITY.

An agreement of a common day laborer, working in a railway's shops in this state, that if injured while in the employment of a railway company, and a claim for damages therefor is made, that notice in writing of such claim shall be given the company within 30 days after the injury is received, and that the failure to give such notice "shall be a bar to the institution of any suit on account of such injuries," is void, because in conflict with section 9 of article 23 of the state Constitution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

2. MASTER AND SERVANT (§ 252*)—EMPLOYMENT CONTRACT—LIMITATION OF LIABILITY—ABROGATION BY CONSTITUTIONAL PROVISION.

And such agreement was stricken down with the adoption of the Constitution, although made prior thereto, where the agreement was for no definite period of service and could be terminated at the option of either party, and the injury sued for did not occur until after the adoption of the Constitution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Pottawatomie County; G. C. Abernathy, Judge.

Action by J. R. Brakebill against the Chicago, Rock Island & Pacific Railway Company. From the overruling of a demurrer to defendant's answer, plaintiff brings error. Reversed and remanded.

J. T. Williams, of Shawnee, for plaintiff in error. C. O. Blake, H. B. Low, R. J. Roberts, W. H. Moore, and J. H. Woods, all of El Reno, for defendant in error.

BREWER, C. On September 16, 1907, the plaintiff in error, J. R. Brakebill, entered the employment of the defendant in error, Chicago, Rock Island & Pacific Railway Company, as a common day laborer in its shops located in the city of Shawnee. He received an injury while so employed in the month of February, 1908. He later filed his suit to recover damages for this injury, alleging that it was caused through the negligence of the railway company. One of the grounds of defense in the answer filed by the railway company alleges that the plaintiff, Brakebill, on or about the 16th day of September, 1907, made a written application to the railway company for employment, and that, among other things, the said application contained the following agreement: "In further consideration of such employment, I agree for myself, my heirs, executors, administrators, legal representatives, and any other person or persons claiming through or under me, that if, while in the service of said company, I sustain any personal injury or injuries for which I shall or may make claim against the company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to the superintendent of the division upon which I shall be at the time of such injury or injuries; and if such injury or injuries shall result in my death, for which claim shall or may be made for damages, that my heirs, executors, administrators, legal representatives or other person or persons that may make such claim will give such notice in writing within thirty days after my death, any and all of which notices shall state the time, place, manner, causes, extent and nature of my injury or injuries, or of my death as the case may be, and the claim made therefor; and the failure to give notice of any such claim in the manner and in the time aforesaid shall be a bar to the institution of any suit on account of said injury or injuries or death."

The answer then avers a failure upon the part of plaintiff to give notice in writing of his said injury, as required by said agreement, and within 30 days after receiving same.

The plaintiff, Brakebill, filed a demurrer to this paragraph of the answer, urging three reasons why the same did not constitute a defense, viz.: (1) That such contract is against public policy. (2) That such contract is rendered void by the Constitution of this state. (3) That it is void, because without consideration.

The demurrer was overruled by the court, and the plaintiff below brings this appeal.

[1] Whether or not the agreement above

recited constitutes a defense in this case is the only question presented. We do not think it constitutes a defense, and therefore it was error to overrule the demurrer. Section 9 of article 23 of the Constitution provides: "Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void."

[2] Were it not for the fact that the application for employment containing the agreement relied upon was made prior to the adoption of the Constitution, it would hardly be contended but that the section quoted above would render such agreement null and void. *Gray v. Reliable Insurance Co.*, 26 Okl. 592, 110 Pac. 728; *W. U. Telegraph Co. v. Crawford*, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930. But it is urged that because this contract was made prior to statehood that the rights of the parties and the validity of the provision must be determined by the law in force at the time it was entered into. We do not think this contention sound. This contract for employment was for no definite time. Its termination at any time was at the option of either party. At the time of the adoption of the Constitution, November 16, 1907, contracts of this class were stricken down. At that date the man had not been injured; no rights of any kind, because of injury, had arisen, bringing into operation the clause in question. At that time the railway company, had it not cared to retain this employe under the changed condition of the law, could have relieved him from duty. Not having done so, but retaining him in its employment, the Constitution protected him in his cause of action in February, when he was injured. Under the clause of the Constitution, this agreement was void, because it abridged the time within which he could, under the law, assert his rights, and required a notice, other than is provided by law, as a condition precedent to the maintaining of an action for the breach of a duty imposed by law.

The cause should be reversed and remanded, with direction that the court sustain the demurrer to this defense.

PER CURIAM. Adopted in whole.

BARNETT et al. v. BLACKSTONE COAL & MILLING CO.

(Supreme Court of Oklahoma. April 1, 1913.)

(Syllabus by the Court.)

COURTS (§ 202*)—DISTRICT COURT—JURISDICTION—PROBATE APPEALS.

Under the provision of section 16, art. 7, and section 2 of the Schedule of the Constitution, an appeal lies to the district court from the county court in probate matters in those

cases in which an appeal was allowed under the statutes of Oklahoma territory.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 430-486; Dec. Dig. § 202.*]

Error from District Court, Muskogee County; R. O. Allen, Judge.

Action between T. A. Barnett, Guardian, and others, and the Blackstone Coal & Milling Company. From the judgment, the first-mentioned parties bring error, and a motion is made to dismiss. Motion overruled.

S. B. Dawes and Charles A. Cook, both of Muskogee, for plaintiffs in error. Horace Speed, of Guthrie, for defendant in error.

WILLIAMS, J. Section 16, art. 7 (section 201, Williams' Anno. Const.), of the Constitution of this state, is as follows: "Until otherwise provided by law, in all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county court to the district court of the county in the same manner as is now provided by the laws of the territory of Oklahoma for appeals from the probate court to the district court, and in all cases appealed from the county court to the district court, the cause shall be tried de novo in the district court upon questions of both law and fact."

In *Apache State Bank v. Daniels*, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901, paragraph 1 of the syllabus is as follows: "Under the provisions of section 16, art. 7, and section 2 of the Schedule of the Constitution, an appeal lies to the district court from the county court, in probate matters, in those cases in which an appeal was allowed by the statutes of Oklahoma territory. *Wilson's Rev. & Ann. St. 1903*, § 1793; *Comp. Laws 1909*, § 5451."

Section 5451 of the Compiled Laws of Oklahoma 1909 is as follows: "An appeal may be taken to the district court from a judgment, decree or order of the county court: (1) Granting, or refusing, or revoking letters testamentary or of administration, or of guardianship. (2) Admitting, or refusing to admit, a will to probate. (3) Against or in favor of the validity of a will or revoking the probate thereof. (4) Against or in favor of setting apart property, or making an allowance for a widow or child. (5) Against or in favor of directing the partition, sale or conveyance of real property. (6) Settling an account of an executor, or administrator or guardian. (7) Refusing, allowing or directing the distribution or partition of an estate, or any part thereof or the payment of a debt, claim, legacy or distributive share; or, (8) From any other judgment, decree or order of the county court, or of the judge thereof affecting a substantial right."

Under the eight subdivisions, the district court acquired the jurisdiction of the appeal from the county court, unless the appeal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

must be prosecuted to the Supreme Court by virtue of section 15, art. 7, of the Constitution, as contended for by the defendant in error. Sections 15 and 16 should be construed together so as to give effect to both.

Under the holding in the Apache State Bank v. Daniels Case as to the appellate jurisdiction of the district court as to probate matters, the motion to dismiss must be overruled. All the Justices concur.

In re ASSESSMENT OF OKLAHOMA NATURAL GAS CO.

(Supreme Court of Oklahoma. April 8, 1913.)

(Syllabus by the Court.)

ASSESSMENT FOR TAXES.

Report of referee confirmed, and judgment ordered accordingly, upon the authority of In re Assessment of Osage & Oklahoma Gas Company, 128 Pac. 692.

Appeal from State Board of Equalization.

In the matter of the assessment of the Oklahoma Natural Gas Company. From the action of the State Board of Equalization, the Gas Company appeals. Affirmed.

Flynn, Chambers, Lowe & Richardson, of Oklahoma City, for appellant. Chas. West and W. C. Reeves, both of Oklahoma City, for the State.

KANE, J. This is an appeal from the action of the State Board of Equalization in assessing the property of the Oklahoma Natural Gas Company for taxation for the year 1911. Upon a trial de novo in this court, by agreement, a referee was appointed to hear the evidence and report his findings thereon. The cause now comes on to be heard upon exceptions to the report of the referee.

The same questions are involved and the same referee was appointed by the court in this proceeding as in Re Assessment of Osage & Oklahoma Gas Company, 128 Pac. 692, and the report herein is based upon the same class of evidence, and the findings and conclusions of the referee are to the same effect. As the report of the referee was confirmed in that case, it must also be sustained in this.

It is therefore ordered that the report of the referee be confirmed, and judgment entered accordingly. All the Justices concur, except WILLIAMS, J., not participating.

In re ASSESSMENT OF CANEY RIVER GAS CO.

(Supreme Court of Oklahoma. April 8, 1913.)

(Syllabus by the Court.)

ASSESSMENT OF TAXES.

Report of referee confirmed, and judgment ordered accordingly, upon the authority of In re Assessment of Osage & Oklahoma

Gas Company, 128 Pac. 692, and In the Matter of Assessment of Oklahoma Natural Gas Company, supra, just handed down.

Appeal from State Board of Equalization.

In the matter of the assessment of the Caney River Gas Company. From the assessment by the Board of Equalization, the Gas Company appeals. Affirmed.

Flynn, Chambers & Lowe, of Oklahoma City, for appellant. Chas. West and W. C. Reeves, both of Oklahoma City, for the State.

KANE, J. This is an appeal by the Caney River Gas Company from the action of the State Board of Equalization in assessing its property for taxation for the year 1911.

This cause in all respects is identical with In re Assessment of Osage & Oklahoma Gas Company, 128 Pac. 692, and In re Matter of Assessment of Oklahoma Natural Gas Company, supra, just handed down.

Upon the authority of those cases, the report of the referee herein is confirmed, and judgment entered accordingly. All the Justices concur, except WILLIAMS, J., not participating.

STAR v. STATE.

(Criminal Court of Appeals of Oklahoma. April 22, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§§ 60, 87*)

—TIME OF OFFENSE—LANGUAGE.

(a) The precise time at which an offense was committed need not be stated in an indictment, but it may be alleged to have been committed at any time prior to the filing of such indictment, except in cases where time is a material ingredient of the offense.

(b) An indictment is sufficient if the offense charged therein is clearly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended thereby.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267, 244-255; Dec. Dig. §§ 60, 87.*]

2. CRIMINAL LAW (§ 957*)—NEW TRIAL—AFFIDAVIT AND TESTIMONY OF JUROR.

The affidavits or the testimony of jurors cannot be used for the purpose of impeaching their verdict, but may be considered for the purpose of sustaining it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.*]

3. CRIMINAL LAW (§§ 628, 915, 1152*)—ACCUSATION—INDORSEMENT OF NAMES OF WITNESSES—DISCRETION—CONTINUANCE.

(a) In felony cases the court in its discretion may permit the names of additional witnesses to be indorsed upon an indictment or information after the trial has begun, and such action will not be subject to review upon appeal unless it be made to appear that there was an abuse of this discretion to the injury of the defendant.

(b) If, after announcing ready for trial, the court permits the names of additional witnesses to be indorsed upon an indictment or information, and if the defendant is surprised thereat,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and if the indorsement of the names of the additional witnesses requires the production of further testimony upon the part of the defendant, the defendant should withdraw his announcement of ready for trial and file a motion for a continuance, in which he should set up the facts constituting such surprise and what evidence, if any, he could produce if the case were continued to rebut the testimony of such additional witnesses for the state.

(c) The statute with reference to indorsing the names of additional witnesses upon an indictment or information in misdemeanor cases has no application to felony cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1409-1411, 1413-1419, 2152-2158, 3053-3057; Dec. Dig. §§ 628, 915, 1152.*]

4. CRIMINAL LAW (§ 784*)—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE — NECESSITY — SUFFICIENCY.

(a) An instruction upon the subject of circumstantial evidence should never be given unless the testimony for the prosecution is wholly circumstantial.

(b) Where an instruction on circumstantial evidence is necessary, it is a mistake for the court to give lengthy explanations of circumstantial evidence; but it is sufficient for the court to instruct the jury that the circumstances proven must not only be consistent with the guilt of the defendant, but they must also be inconsistent with his innocence and incapable of any other reasonable explanation, except that of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

5. CRIMINAL LAW (§ 1059*)—APPEAL AND ERROR — OBJECTION BELOW — SUFFICIENCY — INSTRUCTION.

General exceptions to instructions of the court to the jury will not be considered on appeal. The attention of the court should be directly called to the instruction objected to in order that the court may have an opportunity to correct any error which it may contain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

6. CRIMINAL LAW (§§ 726, 1114*)—ARGUMENT OF COUNSEL—APPEAL AND ERROR—RECORD.

(a) Counsel for appellant cannot be heard to complain if the county attorney in his closing argument to the jury is permitted to go out of the record in his reply to arguments made by counsel for the defendant, which were also out of the record.

(b) Where an appellant desires to present a question to this court, it is his duty to bring up enough of the proceedings of the lower court to enable this court to pass intelligently and safely upon the question presented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1681, 2918, 2921; Dec. Dig. §§ 726, 1114.*]

Appeal from District Court, McIntosh County; Preslie B. Cole, Judge.

S. S. Star was convicted of the larceny of cattle, and appeals. Affirmed.

S. M. Rutherford, of Muskogee, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. First. In his brief counsel for appellant says: "The defects in the indictment are that the time and place of the issuable facts contained in said presentment are not specific. The indictment alleges that on the 25th day of January this defend-

ant, in connection with Jim Star, stole certain cattle belonging to one J. C. Crabtree. No other allegation of time is stated in the indictment, save and except the one specified in the beginning. This is not sufficient, as we contend."

The charging part of the indictment is as follows: "That in said McIntosh county, and state of Oklahoma, on the 25th day of January, in the year of our Lord one thousand nine hundred and ten, and prior to the finding of this indictment, S. S. Star, and James Star, did in the county and state aforesaid, and at the time aforesaid, unlawfully, feloniously and by fraud and stealth and with the intent to deprive the owner, J. C. Crabtree, thereof, take, steal and carry away thirty steers, described as follows, to wit, thirty steers being red in color and three years old each, which said thirty steers was then and there the personal property of the said J. C. Crabtree, and was then and there of the value of twenty-five dollars each, and said S. S. Star and James Star did so unlawfully, feloniously, and by fraud and stealth and with the intent to deprive the said owner, J. C. Crabtree, thereof, take, steal and carry away the said thirty steers, with the felonious intent to convert the said thirty steers to their own use, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state."

[1] The contention of counsel for appellant is that time and place should not merely be mentioned at the beginning of the indictment, but should be repeated at each issuable and triable fact. They cite a number of authorities sustaining this contention. There can be no question but that this was the ancient rule, but the conditions which brought this rule into existence have long since passed away and ceased to exist. Originally defendants were not allowed to be represented by counsel or to testify in their own behalf. Neither were they allowed to summon witnesses and place them upon the stand for the purpose of explaining or contradicting testimony for the prosecution. It was deemed derogatory to the crown to permit the witnesses in its behalf to be contradicted. The injustice of these laws was so manifest that the trial judges, in order to mitigate the hardships of the law, invented and built up an artificial technical system for the protection of men charged with crime, who otherwise would be at the mercy of the prosecution. But this condition, as before stated, no longer exists, and the technical system which was built up solely for the purpose of mitigating the rigors of the law should also cease to exist. Even if this did not result from common sense and justice, our statute in express terms repeals the artificial rules of pleading established by the common law. Section 6700, Comp. Laws 1909, on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

question of time, is as follows: "The precise time at which the offense was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense."

Section 6704, Comp. Laws 1909, in express terms declares that the indictment is sufficient if it can be understood therefrom that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

Section 6705, Comp. Laws 1909, is as follows: "No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

We are therefore of the opinion that the demurrer to the indictment in this case was properly overruled by the trial court.

[2] Second. It is insisted in the brief of counsel for appellant that the court erred in not sustaining the motion for a new trial on account of the affidavit and testimony of the juror Le Blanche. The affidavit and testimony of the juror Le Blanche is to the effect that, something more than a year previous to the trial, said juror had met J. C. Crabtree, the owner of the stolen cattle, at a picnic; that, in a conversation with said Crabtree, said Crabtree had told him about the stealing of his cattle, and that said juror Le Blanche had forgotten this conversation with Crabtree and did not remember it until after being accepted on the jury. On cross-examination the juror Le Blanche testified that the statements made to him by said Crabtree did not in any manner affect his verdict, and that he did not communicate said statements to any of the other jurors. It was also proven that, when the jury retired to consider of their verdict, the vote on the first ballot stood 11 for conviction and one for acquittal, and that the juror Le Blanche then voted for an acquittal. The court did not err in refusing to grant a new trial on account of the affidavit and testimony of the juror Le Blanche. It is the settled law in this state that the affidavit or testimony of a juror cannot be used for the purpose of impeaching the verdict of such juror. If this were permitted, it would subject jurors to all sorts of intimidations and temptations and would tend to unsettle and make insecure the verdicts of juries and the judgments of courts and would place a premium upon corruption. See *Colcord v. Conger*, 10 Okl. 460, 62 Pac. 276; *Vanderburg v. State*, 6 Okl. Cr. 486, 120 Pac. 301; *Keith v. State*, 7 Okl. Cr. 156, 123 Pac. 172; and *Overton v. State*, 7 Okl. Cr. 204, 114 Pac.

1132, 123 Pac. 175. But, even if this were not the law, the trial court did not err in its ruling upon the question, because the testimony shows that, notwithstanding the statements said to have been made to the juror Le Blanche by the owner of the cattle, said juror voted for acquittal and only agreed to a conviction upon a consideration of the entire testimony and the argument of the other 11 jurors.

[3] Third. Counsel for appellant complains at the action of the trial court in permitting the state to indorse the names of Cliff Sellers, Bob Sellers, Minnie Harris, Mollie Sellers, Claude Carille, Jim Jackson, and Dan Foster upon the indictment over the objection and protest of counsel for appellant. The record discloses the fact that, when the case was called for trial, the state announced ready for trial and the defendant made a motion for a continuance which was overruled, and then declined to make an announcement. Thereupon the court directed that a jury should be called. Mr. Robertson, representing the state, requested permission to indorse the names of some additional witnesses upon the indictment, and stated that he did not know that they were important witnesses in the case until a short time before this and did not understand that he had the right to indorse their names on the indictment except in open court and by permission, and this was the first day of the term on which the attorney for appellant had been in court; that he had not cared to ask permission because of his absence. Permission of the court was granted to the county attorney to indorse the names of the witnesses upon the indictment, to which counsel for appellant excepted. But the record fails to show that counsel for appellant was surprised at the action of the court in permitting the names of said witnesses to be indorsed upon the indictment, or that the use of such witnesses by the state required the production of any additional testimony upon the part of appellant. Neither did counsel for appellant ask for time with which to prepare a motion for a continuance on account of the names of the additional witnesses indorsed upon the indictment. But the objection is made that the court should not have permitted the names of the additional witnesses to be indorsed upon the indictment after the trial had begun. In support of this position, counsel for appellant cite the cases of *Nelson v. State*, 5 Okl. Cr. 368, 114 Pac. 1124, and *Hawkins v. State*, 6 Okl. Cr. 308, 118 Pac. 607. Neither of these authorities support the contention of counsel for appellant. In fact, the case of *Nelson v. State* is decisive of this question as against the contention of counsel for appellant.

In *Nelson's Case* the court permitted the indorsement of the names of additional witnesses upon the indictment after the case was called for trial. Counsel for appellant

filed a motion for a continuance, which was overruled. This court said: "No facts sufficient to show that the defendant could meet the testimony of these witnesses having been set up, we think the court properly overruled the motion for a continuance." It is true that Nelson's conviction was reversed, but it was upon another question entirely. The case of *Hawkins v. State* is not in point. This was for a conviction of a misdemeanor, and the decision was based upon an arbitrary statute which is applicable to misdemeanors only, which statute has no application to felony cases. But, even if the statute upon which the decision in *Hawkins' Case* was rendered was also applicable to felonies, we think a sufficient showing was made by the state to authorize the court to permit the indorsement of the names of the witnesses upon the indictment, even after the trial began, especially in view of the fact that appellant did not make any effort to continue the case in order that he might obtain additional witnesses to rebut the testimony of the witnesses, whose names were indorsed upon the indictment. In the later case of *Ostendorf v. State*, 8 Okl. Cr. 360, 128 Pac. 143, we discussed this question fully, and, as applicable to both misdemeanors and felonies, this court said: "Where a witness has been improperly allowed to testify in a case, and the defendant is surprised thereat, he should promptly withdraw his announcement of ready for trial and file a motion for a continuance, in which he should set up the facts which constitute such surprise, and also show how he would be injured by the reception of such testimony and why he should have additional time for preparation for trial on account of such testimony, and what evidence, if any, he could produce if given such time to rebut the testimony of such witness. A failure to do this constitutes a waiver of objection to the testimony of such witness."

As many lawyers do not recognize the differences made in our statute between felonies and misdemeanors in the matter of indorsing the names of witnesses on indictments or informations, we will quote these statutes.

Section 6644, Comp. Laws 1909, is as follows: "The county attorney shall subscribe his name to informations filed in the county or district court and indorse thereon the names of the witnesses known to him at the time of filing the same. He shall also indorse thereon the names of such other witnesses as may afterwards become known to him, at such time before the trial as the court may by rule prescribe. All informations shall be verified by the oath of the prosecuting attorney, complainant or some other person: Provided, that when an information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information and belief." It is seen that this statute relates only to mis-

demeanors, for in 1895, when this statute was enacted, a defendant could not be prosecuted for a felony by information, and this statute requires that the names of additional witnesses must be indorsed on the information before the trial begins. Placing a liberal construction upon this statute to prevent a miscarriage of justice, we have always held that, even after the trial has begun, the names of additional witnesses might be indorsed upon the information if the county attorney had not had previous knowledge of the fact that they were material witnesses, and when this could be done without placing the defendant at a disadvantage.

Section 6691, Comp. Laws 1909, relating to prosecutions for felonies, is as follows: "When an indictment is found, the names of the witnesses examined before the grand jury must be indorsed thereon before the same is presented to the court, but a failure to so indorse the said names shall not be sufficient reason for setting aside the indictment if the county attorney or prosecuting officer will within a reasonable time, to be fixed by the court, indorse the names of the witnesses for the prosecution on the indictment. The court or judge may, at any time, direct the names of additional witnesses for the prosecution to be indorsed on the indictment, and shall order that such names be furnished to the defendant or his counsel." This statute permits the indorsement of the names of additional witnesses upon an indictment or information at any time within the discretion of the court. We have therefore always held that in felony cases it is within the discretion of the court to permit the names of additional witnesses for the prosecution to be indorsed on an indictment after the trial has begun. See *Vance v. Territory*, 3 Okl. Cr. 208, 105 Pac. 307, and *Stockton v. State*, 5 Okl. Cr. 310, 114 Pac. 626. To prevent any advantage being taken of a defendant, we have also held that in felony cases, when the names of additional witnesses are indorsed upon an indictment after the trial has begun, the defendant might file a motion for a continuance under the conditions stated in *Nelson v. State*, 5 Okl. Cr. 368, 114 Pac. 1124, and *Ostendorf v. State*, 8 Okl. Cr. 360, 128 Pac. 143.

[4] Fourth. Counsel for appellant complains at the action of the court in refusing to give a special requested instruction upon the subject of circumstantial evidence. An instruction upon the subject of circumstantial evidence should never be given unless the testimony in the case on the part of the prosecution is wholly circumstantial. See *Hendrix v. United States*, 2 Okl. Cr. 240, 101 Pac. 125. While it is true that much of the testimony in this case against appellant is circumstantial, yet the state's witness Cliff Sellers testified directly and positively as to the guilt of appellant. It is true that Sellers was an accomplice, but this does not alter

the rule dispensing with the instruction upon circumstantial evidence, where there is direct and positive evidence of the guilt of the accused. The instruction requested by appellant upon the subject of circumstantial evidence was argumentative and confusing in its character and should not have been given in the form requested, even if all of the testimony in the case was purely circumstantial. In a case depending upon circumstantial evidence alone, the court should instruct the jury that the circumstances proven must not only be consistent with the guilt of the defendant, but they must also be inconsistent with his innocence and capable of no other reasonable explanation than that of his guilt. It is a mistake for the trial court to give a lengthy instruction attempting to explain circumstantial evidence.

[5] Fifth. Counsel for appellant complains in his brief of a number of alleged errors in the instructions of the court to the jury. We cannot consider these objections, because proper exceptions were not reserved to the instructions at the trial. The record shows that, after the instructions were read to the jury, counsel for appellant stated that he excepted to each and every instruction given by the court, and to each and every paragraph thereof. This only amounts to a general exception which we cannot consider for any purpose whatever. When counsel desire to except to any instruction, the attention of the court should be directly called to the instruction objected to in order that the court may be given an opportunity to correct any error which it may contain. If this is not done, errors in the instructions will be waived, unless they are fundamental. See *Summers v. State*, 7 Okl. Cr. 11, 120 Pac. 1031. We find no fundamental error in the instructions of the court.

[6] Sixth. Counsel for appellant complains at length of remarks made by the county attorney in his closing speech to the jury. The record contains a full stenographic report of the closing argument of the county attorney, which is interspersed with numerous objections made by counsel for appellant to portions of said argument. The county attorney claims that he was only replying to arguments made by counsel for appellant. The trial court sustained the contentions of the county attorney. If it be true that counsel for appellant had gone outside of the record in his argument, he cannot be heard to complain that the county attorney was permitted to reply to such arguments. The trial judge, who had heard both arguments, decided that the county attorney was within the record. We cannot presume error in any case, but, on the contrary, we must presume that all of the rulings of the trial court are regular unless the contrary is clearly made to appear from the record. In the case of *Cowan v. State*, 5 Okl. Cr. 313, 114 Pac. 627, this court held that, where an appellant desires to

present a question to this court for decision and seeks to get it to review the decision of the trial court and pass upon any matter occurring during the trial, it is the duty of appellant to at least bring up enough of the proceedings of the lower court to enable this court to pass intelligently upon the question presented. Where this is not done, we will presume that the ruling of the trial court was correct. We cannot say from the record before us that the trial court erred in the matter complained of.

We think that the evidence in this case amply sustains the conviction; and, as no prejudicial error appears in the record, the judgment of the lower court is in all things affirmed.

DOYLE, J., concurs. ARMSTRONG, P. J., not participating.

GOBIN et al. v. STATE.[†]

(Criminal Court of Appeals of Oklahoma. April 19, 1913.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY—DEFENSE—ACCESSORY.

(a) On the prosecution of a person charged with violating the medical practices act on the ground that he does not possess an unrevoked, valid certificate from the state board of medical examiners, the production at the trial and the introduction in evidence of such certificate is a complete defense to such charge.

(b) The foregoing rule, however, is not intended to, and does not, protect such person from prosecution if he aids and abets another to violate the medical practices act in so far as his connection with such other unauthorized person is concerned.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

2. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY.

A person who does not possess a valid, unrevoked certificate from the state board of medical examiners is not entitled to practice medicine under the laws of this state, except in emergencies and such other cases as are specifically exempted by the statute. And this is true even though he worked with or under the directions of a duly authorized practitioner; and it is immaterial whether he works for a fee, percentage, or on a salary.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

3. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY—DEFENSES—ACCESSORY.

(a) A physician who is authorized under the laws of this state to practice medicine has no more right to aid one who is not properly authorized to evade the law than such unauthorized person has to act on his own responsibility.

(b) The medical practices act, as well as all other laws of this state, was enacted to be observed and enforced and not to be evaded and violated.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 6, 1913.

Appeal from Marshall County Court; J. W. Falkner, Judge.

O. O. Gobin and R. W. Freeman were convicted of violating the medical practices act, and they appeal. Affirmed.

Cruce & Potter, of Ardmore, for plaintiffs in error. Chas. West, Atty. Gen., for the State.

ARMSTRONG, P. J. Informations were filed against the plaintiffs in error, O. O. Gobin and R. W. Freeman, in the county court of Marshall county, in two cases, charging them with practicing medicine without license. They were convicted in both cases and a fine of \$250 and 60 days' imprisonment imposed on each as the punishment in each case.

[2] Much testimony was introduced on behalf of the state, but for the purpose of this opinion it is only necessary to consider the testimony introduced by the plaintiffs in error. The plaintiff in error Gobin admitted that he had no license to practice medicine in Oklahoma; that he was in the employ of R. W. Freeman on a salary; that he was practicing medicine as the assistant of said Freeman; was collecting fees for his services and paying them over to Freeman. The plaintiff in error Freeman in his defense introduced a certificate from the state board of medical examiners authorizing him to practice medicine and surgery in this state. He testified also that Gobin was in his employ on a salary; that Gobin was practicing medicine under his directions and receiving fees therefor which were turned over to him.

There is no question but that Gobin's conviction was entirely proper, and the judgment as to him should be affirmed. In *State v. Paul*, 56 Neb. 369, 76 N. W. 861, the Supreme Court of Nebraska, having under consideration the proposition here involved, says: "A person not being a registered physician, nor acting gratuitously under an emergency, nor being a commissioned surgeon in the army or navy of the United States, nor being in the occupation of a nurse, nor administering usual or ordinary household remedies, who for a remuneration treats any physical or mental ailment of another, is within the condemnation of the statute, even though he acted under the directions of a registered physician." The statute being construed by the Nebraska court is similar to ours; the purpose being the same.

[1] The plaintiff in error Freeman, however, had the required certificate, and so far as his own acts are concerned independent of Gobin he cannot be convicted. Among other instructions the trial court gave the following: "The court further instructs you, gentlemen of the jury, that if you find beyond a reasonable doubt that the defendants R. W. Freeman and O. O. Gobin entered into an agreement by the terms of which the said R. W. Freeman signed up prescriptions in

blank to be used by the said O. O. Gobin in the absence of the said R. W. Freeman, by filling in said prescriptions over the name of the said R. W. Freeman, and prescribing medicines for patients for a compensation, and that pursuant to said agreement between the said R. W. Freeman and O. O. Gobin the said R. W. Freeman did leave prescriptions signed in blank by him for the said O. O. Gobin, and did authorize the said O. O. Gobin to receive patients in his absence and to treat and prescribe for such patients for a compensation, from said patients to O. O. Gobin, or to R. W. Freeman, or to both O. O. Gobin and R. W. Freeman, and that the said O. O. Gobin did receive patients for treatment in the absence of the said R. W. Freeman and did prescribe for them, for a compensation, going to him or to the said R. W. Freeman, or to both him and the said Freeman, and you further find, beyond a reasonable doubt, that the said O. O. Gobin did not have the certificate required by law to practice medicine and surgery, then it will be your duty to find both the said defendants, R. W. Freeman and O. O. Gobin, guilty, although you do find from the evidence that the said R. W. Freeman did have a valid certificate from the proper state authorities to practice medicine and surgery." This instruction warranted the jury in finding the plaintiff in error Freeman guilty in case Gobin did not have a certificate to practice medicine in this state as provided by law even though Freeman had one if they should find further that Freeman was aiding and abetting Gobin.

Section 2045, Compiled Laws 1909, provides as follows: "All persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, or whether they directly committed the act that constituted the offense or aided and abetted in its commission though not present, are principals." Under this statute the plaintiff in error Freeman, if he aided and abetted Gobin in a violation of the medical practices act, would be guilty and subject to punishment not because he (Freeman) did not have a license to practice, but because Gobin did not have, and because he (Freeman) aided and abetted Gobin in the commission of the offense. It is not contended that Freeman did not know Gobin was without authority to practice medicine in this state.

The only doubtful question that presents itself to the writer of this opinion in connection with this case is: Did the jury find Freeman guilty of practicing medicine without a license, or did they find him guilty of aiding and abetting Gobin in practicing without a license? The law and instructions of the court properly applied to the facts are such that the jury would not have been warranted in finding Freeman guilty of practicing without a license. As said by this court in *Wilson v. State*, 8 Okl. Cr. 493, 129 Pac.

82, an unrevoked certificate issued by the state board of medical examiners is a complete defense to a charge of practicing medicine without license in this state. That being true, it was the duty of the jury to acquit Freeman in so far as his own acts independent and apart from participating with Gobin were concerned, and a conviction upon that ground would have to be reversed by this court. Under the instruction of the court quoted supra and the facts, however, the jury were authorized and fully warranted in convicting Freeman of aiding and abetting Gobin in case they found from the facts that Gobin did not have a certificate or license to practice medicine in this state. As said above, Gobin's conviction was proper, and under the testimony of both Freeman and Gobin, Freeman is clearly guilty of aiding and abetting Gobin, and the conviction by the jury under this state of facts as to this feature of the case will not be disturbed.

[3] The medical practices act does not any more contemplate or authorize a registered physician going out and employing all the unauthorized quacks in the country to aid and assist him for a compensation or otherwise, except in emergencies, in the practice of medicine, than it does the employment for the same purpose of the section hands on a railroad. The law is not only intended to protect legitimate practitioners, but also to protect the public against being imposed upon by an incompetent person holding himself out as a physician. The laws of this state were enacted to be observed and enforced and not to be evaded and violated. It is evident from this record that the plaintiff in error Freeman was seeking to aid Gobin in evading the law, and in doing so both of them violated it and incurred its penalties.

We have considered carefully and thoroughly the entire record in this case and are of opinion that the judgment of the trial court should be affirmed as to each plaintiff in error in both cases, and it is so ordered.

DOYLE and FURMAN, JJ., concur.

PEEL v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 22, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1131*)—ESCAPE—DISMISSAL OF APPEAL.

Where a defendant has been convicted and sentenced and perfects an appeal, this court will not consider his appeal, unless defendant is where he can be made to respond to any judgment or order which may be rendered in the case; and where a defendant makes his escape from the custody of the law and becomes a fugitive from justice the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

Appeal from District Court, Oklahoma County; W. R. Taylor, Judge.

Roy Peel was convicted of crime, and appeals. Dismissed.

Harris & Nowlin, William H. Zwick, and Giddings & Giddings, all of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, of Oklahoma City, for the State.

DOYLE, J. The plaintiff in error, Roy Peel, was convicted of the crime of aiding suicide, under an information filed in the district court of Oklahoma county March 11, 1912, and in accordance with the verdict of the jury was sentenced to serve a term of seven years in the state penitentiary at McAlester. The judgment and sentence was entered May 23, 1912.

From the judgment an appeal was perfected by filing in this court, November 23, 1912, a petition in error with case-made. The Attorney General has filed a motion to dismiss said appeal, which, omitting the formal parts, reads as follows: "Comes now the state of Oklahoma by Chas. West, Attorney General, and moves the court to dismiss the appeal herein, and for grounds therefor says: That the appellant, Roy Peel, is now and has been for some time a fugitive from justice from the state of Oklahoma; that the sheriff of Oklahoma county has made diligent search for the said Roy Peel in an endeavor to arrest him pursuant to certain writs issued out of the courts of Oklahoma county; that the bondsmen of the said Roy Peel have offered a reward for his arrest and apprehension, but that the said Roy Peel is now a fugitive from justice and beyond the jurisdiction of this court, as the Attorney General is informed and verily believes—the facts herein stated being shown by the affidavit of M. C. Blinn, sheriff of Oklahoma county, attached hereto and made a part hereof."

The said affidavit reads as follows: "That he is now the duly qualified and acting sheriff within and for said Oklahoma county, in the state of Oklahoma, and has been since the 6th day of January, 1913; that on the 3d day of March, 1913, he was commanded by the clerk of the county court within and for said county and state to apprehend and place in jail one Roy Peel, who had been heretofore convicted in said county court of the crime of violating the prohibitory law, and who had thereafterwards been paroled by the Governor on condition that he pay twenty dollars per month on his fine and costs, and said parole having been revoked by the said Governor said order was made by the county court, as aforesaid. Deponent further says that he and his deputies have made diligent search for the said Roy Peel, and are unable to arrest him or find out where he is now staying, and that his bondsmen have offered a reward for his arrest and apprehension."

The question presented by the motion to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dismiss is the same as the one decided in *Belcher v. State*, 9 Okl. Cr. —, 130 Pac. 515, wherein it is held that, where a defendant has been convicted and sentenced and perfects an appeal, this court will not consider his appeal, unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the cause; and where the defendant makes his escape from the custody of the law, and is at large as a fugitive from justice, this court will, on motion, dismiss his appeal.

It is our opinion that plaintiff in error has waived the right to have his appeal in this case considered and determined, the motion to dismiss is sustained, the appeal is dismissed, and the cause remanded to the district court of Oklahoma county, with direction to carry into execution its judgment and sentence.

ARMSTRONG, P. J., and FURMAN, J., concur.

MAGGARD v. STATE.

(Criminal Court of Appeals of Oklahoma. April 26, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—VERDICT—EVIDENCE.

It is the duty of the jury to settle all conflicts in the testimony, and this court will not disturb a verdict where it is sustained by any testimony which reasonably tends to establish the guilt of the defendant, unless it appears from the record that the jury were influenced by improper motives in accepting the testimony of the state and rejecting the testimony of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§§ 507, 814*)—EVIDENCE—ACCOMPLICE—INSTRUCTION.

It is not error for the trial court to refuse to give an instruction as to the law applicable to the testimony of an accomplice, where the defendant has been convicted of manslaughter in the second degree for having negligently discharged a pistol in the dark, which resulted in the death of the deceased, and where the evidence fails to show that the alleged accomplice aided, abetted, or encouraged the defendant to fire said shot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1086, 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. §§ 507, 814.*]

Appeal from District Court, Caddo County; Frank M. Bailey, Judge.

William Maggard was convicted of manslaughter in the second degree, and he appeals. Affirmed.

The evidence, as far as it is material, may be stated in narrative form as follows:

The record discloses that on the Sunday afternoon of December 4, 1910, appellant armed himself with his 44 and a supply of cartridges, and went to a neighbor's for din-

ner, and early in the afternoon went to the home of Ira B. Cooper, and spent the afternoon entertaining and being entertained by Cooper's daughter Bertha. Late in the afternoon, he left Cooper's place and went to one Antone Gesseck's place (which the evidence discloses was a gambling and drinking place); he there found Bertha's father entertaining Antone and the other guests, and being entertained by Antone's wares. Appellant joined Cooper at Gesseck's and they had several drinks with him, and during the two or three hours that they were at his place did several pistol stunts by twirling the pistols around their fingers. Some time between 8 and 9 o'clock Cooper suggested that he had to go home and he and appellant went out of the Gesseck house together. Marion Miller, an old man 65 years old, a few minutes after Cooper and appellant left, suggested that he had to go home (he living only a few yards from the Gesseck house). Shortly after this Gesseck and Jacobs heard the shots fired, one of which was evidently the one that killed Miller.

From the time appellant and Cooper left Gesseck's there is a material conflict in their testimony. Appellant testified that in leaving the Gesseck house Cooper "stumbled and run five or six steps south of the house and then fell down, and I went and helped him up, and Mr. Miller came out of the door, and he asked him to help him up, and I said, 'Let's go home,' and he said, 'No, let the old man come on, and we will scare him,' and I did not agree to it." It is agreed that appellant and Miller got one on each side of Cooper and went on towards home with him, and that, after going something like a 100 yards, Miller decided they could go on home without him. The evidence conflicts here again. Appellant claims that when Miller decided to turn back, and turned Cooper loose, Cooper pulled his gun and began shooting, and appellant lay down, that Cooper shot three times, and the second shot Miller fell. His evidence further shows that Cooper's pistol only held six shells, four of which were shot before leaving Gesseck's house, during which time appellant gave him one shell; three shots being fired at the time Miller was killed and one up near the house after that, making according to his testimony eight shots fired by Cooper, with only seven shells, as appellant denied firing any shot.

Cooper's testimony in substance is that, when he started away from Gesseck's, he stumbled a few steps and fell down, when Miller suggested he would help him home, at which time appellant stated to Cooper, "We will scare hell out of him." After going down the road about 100 yards, Miller decided to turn back; Maggard "then produced his gun, showed me his gun like this, and Miller stopped and stepped behind me like this, and Maggard stopped and jumped be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

hind me like this, and some one shot behind me."

Cooper's evidence is also, in substance, that after the one shot there were two other shots fired behind him; he was facing south; that both appellant and Miller were behind him, north of him.

The evidence of both Cooper and daughter is that when they got to the house Maggard remarked they had been having some fun; when Maggard returned and stated that the old man (Miller) was still laying down in the road, Cooper said, "You didn't hit him, did you Bill, when you were shooting?" to which appellant answered "No," and he asked Cooper what he must do about it.

The record discloses that appellant was on the night of the homicide very much worried about something after this shooting. The record may not disclose all that took place between these parties during the time after they left the Gesseck place and the time of the homicide, but this much is clear: That the deceased, an old man 65 years old, in trying to assist one drunk man and one drinking man home, was shot and killed by the negligent act of one of the parties. The only persons there except the deceased were appellant and Cooper. Appellant says Cooper fired the shot that killed Miller; Cooper's evidence discloses that it was Maggard who fired the fatal shot. He is corroborated by Bertha and Rhoda Cooper, who testify relative to the conversation between these two men when Maggard returned to the house after having found Miller's body still in the road. That his story is true is strengthened by the actions of this appellant after the shooting.

George T. Webster, of Clinton, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First. It is contended by counsel for appellant that the verdict is not supported by the testimony. The record discloses the fact that the deceased, an old man 65 years of age, was attempting to assist one drunk man and one drinking man home, and that he was shot and killed by the negligent act of one of these parties. Appellant testified that the shot which killed Miller was

fired by the state's witness Cooper. Cooper's testimony is to the effect that the fatal shot was fired by appellant. He is corroborated by the evidence of Bertha and Rhoda Cooper, who testify to conversations between Cooper and appellant after the shooting was over, and his statement was further strengthened by the actions of appellant after the shooting. The credibility of the witnesses was a question for the jury, and there is nothing in the record to warrant us in holding that the jury were influenced by improper motives in accepting as true the testimony of the state's witness Cooper, and rejecting the testimony of appellant. We therefore cannot sustain the contention that the verdict is contrary to the testimony.

[2] Second. It is contended that the court erred in failing and refusing to instruct the jury on the law applicable to the testimony of an accomplice; it being contended that Cooper was the accomplice of appellant. The act of appellant which the jury found resulted in the death of the deceased was negligently discharging a pistol in the dark. There was no proof of concerted action between appellant and Cooper in this matter. According to appellant's testimony Cooper killed Miller, and he, appellant, had nothing to do with it. According to Cooper's testimony, appellant killed Miller, and Cooper took no part in it. This court should certainly not take a more favorable view of the evidence in behalf of appellant than is disclosed by his own testimony. The mere fact that Cooper was present when the shot was fired would not make him the accomplice of appellant, unless he did some act encouraging, aiding, or abetting the appellant in doing the act which resulted in the death of the deceased.

We therefore hold that the court did not err in failing to give the instruction requested.

No other questions are presented to the court by the petition in error or were discussed in the brief of counsel for appellant. Therefore none other will be considered.

The judgment of the lower court is in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

STERNER v. ISSITT.

(Supreme Court of Kansas. April 12, 1913.)

(*Syllabus by the Court.*)

HIGHWAYS (§ 181*)—AUTOMOBILES—DUTY OF DRIVER—"LOOK OUT."

The expression, "Look out," uttered by the driver of a horse and buggy to the operator of an automobile on approaching the automobile in a public highway, without any accompanying signals or attending circumstances which might affect the meaning of the words, cannot be regarded as a request to the operator of the automobile to stop and remain stationary, within the meaning of section 452, General Statutes of 1904, and in such a case the meaning of the expression is a question for the determination of the court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.*]

Appeal from District Court, Dickinson County.

Action by W. E. Sterner against B. H. Issitt. Judgment for defendant, and plaintiff appeals. Affirmed.

S. S. Smith, of Abilene, for appellant. C. S. Crawford, of Abilene, for appellee.

JOHNSTON, C. J. This action was brought by the appellant, W. E. Sterner, to recover damages from the appellee, B. H. Issitt, for the loss of a horse, which, it is alleged, was occasioned by the negligence of the latter. The brothers of appellant were driving a horse attached to a buggy on a public highway going south, and were approached by appellee traveling north in an automobile. Both were on the beaten part of the road close to the wire fence on the west side. When they came within 15 or 20 steps of each other, the horse showed fright, and the driver shouted, using the expression, "Look out!" The appellee then turned to the right and passed on the east side of the road. When the automobile was opposite the horse, it plunged into the wire fence, and was so badly injured as to be valueless, and shortly afterwards was killed. The only charge of negligence alleged in the petition of appellant was that appellee failed to stop his car when appellant's brother called to him to "look out." There was proof that the driver spoke twice to appellee, using the same expression both times, and that he intended it as a direction to appellee to stop. Appellee, however, testified that he heard the call, "Look out!" but once; that he interpreted it to mean to turn out of the beaten road; and that he immediately did so, passing on the other side of the road.

It is conceded that the action was brought under the statute regulating the use of automobiles on public highways, which provides, in effect, that if a person in charge of an automobile approaches a vehicle drawn by a horse, and the horse shows fright, the driver of the automobile shall reduce the speed of the machine and, if practicable,

turn to the right and give the road, and, "if requested by signal or otherwise by the driver of such horse or horses or domestic animals, shall proceed no farther towards such animal or animals, but remain stationary so long as may be necessary to allow such horse or domestic animals to pass." Gen. Stat. 1909, § 452.

When the appellant had offered his evidence, appellee demurred thereto, claiming that the evidence did not tend to establish a liability against appellee. The demurrer was overruled; the court holding that there was a disputed question of fact to be submitted to the jury. The testimony of appellee was then introduced, which was substantially like that offered by appellant, and on the whole evidence the jury returned a general verdict in favor of appellant for the value of the horse. With the general verdict two answers to special interrogatories were returned, as follows:

"Ques. Did the driver of the horse request or signal the defendant to stop? Ans. Yes.

"Ques. If you answer the above question, 'Yes,' then state by what language or in what manner was the request made. Ans. By the words, 'Look out.'"

Appellee then moved for judgment on the special findings, and the court granted the motion, holding that the interpretation of the expression, "Look out," devolved on the court, and that it did not amount to a request or signal to the appellee to stop.

The only substantial dispute between the parties was whether the appellee failed to stop his automobile upon a request of the driver of the horse. That was the sole negligence alleged, and it is agreed that there was no request or signal to stop other than the admonition, "Look out." It does not appear that these words have any local meaning; nor is there any claim that there was any accompanying motion or signal which might indicate a meaning other than that ordinarily applied to them. The meaning of the expression, without accompanying signals or some attending circumstances which would affect its meaning, was a question for the determination of the court. According to dictionary definitions, the meaning of the words is to exercise care, rather than to proceed no farther. The equivalents of the phrase are "take care," "be watchful," "take heed," and "act with prudence." In their popular signification, and alone, they do not import a request to stop or stand still. To convey that meaning such expressions as "halt," "keep back," "hold on," "stay there," "stand still," "pause," and "stop" might be used in a request to the operator of an automobile to proceed no farther. The option of whether the operator should stop and remain stationary or pass around is given by the statute to the driver of the horses. The provision is arbitrary, and the automobile

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

must be stopped if such a request is made by the driver of the horses. It is an easy request to make, and should be made in words or signs which an ordinary man could understand. The words, "Look out," might mean turn out, slow down speed, muffle the noise, or pass as far to the other side of the road as possible. In some cases the driver of a nervous horse might prefer that the operator of the automobile would increase his speed and hurry on. He might conclude that there was less danger to pass on than to stop, and if he concludes to exercise the option and control which the statute gives him to arrest the approach of the automobile he should make his meaning plain enough for comprehension by the ordinary chauffeur. The expression used in this instance, whatever the driver of the horse may have meant by it, would not be ordinarily understood as a request to stop, and the interpretation placed upon it by appellee that it was a direction to turn out was, not an unreasonable one. It is the duty of the operator of the automobile, in approaching vehicles drawn by horses, to handle his machine carefully, using every reasonable precaution to avoid the frightening of the horses which he may meet, and a liability will arise for injury or loss resulting from a neglect of this duty. Here, however, there was no claim of negligence, excepting the naked charge that appellee did not stop when the driver called, "Look out!" The nonobservance of the statutory duty to stop on request is the only basis upon which a recovery is sought. That expression, as used, cannot be regarded as a request to stop; and hence the decision of the trial court, setting aside the general verdict and giving judgment for appellee, must be affirmed. All the Justices concurring.

MADDEN v. UNION PAC. R. CO.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

GARNISHMENT (§ 8*)—RIGHT TO REMEDY—RETURN OF EXECUTION UNSATISFIED.

Under the circumstances stated in the opinion, it is held that a judgment creditor should have seized property of his debtor, which had been delivered to a railway company for transportation but which still remained at the carrier's warehouse, by execution, although one execution had been issued and returned unsatisfied; and that it was an abuse of the remedy given by section 6524 of the General Statutes of 1909 (garnishment after the return of execution unsatisfied), for the creditor to attempt to impound the property in the possession of the carrier by garnishment proceedings.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 11; Dec. Dig. § 8.*]

Appeal from District Court, Shawnee County.

Action by John C. Madden against the

Union Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded with directions.

R. W. Blair, C. A. Magaw, and B. W. Scandrett, all of Topeka, for appellant. J. M. Stark, of Topeka, for appellee.

BURCH, J. Madden obtained a money judgment in the court of Topeka against Fred C. McMann upon which an execution was issued and returned unsatisfied. Subsequently the railroad company was garnished as having personal property of McMann's in its possession. The proceeding resulted in an order upon the garnishee to deliver to the marshal of the court a piano and certain other articles of household furniture. The order not having been complied with, Madden instituted suit against the railroad company in the city court for the amount of his judgment and for damages and costs. Judgment was rendered by the city court in favor of the defendant. The plaintiff appealed to the district court, which rendered judgment in his favor. The defendant now appeals to this court.

The property in controversy was delivered to the defendant by the Topeka Transfer & Storage Company for shipment to Portland, Or. It was consigned to J. B. Lilly, and a bill of lading was issued accordingly and delivered to the consignor. While the goods were on the defendant's warehouse platform and were being loaded into a car, the garnishment summons was served. A few hours later the goods were dispatched to their destination. The garnishment summons, or order, as the statute terms it, read as follows: "The State of Kansas to the Union Pacific Railroad Co.: Whereas, on the 5th day of August, 1910, John C. Madden recovered judgment against Fred C. McMann in the court of Topeka, city of Topeka, in said county, for the sum of one hundred twenty-seven and 35/100 dollars; and whereas, execution has been duly issued upon said judgment and has been duly returned wholly unsatisfied for want of property whereon to levy the same; and whereas, said plaintiff has duly filed his affidavit stating that he has good reason to believe and does believe that you, the Union Pacific Railroad, within the said county of Shawnee, have property of the said defendant Fred C. McMann and are indebted to the said defendant Fred C. McMann: You are hereby commanded to appear before the court of Topeka, in said city, on the 21st day of October, 1910, at 8 o'clock a. m., to answer such questions as may be propounded to you by the said judgment creditor, touching the property of said judgment debtor in your possession or under your control, and the amount owing by you to said judgment debtor, whether due or not." On the back of the summons the following words appeared, written in pencil:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied May 16, 1913.

"Household goods billed to J. B. Lally, Portland, Or." The memorandum was called to the attention of the defendant's agent by the marshal of the court when the summons was served.

At the trial it was shown that McMann had listed the property for taxation, had mortgaged it, and that it had been stored in his name by the storage and transfer company. While McMann claimed that the piano belonged to his daughter and the other articles to his wife, the evidence was sufficient to warrant the jury in finding title in him. The memorandum indorsed on the summons was written by the clerk of the court who issued it. No evidence was offered that the defendant had any knowledge whatever of who in fact owned the goods or any notice that McMann owned them. The goods were moved by the transfer company and delivered to the defendant, the affidavit in garnishment was filed, and the summons was issued and served, all on October 11, 1910, and all by 2 o'clock of the afternoon of that day. The defendant moved for a peremptory instruction to the jury to find in its favor.

The proceedings having originated in the court of Topeka, they are governed by the Code of Civil Procedure before justices of the peace. The order of delivery made by the city court was not a final determination of the liability of the garnishee. When sued for the value of the property, the garnishee had the right to show any state of facts which would defeat the plaintiff. *Board of Education v. Scoville*, 18 Kan. 17; *Mull v. Jones*, 33 Kan. 112, 5 Pac. 388; *Linder v. Murdy*, 37 Kan. 152, 14 Pac. 447.

The case of *Cunningham v. Railway Co.*, 60 Kan. 268, 56 Pac. 502, cited by the plaintiff, is not pertinent. In that case the defendant in the principal action contested the garnishment order on the ground that the money sought to be reached was exempt. He was defeated and did not appeal. Afterwards, when the garnishee was sued for non-compliance with the order, it attempted again to invoke the defendant's right of exemption. Under these circumstances the court properly held the matter to be res judicata.

There is no doubt that the defendant was not relieved from garnishment merely because it is a common carrier and held the property for purposes of transportation only.

"According to the better doctrine, property in the hands of a common carrier in actual transit cannot be reached by garnishment proceedings by summoning the common carrier as garnishee. Where, however, property has been delivered to a common carrier for shipment, but it is not in actual transit at the time of the service of the garnishment process upon the carrier, according to the weight of authority, such property is liable,

and the carrier may be held as garnishee or trustee." 20 Cyc. p. 1021.

A list of cases dealing with the subject may be found in *Ann. Cas.* 1913A, at page 1821.

In this case, however, the remedy was abused. The plaintiff should have sent the marshal of the court to the defendant's warehouse with an execution instead of a garnishment summons.

While garnishment proceedings are purely legal in the sense that they are out of the course of the common law and must be authorized by statute, in this state the remedy both in the district and other courts is in many respects essentially equitable.

"The general theory and doctrine of garnishment is that the garnishee is to be protected against all unnecessary vexation, and that the garnishee proceedings amount to no more than a substitution of the plaintiff for the defendant debtor in the enforcement of any liability against the garnishee." *Phelps v. A., T. & S. F. R. Co.*, 28 Kan. 165, 169.

"Moreover, proceedings in garnishment are not in the ordinary course of the common law. They involve consequences that would not otherwise occur in law or equity, and often compel the garnishee to submit to the expense of a suit in which he has no interest, and which he might be saved but for the garnishment. The proceeding should be governed by equitable principles, to the end that no unwarranted vexation or expense be inflicted upon the garnishee." *Brooks v. Fields et al.*, 25 Okl. 427, 432, 106 Pac. 828.

"Statutes of garnishment at best give a 'harsh and peculiar remedy,' and ought not to be resorted to when the redress sought may be obtained through common-law proceedings." *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 396, 18 N. W. 121, 122.

The statute under which the plaintiff proceeded is framed according to these principles.

"When an execution issued by a justice of the peace shall have been returned unsatisfied, the judgment creditor, his agent or attorney, may file an affidavit with the justice, setting forth that he has good reason to and does believe that any person or corporation (to be named), and within the county, has property of the defendant, or is indebted to him, and thereupon the justice shall issue an order to such garnishee to appear before him on a day to be named and answer such questions as may be propounded to him by the judgment creditor touching the property of the judgment debtor in his possession or under his control, and the amount owing by him to the judgment debtor, whether due or not." *Gen. Stat.* 1909, § 6524.

When the plaintiff has obtained a judgment upon which an ordinary execution may issue, that remedy must be exhausted before garnishment may be resorted to. This means

exhausted in fact and in good faith and not merely as a matter of form.

"An affidavit in garnishment is insufficient to support a garnishment proceeding where predicated upon a return of execution made by order of the plaintiff's attorney 'no property found and no part satisfied.' An execution in order to support the proceedings should show that the legal remedy provided thereby has been exhausted." *Horral v. Brassie*, 158 Ill. App. 526, Syll.

The same general principle is applied in cases of garnishment before judgment.

"Before the process of garnishment can issue, an affidavit must be made on behalf of the plaintiff which shall state, among other things, that the deponent 'verily believes * * * that such defendant has not property liable to execution sufficient to satisfy the plaintiff's demand.' Rev. St. § 2753. It being a harsh remedy, the statute which gives it will not be extended by construction to cases not fairly within its words. It is safe to assume that it is not the intention of this statute to permit garnishment where the debtor has property liable to execution sufficient to satisfy the plaintiff's demand, for it has limited the right to cases where the defendant has not sufficient property. It is not intended that such a debtor shall be tied up by garnishment so long as he neither does nor contemplates doing some act which will justify an attachment against his property, because the creditor cannot always know the true state of the debtor's property; and to make the remedy effective he is permitted to inaugurate this remedy by his affidavit that he verily believes that his debtor has not property liable to execution sufficient to satisfy his demand. But if, in truth, it shall appear that the debtor has property sufficient to satisfy his demand, a case is shown where this remedy is not within the intention of the law. This process has been used in a case not intended by the lawmakers. Doubtless some liberality must be allowed in order to give the remedy efficiency. But where the property of the debtor is abundant for the satisfaction of the plaintiff's claim, there can be no case for garnishment; and where it is known to the affiant that the debtor has property subject to execution, sufficient, many times, to satisfy the plaintiff's demand, he cannot honestly make the affidavit. To procure the process in such a case is an abuse of the remedy given by the statute." *German American Bank v. Butler-Mueller Co. et al.*, 87 Wis. 467, 470, 58 N. W. 746.

When the ordinary remedy by execution has proved to be ineffectual, a garnishee may be summoned to appear and submit to examination for the purpose of obtaining a disclosure of property which could not be reached directly. While, as the Wisconsin court said, some latitude must be allowed in order to make the remedy efficient, it cannot be resorted to when there is plainly no occasion

for it so far as the creditor is concerned, and when it results in unnecessary hardship and embarrassment to the garnishee.

The defendant received the property from a stranger to the proceeding and innocently contracted to transport it to Portland, Or., and there deliver it to another stranger. This contract, besides giving the defendant valuable rights, imposed upon it an obligation which might prove very embarrassing if not promptly fulfilled. The defendant was justified in assuming that the consignee was the owner of the goods. The garnishment summons asserted nothing to the contrary, and the memorandum on the summons asserted nothing to the contrary. The utmost effect to be given to the memorandum is that it identified the property concerning which the defendant was to answer. So far as the question of title was concerned, the defendant could say nothing except that it had no property belonging to McMann since the goods were billed to Lilly. If issue were taken on this answer, the defendant would be involved in a vexatious and expensive controversy over a matter in which it had no interest whatever. If the plaintiff had no case, the defendant would have goods on its hands at the end of the litigation which the consignee might claim were converted by failure to deliver. The plaintiff had no right to place the defendant in this compromised situation when a simple execution would have served his purpose at once. If the question of McMann's ownership were so doubtful that the marshal would not levy without indemnity, the plaintiff should have assumed responsibility instead of attempting to cast it upon the defendant.

"The statute does not attempt, if it could do so, to cut off the rights of strangers to the litigation, or to compel a garnishee at his peril to decide questions of fact on which he has no means of knowledge." *Walker v. Detroit, G. H. & M. R. Co.*, 49 Mich. 446, 13 N. W. 812.

While no witness testified that the plaintiff furnished the information that went into the memorandum indorsed on the summons, it is perfectly clear that the garnishment proceeding was instituted for the express purpose of impounding the identical property in controversy which had in fact been within reach of execution ever since the judgment against McMann was rendered.

"This whole proceeding is in the nature of process to obtain satisfaction of a judgment. And the court may, and it is its duty, at any stage, upon its appearing that the garnishee process was improvidently issued, to dismiss the proceeding. Courts will not permit their process to be employed for improper and unauthorized purposes." *Chanute et al. v. Martin*, 25 Ill. 63, 65.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant. All the Justices concurring.

GRAY v. MISSOURI PAC. RY. CO.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

RAILROADS (§ 483*)—FIRES—ATTORNEY'S FEES—ALLOWANCE—JURY TRIAL.

In an action in which it is sought to recover attorney's fees for the prosecution thereof, the necessary facts should be pleaded, and, when a jury trial is had, evidence should be produced of the fact and of the value of the services, and the issues should be determined by the jury as other issues in the case are determined.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1737-1739; Dec. Dig. § 483.*]

Appeal from District Court, Rice County. Action by Frank M. Gray against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Modified.

W. P. Waggener and J. M. Challiss, both of Atchison, for appellant. Foley & Hopkins, Samuel Jones, and Ben Jones, all of Lyons, for appellee.

SMITH, J. This action was brought against the appellant to recover damages for the burning of a barn belonging to appellee and certain personal property alleged to have been contained therein, by the alleged negligence of the appellant in operating its train. The answer was a general denial and a defense upon the modernity and sufficiency of its approved spark-arresting appliances, the competency and skill of its employés in charge of its engine, and the care exercised by them in handling the engine at the time in question.

The barn was in Geneseo, north of the switch tracks of appellant. The evidence shows that appellant's train came into the station; that a part of the cars were detached from the engine, and that three or four switches of cars were made running from the depot past the barn and back; that these three or four switches were made in about five minutes' time and the estimate of the distance run at each switch justified the finding that the switch engine was moving rapidly. There was a strong southern wind blowing at the time. The barn was observed to be burning almost immediately after the switches were made, and no other explanation or accounting for the fire is suggested, except that it was caused by sparks or cinders from the engine. There was evidence from several of the railroad men that the spark-arresting apparatus was of the most modern device, properly adjusted, and in perfect condition; also that the engine under these conditions would not throw off sparks or cinders if properly operated.

The appellant offered as a witness its fireman, Miller, who testified, in substance, that he was familiar with the operation of locomotive engines and could run one; that he

knew what was necessary to be done in the operation thereof, and was thoroughly familiar with that line of business. This evidence was offered for the purpose of qualifying the witness as an expert to testify that the engineer was competent, careful, and skillful. The objection was made that the evidence of the fireman did not show that he was competent as an expert witness. The objection was sustained. If erroneous, the ruling was not prejudicial.

The following question was submitted to the jury: "Were the persons in charge of the operation of said engine skillful and prudent persons to discharge the duties they were engaged in? A. Skillful, but not prudent."

There was evidence not only that the barn was burned by a fire started about the time of the switching operations but that the grass was ignited in one or more places near the track and barn. There was abundant evidence, also, of other witnesses that the engine did throw sparks and cinders. And as the evidence of the operatives of the railroad was that the engine could not throw sparks or cinders if properly operated, the jury, evidently believing that the engine caused the fire, concluded and answered in response to a question that the fire was caused by the imprudent handling of the engine; that it was operated too fast in making the switches. We think the evidence fully justified the conclusion and also justifies their general verdict against the appellant. No objection is raised to the amount of the verdict.

The petition alleged that it was necessary for the plaintiff to employ counsel to conduct his case, and that the reasonable value of such services was \$500, for which amount he prayed judgment. The general verdict was for \$4,613, but no verdict was returned in regard to the attorney's fees and no evidence was produced to the jury nor to the court at the time it rendered judgment as to the value of the attorney's fees. Appellant filed a motion for judgment in its favor, notwithstanding the verdict, which motion was overruled. The motion for a new trial was also overruled, and judgment was rendered for the appellee in accordance with the general verdict.

The journal entry of the proceedings recites the further action of the court as follows: " * * * And the court further finds that a reasonable attorney's fee in this cause is the sum of \$400. It is therefore by the court ordered, adjudged, and decreed that the plaintiff have and recover of and from the defendant the sum of \$400 as his attorney's fees in this matter, to which judgment for attorney's fees the defendant duly objected and excepted." In this there was error. The amount of attorney's fees, if any, to which a plaintiff is entitled in such a case is a question for the determination of the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes

to be tried by the jury as other questions of fact in the case are tried.

In *Mo. Pac. Rly. Co. v. Merrill*, 40 Kan. 404, 409, 19 Pac. 793, 795, it was said: "The question, what was a reasonable attorney's fee, was properly submitted to the jury. It is true the statute provides that the court shall allow a reasonable attorney's fee, which shall become a part of the judgment. The word 'court,' however, was doubtless used by the Legislature in the broader sense as including both judge and jury or judge alone, according as the court may be constituted when the trial occurs. What is a reasonable attorney's fee is a question of fact which should be submitted and determined the same as any other fact arising in the case." See, also, *Ft. S. W. & W. Rld. Co. v. Karracker*, 46 Kan. 511, 26 Pac. 1027; *Ft. S., W. & W. Rly. Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612.

We have considered all of the trial questions presented and think there was no substantial error in the trial of the case, and the general verdict and judgment based thereon is affirmed. The appellant duly objected to the rendition of judgment for attorney's fees, and the court, in mistake of the law, rendered judgment therefor.

The judgment is modified, and the amount therein adjudged for attorney's fees is eliminated. The case is remanded for a new trial upon the sole question of attorney's fees to be had to the court and a jury, unless counsel for the parties shall agree upon a different adjustment thereof. All the Justices concurring.

FINNUP v. BURNSIDE

(Supreme Court of Kansas. April 12, 1913.)

(*Syllabus by the Court.*)

PUBLIC LANDS (§ 135*)—PASTURAGE.

The plaintiff owned land, which was inclosed with other land constituting a part of a national forest reserve. The proper authorities issued a permit to him to graze a designated number of cattle upon the government land so inclosed with his own, which permit was not assignable. The defendant leased the plaintiff's land within the pasture for grazing purposes for the season with the understanding that he was to have the benefit of the government permit so granted to the plaintiff. He then obtained a permit to graze an additional number of cattle upon the same government land and made preparations to occupy and use the pasture, but made no use of it because of the failure of his plan to procure cattle. The government regulations provide for forfeiting permits in case they are sold or transferred, and also for the issuance of new permits where the original is abandoned by the permittee in favor of another. The defendant was not deprived of the use of the pasture by the government authorities but by his failure to obtain cattle, and is liable for the stipulated rent. A verdict for that amount is sustained by the evidence.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 351-362; Dec. Dig. § 135.*]

Appeal from District Court, Finney County. Action by George W. Finnup against John H. Burnside. Judgment for plaintiff, and defendant appeals. Affirmed.

Hoskinson & Hoskinson and Edgar Foster, all of Garden City, for appellant. Wm. Easton Hutchison and C. E. Vance, both of Garden City, for appellee.

BENSON, J. This action was brought to recover a sum agreed upon between the parties for the use of pasture land. The defense is based upon the alleged invalidity of the agreement because government lands situated within a national forest reserve are included in the limits of the pasture.

The plaintiff is the owner of 3,920 acres of land which is fenced in with 3,520 acres included in the Kansas Natural Forest Reserve, designated as grazing district 1, division 6. In May, 1909, a verbal agreement was made between the parties that the defendant should have the use of the pasture for the ensuing pasturage season for \$800; one half to be paid September 1st and the other half November 1st of that year. The plaintiff had in the preceding April obtained a permit from the superintendent of the reserve for grazing 270 head of cattle upon the government lands in that pasture for the season, and it seems to have been the understanding that the defendant should have the benefit of this permit. He afterwards applied for and obtained a permit from the superintendent to graze 10 head of cattle on each section of government land in the pasture and was informed by the superintendent that this was allowed in addition to the 50 head per section allowed to the plaintiff, but that the grazing privilege of the plaintiff was only available for his cattle. The defendant proceeded with the preparations to use the pasture, but because of a failure to receive cattle as intended he did not do so. When the September payment was due, he asked for an extension of time, still expecting to receive the cattle and use the pasture. He made no use of it because of his failure to obtain cattle, but never surrendered or indicated a purpose to surrender it, nor did the government authorities interfere with such use, otherwise than by giving the information above stated.

The government regulations relating to forest reserves provide that permits for grazing will be granted only for the benefit of the owners of stock and will be forfeited if sold or transferred. Permits are not assignable, and abandonment in favor of another necessitates a new application. In case of abandonment and issuance of a new permit the original holder may sell his improvements to the new permittee. The defendant testified: "I understood from Mr. Finnup that he had a permit for 50 to the section that he would allow me to use for this stock. Mr. Finnup

told me he had a permit, for which he paid \$81, allowing him to run 50 head per section on the government land which he would transfer to me. Q. That was an arrangement rather than the leasing of the land he didn't own? A. You can call it whichever you please. Q. If you had leased the land itself from Mr. Finnpup, then you wouldn't have needed to see anybody else about putting additional cattle on it? A. Understand, I only seen about the additional number of cattle of 10 per section. The 50 to the section that he had already a permit on I made no application for that he had told me he had this permit of 50 to the section for which he had paid \$81, that he would allow me to use. Q. In both events there was no leasing of the forestry land; it cannot be leased? A. No, sir. Q. There was no attempt on your part to lease it or Mr. Finnpup to lease it to you? A. Only a transfer of this permit. * * * Q. And your failure to use it was not on account of any particular ruling of the department or Mr. D'Allemand's statement to you? A. We never got to that point. Q. You still held the pasture? A. Yes, sir. Q. And you never told Mr. Finnpup that you didn't want it on account of not using it? A. I told Mr. Finnpup I wasn't able to use the pasture during this season and asked him for an extension of time to use it. Q. When was that? A. That was some time in September. Q. After the first payment was due? A. Yes, sir. Q. Not until that time? A. No, sir. Q. And at that time you hadn't got your cattle, any cattle, there for it? A. Not at all."

The jury returned a specific finding that the land leased was "all land inside the Finnpup pasture belonging to G. W. Finnpup." This finding, in connection with the undisputed evidence, establishes the fact that the parties intended that the privately owned land in the pasture only should be leased, but with the privilege which had been granted to the plaintiff of grazing 50 head of cattle per section upon the government land. While this privilege was not assignable, its existence was recognized by the superintendent when the permit for grazing 10 head to the section in addition was granted to the defendant. The regulations provided, as we have seen, how the defendant might have the benefit of the first permit through its abandonment in favor of the defendant and the issuance of a new one to him. The agreement of the parties must be construed in the light of these regulations and the attendant circumstances, and it appears reasonably certain that the defendant might have enjoyed all the benefits of his contract, and would have done so, had he not been disappointed in the arrangements he had previously made for a supply of cattle. If found necessary he could have taken out a new permit in place of the one abandoned in his favor.

After the superintendent informed him of the rights of the first permittee, he did not complain that he was deprived of the use of the pasture or any part of it, but, on the contrary, treated the agreement as in force and asked for an extension of time. There was no interference by any one to prevent the defendant from enjoying the full benefit of his agreement, and he does not seem to have anticipated any interference. When another person endeavored to secure like privileges from the plaintiff, he was referred to the defendant as the holder of the lease. Both parties treated the agreement as being in force through the season, and no valid reason is shown for holding otherwise.

The only alleged error argued in the appellant's brief is that the verdict is not sustained by the evidence. This contention cannot be sustained.

The judgment is affirmed. All the Justices concurring.

SMITH v. SCHOOL DIST. NO. 64 OF MARION COUNTY.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. TENDER (§ 14*)—SUFFICIENCY—CONDITIONS.

To constitute a sufficient tender, it must be unconditional. Where a larger sum than that tendered is in good faith claimed to be due, the tender is ineffectual as such if its acceptance involves the admission that no more is due.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 33-38; Dec. Dig. § 14.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 144*)—TEACHERS—RIGHT TO COMPENSATION.

A district board ordered school closed a month earlier than the contract with the teacher provided for, on the ground that it was getting late, and the older boys were needed for farm work. *Held*, that the teacher was entitled to recover his salary for the full term.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 308-314; Dec. Dig. § 144.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 144*)—TEACHERS—RIGHT TO COMPENSATION.

A teacher whose contract with the board makes no provision for deduction in compensation during times when school is closed, and who stands ready to teach, and is prevented from teaching only because the board orders the school closed on account of the prevalence of a contagious disease in the community, is entitled to recover the compensation agreed upon.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 308-314; Dec. Dig. § 144.*]

Appeal from District Court, Marion County.

Action by Sam J. Smith against School District No. 64 of Marion County. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

D. W. Wheeler, of Marion, for appellant. W. H. Carpenter, of Marion, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PORTER, J. The plaintiff, who is appellant, was employed to teach school at a salary of \$55 per month. The action is to recover for two months' salary. A copy of the written contract between the board and the plaintiff was attached to the petition, and it was alleged that plaintiff had been able, ready, and willing at all times to perform his part of the contract, and had performed the same, and that the board had failed to pay two months of the salary agreed upon. The answer set up a general denial and a further defense, admitting the execution of the written contract for a seven-months school, but alleging that the plaintiff had failed to teach two months of the term. On the trial, which was to the court, it was shown by the plaintiff's testimony that the school opened September 28, 1910, and continued until February 9th, when it was closed by order of the board on account of sickness among the scholars. It reopened March 14th, and continued until April 11th, at which time over appellant's objections the board ordered the term finally closed on the ground that it was getting late, and that a good many of the boys were needed for farm work. It appeared that plaintiff was ready and willing to complete the full term, and had been paid for five months only. In his testimony he admitted, in substance, that the board was willing to pay him for the sixth month, and the court intimated an intention to hold that he was only entitled to pay for one month, and that, as he had been tendered an order for that month and refused to accept it, the costs should be taxed against him. He was then recalled for further examination as follows: Direct examination: "Q. Mr. Smith, did the school board ever write out and tender you an order for your wages, hand you, or offer to hand you, an order for it? * * * A. They never handed me any; but, when I handed the books in, Mr. Kennard had his pencil in his hand, and acted as though he would give an order for \$55 for the sixth month. Q. He never actually wrote an order? A. He did not. * * * Cross-examination: "Q. He took his pencil and started to write out the order, and you told him not to do it, and you said you wouldn't accept it? A. No, sir; he didn't start to write it out, any more than he had the pencil in his hand and raised from the chair. Q. You told him you wouldn't accept an order for \$55? A. I told him that wouldn't pay it. Q. And that you wouldn't accept it, didn't you? A. Yes, sir; I wouldn't accept that as complete pay, because it wasn't. By the Court: Judgment will be for the defendant upon the district board depositing in the hands of the clerk an order for one month's wages and the costs adjudged against the plaintiff." From the judgment plaintiff appeals.

There is a motion to dismiss the appeal on the ground that the amount in controver-

sy is less than \$100. The contention is that there was a tender of salary for the sixth month, a refusal to accept it, an order for the defendant to pay the amount into court, and that, therefore, the only controversy is over the salary claimed to be due for the seventh month. The plaintiff, however, sued for \$110. No judgment was rendered in his favor. On the contrary, the judgment was for the defendant. The amount involved in the appeal is the full sum sued for and claimed to be due.

[1] If it is conceded that the evidence shows an offer to give appellant an order for one month's salary, it was not a tender which could have the legal effect which the court gave to it, for the reason that it was conditional upon the appellant accepting it in full payment of the amount due. All the offer that was made was to give an order for one month's salary as full payment. A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if it be coupled with such conditions that the acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due. *Moore v. Norman*, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526, and note page 529; 38 Cyc. 152, and cases cited in note 152, 153. The petition might have recited the facts more fully by stating that the board closed the school and prevented him from completing the term; but the averment that he was ready, able, and willing at all times to perform his part and had performed the same could in no manner have misled the board. Giving the petition the liberal construction to which it is entitled, in the absence of any other attack except an objection to the admission of testimony relating to the action of the board in closing the school, we think that the variance between the statements of the petition and the proof should be deemed immaterial. Code Civ. Proc. § 134 (Gen. St. 1909, § 5727), requires this except where it appears that the adverse party has actually been misled to his prejudice.

[2, 3] It must be obvious that the board could not avoid liability for payment of the salary for the full term by arbitrarily closing the school a month earlier than the contract provided; and that, since there was no express stipulation for a deduction from the compensation agreed upon by reason of the closing of the school during the prevalence of a contagious disease in the community, the plaintiff was entitled to his salary for that month. *McKay v. Barnett*, 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371; *School Town of Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059; *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808; 35 Cyc. 1099; 25 A. & E. Encycl. of L. 16. In the opinion in the case last cited the court used this language:

"The committee closed the school because of the prevalence of diphtheria in the town. The defendants contend that this excuses the town from paying the teacher's salary for the time when the school was thus suspended. Although the prevalence in the town of a contagious disease made it prudent to suspend the school, that fact is not a reason why the plaintiff should not have the compensation which had been promised him. He stood ready to teach, and failed only because the committee thought it for the welfare of the town that the scholars should not attend." 175 Mass. 128, 55 N. E. 808. The precise question was before the Supreme Court of Michigan in *Dewey v. Union School District*, etc., 48 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206, where it was held that the situation brought about by the prevalence of the contagious disease was the misfortune of the district and not of the teacher, and that the district ought to bear it.

The judgment will be reversed, and the cause remanded, with directions to render judgment for the plaintiff for the amount prayed for. All the Justices concurring.

GARDEN CITY NAT. BANK v. SCHULMAN.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 217*)—GUARANTY ON NOTE—PRESUMPTIONS.

In an action upon a written guaranty in the name of a trading partnership indorsed on the back of the promissory note of a third person, it will be presumed, until proof to the contrary is produced, that the guaranty was made in the course of the firm's business.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 419-425; Dec. Dig. § 217.*]

2. PARTNERSHIP (§ 157*)—UNAUTHORIZED ACT OF PARTNER—RATIFICATION.

The subsequent ratification by one partner of the unauthorized act of his copartner in guaranteeing in the firm name payment of a note of a third person is equivalent to antecedent authority.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 282-291; Dec. Dig. § 157.*]

Appeal from District Court, Finney County.

Action by the Garden City National Bank against S. Schulman. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Hopkins and R. J. Hopkins, both of Garden City, and Abram Schulman, of Lawrence, for appellant. Edgar Foster, of Lakin, and Hoskinson & Hoskinson, of Garden City, for appellee.

BURCH, J. The action in the district court was one for the recovery of money brought by the Garden City National Bank against S. Schulman. Judgment was rendered for the plaintiff, and the defendant appeals.

The petition was filed on May 10, 1910, and disclosed the following facts: The plaintiff is a banking corporation organized under the laws of the United States. Previous to March 23, 1908, S. L. Leonard and the defendant were partners engaged in trade, conducting a hardware and implement business under the firm name of Leonard & Schulman. On the date last mentioned the partnership was dissolved by the retirement of Leonard. Schulman continued the business, assuming all the firm liabilities. On March 20, 1906, George B. Warner and G. G. Baker executed to the plaintiff their promissory note for \$500 due in four months. On the same day the firm of Leonard & Schulman indorsed on the note the following guaranty: "For value received we guarantee payment, waiving notice and protest. Leonard & Schulman." In that form the note was negotiated and delivered to the plaintiff, who loaned Warner and Baker the sum of \$500 thereon. The plaintiff was the owner and holder of the note, and no part of it had been paid. The defendant moved to require the plaintiff to make the petition more definite and certain by stating whether or not the articles of partnership between Leonard & Schulman authorized the indorsement on the note; whether or not the indorsement was authorized by the members of the firm; who signed the firm name to the guaranty; and what the consideration for the guaranty was. The defendant complains because this motion was overruled.

The nature of the plaintiff's cause of action was perfectly apparent. The defendant was sued as a member of the firm of Leonard & Schulman on the written contract of the firm guaranteeing the payment of the Warner and Baker note. The defendant knew better than the plaintiff who signed the firm name to the guaranty, and whether or not the action of the partner signing the firm name was authorized by the articles of partnership or by the defendant.

[1] It is the law of this state that, where a guaranty in the name of a trading partnership is indorsed on the back of the promissory note of a third person, it is presumed, in the absence of proof to the contrary, that the indorsement was made in the course of the firm's business. *Fuller v. Scott*, 8 Kan. 25. The guaranty, being in writing, imported a consideration. *Prima facie*, therefore, the petition disclosed liability on a binding obligation of the firm of Leonard & Schulman and of the defendant as a member of that firm, and it devolved upon him to plead and prove unauthorized use of the firm name, and want of sufficient or proper consideration, if those were his defenses. The petition also contained an allegation that the defendant repeatedly promised to pay the Warner and Baker note, and the defendant moved to require the plaintiff to make the charge more definite and certain by stating wheth-

er or not these promises were oral or in writing. The motion was well founded. The defendant would not be liable on his own independent promise to discharge Warner and Baker's indebtedness unless the promise were in writing, based upon sufficient consideration, and the nature of his supposed liability was not apparent from the statement of the petition. This matter, however, became of no consequence, because it clearly appears that the defendant suffered no embarrassment in making his defense and because the judgment against him was finally rested upon other grounds.

A demurrer to the petition raised substantially the same questions presented by the motion to make more definite and certain, and consequently was properly overruled. The defense was that the guaranty was given by Leonard, without the consent or authority of the defendant, as an accommodation to Warner and Baker. The jury found specially that the defendant ratified the guaranty. It is argued that the evidence was insufficient to warrant a finding of ratification.

Warner and Baker were partners. Baker died, and the partnership estate was administered in the probate court. The plaintiff presented a claim in writing against the estate for the amount of the note, to which a copy of the instrument was attached, but retained the note in its possession. When called upon to pay the note, the defendant said it was given wherein there was an estate, and that he would like to have the bank wait until he could get the estate settled before paying. The cashier said he thought the note had run long enough and should be settled, but the defendant finally showed that he had a trade on hand the bank knew of, and that he could get the money out of the estate, and that he would pay it. A question arose concerning interest in another matter, but the defendant said that in this matter he would not ask for a reduction of interest, but would pay in full. He only wanted time until he could realize out of the property. The defendant had several conversations with the cashier of the bank with reference to the note, and in one of them he said he desired to take the note, together with another note given by Warner and Baker to Leonard & Schulman and held as collateral security to the first one, and file them with the probate court. On June 10, 1908, he gave a receipt to the bank for the notes, took them away with him, and took them to the probate court. He did not return the notes to the bank, and the plaintiff's cashier found the one in suit on file in the probate court shortly before the trial. The defendant filed a claim against the Warner and Baker estate for the note held by the bank as collateral security, and the defendant himself testified that the firm

was financially interested in the transaction out of which the note in suit arose. While the defendant's testimony was quite at variance with that of the cashier of the bank in many particulars, the jury has resolved the conflict in the plaintiff's favor.

[2] The finding of ratification is abundantly sustained, and it is elementary that the subsequent ratification by one partner of an unauthorized act of his copartner is equivalent to previous authorization. The jury were properly instructed on the subject of ratification.

In view of the foregoing, a consideration of other errors assigned would be superfluous.

The judgment of the district court is affirmed. All the Justices concurring.

CASILLAS v. ALTOONA PORTLAND CEMENT CO.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—INJURY TO SERVANT—INSTRUCTION.

Although the petition and evidence in a personal injury case might justify a recovery under the common law, the defendant cannot be prejudiced by a refusal to instruct upon assumed risk and contributory negligence, where the jury are told that the plaintiff can recover only under the factory act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

Appeal from District Court, Wilson County. Action by Fred Casillas against the Altoona Portland Cement Company. From judgment for plaintiff, defendant appeals. Affirmed.

Keene & Gates, of Ft. Scott, and E. D. Mikesell, of Fredonia, for appellant. James M. Kennedy and J. T. Cooper, both of Fredonia, for appellee.

MASON, J. The Altoona Portland Cement Company appeals from a judgment rendered against it in favor of Fred Casillas on account of injuries received by him while in its employ.

The plaintiff founded his claim upon allegations that the defendant had violated the "factory act" by failing to safeguard its machinery. The defendant interpreted the petition as also charging such negligence as to render it liable under the common law, and asked the court to instruct that as to this feature of the case the defenses of assumed risk and contributory negligence were open. This instruction was refused, and the ruling is complained of. The court had previously overruled a motion to require the plaintiff to elect whether he would proceed under the factory act or the general law, stating the ground of its decision to be that the petition authorized a recovery only under the former.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Inasmuch as the case was tried throughout on the theory that no recovery could be had except under the factory act, no prejudice could have resulted to the defendant from the refusal to instruct on any other theory, even although the petition and evidence might have justified submitting to the jury the question whether a liability existed independent of the statute.

Complaint is made of the admission as evidence of the value of medical services, of bills rendered to the plaintiff by the physicians, but they were made competent by testimony that the charges were fair and reasonable.

It is urged that the evidence of the value of the time lost by the plaintiff was insufficient, because he testified that he had been receiving \$2.50, without indicating whether this was his daily or weekly wage. The circumstances justified the jury in understanding the former to be meant.

The judgment is affirmed. All the Justices concurring.

CARTER v. CARTER. †

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 326*)—FOREIGN DIVORCES—REPEAL OF STATUTE.

Chapter 184, Laws of 1907, entitled "An act in relation to foreign judgments of divorce and defining the faith and credit to be given them," was never a part of the Code of Procedure and was not repealed by the revision of the Code in 1909.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840; Dec. Dig. § 326.*]

2. FOREIGN DIVORCE.

McCormick v. McCormick, 82 Kan. 31, 107 Pac. 546, and Miller, as Guardian, v. Miller et al., 130 Pac. 681, followed, and held, that the demurrer to the reply was rightly sustained.

Appeal from District Court, Shawnee County.

Action by Arie Carter against Benjamin Carter. From a judgment sustaining a demurrer to the reply, plaintiff appeals. Affirmed.

W. I. Jamison and W. H. Cowles, both of Topeka, and C. H. Kirshner, of Kansas City, Mo., for appellant. Osmond & Cole, of Great Bend, for appellee.

PORTER, J. On January 1, 1911, plaintiff, who is the appellant, brought this action for divorce and alimony. The defendant (appellee) answered setting up a decree of divorce rendered in his favor June 16, 1909, by the circuit court of Jackson county, Mo., alleging that court to be one of general jurisdiction and that it had jurisdiction of the subject-matter and of the parties. The answer further alleged that after the rendition of the judgment the appellant made application to that court to vacate the same and

that after a full hearing her application was denied. The reply admitted the rendition of the Missouri judgment and that the court there was a court of general jurisdiction, but sought to avoid the effect of the judgment on the ground that it was obtained by fraud in that the appellee in his petition had alleged that he was and had been a resident of the state of Missouri for more than one year next preceding the filing of his petition, when in fact he was all of that time a resident of Kansas. It further alleged that the judgment was obtained upon the false and perjured testimony of appellee, that her application to set it aside had not been decided on the merits but upon technical grounds, and that the question of fraud in obtaining the judgment had not been inquired into. The reply further alleged that in any event the Missouri decree, whether valid or not, could only affect the marital status of the parties and could not conclude appellant as to her rights in property acquired by her former husband. To this reply the court sustained a demurrer which is the ruling complained of as error.

[1] The first contention is that chapter 184, Session Laws of 1907, was repealed by the revision of the Code of Civil Procedure in 1909. The title of the act is "An act in relation to foreign judgments of divorce and defining the faith and credit to be given them." The act provides that a decree of divorce rendered in another state upon service by publication in conformity with the law there shall be given full faith and credit here, and shall have the same force with regard to residents of this state and shall affect the status of all persons and be treated and considered the same as a judgment rendered in this state. The act was not a part of the former Code of Civil Procedure, and therefore was not repealed by the revision.

[2] The claim of appellant that the Missouri decree is void and subject to collateral attack is fully met and answered in the opinion in the case of McCormick v. McCormick, 82 Kan. 31, 107 Pac. 546, and by the case of Miller, as Guardian, v. Miller et al., 130 Pac. 681. The McCormick Case likewise answers the contention of appellant that her property rights were not affected by the Missouri decree. The decree there dissolved the marriage relation and changed the status of the appellant, so that, being no longer the wife of the appellee, she has no rights in his property. Every point suggested in the argument and in the briefs has been covered so fully by the opinions in the cases cited that further comment is unnecessary.

Upon the authority of those cases the judgment sustaining the demurrer to the reply must be affirmed. All the Justices concurring.

*For other cases on the same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MASON v. SANDERS (WORKMAN, Garnishee, and BROOKS, Intervener). †

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

GARNISHMENT (§ 51*)—PROPERTY SUBJECT—SALES.

Upon a sale of personal property the purchaser agreed with the vendor to pay the consideration to a third party who claimed a lien upon it under a chattel mortgage. After the property was delivered the purchaser was garnished by another creditor of the vendor. The mortgage was not in fact a lien upon the property; but, the mortgagee and mortgagor having treated it as a lien and by mutual agreement provided that the proceeds should be applied upon the mortgage debt, they will be so applied.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 74, 97-101; Dec. Dig. § 51.*]

Error from District Court, Lyon County.

Action by M. M. Mason against Riley Sanders, J. G. Workman, garnishee, and W. H. Brooks, Intervener. From the judgment plaintiff brings error. Affirmed.

Kellogg & Frith, of Emporia, and W. S. Kretsinger, of Escondido, Cal., for plaintiff in error. Huggins, Ganse & Riddle and Hamer & Harris, all of Emporia, for defendant in error.

BENSON, J. The controversy in this action is over a fund paid into court by the garnishee. The action was for the recovery of money from the defendant Sanders, against whom judgment was rendered by consent. The garnishee was indebted for hogs sold to him by the defendant. The intervener, Brooks, claimed the money due upon this sale. He held a mortgage covering 85 hogs and their increase. Learning that the defendant had sold hogs to Workman, Brooks notified Workman that he claimed the proceeds under his mortgage. At that time but one load of hogs had been delivered. Sanders then agreed with Brooks that the remainder of the hogs should be delivered to Workman, and that the proceeds should be paid over to Brooks. Workman consented to this arrangement and promised to make the payment to Brooks upon an order from Sanders. Thereupon further deliveries were made until the lot of 36 so sold were received. Tickets showing weights were given to Sanders, who delivered them to Brooks. Two days after the last load had been delivered Workman received a written order from Sanders to pay the proceeds to Brooks, but he had on the preceding day been served with the garnishment notice in this action. Thereupon he filed an answer stating that he had purchased hogs of Sanders, the amount due, the claim of Brooks to the fund, and his agreement to pay it.

It is admitted that the mortgage was not a valid lien on the hogs sold to the garnishee for the reason that its date was too remote

to make their existence possible at that time. Nevertheless the mortgagee claimed the property under that instrument, the mortgagor yielded to that claim, and agreed that the proceeds should be applied upon the mortgage debt. The hogs were delivered upon the agreement that such application should be made to which the purchaser consented. The transaction was completed before this action was begun, except the written order for the money which was delivered two days afterwards.

While a mortgage lien did not attach to the property in question, the parties consented that it should attach to the proceeds of the sale; that is, they agreed that the hogs should be delivered to Workman, who should pay the consideration upon the debt owing by Sanders to Brooks which the mortgage purported to secure. Upon receipt of the hogs the purchaser became indebted for the amount, not to Sanders, but to Brooks to whom he had promised to make the payment. The written order was useful as a voucher, but if Sanders had refused to give it, the right of the creditor to receive the money would not have been affected. In a similar transaction this court held: "When the purchasers of land agree as a condition precedent to such purchase, and as a part of the consideration thereof, that they will pay a debt of their grantor, such agreement makes them the debtors of the party holding such claim, and not the agent merely of their grantor for its payment." *Rickman v. Miller*, 39 Kan. 362, 18 Pac. 304.

It is true that in the first instance the agreement to sell the hogs did not include an agreement to pay the consideration to Brooks, but after the first load had been delivered, upon the assertion of the claim of the mortgagee, Sanders agreed that the proceeds should be applied upon the mortgage debt to which the purchaser assented. As no right of the plaintiff had then attached, no reason is perceived why this agreement should not be enforced. It was an application of the property to pay the debt. Neither the circumstance that the mortgage was not a valid lien nor the fact that the written order was not delivered until after the garnishment can defeat this arrangement.

It was held in *Center v. McQuesten*, 18 Kan. 476, that an agent after garnishment is not liable to the person to whom he is directed by his principal to pay money. After another trial that case was again reviewed (*Center v. McQuesten*, 24 Kan. 490), and upon consideration of the additional facts that the party to whom the promise of payment had been made was a creditor of the vendor holding a chattel mortgage claimed as a lien upon the property, it was held that the purchaser became the principal debtor and that the fund was not subject to garnishment, although the mortgage when considered alone was void. This last decision in the *Center*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

Case, rather than the first one, is deemed applicable to this controversy.

The judgment is affirmed. All the Justices concurring.

SMETHERS v. LINDSAY et al.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—TENDER (§ 4*)—FRAUDS, STATUTE OF (§ 129*).

The rules that a finding or determination by the trial court supported by competent evidence must stand, that a tender is unnecessary when its futility is shown, and that part performance and possession take an oral contract for the sale of real estate out of the operation of the statute of frauds followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8979-3982, 4024; Dec. Dig. § 1010;* Tender, Cent. Dig. § 5; Dec. Dig. § 4;* Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.*]

Appeal from District Court, Greenwood County.

Action by Alonzo Smethers against L. M. Lindsay and another. From judgment for plaintiff, defendants appeal. Affirmed.

O. C. Zwicker, of Eureka, for appellants. Howard J. Hodgson, of Eureka, for appellee.

WEST, J. Defendant W. S. Lindsay owned 120 acres of land adjoining a large pasture owned by the plaintiff, and made an oral agreement with him to sell the tract at \$20 an acre, receiving a payment of \$50 on the purchase price, the remainder to be paid and a deed given on or before the 10th of March. The plaintiff took possession of the land, and moved a division fence and repaired the fence along the boundary. On March 1st the time of payment was extended to May 1st at the request of the plaintiff. Up to this point the parties substantially agree. Defendant contends: That about March 1st Smethers said he could not raise the money; but, if Lindsay and wife would sign a contract, he would pay the 1st of May, and that Lindsay replied: "Well, I told him we were ready to make the deed whenever he furnished the money." That later Smethers agreed to pay 6 per cent. from the 1st of March, and was to pay the taxes. That he met him in November, when Smethers offered to pay \$70, and said this would make \$120 for the pasture, and they would call the deal off. That the remainder of the purchase price was never tendered. Lindsay also testified that "we were always ready" to make a deed if Smethers paid the \$2,350 and 6 per cent. interest. Smethers' version of the affair was that, when he called for a written contract, Lindsay said he did not need any contract, but when ready to pay the money the deed would be made. That at the November talk he complained that Mrs. Lindsay would not sign the

deed, but that, when she got in a humor to do so, the deed would be made. The trial court believed the plaintiff's story, which was corroborated by Mr. Sumner, who testified that Mrs. Lindsay stated in his presence that they got ready to sign the deed and started in a buggy with her son and was passed by her husband, who when she arrived, instead of having a deed ready, had "hired a lawyer to fight the case." Mrs. Sumner testified that Mrs. Lindsay told her frequently that she was ready to sign the deed any time that her share of the money was provided. The court found that the plaintiff had tendered the money into court and was entitled to a deed.

We think the evidence and the circumstances and conduct shown thereby justify the conclusion reached. The plaintiff testified that in November he told the defendant W. S. Lindsay that he had the money and wanted to pay for the land, "and he says, 'No use of tendering me any money,' and he says, 'I cannot make a deed, and I will not make the deed.'" This avoided the necessity of a formal tender, and the offer to pay the money into court was all that he was required to do. It is argued that the petition was demurrable because the contract was not in writing. But it alleged part performance, possession, and tender. After the demurrer was overruled, the defendants answered, admitting the oral contract to sell, the payment of \$50, the taking of possession (without the knowledge or consent of the defendants), and further alleged an abandonment in November of the contract and of the land by the plaintiff. An attempt was made to claim lack of knowledge of the contract on the part of the defendant's wife, but this was not sustained by the evidence. Failure of tender is argued, but a tender is not necessary when it would be futile. *Sherwin v. Baxter*, 86 Kan. 730, 121 Pac. 1128, and cases cited.

Mr. Lindsay in his answers to the following questions disclosed, we think, the cause of his reluctance to make the deed: "Q. At the time that you were selling this land to Mr. Smethers at \$20 per acre, that was a fair value of the land? A. It might have been then, but it is not now. Q. You do not think it is now? A. No, sir. Q. What do you think the land is worth now? A. I think \$25 an acre."

Finding no error in the record, the judgment is affirmed. All the Justices concurring.

CHICAGO LUMBER CO. v. DOUGLAS et al.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 47*)—LIENABLE MATERIAL.

Lumber furnished for and used in the making of forms for a concrete structure as provided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes
† Rehearing denied May 16, 1913.

in the contract and specifications for its erection, and which is largely consumed and rendered valueless by such use, is material within the meaning of the Mechanic's Lien Law (Code Civ. Proc. §§ 649-662 [Gen. St. 1909, §§ 6244-6257]) and of the provision of a bond given by a surety company in the form provided for in section 660 Code Civ. Proc. (Gen. St. 1909, § 6255), the obligation of which is that the contractor will "pay all indebtedness incurred for labor and material furnished and used in and about said contract work, or which might become the basis of a lien."

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 50; Dec. Dig. § 47.*]

2. MECHANICS' LIENS (§ 227*)—BOND TO RELEASE—DEFENSE.

The surety company cannot escape liability upon the bond for material furnished to and used by the contractor in the building on the ground that money received from the owner and paid to the materialman was applied by the latter in discharge of an earlier indebtedness of the contractor for material used on other buildings; no direction having been given by the contractor as to the application of the payment at the time it was made.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 410; Dec. Dig. § 227.*]

3. PRINCIPAL AND SURETY (§ 59*) — SURETY COMPANIES—LIABILITY.

The law does not have the same solicitude for corporations organized for the purpose of giving indemnity bonds, and which make suretyship a business for profit, that it has for voluntary sureties. Such corporations are essentially insurers, and in determining their rights and liabilities the rules peculiar to suretyship do not apply.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

Appeal from District Court, Shawnee County.

Action by the Chicago Lumber Company against H. S. Douglas, the Federal Union Surety Company, and others. From a judgment for plaintiff, the surety company appeals. Affirmed.

Ferry, Doran & Dean, of Topeka, for appellant. O. J. Evans, of Topeka, for appellee.

JOHNSTON, C. J. This appeal involves the liability of the appellant, the Federal Union Surety Company, which guaranteed the faithful performance of a contract of Douglas & Evans with the state of Kansas to furnish the material and erect the foundations of the Memorial building, and also that it would pay all indebtedness for labor and material furnished and used in and about the work. Douglas & Evans were general contractors, and were, at the time, engaged in building structures other than the Memorial building. They purchased a large quantity of lumber from appellee, the Chicago Lumber Company, which was used to make forms for the concrete foundations of the Memorial building, and they had previously purchased lumber from appellee for other buildings for which payment had not

been made. On May 10, 1910, a payment of \$4,000 was made by the state to the contractors, and on the following day they paid \$2,000 of the amount received from the state to appellee which appellee applied on the oldest bills held against the contractors, and which were for materials used on other buildings. Of the lumber furnished for the concrete forms the court held the surety company liable for \$1,322.98, being the cost of the same less \$38, the value of the lumber which was fit for use again after it was removed from the building.

[1] It is first contended that the surety company is not liable for the lumber used in the concrete forms, for the reason that it did not become a permanent part of the foundations or other portion of the building. By its bond the company guaranteed that the contractors would faithfully perform the contract in all particulars, and "pay all indebtedness incurred for labor and material furnished and used in and about said contract work," and there is an added clause, "or which might become the basis of a lien." The form of the contract was evidently the one ordinarily used, where the owner is a private person against whose property a lien might be obtained. If the lumber placed in the concrete forms can be said to have been used in and about the contract work, the surety company is liable for it. Although no mechanic's lien can be created where the state is the owner, counsel for both parties argue the case on the theory that the rule of liability of the surety company under its bond is the same as it would have been if the owner of the building was not the state, and the property improved was subject to a lien. Assuming that to be the rule, we have the question whether a person who furnishes the material for the forms into which the concrete for the walls of the building were poured is entitled to a lien. On one side it is contended that it is essential to the existence of a lien that the material shall have entered into and become a part of the permanent structure. On the other side, it is insisted that it is not necessary that the material shall be incorporated into the building if it is material provided for in the contract, and is used and consumed in whole or in part in the erection or repair of the building.

The statute gives a lien to any person who shall "furnish material for the erection, alteration or repair of any building, improvement or structure," on the land of the owner with whom a contract is made. Code Civ. Proc. § 649 (Gen. St. 1909, 6244). There is a division of judicial opinion as to whether a lien is given unless the material actually enters into and becomes a part of the completed structure, and this arises, to some extent, from the language of the different statutes providing for liens. In *Hill v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bowers, 45 Kan. 592, 26 Pac. 13, it is said that no lien can be allowed for material purchased for a building or structure on the land of the owner, unless it in fact goes into the building. This was said in a case where the material was not used in any way in or about the structure. It was purchased for the building of a fence on the owner's land, and was taken and left for a time on the highway in front of the land, but was afterwards seized and sold by the sheriff on execution. That rule was followed in *McGarry v. Averill*, 50 Kan. 362, 31 Pac. 1082, 34 Am. St. Rep. 120, where it was held to be error to refuse an offer of proof that the material purchased to improve a lot was never used in the construction of the building upon the lot, but was taken away and used elsewhere. The question involved in these cases was whether a lien could be had for material purchased for use in the erection of a building or other structure, but which, in fact, was never used for that purpose. It not only did not enter into or become a part of the completed structure, but was not even used to promote the erection, alteration, or repair of the same, and involved a very different question than is presented in the case under consideration. Here the material was used in the erection of the building, and it became temporarily a part of the foundations of the building. Its use was provided for in the plans for the building, and was included in the contract of the parties. By its use most of the material was destroyed or rendered unfit for any other practical use. One witness said that lumber so used became water-soaked, twisted, and practically valueless, and that architects now generally provided in their specifications that new lumber should be used for such forms. Some of the thicker or dimension lumber was not destroyed, and that much of it was used for other purposes. For this a credit of \$88 was allowed. However, one of the contractors said that they would have been as well off if they had thrown it aside, and procured new lumber. The material having been provided for in the contract, and having been used and practically consumed in the erection of the building, can it be held to be lienable under the law or can the surety company be held liable for such material?

In *Kennedy v. Commonwealth*, 182 Mass. 480, 65 N. E. 828, a like question was involved where the statute gave a lien for material purchased for or used in the construction or repair of buildings. Lumber for forms was used in a building to hold the concrete in place while hardening after which it was taken down and used again, and after being so used several times was finally sold for firewood. The court held that the lien statute did not contemplate the giving of a lien for all labor and all kinds of material that might incidentally promote the construction of the building, but only for such materials

as entered into the construction and became a part of the structure. The court placed material so used in the same class with the tools of the mechanic or the horses sold to the contractor to haul the material to the building. The same court in a later case sustained a claim for a lien for gunpowder used in the building of an aqueduct. To accomplish the work, it became necessary to excavate through rock, and powder was used in blasting a trench for a conduit, and this was done in accordance with a provision of the contract. When the *Kennedy* Case was cited as an authority against the allowance of a lien, it was said: "This court has never had occasion to consider a case like the present, where the material was used directly upon the work or the structure in process of construction, for the purpose of bringing it into proper form or condition, and was entirely consumed in the use. In such a case it may be said that in a general sense the material enters into the completed structure. In this broad sense it forms a part of it, as it loses its identity and ceases to exist as a separate substance, in producing a direct effect upon the construction, which effect remains as a part of the result shown in the completed structure." *Sampson Co. v. Commonwealth*, 202 Mass. 326, 333, 88 N. E. 911.

In California, where lumber was used as a temporary structure in connection with the building of a steel bridge, it was held that a lien could not be had for material used in the temporary structure which was moved away when the permanent bridge was complete; the court saying that the statute meant "that the materials must be used, not merely in the process of construction, but 'in the structure'; that is to say, they must be used as the materials of which it is constructed." *Stimson Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 32, 74 Pac. 357, and cases cited. The same court, in 1912, decided that a mechanic's lien might be had for lard oil furnished and applied on the threads of joints of pipe used in a structure and also for soapstone used as a lubricant in order to facilitate the pulling of the electric wires through the pipes in the building. It can hardly be said that the oil or soapstone remained as a part of the permanent structure, but they appear to have been allowed upon the theory that they were used in construction, and therefore were lienable. *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 124 Pac. 230. In *Oppenheimer v. Morrell*, 118 Pa. 189, 12 Atl. 307, it was held that one who furnishes lumber to erect a scaffold for laying brick in the walls of a building did not acquire a lien thereon under the statute.

It has been decided, too, that the cost of coal used in generating power to operate a steam shovel in excavating for a reservoir could not be recovered from a surety com-

pany which had agreed to be liable for materials furnished in and about the work. *Philadelphia, Appellant, v. Malone*, 214 Pa. 90, 63 Atl. 539. Other cases to the same effect are *United States v. Morgan* (C. C.) 111 Fed. 474; *Pennsylvania Co. v. Mehaffey*, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. Rep. 746, 9 Ann. Cas. 305; *Cincinnati, etc., Railroad v. Shera*, 36 Ind. App. 315, 73 N. E. 293.

On the contrary, it has been held that material used directly upon the structure which promotes its construction and is consumed in the use really enters into and is a part of the completed structure. In line with this view, it was held that dynamite furnished for use in excavating for a railroad was material within the meaning of the lien law. In reply to the argument that explosives should be regarded as a part of the contractor's plant like picks, shovels, and mechanical appliances, the Court of Appeals of New York said: "A steam shovel, an engine and boiler, picks, shovels, crowbars, and the like are tools and appliances, which, while used in the doing of the work, survive its performance and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work, and are thereafter invisible except as they survive in tangible results. We think that explosives when used as substitutes for other recognized 'materials' are covered by the same principle. They enter into and form a part of the permanent structure quite as much as the earth, rails, ties, culverts, and bridges that we can see and feel." *Schaghticoke Powder Co. v. G. & J. Ry. Co.*, 183 N. Y. 306, 312, 76 N. E. 153, 155 (2 L. R. A. [N. S.] 228, 111 Am. St. Rep. 751, 5 Ann. Cas. 443).

In *Powder Co. v. Railroad*, 113 Tenn. 382, 392, 83 S. W. 354, 356 (67 L. R. A. 487, 106 Am. St. Rep. 836), the same question was considered, and it was said: "The fact that the materials were consumed in the use, and were thus destroyed in the construction, we think does not deprive the furnisher of his lien. The consumption of the explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road as much so as trestles, bridges, and culverts contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts." Authorities of like effect are *Keystone Mining Co. et al. v. Gallagher et al.*, 5 Colo. 23; *Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Giant Powder Co. v. Oregon Pac. Ry. Co.* (C. C.) 42 Fed. 470, 8 L. R. A. 700.

An authority more directly in point is *Avery & Sons v. Woodruff & Cahill*, 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866. Under a statute similar to our own it was

held that lumber used to make forms for concrete was material for which a lien may be had. It was said that the parties contemplated that the material would be used up in making the building, and could not be treated as mere tools and appliances of the workmen. It was also said that the "appellees furnished material to be used in the erection of a building, which was as necessary as the sand, cement, water, or other material. In fact, the building could not have been erected without lumber to be used for the purpose for which appellees' was furnished." 144 Ky. 229, 137 S. W. 1089, 36 L. R. A. [N. S.] 866.

In a similar case in Missouri where lumber was furnished for forms for concrete walls the following rule as to liens was laid down: "Where certain material is provided for by the contract in erection of a structure, and is furnished and used accordingly, and is either in whole or in part consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure to the extent of the consumption of its reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means the depreciation in the market value of the material by the use provided for by the contract." *Lumber Co. v. Construction Co.*, 161 Mo. App. 723, 729, 141 S. W. 931, 933.

Another case closely in point is *Barker & Stewart L. Co. v. Marathon P. M. Co.*, 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875, where lumber and hardware were furnished to build a temporary cofferdam which was necessary to the construction of a permanent dam. Under a statute giving a lien for material used "for or in or about the erection, construction, repair," etc., of a structure, it was determined that, the life and substance of the material having gone into the fabric of the structure as effectively as has the stone, cement, or lumber which retains its existence as a part of the structure, a lien attached.

In our opinion the authorities last cited state the true rule of liability. The mechanic's lien, although unknown to the common law, is not to be given a narrow and strict construction. It is intended as an enlargement of the rights of those who furnish labor and material, and who cannot conveniently protect themselves in any other way. It is a general and remedial statute, and the rule that statutes in derogation of the common law shall be strictly construed does not apply to it. Gen. Stat. 1909, § 9850. On the contrary, such statutes are to be liberally construed with a view of advancing the beneficent purposes which the Legislature was seeking to accomplish by the enactment. *Lumber Co. v. Water Co.*, 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301. A reasonable interpretation of our statutes, we think, fairly includes the mate-

rial used and consumed in the erection of the concrete walls. As counsel for appellee says: "This is coming to be an age of concrete. Great concrete buildings are constantly being erected in all our cities. Several thousands of dollars worth of lumber will frequently be used up for forms in the erection of a single building. And architects and contractors must include such lumber in specifications and contracts as an inevitable part of the cost." The material in the forms furnished by appellee was understood by all to be a necessary part of the construction of the building. For a time these forms were an essential part of the walls, columns, and partitions. They were provided for in the contract, and their character was included in the specifications. While the walls were hardening they were as essential to the structure as the cement and sand which remained in the walls in a different form after the work was completed. These forms operated to enhance the value of the land on which they were used as did the labor in setting them up. They were finally taken down and removed, but the life and substance of the material had been used up in the erection of the building. The material cannot be regarded as a part of the contractors' plant because it was impregnated with cement, and rendered practically unfit for other uses. It was used directly in the construction of the building, and, being consumed in that use, it can be fairly said that within the meaning of our statute it entered into and was used in the erection of the building. It is clear that it came within the terms of the bond as it was "material furnished and used in and about said contract work."

[2] It is next contended that the surety company should have been allowed a credit of \$2,000, the amount paid by the contractors to the Chicago Lumber Company on May 11, 1910. The money from which this payment was made was obtained from the state in consideration of the work done on the Memorial building, but it was applied to an old debt due from the contractors for material furnished under other contracts. It appeared that the contractors were carrying on a great many building contracts while they were constructing the Memorial building. They had an account with a bank into which the moneys derived from all the contracts were deposited, and the bills for material and labor were all of them paid out of this account on the personal check of the contractor. The lumber company furnished materials on a number of these contracts, and checks to pay them were given to the lumber company from time to time by the contractors. When the check for \$2,000 was given to the lumber company, there was no direction as to how the payment was to be applied, nor does it appear that the lumber company had any notice that the money was

obtained from the state. There is some testimony that the manager of the lumber company was informed as to the source from which the money came shortly after the payment was made, but he testified that he had no recollection that any such information was given to him. However, the laborers and materialmen were not under obligations to watch the dealings between the state and the contractors. A bond had been given to secure the payment of their claims. That bond having been given, and there being no provision in it requiring those furnishing labor and material to watch the source from which money paid was derived, or to make any particular application of payments when made, they owed no duty to the surety company to do so. No liens could be obtained upon the building, and no equities could arise as between the lumber company and the surety company. The bond given conformed substantially with the provisions of section 860 of the Code. In cases where property may be subject to liens for labor and material, the statutory bond operates as a substitute for the rights and equities which may be acquired under the lien law. The legal relations which arise between the owner and those who furnish labor or materials under the mechanic's lien law is cut off by the bond. In this case the lumber company had no interest in the money due from the state, nor any right in the state's property which it could enforce under the law. After the bond was given the only relation there was between the contractors and the lumber company was the ordinary one of debtor and creditor, and, as far as the surety company is concerned, the money paid to the contractors by the state was their own, and they could do with it as they pleased. The surety company could claim nothing by way of subrogation to the rights of the state as the state had paid in full for the work, and there was no fund or security in its hands which any claimant could reach. The state had no interest in the application of the money, and is claiming nothing under the bond. There were only two conditions in the bond; one, the faithful performance of the contract by the contractors, and, as this condition had been fully performed, the state had no direct interest in the bond, and neither had the lumber company any interest in this condition of the obligation. The other was the unqualified condition that the surety company would pay all indebtedness incurred for labor and material furnished and used in the building, and that was one for the benefit alone of the laborers and materialmen. For a valuable consideration the surety company gave this bond guaranteeing that the labor and material furnished should be paid for. The giving of such a bond relieves the laborer and materialman from looking after liens or other security. The owner is then at liberty to pay his contrac-

tor when he pleases without liability to any subcontractor, and the contractor is free to draw his money from the owner and pay it out as he may choose. The duty of the lumber company and the liability of the surety company are measured by the terms of the bond. There is nothing in it, as we have seen, which requires that money received by the contractor for the structure shall be applied on the claims of those furnishing labor and material, but there is an absolute and unqualified guarantee that all indebtedness for labor and material shall be paid. In a case in Michigan where a bond was given by a contractor to insure the payment of labor and material furnished on the contract, it was held that the sureties were not relieved by reason of the payment of an antecedent debt from the contract price of the improvement. It was said: "This bond did not, in terms, provide that the contractor should apply his earnings to pay the laborers or materialmen, and the statute does not provide for such a bond. It undertook that the contractor should perform his personal obligations in his own way. It contemplated that he would receive and disburse his money as should suit his convenience. This contention depends upon an alleged equity that the money earned shall be applied only upon the account for materials furnished for the particular job. It is not supported by the letter of the bond or statute, and we think it is not supported by authority." *People v. Powers*, 108 Mich. 339, 343, 66 N. W. 215, 216.

[3] Appellant contends and cites some cases to support the theory that sureties, who are favorites of the law, are entitled to have money paid to their creditor applied to the payment of the debt for which they are sureties, rather than to earlier or unsecured debts. The cases are not applicable, even if it could be held that an equity might have arisen in favor of a gratuitous surety. The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does for the individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are in fact insurers, and in determining their rights and liabilities the rules peculiar to suretyship do not apply. *Hull v. Bonding Co.*, 86 Kan. 342, 120 Pac. 544; *Medical Co. v. Hamm*, 89 Kan. —, 130 Pac. 650; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; case note in *Phila. v. Fidelity & Deposit Co.*, Appellant, Ann Cas. 1912B, 1085; case note in *George A. Hormel & Co. v. American Bonding Co.*, 83 L. R. A. (N. S.) 513.

We think the court correctly ruled in denying the credit, and, finding no error, the judgment of the district court will be affirmed. All the Justices concurring.

SEWARD et al. v. KAW VALLEY ICE & COLD STORAGE CO.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—WARNING TO EMPLOYEE.

Where a lever, designed for use in starting a drivewheel when it has stopped on a dead center, is so attached that if used while the wheel is in motion it may become dangerous to the person using it, and the custom has been for the engineer to turn on steam to aid in the operation, the question whether, in the exercise of reasonable care, the employer ought to warn an inexperienced employé of such danger before directing him to operate the lever is ordinarily one of fact, to be determined under all the circumstances of the case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 201*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where an injury has occurred through the omission of such a warning, when it ought to have been given, a recovery on account thereof cannot be defeated by a showing that it was negligence for the engineer, being a fellow servant, to turn on steam while the lever was being operated by the inexperienced employé.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

Appeal from District Court, Shawnee County.

Action by Thomas J. Seward and Isabelle Seward against the Kaw Valley Ice & Cold Storage Company. Verdict for defendant. From an order granting a new trial, defendant appeals. Affirmed.

Blair, Scandrett & Magaw, of Topeka, for appellant. Charles Blood Smith and Samuel Barnum, both of Topeka, for appellees.

MASON, J. Dennis F. Seward, while in the employ of the Kaw Valley Ice & Cold Storage Company, received an injury from which he died. His parents brought action against the company, alleging the fatality to have been caused by its negligence. Upon a jury trial the court sustained a motion for a peremptory instruction to find in favor of the defendant, and a verdict was rendered accordingly. Later a motion for a new trial was granted, and from this order the defendant appeals.

The question presented is whether the evidence was sufficient to justify a finding for the plaintiffs. The defendant maintains that if the negligence of any employé was the proximate cause of the injury it was that of a fellow servant, for which it was not liable. The plaintiff contends that the injury was due to an omission of a nondelegable duty to instruct and warn the decedent.

There was evidence tending to show these facts: Dennis Seward was 16 years old, of good intelligence for his age, but without ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

perience with machinery. He was employed as an oiler, and his duties included helping the engineer. A 12-foot flywheel, the center of which was about a foot above the level of the floor, was provided with a row of cogs on the inside of the rim. A device was provided for starting this wheel by a lever when it stopped on a dead center. The lever turned upon a pivot near its end, and when not in use stood nearly perpendicular; the other end resting against a bar. When worked back and forth, its point engaged the cogs and caused the drivewheels to revolve slowly. When the engineer was alone, he would work the wheel off center with the lever and then go and turn on the steam. But when he had a helper to work the lever he would always turn on a little steam to assist in starting, cutting it off as soon as the wheel turned over. On the day of the accident, the drivewheel having stopped on a dead center, the engineer directed Dennis to start it with the lever. As this was done, he turned on a little steam and, as the wheel began to revolve, directed Dennis to throw the lever back in place. Dennis made two or three attempts to do so, and at the last throw the point of the lever caught in the moving cogs, and the end came down and struck him, inflicting the fatal injury. He had never before used the lever or seen it used, and had received no specific instructions regarding it, or warning as to any danger in connection with its use. The engineer testified: "I told the boy how to operate the lever, but did not give any instructions about the matter, because there was not anything to tell him."

[1] It cannot be said, as a matter of law, that a bright, 16 year old boy, entirely inexperienced in the use of machinery, would understand the working of the starting lever, or expect it to catch in the moving cogs, or know what was likely to follow if it did. We think the evidence, while, of course, open to other interpretations, would support these conclusions: The defendant, in the exercise of reasonable prudence, could have anticipated, and therefore ought to have anticipated, that the boy, not realizing the effect of getting the point of the lever caught in the cogs while the drivewheel was in motion, might attempt to restore it to place after steam had been turned on, without taking thought for his own protection, and that, unless he were instructed and warned, the very thing might happen that unfortunately did happen in this case. If such instruction and warning had been given, the injury would not have happened. If these facts are regarded as established, it follows that the defendant owed the boy a duty to so instruct and warn him, and that the proximate cause of his death was the failure to perform this duty. Such a duty is nondelegable, and the employer is liable for the results of neglecting it, irrespective of any question of fellow service. 26 Cyc. 1167.

[2] The defendant maintains that the proximate cause of the injury was the conduct of the engineer in turning on steam before the lever was replaced, and that if this was negligence the company is exempt from liability on that account, because the engineer and the boy were fellow servants; that the boy's ignorance of his danger was merely the condition that made possible the unfortunate consequence of the engineer's act. It does not conclusively appear that it was negligence for the engineer to turn on steam when he did. True it is so alleged in the petition, but only in connection with the allegation of negligence in failing to give the instruction and warning. If it was negligence for the defendant to fail to instruct and warn, and if the injury was the direct result of this omission (and we hold that the evidence warrants these conclusions), its liability is not affected by the fact that a contributing cause of the injury may have been the negligent act of the engineer, a fellow employé, in turning on the steam. "If an injury result to a servant from the concurring negligence of his master and a fellow servant, the master will be liable." *Schwarzschild v. Drysdale*, 69 Kan. 119, 78 Pac. 441 (Syl. § 2); Note, 54 L. R. A. 167; 26 Cyc. 1228.

The order granting a new trial is affirmed. All the Justices concurring.

ALD'S ESTATE v. APPLING.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. INSANE PERSONS (§ 27*)—APPOINTMENT OF GUARDIAN—RIGHT OF APPEAL.

An appeal may be taken from a decision of the probate court adjudging that a person is of feeble mind and incapable of managing his affairs and appointing a guardian for his person or estate.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 37, 38; Dec. Dig. § 27.*]

2. COURTS (§ 202*)—PROBATE COURTS—APPEAL —"TERMS AND CONDITIONS."

The clause in section 4852, Gen. St. 1909, providing that appeals taken in any matter arising under that act shall be "upon the same terms and conditions as are appeals under the provisions of the act respecting executors and administrators," refers to the time and manner of taking appeals, and not to the grounds of appeal or to cases in which an appeal may be taken.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 6923.]

3. COURTS (§ 202*)—PROBATE COURTS—APPEAL —FILING BOND.

Where an appeal bond in proper form and of approved security is tendered to and received by the probate judge within the time prescribed for taking appeals, and is placed by him among the files in the case without indorsing it as filed, it is filed in contemplation of law.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Sedgwick County.

In proceedings in the probate court, J. H. Ald was found incompetent, and W. L. Appling was appointed guardian. The incompetent appealed from the judgment, and, from an order refusing to dismiss the appeal for want of a bond, the guardian appeals. Affirmed.

John D. Davis, of Wichita, for appellant. Jean Madalene and Dale, Amidon & Hegler, all of Wichita, for appellee.

JOHNSTON, C. J. J. H. Ald, the appellee, was on August 9, 1911, found to be of feeble mind and incapable of managing his affairs by a jury in the probate court of Sedgwick county, and the court thereupon appointed W. L. Appling, the appellant, who was one of the jurors, as guardian. On August 15, 1911, appellee appealed from the judgment of the probate court to the district court, tendering an appeal bond in the sum of \$200, which was approved but not formally indorsed as filed. On October 7, 1911, a transcript of the proceedings in the probate court was filed in the district court, but the appeal bond was not transmitted with the transcript. On October 16, 1911, a motion was filed in the district court to dismiss the appeal; one of the grounds being the failure of Ald to file an appeal bond. On January 9, 1912, the probate court in a nunc pro tunc order formally approved and filed the bond as of the date it was presented, and then transmitted a corrected transcript to the district court. Subsequently the district court overruled appellant's motion to dismiss the appeal, and from that ruling Appling appeals to this court, alleging that there was error in permitting the filing of an appeal bond more than ten days after the decision from which the appeal was taken and in holding that appellee was entitled to an appeal.

[1] Appellant insists that there is no statutory authority for an appeal from such a decision. In the act providing for an inquiry as to the mental capacity of a person and for the appointment of a guardian for his person or estate, it is enacted that: "An appeal may be taken to the district court from any order or decision of the probate court in any matter arising under the provisions of this act upon the same terms and conditions as are appeals under the provisions of the act respecting executors and administrators and the settlement of the estate of deceased persons." Gen. Stat. 1909, § 4852. But it is contended that such an appeal can only be taken on the "terms and conditions" prescribed in the executors and administrators' act, and, that although 12 kinds of decisions are named in that act as appealable, a decision adjudging a person to be of feeble mind and appointing a guardian is not among them.

[2] The expression, "terms and conditions," does not refer to the class of decisions from which an appeal may be taken, but rather to the time and manner for taking and perfecting them. As the acts treat of distinct and different subjects, the decisions in cases arising under each of them are, of course, entirely unlike. The section we are considering defines the cases that are appealable under the act, and, as has been seen, it places no limit on them, as it provides that appeals may be had from any order or decision that can be made under the act. We only need to refer to the executors and administrators' act to determine the time and manner of taking appeals, and the provisions of that act in that respect have been substantially followed in this instance. It may also be observed that appeals from judgments rendered and final orders made by the probate court are recognized in the new Code, and some of the provisions in regard to the method of taking them are prescribed. Code Civ. Proc. §§ 564, 567, 571 (Gen. St. 1909, §§ 6159, 6162, 6166); *In re Pettit*, 84 Kan. 637, 114 Pac. 1071.

[3] There is nothing substantial in the objection to the appeal bond. A sufficient bond was tendered to and received in the probate court. For some reason, possibly on the theory that no bond was required, the judge failed to transmit the bond with the transcript to the district court. It is argued that, because the bond was not indorsed as filed, it was not filed in good time. The fact that it was not indorsed and transmitted to the district court was not the fault of Ald. He presented a bond in proper form and of unquestioned security in seven days after the decision was made. It was received by the probate judge and retained among the papers in the case. He approved the bond but failed to place a filing mark upon it. When a sufficient and approved bond was placed in the custody of the judge and received as one of the files in the case, it was filed in contemplation of law. The rights of Ald could not be prejudiced by the failure of the judge to indorse the evidence of filing upon the paper. *Wilkinson v. Elliott*, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; *Rathbunn v. Hamilton*, 53 Kan. 470, 37 Pac. 20; *State v. Heth*, 60 Kan. 560, 57 Pac. 108.

There was a suggestion that no appeal bond was necessary because of the exception in section 4822, General Statutes of 1909; but if we assume that that exception applies only to decisions adjudging the cost of the inquiry against the person who files the information, and that a bond was necessary, we must still hold that a bond was given and that an appeal was perfected in good time.

The judgment of the district court will be affirmed. All the Justices concurring.

SWISHER v. DUNN et al.

(Supreme Court of Kansas. April 12, 1918.)

(Syllabus by the Court.)

1. SALES (§ 48*)—PURCHASE OF BUSINESS—
VALIDITY OF CONTRACT.

A contract for the sale of a drug store, including the stock and business, is not rendered unenforceable by the fact that the business had at all times been conducted in violation of the law requiring the owner or some employé to be a pharmacist or assistant pharmacist.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101-107; Dec. Dig. § 48.*]

2. RECEIVERS (§ 16*) — APPOINTMENT —
GROUNDS.

In an action by a vendor for the purchase price of a stock of merchandise which the purchaser has refused to accept and pay for according to his agreement, no error is committed in the appointment of a receiver to take charge of and sell the goods, that the proceeds may be applied upon the plaintiff's claim.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 24, 28; Dec. Dig. § 16.*]

3. SALES (§ 77*)—CONTRACT—APPRAISEMENT
—"INVOICE PURCHASE PRICE."

A contract for the appraisement of a stock of merchandise "at the invoice purchase price" means that the goods are to be appraised at what had been paid for them when they were bought, not at what it would cost to buy them from wholesalers at the time of the appraisement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 208-212; Dec. Dig. § 77.*]

4. ARBITRATION AND AWARD (§ 63*)—CON-
CLUSIVENESS OF AWARD—MISTAKE OF ARBI-
TRATORS.

The award of arbitrators is not binding, where it is the result of a misapprehension on their part of the meaning of the language used in defining the matter submitted to their decision.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 313-320; Dec. Dig. § 63.*]

Appeal from District Court, Greeley County.

Action by A. Z. Swisher against P. L. Dunn and the First State Bank of Tribune. Judgment for plaintiff, and defendant Dunn appeals. Reversed.

W. M. Glenn, of Tribune, and Monroe & Roark, of Topeka, for appellant.

MASON, J. A. Z. Swisher and P. L. Dunn entered into a written contract for the sale to Dunn of a drug store owned by Swisher, "including the business of a druggist," for a price to be determined by an invoice. Dunn refused to accept and pay for the property, and Swisher brought an action for the purchase price, asking that the stock be sold and the proceeds applied thereto. A receiver was appointed, who took charge of the stock, and upon order of the court sold it at public auction in bulk; Swisher being the purchaser. Swisher obtained judgment for the balance of the purchase price, and Dunn appeals.

[1] The defendant in his answer, among other matters, asserted that the contract was

unenforceable, for the reason that the good will of the business formed a substantial part of the consideration, and this had been built up by acts in violation of law, inasmuch as Swisher, although a physician, was not a pharmacist or assistant pharmacist, and at no time had either in his employ. The court held that these allegations stated no defense, and this ruling is complained of. The statute makes it a misdemeanor for any one not a pharmacist to conduct a drug store without employing a pharmacist or assistant pharmacist. Gen. Stat. 1909, § 8095. A physician is exempted only with respect to articles administered or supplied to his patients. Gen. Stat. 1909, § 8104. Under the allegations of the answer the contract price was larger than it otherwise would have been because the value of the merchandise was increased by its being the stock of a going business, with an established trade, and this increase was due in part at least to acts done in violation of the criminal law. The defendant in support of his contention invokes a rule thus stated in *Greenhood on Public Policy*: "Any contract to pay money in consideration of something whose existence is due to a violation of law, is void." Page 538. We do not think this rule always applies where the existence of the thing in question is due to a violation of law, only in the sense that incidentally some law was violated in its production, when it might have been created without such violation. For instance, we think the owner of an article might make a valid contract for its sale, although it was produced in whole or in part by labor which was illegal because performed on Sunday. The objection here made is much the same as though the purchaser had refused to comply with his agreement because the custom of the business had been increased by sales made in violation of the law forbidding goods to be sold on Sunday. We regard the present case as distinguishable from any of those cited in support of the defendant's position. Perhaps that most nearly in point is *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523, holding that one who had established a public ferry, without obtaining a license which the law required, could not recover on a note given for the rent of it for a year. There, however, the maintenance of the ferry by the lessee would seem to have been unlawful; so that he acquired no legal right under the lease. Here the past delinquency of Swisher imposed no restraint upon Dunn in the conduct of the business. While not closely in point, the questions decided in the following cases have some slight analogy to that here involved: *Rahter v. First Nat. Bank of Lancaster*, 92 Pa. 393; *Wyman v. Wentworth (Me.)* 10 Atl. 454, not officially reported. The answer also included the allegation that the plaintiff's former violation of the law rendered the good will of the busi-

ness less valuable than the defendant rightfully supposed it to be. We think this is not a sufficient ground for avoiding the contract. The suggestion is made that Swisher could not lawfully sell the stock of goods to Dunn, because it included medicines and poisons. The provisions of the statute regulating the sale of medicines and poisons are expressly limited to sales at retail. Gen. Stat. 1909, §§ 8096, 8105. The ruling of the trial court on this phase of the case is approved. Another ground assigned by the defendant for his refusal to carry out the contract was that the plaintiff had misrepresented the age and consequent quality of the goods. It is urged that this defense should be taken as established because supported by the undisputed evidence. The credibility of the witnesses was a matter for the consideration of the jury, and the verdict must be regarded as conclusive; the issue having been submitted under proper instructions. A deposition was rejected bearing upon the condition of a part of the stock some years before; but, as this was not shown to refer to any of the goods still on hand, the rejection was not error. Evidence of the extent of depreciation of goods caused by lapse of time was stricken out, but the ruling does not seem seriously prejudicial.

[2] It appeared from the testimony of Swisher that there was a small chattel mortgage against the stock. There could have been no difficulty in adjusting that if the contract had been carried out. In view of the course taken, the defendant was not prejudiced. Complaint is made of the appointment of the receiver. If the defendant without sufficient reason refused to accept and pay for the goods, the plaintiff had a right to sell them and apply the proceeds on the agreed price. 85 Cyc. 520. The action was essentially one by a creditor to subject his debtor's property to the payment of his claim. The appointment of a receiver was a step reasonably calculated to protect the interest of the defendant as well as that of the plaintiff by insuring a fair sale, and there is nothing to suggest that its effect was otherwise than beneficial.

[3] The contract of sale provided that the stock should be appraised by two persons (Swisher being one of them) "at the invoice purchase price of all goods with the cost of transportation added." Swisher testified that a part of the goods were appraised at the current wholesale market price, which in some instances had greatly increased since he had purchased them. This necessarily worked an injustice to Dunn. The "invoice purchase price" referred to in the contract meant the price at which the goods were bought by Swisher, not the price at which new goods of a similar kind could be purchased at the time of the sale to Dunn. The award of the appraisers, made in good faith,

was binding upon the parties with respect to matters submitted to their judgment. But they were selected to appraise the value of the goods, not to interpret the written contract.

[4] An award of arbitrators which is the result of a mistaken view of the meaning of the language in which the terms of the submission are expressed is not binding. Cases supporting that principle are cited in *Atchison v. Rackliffe*, 78 Kan. 320, 325, 96 Pac. 477. The appraisers, of course, intended and were required to make their decision according to the proper meaning of the written contract of submission. Its true meaning was a matter of law. They were mistaken as to what its meaning was. This was in a sense a mistake of law, but amounted in this situation to a mistake of fact, such as to vitiate the award. 3 Cyc. 740, 741; 5 Enc. L. & P. 232. The record does not show the amount by which the appraisement was increased by this mistake, and therefore a new trial is necessary. The abstract seems to show that the receiver applied \$199.65 of the amount received from the sale of the goods to the payment of a personal debt of Swisher. No explanation of this error has been offered; the plaintiff making no appearance in this court, and none is apparent. It should, of course, be corrected upon a new trial.

The judgment is reversed and a new trial ordered. All the Justices concurring.

SINGER MFG. CO. v. GODDING et al.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

REPLEVIN (§ 8*)—RIGHT TO POSSESSION—EVIDENCE.

Where, in an action in replevin, the plaintiff fails to show a completed sale to himself, or to show any other right to the possession of property, he cannot recover in the action.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 45-68; Dec. Dig. § 8.*]

Appeal from District Court, Butler County.

Action by the Singer Manufacturing Company against F. O. Godding and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. B. Amidon, of Wichita, H. W. Schumacher, of El Dorado, and Jean Madalene, of Wichita, for appellant. Geo. J. Benson and T. A. Kramer, both of El Dorado, and G. H. Buckman and S. C. Bloss, both of Winfield, for appellees.

SMITH, J. This action was brought by the appellant to recover possession of a certain lot of walnut logs, which appellant claimed it had bought of the appellee Godding. The logs were taken under the writ of replevin, and were delivered to the appellant. The case was tried to a jury, which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

returned a verdict in favor of the defendant, and the value of the logs was assessed therein at \$1,754.21. Judgment was rendered in accordance with the verdict, and it was further ordered that if the return of the property could not be had that the defendant recover said sum of money from plaintiff, with interest at 6 per cent. thereon from the date of the judgment. It was also adjudged that the appellee the State Bank of Winfield has a mortgage lien on the logs in the sum of \$359.50, and in case the judgment in favor of Godding was collected the clerk should pay to the bank from the proceeds thereof the amount of its lien.

The contract, as shown by the evidence, was made about three years before the controversy over the logs arose. It was simply a contract of the appellant to buy walnut logs of Godding at certain prices, varying for different sizes, and seems to have been indefinite as to the amount of logs to be bought and as to the time it was to run. Godding thereafter got out logs at different places and piled them up at places agreed upon. He and a representative would thereafter scale a desired lot or lots of logs, and the company's representative would identify them by a stamp driven against the end of each log, which indented the letters "S. M. C." thereon.

The lot of logs in question had been piled up at Chelsea, Butler county, about two years prior to the scaling thereof by Godding and the company's representative. Two or three representatives of the company together had scaled this lot of logs in the absence of Godding. Godding thereafter informed a representative of the company that he had scaled the logs when they were piled up, and that his scale made much more of the lumber than did the scale as reported by the company's representatives. Thereafter another representative of the company and Godding scaled the logs without any controversy as to the amount, except that Godding claimed he had been selling logs soon after they were cut; that these logs had laid out about two years and had shrunk in diameter, but not in length; that the shrinkage not only reduced the amount of feet in measurement, but also reduced the price per thousand feet. He claimed an addition of 10 per cent. to the scale by reason thereof. The representative declined to make the allowance, but said he would refer the matter to Mr. Norman, another representative of the company, whom Godding said had agreed to make the allowance. These logs were not stamped, and the controversy in reference to the allowance for shrinkage, it appears from the evidence, was not settled nor the allowance made.

The stamping of the logs appears to have been the method by which the identification of the logs sold was determined. By placing the stamp upon the logs it seems to have

been intended that the title thereto passed from Godding to the company and identified such logs from other logs owned by Godding.

It was conceded that the railway company had no interest in the controversy, and the jury returned a verdict in favor of Godding and the bank, which verdict was approved by the court.

We have examined all the questions upon which the appellant claims error and find no merit in them. The main question is purely one of fact—whether the title or right of possession of the logs had passed. The appellant claimed no right to the possession of the property, except by purchase from the appellee Godding. It failed to show a completed purchase. The sum to be paid for the logs had not been agreed upon between the parties, but depended upon the allowance or refusal to allow the claim of the appellee for shrinkage. The evidence was ample to sustain the verdict and judgment.

The judgment is affirmed. All the Justices concurring.

CAIN v. PERFECT.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 74*)—ACTION AGAINST NONRESIDENT—WHEN MAINTAINABLE.

A civil action for the recovery of damages resulting from a libel published in another state may be brought against a nonresident of this state in any county in which the defendant has property subject to attachment. Code Civ. Proc. § 53 (Gen. St. 1909, § 5646).

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 201½; Dec. Dig. § 74.*]

2. ATTACHMENT (§ 71*)—ACTION AGAINST NONRESIDENT—TORTS.

Under section 190 of the Code of Civil Procedure (Gen. St. 1909, § 5783, as amended by chapter 231, Laws 1911), the plaintiff in a civil action for the recovery of money may have an attachment against the property of the defendant on the ground that the defendant is a nonresident of this state, although the cause of action arose ex delicto and in another state.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 198; Dec. Dig. § 71.*]

3. ATTACHMENT (§§ 8, 105*)—WHEN MAINTAINABLE—AFFIDAVIT AS TO DAMAGES.

It is not essential, in order that the plaintiff may have an attachment, that the damages claimed should be capable of definite estimation so that the affidavit may state them with approximate certainty. It is sufficient if the action be one for the recovery of money and the affidavit state the nature of the claim, as, for example, damages for libel, that the claim is just, and the amount the affiant believes the plaintiff ought to recover. Code Civ. Proc. §§ 190, 191 (Gen. St. 1909, §§ 5783, 5784).

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 30, 276–279; Dec. Dig. §§ 8, 105.*]

Appeal from District Court, Labette County. Action by Ralph R. Cain against E. M. Perfect. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

A. D. Neale, of Chetopa, for appellant. M. E. Williams, of Oswego, and A. R. Bell, of Chetopa, for appellee.

BURCH, J. The plaintiff sued the defendant for damages in the sum of \$5,000 resulting from a libel of the plaintiff published by the defendant in the states of Iowa and Oregon. Real estate belonging to the defendant situated within the jurisdiction of the court was attached. The ground for the attachment stated in the affidavit was that the defendant is a nonresident. Summons having been returned not found, service was made by publication. The defendant appeared specially and moved for a dismissal on the ground that the court was without jurisdiction. The motion was sustained and the plaintiff appeals.

[1] If the attachment was valid, the judgment dismissing the action was wrong.

The action being of a transitory nature, it was commenced in the proper county under section 53 of the Civil Code, which reads as follows: "An action, other than one of those mentioned in the first three sections of this article, against a nonresident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose." Gen. Stat. 1909, § 5646. The first three sections of the article containing this section relate to local actions. The affidavit complied in all respects with section 191 of the Civil Code, which reads as follows: "An order of attachment shall be issued by the clerk of the court in which the action is brought in any case mentioned in the preceding section when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: First, the nature of the plaintiff's claim. Second, that it is just. Third, the amount which the affiant believes the plaintiff ought to recover. Fourth, the existence of some one of the grounds for an attachment enumerated in the preceding section." Gen. Stat. 1909, § 5784. Previous to 1911 the preceding section (section 190, c. 95, Gen. Stat. 1909) read, so far as is now material, as follows: "The plaintiff in a civil action for the recovery of money or in a suit for alimony may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon one or more of the grounds herein stated: First, when the defendant or one of several defendants is a foreign corporation, or a nonresident of this state; but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within

the limits of this state, which fact must be established on the trial. * * * Tenth, where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or the seduction of any female. * * * At the session of 1911 the Legislature amended this section by an act which reads as follows:

"An act to amend section 190, chapter 95 of the General Statutes of 1909 and repealing said section 190.

"Be it enacted by the Legislature of the state of Kansas:

"Section 1. That section 190 of chapter 95 of the General Statutes of 1901 (1909) be amended to read as follows: Grounds for Attachment. Section 190. The plaintiff in a civil action for the recovery of money or in a suit for alimony may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon one or more of the grounds herein stated: (1) When the defendant or one of several defendants is a foreign corporation, or a nonresident of this state; * * * (10) where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or the seduction of any female. * * *

"Sec. 2. That section 190 of chapter 95 of the General Statutes of 1909, is hereby repealed." Laws 1911, c. 231.

It is claimed by the defendant that the act of 1911 is nugatory because section 1 purports to amend section 190 of chapter 95 of the General Statutes of 1901, when there is no such section. The title of the act, the body of section 1 and section 2 show, however, that a clerical error was made in enrolling the bill and that the General Statutes of 1909 were intended. The defendant argues that, conceding the act of 1911 to be effective, no attachment can be had in actions *ex delicto* unless clearly authorized by statute, and that the inclusion of the torts specified in subdivision 10 indicates a purpose to exclude all others. Section 190, both before and after the amendment, is divisible into two parts: First, a specification of the classes of action in which an attachment may be had; and, second, a specification of the grounds for an attachment. An attachment may be had in a civil action for the recovery of money, or in a suit for alimony, which may or may not be for a money judgment. In such actions an attachment may be had on any one or more of the 11 grounds prescribed. The fact that the damages sued for arose from the commission of a felony or misdemeanor, or the seduction of a female, furnishes a ground for attachment the same as nonresidence, or absconding to defraud creditors, or the removal, conversion, or fraudulent disposition of property.

[2] Previous to the amendment of 1911, the only limitation upon the right to an attach-

ment in actions for the recovery of money, so far as the nature of the cause of action was concerned, was that contained in the first subdivision of the section. If the ground for attachment was that the defendant was a nonresident or a foreign corporation, it was necessary that the cause of action should rest upon contract, judgment, or decree, unless it arose wholly within the limits of this state. The sole purpose of the amendment of 1911 was to strike out this limitation, and the result is that the plaintiff in a civil action for the recovery of money, whether the cause of action be founded upon contract or tort and whether it arose in this state or not, may have an attachment on the ground that the defendant is a nonresident.

[3] It is argued further by the defendant that an attachment cannot be had unless the damages are capable of definite estimation so that the affidavit may state them with approximate certainty. The Legislature not having annexed this qualification to the statute, the court cannot do so. It is sufficient if the action be one for the recovery of money, or for alimony, and the affidavit state the nature of the plaintiff's claim, that it is just, and the amount the affiant believes the plaintiff ought to recover. Sections 190 and 191.

The district court did not state upon the record the ground of its ruling. The matters which have been considered are all that are urged in its support. They are insufficient for the purpose, and, no other being apparent, the judgment is reversed, and the cause is remanded, with direction to proceed according to law. All the Justices concurring.

BUBB v. MISSOURI, K. & T. RY. CO.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 121*)—RAILROADS—MANUFACTURING ESTABLISHMENT—SAFEGUARDS.

A railway company, which maintains a manufacturing establishment, is not relieved from compliance with the factory act (Gen. St. 1909, §§ 4676-4689) because the establishment is maintained as a mere incident to the company's business as a common carrier, or because the manufactured product is used by the company itself and not sold, or because manufacturing is not within the company's charter powers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 121*)—"MANUFACTURING ESTABLISHMENT."

A separate building maintained by a railway company as a carpenter shop, which contains turning lathes, planing machines, boring machines, mitering and morticing machines, circular saws, and other machinery, operated by electricity, wherein lumber is sawed and otherwise converted into proper forms for mold patterns, frames for concrete work, re-

pairs on buildings, and divers other uses, is a manufacturing establishment within the meaning of the factory act (Gen. St. 1909, § 4682).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4347-4358; vol. 8, p. 7716.]

3. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTION—PLEADING.

In an action for damages prosecuted under the factory act (Gen. St. 1909, §§ 4676-4689) for failure to provide a safeguard for a circular saw, it is not necessary that the plaintiff advance an issue in the petition respecting the practicability of such a safeguard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—SAFEGUARDING MACHINERY—PRACTICABILITY.

The testimony of witnesses describing a circular saw used in a carpenter shop, its accessories, the method of using it, and the danger to be apprehended from it, is sufficient without more to sustain a finding by the jury that it was practicable to safeguard the saw, although several witnesses testified to the contrary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

Appeal from District Court, Labette County.

Action by Maggie M. Bubb against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Madden and W. W. Brown, both of Parsons, for appellant. C. E. Pile, of Parsons, for appellee.

BURCH, J. Oscar M. Bubb was employed by the defendant as a car carpenter. He was killed by a piece of timber projected against him by an unguarded circular saw in the defendant's carpenter shop, where he was working. His widow, as administratrix of his estate, recovered a judgment for damages resulting from his death in an action prosecuted under the factory act (Gen. St. 1909, §§ 4676-4689). The defendant appeals.

[1,2] The defendant contends that the deceased was not employed in a manufacturing establishment such as the factory act contemplates. The act contains the following provision: "Manufacturing establishments, as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and, in addition to the foregoing, any other kind or character of manufacturing establishment, of any nature or description whatsoever, wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incomplete state or condition, are converted into a new or improved or different form." Gen. Stat. 1909, § 4682.

The defendant is a railway corporation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

engaged in the transportation of persons and property for hire in this and in other states. It maintains at the city of Parsons, where the casualty occurred, roundhouses, machine shops, repair shops, and the carpenter shop in question, for the promotion of its corporate purposes. The carpenter shop is a separate building and contains turning lathes, planing machines, boring machines, mitering and morticing machines, circular saws, and other machinery, all operated by electricity. In this shop lumber is sawed and otherwise converted into proper forms for mold patterns, frames for concrete work, repairs on buildings, and divers other uses. Under these circumstances, the shop is clearly embraced within the statutory definition of a manufacturing establishment. *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657.

It is urged that a manufacturing establishment is one in which things are made for sale and not for the use of the manufacturer himself. It has become the custom in many industries to maintain manufacturing departments for the production of articles essential to the conduct of the main business, which may be quite remote from manufacturing. Thus, growers of fruit in very large quantities frequently manufacture their own packing boxes. An establishment maintained for this purpose is as much a manufacturing establishment as if it were a distinct and separate enterprise. The statute concerns itself with labor conditions and not with the destination of products, and whoever sets up an establishment of the character defined by the statute, whether the manufactured article be designed for his own consumption or use or not, must safeguard his workmen in the manner prescribed or suffer the penalty. For the same reason it is not material whether manufacturing be the principal occupation of the owner or operator of a manufacturing establishment or be merely incidental to some other business. For some purposes the matter might be important. Thus, if the question were one of taxation, the defendant should be classified as a railroad company and not as a manufacturer. But if a company engaged in transportation maintain a manufacturing establishment for the better or more economical conduct of its affairs, it falls within the purview of the factory act the same as if that were its chief business. On the same principle it is of no consequence what the charter powers of a corporation may be if it in fact owns or operates a manufacturing establishment.

The petition did not allege that it was practicable to guard the saw, and it is said that a demurrer to it should have been sustained for that reason. The statute provides as follows: "In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance, in order to establish the liability of the defendant, that the death or

injury complained of resulted in consequence of the failure of the person owning or operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as required by this act, or that the failure to provide such safeguard directly contributed to such death or injury." Gen. Stat. 1909, § 4681.

[3] Since it is not necessary for a plaintiff to extend his proof in the first instance to the subject of the practicability of safeguards (*Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657), it is not necessary that he advance an issue on the subject in the petition. When it is alleged and proved that the injury complained of resulted wholly or partially from the failure to provide a safeguard required by the statute, the practicability of such safeguard is assumed unless proof to the contrary be produced.

[4] On cross-examination of some of the plaintiff's witnesses, testimony was elicited showing doubt in the minds of those witnesses regarding the practicability of safeguarding the saw. For present purposes it may be said that there was positive proof that it was not practicable to do so. It is argued that the plaintiff should then have introduced the testimony of witnesses to the contrary. This was not necessary. The saw was 12 inches in diameter and was fastened to a stationary frame 30 inches in height, covered with a table 8 feet wide and 5 feet long, made of 2-inch oak timber. The saw protruded through a slot in the table and to a height of four inches above it. The saw was used for ripping lumber, and on one side of it was an adjustable guide for the purpose of regulating the width of pieces to be produced. On the day of the injury three men were working at the saw ripping 16-foot boards into strips 2 inches wide. Bubb would press a board against the saw, which revolved toward him. Another man would hold the board against the guide, and the third man would take the two pieces which came from the saw and walk backwards with them until the board was ripped its entire length. The 2-inch piece would then be thrown to one side and the remainder of the board would be passed back for another operation of the same kind. Just as a board left the saw the offbearer stumbled. The 2-inch piece came in contact with the unguarded saw which seized it and hurled a broken portion of it like a javelin against Bubb's breast.

The foregoing description of the saw and its accessories, of the method of using it, and of the danger to be apprehended from it, given by several witnesses, constituted evidence bearing directly upon the question whether or not a guard could be installed which would protect workmen without substantially impairing the usefulness of the tool. No expert testimony on the subject was required. It takes such slight invention to

provide a guard for a saw of this kind, and saw shields, guards, and screens are now so common that a jury might well regard testimony that they are not practicable as more derogatory to the witness giving it than to those appliances.

The petition was based upon the factory act alone. No attempt was made to state a cause of action for failure to furnish a safe place to work, or safe appliances with which to work. Therefore, the defenses of assumption of risk and contributory negligence on the part of the deceased, which the defendant tried to interpose, were not available, and the constitutionality of the factory act, which the defendant attacked, is no longer an open question in this court. *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657.

The principal questions discussed above were raised in many ways and are argued by the defendant from many points of view, but enough has been said to dispose of them.

The judgment of the district court is affirmed. All the Justices concurring.

POLLEY v. KANSAS CITY OIL CO.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

WITNESSES (§ 268*) — CROSS-EXAMINATION — ACCIDENT.

Upon the cross-examination of a witness in a trial, the examiner has the right to ask questions to test the knowledge of the witness concerning the matters with reference to which he has testified or to elicit evidence favorable to the examiner's side of the case, provided such questions are not otherwise objectionable.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.*]

Appeal from Court of Common Pleas, Wyandotte County.

Action by James A. Polley against the Kansas City Oil Company. Judgment for plaintiff, and defendant appeals. Reversed.

C. A. Bissett, of Kansas City, Mo., and Angevine, Cubblison & Holt, of Kansas City, Kan., for appellant. James F. Getty, of Kansas City, Kan., for appellee.

SMITH, J. This action was brought by the appellee to recover from the appellant corporation damages for personal injuries received in the fall of a platform upon which he was standing while engaged in painting a building for the appellant.

The petition, in part, was as follows: "That the platform or scaffold was erected against the side of said building at the height of about twelve feet in the following manner: That certain brackets or supports were constructed by fastening two pieces of plank or timber together in the form of a right angle, one arm of said angle being about three feet long, and the other being about four feet long, and then fastening a board on each

side of said first two planks or timbers, extending to a point near the outside end of the short arm of said right angle, diagonally down to a point on the long arm of said right angle, and about five or six feet below the point where said arms of said right angle were connected. That the long arms of said brackets were placed in a vertical position against the side of said building, the short arms of said brackets projecting out at right angles from the said building, the said brackets being secured and supported by another piece of timber or plank being first inserted between the two braces and against the point where the short and long arms of said right angle were fastened together; the other end of said plank resting on the ground in such a manner as to brace and hold said brackets against said building. That said brackets or braces were not fastened to the sides of said building, and were held in place solely by the last-mentioned plank resting on the ground. That the said defendant in disregard of its duty to furnish the plaintiff a reasonably safe place to work negligently and carelessly omitted to properly place said braces or supports upholding said brackets or to secure the ends of said brace timbers upon the ground. That by reason thereof the said scaffold was weak, defective, and wholly unfit for the purpose for which it was used by the defendant by reason whereof at the time aforesaid when the plaintiff, in pursuance of the orders and directions of the said superintendent, went upon said scaffold, the said braces slipped or sank into the ground or loosened in such a manner that the said brackets were permitted to and did fall, permitting said scaffolding to fall to the ground, whereby plaintiff was caused to fall and drop with said scaffold and was injured. That plaintiff was damaged by the fall in the amount of \$2,000, for which sum he prays judgment."

The answer of appellant, after a general denial, was, in part, as follows: "That said injury complained of by the plaintiff in his petition, if any injury there was, was caused by the fault and negligence of the plaintiff himself, and not by any act or omission on the part of this defendant. For a third and further answer and defense, this defendant says that the injuries of the plaintiff, if any such there were, were the result of the usual and ordinary risks of the business in which the plaintiff was engaged, and that all of the risks and dangers of said employment, together with the risks and dangers of being injured in the manner in which the plaintiff was injured, were open and obvious, and were well known to the plaintiff, or by the exercise of ordinary care and prudence should have been known to the plaintiff, and said plaintiff assumed such risks and dangers as a part of his employment. For a fourth and further defense to the petition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

filed herein the defendant says that, if the plaintiff was injured at the time and place mentioned in his petition, his injuries were caused by and through the negligence of a fellow servant." The reply was a general denial.

In accordance with the petition, the appellee tried the case on the theory that it was the duty of the appellant to furnish him a safe place to work, and by reason of the failure to do so he fell and was injured, and was entitled to damages. The form and description of the several parts of the platform or scaffold as set forth in the petition is in accord with the evidence, in which there was no conflict in this respect.

On the part of the appellant, the case was tried on the theory that the appellant furnished the appellee and his fellow laborers all necessary material to make the scaffold, which appellant claims was a very simple matter, and that they undertook to and did make their own place to work without any superintendence; that the appellee and his fellow laborers had several days of experience in putting up this and like scaffolds for painting; that the appellee and his fellow laborers were guilty of negligence in putting up the scaffold from which he fell; and that the appellant was not responsible for any damages which may have resulted therefrom. The scaffold from which the appellee fell was one of several of like pattern before described used in painting the buildings. Three or more of the brackets supported planks which were placed on top of the upper arm of the right angle to form a floor upon which the painters stood.

The principal allegation of error on the trial is based upon the rulings of the court in sustaining objections to questions propounded to the appellee as a witness on cross-examination. A number of similar platforms were used upon this and other buildings which were being painted, and the appellee testified that he had been at this work for some days, had seen the platforms erected, and had assisted in lowering the one, upon which he worked, as occasion required. He had also testified that he and two fellow workmen were left to erect a platform upon which they were to work on the morning of the accident, and that about the time they began to erect the platform he left the place, and went some distance for water to drink.

On cross-examination he was asked the following, and other, questions: "Q. Now, you stated, I believe, that you had worked on that scaffold, arranged with these brackets and supports for painting eight or ten tanks? A. Yes. Q. It was this same scaffold or the same character of scaffold you used in painting tanks that you were using at the time you were hurt? A. Yes; I think they was the same ones. Q. During the time you would be painting on the tanks,

would the scaffold be lowered from time to time? A. We would take it down and lower it." The appellee was then asked the following question, to which objection was made as immaterial, and the objection was sustained: "Q. Just tell how that would be done, to lower it?" Then followed the following questions and answers: "Q. Were you ever present when they were putting up or taking down any of the scaffolds at any of the tanks or buildings during the eight or ten days you were there helping to paint tanks and buildings? A. Yes, sir; I was there. Q. Did you see the men put up the scaffolds and take them down? A. Yes, sometimes I had. Q. Did you help at any times in doing anything toward putting up the scaffolds? A. Well, I helped lay the boards on them. Q. Did you ever help put up any of the supporting two by fours? A. No. Q. Did you ever see them put up? A. Yes; I seen them put up. Q. Who was that at these various times that erected the scaffolds? A. When we was there on the hill, you mean, painting tanks? Q. Yes. A. My father. Q. And who else? A. Well, there was, sometimes Bill Hiller would be up there with us and be another fellow or two up there; sometimes there would be only three of us, sometimes two of us. Q. Did you ever help your father in putting the scaffolds up? A. I helped lay boards on it. Q. Now, at those times, when you helped lay the boards across the brackets, how were the supporting two by fours set? A. Set just like I told you awhile ago, as near as I can tell you. Q. How is that? A. They were up against, in that there like that (indicating on model), and then leaning against the ground. Q. What was against the ground? A. The two by four. Q. Just resting on the ground you mean? A. Yes; there was the end of it sticking down on the ground. Q. Did you see your father or one of the men help erect this scaffold, where you were hurt? A. Oh, no; he never helped them at all. Q. Who put that up? A. A fellow by the name of Fletcher and Bill Hiller." The following question was asked and objected to, and the objection sustained: "Q. Was that set up the same as the rest of them, with the two by fours resting on the ground?" Other questions were asked as follows: "Q. Did you say you helped take down the scaffolds at times? A. Yes; I helped take them down. Q. How many times did you help take this same kind of scaffolding down? A. I couldn't say. Q. As many as half a dozen times? A. No; I don't believe I have. Q. Three or four times? A. Well, something like that." After the appellee had testified that he had gone for water, he was asked: "Q. Where was the scaffolding at that time, when you started for water?" The question was objected to as immaterial and not proper cross-examination, and the objection was sustained. Also: "Q. How far had you got along putting up

the scaffold when you went for the bucket of water? (Objected to and the objection sustained.) Q. Do you know how the scaffold was put up on the south side? A. I don't know. Q. You were there while they were putting it up, weren't you? (Objected to as argumentative, and objection sustained.)"

It appears from the undisputed evidence that all the material for the scaffold was at hand; that for some time previous the workmen had all been setting up and taking down scaffolds, and that it was a very simple operation, viz., to put the brackets against the side of the building, to put in a scantling for a brace to hold it up and a brace to keep it from swerving sideways, and a stake at the foot of the brace to keep it from slipping; that this was as much a part of their work as was the painting; that appellee had repeatedly assisted or at least had been present at the putting up and taking down of similar scaffolds, and that no expert skill or knowledge of superintendence was required; and that they were simply fixing a place to work by an ordinary and well-known contrivance.

The appellee testified that he went away for water about the time the other two workmen commenced to remove and put up the scaffold. The appellant on cross-examination asked questions to show the appellee's knowledge in regard to putting up the scaffold, whether the work had commenced before he went for the water, and whether it was completed when he returned—in short, to show whether he knew how the scaffold should be put up, and how, in fact, it had been or was being put up. Objections were made to each of these inquiries, and the court sustained the objections. We think they were proper and material questions in determining whether or not he participated in the negligence of the other two, it appearing that one of the braces that rested upon the ground was not staked and was set upon soft ground at the edge of a ditch, and the brackets had not been side braced. On the cross-examination of a witness the examiner has the right to ask proper questions tending to show the knowledge of the witness concerning the matters of which he has testified, or to elicit evidence concerning the same matters favorable to his side of the case if the questions are not otherwise objectionable. We think the court erroneously limited the cross-examination of the appellee as a witness in these respects. If the plaintiff had nothing to do with the preparation of the scaffold, and had not sufficient knowledge or experience to enable him to judge of its safety, the fellow servant rule is not a defense. *Henry v. Kaw Boiler Works*, 87 Kan. 571, 125 Pac. 67.

The judgment is reversed, and the case is remanded for new trial. All the Justices concurring.

BARTELS v. SCHOOL DIST. NO. 118 et al.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—REVIEW OF EVIDENCE.

In a controversy as to whether parts of a building were provided for in the building contract, or were extras, it appeared that the provisions of the contract respecting them were obscure and conflicting, and there was oral and conflicting testimony as to the interpretation of the contract by the parties, and also as to what was done under it; and hence the findings of the trial court on this issue, which are supported by some substantial testimony, cannot be disturbed on appeal, although the Supreme Court might have reached a different conclusion in an original investigation based on the same testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Appeal from District Court, McPherson County.

Action by H. Bartels against School District No. 118 and others. Judgment for plaintiff, and C. W. De Lano and others appeal. Affirmed.

J. S. Simmons, of Hutchinson, and Frank O. Johnson, of McPherson, for appellants. Hettinger & Hettinger, of Hutchinson, for appellee.

JOHNSTON, C. J. This action was brought by H. Bartels to recover a judgment for material furnished to C. W. De Lano, as contractor, to be used in the erection of a six-room schoolhouse for school district No. 118 in McPherson county, and to enforce a mechanic's lien therefor. The United States Fidelity & Guaranty Company of Baltimore, which gave a bond for the faithful performance of the contract by De Lano, was made a party. Other parties came in and claimed liens for labor and material, but the rulings and decisions on these claims are not in controversy now. De Lano failed to finish the building in accordance with his contract, and the school district, which did complete the building, asked damages for the failure of De Lano to furnish labor and material in accordance with his contract, and also for the penalty specified in the contract for failure to complete it, to wit, \$5 a day after September 10, 1909, until October 1, 1909, and \$10 a day after October 1, 1909, until the building was completed, and this was never done by him.

The principal controversy between the parties grew out of the claims of De Lano for extra compensation for work and labor done upon the building, and which, it is claimed, were not included in the contract. The court found that he was entitled to \$235.70 for extras provided by him, but found against a number of things furnished and done by him which, it is claimed, were outside of the contract. Of the claims not allowed, there

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are but two about which appellants now complain. One is a claim for \$1,390 for vent flues and stacks, and the other is \$263 for gables on the building. In their appeal De Lano and the guaranty company insist that the evidence does not support the findings and judgment of the court. In the principal or general contract, which was executed on May 1, 1909, De Lano was to provide all the material and furnish all the labor to erect the schoolhouse, excluding the plant for the heating and ventilation of the building, for which he was to receive \$9,809.50. In the second contract, executed on July 3, 1909, Lewis & Kitchen, as well as De Lano, agreed to provide for a heating and ventilating plant in accordance with plans and specifications which were provided. They were to furnish all the materials and do all the work in installing a gravity furnace system of heating and ventilation for \$1,400, \$1,200 of which was for heating, and \$200 of the amount, it was stipulated, was for the brickwork of the vent stack and vault for a dry closet system.

There is confusion and conflict in the stipulations of the contract as to the vent flues and stacks, which are referred to in the general as well as in the heating contract. In the general contract there is a provision that the building is to be completed according to the plans and specifications, except as to heating and ventilating and some other items that are enumerated, and appellants insist that everything furnished and done toward the flues and stacks by the contractor constituted a part of the heating and ventilating system, and were extras which should have been allowed by the trial court. The flues, chimneys, and other brickwork were provided for in the plans and specifications of the general contract; and in the second, or heating, contract, which was signed by De Lano, it was expressly stated that the building of the flues and stacks devolved upon De Lano. Although he testified that he did not understand that they were included in his contract, he appears to have interpreted it as including them, because, before the heating contract was made, he had begun the construction of the building, and was carrying up the flues and stacks with the walls of the building. That he regarded them as a part of his general contract is also indicated by the fact that he did not then claim them to be extra, nor have their value approved in advance by the architect and the owner, as the contract provided. There was considerable oral testimony that the parties acted and treated the flues and stacks as part of the contract, and that when the second, or heating, contract was made the architect and De Lano, upon inquiry, stated to members of the school board that everything was included in the contract. Another reason why the flues and stacks were not regarded to be a part of the heating plant is that the

cost of them about equaled the price paid for the entire furnace and heating plant provided for in the second contract.

As to the gable which was claimed to be an extra, there was testimony that a gable placed in the roof was not shown upon one of the plans of the building. The gable was shown, however, on three of the plans, but appears to have been omitted from what is called the roof plan. There is testimony to the effect that at one time it was the subject of discussion with the members of the board, who insisted that it was included in the contract, and the result was that the contractor made a pencil correction on the roof plan and put it in the building without having it approved and provided for as an extra. According to one of the witnesses the plan was corrected by De Lano and the lumber cut for the gable before any question was raised about the omission, and before any claim was made that it was not included in the contract; but this is denied by De Lano.

It thus appears that there is a conflict in the oral testimony as to the interpretation which the parties placed upon the contract on both items for extras as well as a conflict of testimony as to what was done under the contract. In this state of the case the finding of the court that the so-called extras were not intended to be included in the contract or treated by the parties as extras is binding on this appeal.

Appellants ask this court to examine the evidence independent of the prior adjudication of the trial court, upon the theory that it is principally a construction of the contract and the specifications included in it, explained by undisputed oral testimony. This may be done where all of the evidence as to the controverted points is in writing, and so, too, may findings be reviewed and set aside on appeal, where there is no substantial testimony to support them. Here, however, there is, as we have seen, oral testimony of a conflicting character on the vital points in the case, and the findings of the trial court, based on such a conflict, cannot be disturbed on appeal, even if this court might have reached a different conclusion in an original investigation of the same testimony. Counsel cite *Belknap v. Sleeth*, 77 Kan. 164, 93 Pac. 580, as an authority for an original consideration of the testimony in this case, but there all of the material testimony was in writing. One witness testified orally, but his evidence was upon a point that was not material to the controversy, and the case was presented in this court substantially as it was in the district court. In this case there was competent oral evidence tending to support the findings of the trial court. It was its province to weigh the evidence, settle the conflicts in it, and draw all reasonable inferences therefrom, and to set aside its findings because this court was

of opinion that the preponderance of the evidence was against them would be a usurpation.

There appears to be substantial and sufficient evidence to sustain the findings of the court, and its judgment will therefore be affirmed. All the Justices concurring.

ATCHISON, T. & S. F. RY. CO. v. BOARD OF COM'RS OF NEOSHO COUNTY

et al.

(Supreme Court of Kansas. April 12, 1918.)

(Syllabus by the Court.)

STATUTES (§ 76*)—CONSTITUTIONALITY—SPECIAL ACT.

Chapter 88 of the Laws of 1907, purporting to amend section 1 of chapter 88 of the Laws of 1905, relating to the building of certain bridges in Neosho county, is a special act, the purpose of which could be effected by a general law, and must therefore be held to be repugnant to section 17 of article 2 of the Constitution, although the act which it purports to amend is a valid special law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

Appeal from District Court, Neosho County.

Action by the Atchison, Topeka & Santa Fé Railway Company against the Board of County Commissioners of Neosho County and others. Judgment for defendants, and plaintiff appeals. Reversed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. E. W. Grant, of Erie, for appellees.

JOHNSTON, C. J. The commissioners of Neosho county levied a tax upon the property in the county to pay for certain bridges, which were built in pursuance of the authority given by chapter 88 of the Laws of 1907. The appellant, the Atchison, Topeka & Santa Fé Railway Company, challenged the legality of the tax levied against its property for that purpose, and, having paid the same under protest, brought this action to recover \$690.52, the amount of the bridge tax. Upon a demurrer to its petition the trial court held that the tax was valid, and from its decision an appeal was taken.

The right of recovery depends upon the validity of the act under which the tax was levied. The ground of attack is that the act is special legislation and repugnant to section 17 of article 2 of the Constitution. It applies only to Neosho county, and only purports to affect three of the bridges of that county. It is obviously special in its nature, and it is undoubtedly a case in which a general law could be made applicable. Counsel for appellee concedes the contention that the act is local and special in form and purpose, and frankly says that if it had originated since section 17 of article 2 of the Constitution had been amended it would be

clearly invalid. It is insisted, however, that the act cannot be regarded as new legislation, but merely as an amendment of section 1 of chapter 88, Laws of 1905, and that chapter was enacted before the adoption of the amendment of 1906, which gave the courts the final determination of the question whether a general law was applicable and could have accomplished the purpose for which a special law was enacted. It has been decided that this constitutional amendment is prospective in its operation and does not apply to laws enacted prior to its adoption. *State v. Cox*, 79 Kan. 530, 99 Pac. 1128. The special act of 1905 must therefore be treated as a valid law, and it is contended that an enactment, confessedly special in its nature, may at this time be added to or substituted for some or all of the sections of a valid special law by way of amendment.

The original act of 1905 provided that three bridges should be erected at certain points in Neosho county at a cost of \$8,000 each. To obtain funds for the building of the bridges, authority was given to the county commissioners to levy taxes and issue warrants. In 1907 the first section of the law of 1905 was taken out of the act, and there was substituted for it another act, which authorized the building of one of the bridges at a cost of \$12,000 and each of the other two at a cost of \$6,000. It thus appears that a change was made in one of the substantial provisions of the act, and the section for which the new act is a substitute was expressly repealed. However, it is immaterial to what extent the act of 1907 amends that of 1905, or whether the amended act is to be inserted in and treated as a part of the former. The later act embodies new legislation. It is admitted to be special legislation. No special legislation is excepted from the limitation of the Constitution. The effect of the limitation cannot be avoided by dressing special legislation in the garb of an amendment to an earlier act. We have a multitude of special acts, relating to a great variety of subjects, which were passed prior to the recent amendment to the Constitution, and if it were held that these could be amended by special legislation the amendment would have little effect. The Legislature may amend statutes by substituting one provision for another, whether cognate or not, providing the new provision comes fairly within the subject expressed in the title of the earlier act. If the theory of appellees was adopted, it would be comparatively easy, therefore, for the Legislature to achieve its ends in great part by special legislation, and in that way defeat the purpose of the constitutional restriction which was intended to prohibit the doing of anything by a special act which can be effected by a general law. If the other view were taken, it would, in effect, mean that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Legislature might accomplish any of its purposes by a special act, including those which could be effected by a general law, providing they were disguised as amendments of existing statutes.

That the purpose sought to be accomplished by the special act in question can be reached by a general law is demonstrated in *Anderson v. Cloud County*, 77 Kan. 721, 735, 95 Pac. 583, 588. It was there said: "To enact a general law on the subject, giving to boards of county commissioners in every county in the state authority to build or remove bridges, appropriate funds, and issue bonds to meet the expense thereof, under such restrictions and limitations upon their authority in the premises as the Legislature may deem wise and salutary, would not require more than ordinary skill in the science of legislation."

The act, being special legislation, violates the constitutional limitation; and hence it furnished no authority for the levy of the bridge tax which appellant was compelled to pay.

The judgment will therefore be reversed and the cause remanded, with the direction to overrule the demurrer to the petition of appellant. All the Justices concurring.

AARON et al. v. MISSOURI & K. TELEPHONE CO.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES (§ 15*)—USE OF POLES—PERSONAL INJURIES—CARE REQUIRED.

One telephone company which sells to another the right to maintain a wire upon its poles is liable for an injury to an employé of the other company, who is himself free from fault, which is occasioned by the failure of the owning company to use reasonable diligence to keep the poles in such condition that they can be used with safety in the customary manner.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.*]

2. TELEGRAPHS AND TELEPHONES (§ 15*)—USE OF POLES—NEGLIGENCE—LIABILITY.

In that situation, where the owning company for the purpose of installing a new set of poles has stripped its wires from the old ones, and an employé of the other company is killed while removing the remaining wire by the breaking of a pole caused by a weakness not discoverable by mere observation, it is not necessarily relieved from liability by the fact that it was engaged in replacing the old poles.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.*]

3. TELEGRAPHS AND TELEPHONES (§ 15*)—USE OF POLES—NEGLIGENCE—WARNING OF DANGER.

In that situation a general warning to the workman to be careful while removing the wires is not necessarily sufficient to relieve

the owning company from further responsibility.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.*]

4. TELEGRAPHS AND TELEPHONES (§ 15*)—USE OF POLES—CONTRIBUTORY NEGLIGENCE.

In that situation the owning company is not as a matter of law exempt from liability on the ground that the workman was bound at his peril to ascertain the condition of the pole before climbing it.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.*]

5. DEATH (§ 99*)—DAMAGES.

Under the evidence, an allowance of \$10,000 to the parents for the death of their son is held to have been excessive.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Appeal from District Court, Leavenworth County.

Action by Michael Aaron and Jeanette Aaron against the Missouri & Kansas Telephone Company. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

Gleed, Hunt & Palmer, of Topeka, for appellant. John T. O'Keefe and Lee Bond, both of Leavenworth, and M. N. McNaughton, of Tonganoxie, for appellees.

MASON, J. A partnership which was conducting a local telephone business attached a wire to a line of poles of the Missouri & Kansas Telephone Company under a contract allowing this to be done for an agreed consideration. The owner of the poles, which will be spoken of as the telephone company, was engaged in replacing them by a new set. For this purpose it had a crew of men at work removing from the old poles all of its own wires excepting one, which was described as a "dead" wire. Walter Aaron, in the employ of the partnership referred to, was following this crew, and removing the two remaining wires. For this purpose he climbed a pole from which all but these two wires had been removed. He took one off, and as he loosened the other the pole fell with him, inflicting injuries from which he died. His parents sued the telephone company, alleging its negligence to have been the cause of his death. They recovered a judgment, and the defendant appeals.

The defendant maintains that there was no evidence of any negligent act or omission on its part that could have been the proximate cause of the injury. The injured workman was not its employé, and its liability cannot be based upon principles peculiar to the relation of master and servant. The plaintiffs contend that the injury resulted from the neglect of two duties which the telephone company owed to the local telephone company and its employés, to keep the poles in such condition that it was safe to climb them for any purpose connected with the maintenance

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

of the telephone wire of the partnership, and, if any of them were in such condition as to make this unsafe, to give a sufficient warning of that fact.

[1] The telephone company in selling the privilege of attaching a wire to its poles by fair implication assumed an obligation to use reasonable diligence to keep them in such condition that they could be used with safety in the customary manner; and this obligation inured to the benefit of the employes of the local company. The company owning the poles necessarily knew that the employes of the other company would make use of the poles, and in legal contemplation invited them to do so; it is not absolved from liability by the want of contractual relation with them. The case is within the principle thus stated: "One who supplies a thing for such use by others that it is obvious that any defect will be likely to result in injury to those so using it is liable to any person who, using it properly for the purpose for which it is supplied, is injured by its defective condition. The doctrine of invitation has been invoked as a ground of liability in such cases, proceeding upon the theory that he who furnishes a thing for a certain use by others invites others to use it, and is therefore bound to make it safe for such purpose." 29 Cyc. 484.

In a celebrated case involving the basis of noncontractual liability for negligence, Sir William Ballot Brett, Master of the Rolls, deduced from the prior decisions a comprehensive principle which he expressed in this language: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 509. This generalization has met with judicial approval in this country as well as in England. *Huber v. La Crosse City R. Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940. See, also, note, 46 L. R. A. 41, 109; 1 Thompson on the Law of Negligence, § 979; 2 Cooley on Torts (3d Ed.) p. 1491. The facts of the case are unusual, and we find no precise parallel in the decisions, but the circumstance that the telephone company remained in full control of the poles is a sufficient basis for establishing a noncontractual liability. Of this phase of the matter it has been said: "No question has ever been raised as to the propriety of the rule that, provided the plaintiff has a right to be where he was at the time he was injured, the fact that the defendant or his servants had control of the injurious agency is a sufficient ground for requiring him to indemnify the plaintiff independently of the questions whether there was or was not any

privity of contract between them, and whether the injurious agency was real or personal property." Note, 46 L. R. A. 38. Such a liability is measured by the same standard as that of an employer to his employé. The cases cited bear out this statement of the same note: "Whether the person who owns or supplies the agency which caused the injury occupies the position of master or is a mere stranger as respects the servant injured, the duty incumbent on him must necessarily be measured by the standard of 'ordinary care,' and neither on principle or authority is there any reasonable ground for arguing that this expression can have a different meaning in cases involving an exposure of the servant to exactly the same perils simply because the party who subjects him to those perils is not his master." Note, 46 L. R. A. 52.

[2] If no change of poles had been in progress, and a pole had broken while Walter Aaron was climbing it to attach or repair the wire, causing him to fall, he being without fault in the matter, liability of the company could be based upon its negligence in permitting the pole to become defective. But the defendant argues that there could be no liability here for allowing the pole to become weakened, because the telephone company was in the act of putting in a line of new poles, a course adapted to remedy any existing defect. The reason for the substitution of new poles was not shown. It does not affirmatively appear that it was because the old poles were worn out, or were regarded as unsafe. In any event, the process of substitution involved the climbing of the old poles for the purpose of detaching the wires. If the telephone company, after having stripped the old poles of its own wires (excepting the one described as "dead"), ought reasonably to have expected that some employé of the local company in the course of the removal of the other wire might be injured by climbing a pole which was unsafe for that purpose because of a weakness not apparent, but discoverable by methods in ordinary use, it was bound to use reasonable diligence to prevent this, and, if it neglected to do so, it was liable for any injury resulting from such omission. We think each of these hypotheses had support in the evidence, and therefore that the question of liability was rightfully submitted to the jury. It was shown that the pole that fell broke off at the surface of the ground; that it was hollow, but its outside appearance gave no indication of this fact; a witness who had been in the service of the telephone company for 18 years testified that the customary method of ascertaining whether a pole had become unsafe was by thrusting a sharp crowbar into the portion below the ground, or by pressing against it with a long pole having a sharpened iron at the end; that the practice was for the safety of the poles to be tested and the unsafe ones mark-

ed before the workmen undertook to strip the wires from a line of poles. The wires themselves might help to support a weak pole, and whatever danger there was in climbing it would naturally be increased by their removal.

[3] The employés of the telephone company may have been perfectly safe in the work they were doing, and yet the situation may have required some such precaution as that suggested, for the benefit of whatever person should remove the last wire. The jury found that an employé of the defendant had warned the president of the local company in a general way to be careful while removing the wires, and he had repeated the warning to Walter Aaron; nothing being said in either case about this particular pole. This cannot be held as a matter of law to have been sufficient to absolve the telephone company from further responsibility.

[4] The defendant further maintains that the evidence conclusively established that the injured workman was guilty of contributory negligence, because reasonable care for his own safety required him to examine into the condition of the pole before climbing it, and such examination would have shown it to be dangerous. The right of a "lineman" to recover for injuries resulting from a defect in the pole on which he is working has been affirmed and denied. Note, 15 Ann. Cas. 598; note, Ann. Cas. 1912B, 467; note, 21 L. R. A. (N. S.) 774; note, 30 L. R. A. (N. S.) 477; notes, 26 L. R. A. (N. S.) 509, 1195. In each of the cases to which the two notes last cited are appended the injured workman was employed by a company other than that owning the poles; but as he sued his own employer no point was developed having on that account any special application here. There can be no hard and fast rule that any workman whose duties require him to climb a telephone pole must judge of its condition at his peril. Here there was positive evidence of a custom to have an inspection made by some one else. At the time of his death Walter Aaron was 19 years old, and had been working for the local telephone company 2 or 3 weeks. He was not shown to have had any other experience. The question whether his conduct precluded a recovery was for the jury.

A number of trial rulings are complained of. A witness was allowed to be asked whose duty it was to inspect the poles, and other similar questions. The form was objectionable, but no prejudice resulted, for his answers as a whole showed plainly that what he was undertaking to do was to describe the usual practice as he had observed it. An objection is made to an instruction because it seemed to allow the jury to determine what the defendant's duty was. In effect, however, the court instructed that it was the duty of the defendant to use reasonable precautions, and left the jury to deter-

mine whether certain conduct was necessary to that end, and therefore became its duty. The jury were told that it was the duty of the defendant to keep the poles in a reasonably safe condition. A more accurate statement would have been that its duty was to use reasonable diligence to make them safe, but the failure to observe the distinction does not warrant a reversal, for upon the whole charge it does not appear that any misconception on the part of the jury was probable. *Kamera v. Boiler Works*, 82 Kan. 432, 108 Pac. 806. An instruction was given to the effect that the company was liable if the injury resulted without fault of the person injured by reason of a hidden defect of which the defendant knew or would have known if it had exercised reasonable diligence. If the defendant actually knew of the defect, its liability would depend upon whether it used due care to warn the workman, but that aspect of the matter is made sufficiently clear elsewhere in the charge. An instruction that ordinary care on the part of the injured person may be inferred from the instinct of self-preservation is criticised on the ground that it should have been limited by the phrase, "in the absence of evidence to the contrary." The language used does not suggest that the inference referred to would necessarily overcome positive evidence, but properly leaves the matter to the jury. The contention is made that several of the special findings were without support in the evidence. The jury found in answer to questions that Walter Aaron was completing the work of the gang ahead of him; that he was working indirectly for the defendant under the defendant's foreman. There was a sense in which these answers were justified. The evidence showed that Aaron was removing the dead wire owned by the telephone company, but left on the poles by its foreman. The defendant introduced no evidence whatever, and the presence of this wire is not explained. There was room for the inference that the defendant was interested in having it removed before the poles were taken down, and therefore that to that extent Aaron was doing work for its benefit. In any event no prejudice resulted, for the judgment was not based on the theory that he was in its employ. The jury also said there was no direct evidence whether Aaron inspected the pole before climbing it. Several witnesses testified that they did not see him do so, although he was within their sight. The evidence was far from conclusive, and might well be characterized as not direct. The finding as to the grounds of negligence is not clearly expressed, but we interpret it as meaning that the defendant was negligent in using an unsafe pole and in failing to give warning of its condition.

[5] The defendant maintains that the amount of recovery allowed—\$10,000—was too large. Under our statute the damages

must be estimated solely upon the basis of compensation for pecuniary loss. *A. T. & S. F. R. Co. v. Brown*, Adm'r, 26 Kan. 448; *Railway Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603. The parents were entitled to recover what their son would probably have earned during his minority, less the probable expense of his maintenance, and in addition thereto such sum as he would have been likely to contribute to their support, or to the support of either, after he became of age. *Railroad Co. v. Cross*, 58 Kan. 424, 49 Pac. 599. The deceased was the oldest of six children. Nothing is shown as to his parents' financial circumstances beyond the fact that they owned their home. The father was township assessor. He was at the time of the trial 54 years of age; his wife being 44. Walter at the time of his death was receiving "possibly" \$1.50 or \$1.75 a day. He had at one time been deputy township assessor, receiving \$3 a day. His mother testified that during this time the money was kept for him, he buying what he wanted as he needed it—high school books and clothing—and that she received a part of it. There was no further testimony regarding the disposal of his wages or his contribution to the support of the family. This was substantially all the evidence that bore upon the extent of the plaintiff's pecuniary loss. We think it failed to justify so large an award. What rate of interest the amount allowed should be regarded as capable of earning is debatable. An annuity payable jointly to a husband of 54 and a wife of 44 until the death of one of them, and thereafter for life to the survivor, can be purchased at the rate of \$1,973.30 for each \$100. Ten thousand dollars would, therefore, be more than enough to secure to the plaintiffs the payment of \$500 a year for so long as either should live. At the time of the death of their son they were aged, respectively, 50 and 40, and such an annuity would have cost them \$2,099.70 for each \$100. While the amount that their son would probably have contributed to their support if he had lived is not capable of exact computation, it seems clear that there was no basis in the evidence for expecting that his annual contribution would reach anything like so high an average as \$500. In determining what allowance should be deemed excessive little aid is to be had from the adjudications, for each case turns upon its peculiar facts. In this state recoveries by parents for the death of a child have been sustained where they amounted to \$4,000 (*Railway Co. v. Fajardo*, 74 Kan. 314, 86 Pac. 301) and \$4,500 (*St. L. & S. F. Rly. Co. v. French*, 56 Kan. 584, 44 Pac. 12), and set aside as excessive where they amounted to \$3,000 (*A. T. & S. F. Rld. Co. v. Brown*, Adm'r, 26 Kan. 443) and \$1,500 (*Coal Co. v. Limb*, 47 Kan. 469, 22 Pac. 181). A mere comparison of the amount of

the judgment with that sustained or set aside in other cases is obviously of little value, especially with respect to decisions in other jurisdictions, where the measure of recovery is different. Cases are collected in notes in 12 Am. St. Rep. 381, 70 Am. St. Rep. 669, and 18 Ann. Cas. 1209. See, also, 4 Sedgwick on Damages (9th Ed.) § 1367, and 1 White on Personal Injuries, § 206.

We are of the opinion that the judgment is excessive, but not so much so as to suggest the influence of passion or prejudice. *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935. Upon a careful consideration we have concluded that \$6,000 is as large a judgment as should be permitted to stand under the evidence.

The judgment will be reduced to \$6,000, and, as so modified, affirmed, subject to the right of the plaintiffs to require a new trial upon the question of the amount of damages sustained by filing with the clerk of the district court a request therefor within 20 days after the mandate of this court shall have been issued. All the Justices concurring.

GARNER v. HORNER. †

(Supreme Court of Kansas. April 12, 1913.)
APPEAL AND ERROR (§ 1010*)—FINDINGS—EVIDENCE.

Findings of fact sustained by competent evidence will not be set aside on appeal, in the absence of error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Appeal from District Court, Ford County. Action by T. F. Garner against A. M. Horner. From judgment for defendant, plaintiff appeals. Affirmed.

Robt. Garvin, of St. John, and Francis C. Price, of Ashland, for appellant. T. A. Scates and A. F. Watkins, both of Dodge City, and Chas. C. Calkin, of Kingman, for appellee.

PER CURIAM. The judgment appealed from is for a balance found to be due upon an accounting between partners. No error is alleged except in the findings of fact. These findings appear to be sustained by competent evidence, and therefore will not be set aside.

The judgment is affirmed.

BANK OF TOPEKA v. SADLER.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 570*)—VOLUNTARY DISMISSAL—EFFECT.

Following *Deming v. Douglass*, 60 Kan. 738, 57 Pac. 954, it is held that a plaintiff in ejectment, who has voluntarily dismissed his action, after a judgment upon a first trial had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

been set aside under the statute (now repealed) allowing a second trial as a matter of right, is regarded as having thereby permanently abandoned his claim, and can maintain no further action thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1023-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.*]

2. JUDGMENT (§ 617*)—VOLUNTARY DISMISSAL—EFFECT.

One who has in that manner lost the right to maintain such an action cannot, by taking possession of the land while temporarily without an actual occupant, acquire the right to assert his claim of title by way of defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1130, 1134; Dec. Dig. § 617.*]

3. JUDGMENT (§ 525*)—RECITALS IN RECORD—VACATION OF JUDGMENT—GROUNDS.

A recital in the record of an ejectment action that a judgment upon a first trial was vacated for good cause shown, upon application of the unsuccessful party, notice thereof being entered on the journal, is to be interpreted, in the absence of anything further to indicate the contrary, as showing that the judgment was vacated upon a demand made as a matter of right.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 568, 968, 982½; Dec. Dig. § 525.*]

Appeal from District Court, Chautauqua County.

Action by the Bank of Topeka against M. C. Sadler. Judgment for plaintiff, and defendant appeals. Affirmed.

H. E. Sadler, of Sedan, for appellant. D. R. Hite and Mulvane & Gault, all of Topeka, for appellee.

MASON, J. In June, 1903, M. C. Sadler, the grantee in several tax deeds, dated September 21, 1901, brought ejectment based thereon against Alfred P. Reid, the holder of the patent title; other defendants being joined. A first trial resulted in a judgment for the defendants. Upon application of the plaintiff the judgment was vacated and the cause was continued until the next term of court, when it was dismissed upon the voluntary application of the plaintiff. In January, 1904, the Bank of Topeka acquired Reid's title and rented the land. The tenant, without the knowledge or consent of the bank, abandoned it. On September 4, 1904, M. C. Sadler, finding it thus without an actual occupant, took physical possession. On February 11, 1911, the bank brought ejectment against her (M. C. Sadler). The court found the facts substantially as above stated and rendered judgment for the bank, from which this appeal is taken.

[1] In *Deming v. Douglass*, 60 Kan. 733, 57 Pac. 954, it was held that a plaintiff in ejectment, who had voluntarily dismissed his action, after the judgment upon a first trial had been set aside under the statute allowing a second trial as a matter of right, was to be regarded as having thereby permanently abandoned his claim. This precedent, if followed, compels an affirmation of the de-

cision of the trial court in the present case. We are asked to re-examine the soundness of the doctrine there announced, but do not regard that course as necessary or called for. The matter relates to policy rather than principle. There is no inherent hardship or injustice in compelling a plaintiff, after the results of a first trial have been set aside as a matter of right, to allow the cause to proceed to a final trial, under penalty of losing his right of action. The question is one of procedure and statutory construction. A definite rule on the subject was adopted by this court in 1899, the reasons therefor being set out in the opinion in the case cited. Before the situation arose to which the rule was applied in this case, two sessions of the Legislature had been held, without an amendment to the statute as it had been construed, and the decision had been followed by this court after its membership had been enlarged. *Douglass v. McGinnis*, 64 Pac. 1113,¹ not officially reported. Whether or not the rule was the best that might have been adopted, it is not so manifestly unsound in principle or pernicious in result as to justify the trial court in refusing to follow it, or this court in now changing it.

[2] Within the authority of the decisions cited, the plaintiff in the first ejectment action, having voluntarily dismissed it after one judgment had been set aside on her own application, made as a matter of right, could not maintain a new action, reasserting the same claim. Nor could she better her situation, and acquire a right to assert her claim by way of defense, by taking possession of the land when it was left without an actual occupant, through the departure of the tenant without the knowledge of the landlord. *Nicholson v. Hale*, 73 Kan. 599, 85 Pac. 592; *Buehler v. Teetor*, 84 Kan. 281, 114 Pac. 387; *Buckner v. Wingard*, 84 Kan. 682, 115 Pac. 636.

[3] The appellant contends that the record does not affirmatively show the vacation of the first judgment to have been procured by invoking the statutory right to a second trial in ejectment—that so far as shown in this proceeding a new trial may have been granted because of errors committed in the former one. The journal entry in the first action, after reciting the rendition of a judgment for the defendants, proceeds: "And thereupon upon application of said plaintiff, notice of such application being entered on the journal of the court, and for good cause shown, the said judgment against the plaintiff was set aside and vacated by the court and a new trial granted, and said cause was duly continued to the ensuing term of this court." The statute relating to a second trial in ejectment (Gen. St. 1901, § 5086, repealed by chapter 333, Laws 1905) read: "In an action

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 63 Kan. 869.

for the recovery of real property, the party against whom judgment is rendered may at any time during the term at which the judgment is rendered demand another trial, by notice on the journal, and thereupon the judgment shall be vacated and the action shall stand for trial at the next term." The recital of the journal entry is that the judgment was vacated on the application of the plaintiff; notice thereof having been entered on the journal. This points plainly to an invocation of the statute quoted, for the entering on the journal of a notice of an application to vacate a judgment is not adapted to any other proceeding. This consideration is not offset by the presence of the phrase, "for good cause shown," which is formal and indefinite and applicable to any situation. If a motion for a new trial on account of errors had actually been made, the fact would undoubtedly have been shown to the satisfaction of the court in the trial of the second action.

The judgment is affirmed. All the Justices concurring.

FOLTZ v. BUCK.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION (§ 27*)—MALICE—ELEMENTS.

In an action for malicious prosecution malice is an essential element, but it is not restricted to the personal hatred, spite, or revenge of the one who institutes the prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 60; Dec. Dig. § 27.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4309, 4310.]

2. MALICIOUS PROSECUTION (§ 72*)—INSTRUCTION.

In a case where there was testimony tending to show that the defendant caused the plaintiff to be prosecuted for an offense, when he did not believe the plaintiff to be guilty, and that a prosecution was instituted for an improper and wrongful purpose, it was not error for the trial court to include in his charge the statement that "the prosecution of a person with any other motive than to bring the guilty person to justice is, in the law, a malicious prosecution."

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 168-173; Dec. Dig. § 72.*]

3. TRIAL (§ 350*)—SPECIAL INTERROGATORIES—MALICIOUS PROSECUTION.

The refusal of the court to submit a special question, asking the jury to state in detail the material facts which the defendant withheld when he consulted the county attorney as to the bringing of the prosecution, was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

4. TRIAL (§ 343*)—FINDINGS AND VERDICT—CONSTRUCTION.

Special findings will be construed, if possible, so as to uphold the general verdict; and where there is obscurity as to the kind of damages included in the general verdict the prayer of the petition is not absolutely controlling, but

consideration may be given to the allegations in the body of the petition and to the testimony introduced in support of them, as well as to the instructions given to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

Appeal from District Court, Butler County. Action by Dan Foltz against Carl Buck. From a judgment for plaintiff, defendant appeals. Affirmed.

N. A. Yeager, of Augusta, and Geo. J. Benson and T. A. Kramer, both of El Dorado, for appellant. C. L. Aikman, of El Dorado, for appellee.

JOHNSTON, C. J. This action was brought by Dan Foltz, the appellee, against Carl Buck, the appellant, to recover damages for malicious prosecution. The parties both resided in Augusta, and on October 28, 1910, Buck swore to a complaint charging Foltz with feloniously and burglariously entering a store building in that city with the intention of stealing merchandise kept there. On this complaint the warrant was issued, and Foltz was arrested and taken before a justice of the peace in El Dorado. On November 17, 1910, a trial was had, and upon the evidence the magistrate found that Foltz had not committed the offense charged, and also that there was no probable cause for charging him with the offense. Shortly afterwards the present action was brought, and on the trial a verdict, awarding damages to Foltz in the sum of \$500, was returned.

The appellant and his partner were engaged in the produce business, and had stored butter, eggs, poultry, and other articles in the basement of a building in Augusta, and appellee and his family resided in rooms in the same building immediately above the basement. It appears that appellant and his partner kept dogs in the basement, and that female dogs were sometimes brought there for the purpose of breeding them to one of appellant's dogs. The howling and noise made by the dogs irritated appellee, and he had quarreled with appellant about this, and also about an improper proposal that appellant had made to the wife of appellee. According to appellee's testimony there was a great deal of howling by the dogs on October 24, 1910, which angered him, and he undertook to find appellant and to put an end to the disturbance. He stated that he heard some one in the basement, but when he knocked at the door no one answered, and when he tried to enter the basement he found it was locked. He then called to a young woman who was in his home to hand him the key to the kitchen door, and when this was given him he unlocked the door and entered the basement. There he found two men, who told him they were there to breed the dogs, but upon inquiry he found that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant was not in the basement. After upbraiding them for keeping dogs there, he learned, upon inquiry of the wife of appellant, where he had gone and followed him to that place. There a somewhat angry controversy ensued. On the other hand, appellant claims that his firm had been losing articles from the basement for some time, and that in order to detect the criminals he had left these men in the basement, and that appellee had entered that day without knocking, and he appeared to be surprised when he found that persons were in there. As against this claim, the appellee says the building was upon a public street opposite a hotel; the basement was high and with windows through which persons inside could be readily seen; that appellee called aloud for the key with which the door was unlocked; and that he entered there in the middle of the day, without secrecy or stealth, but for the sufficient reason of putting an end to a nuisance under his dwelling.

The first contention is that appellee failed in his proof, and that therefore appellant's demurrer to the evidence should have been sustained. There appears to be no shortage in the proof. It was shown that, upon an examination of the merits of the charge made by appellant that appellee was not guilty, and aside from the discharge and the findings of the magistrate that there was no probable cause, there was abundant testimony to show that appellant had no reasonable grounds for believing appellee to be guilty at the time he made the charge, and that, in fact, he did not then believe appellee to be guilty, but maliciously instituted the prosecution against him. It is unnecessary to recount the facts brought out in the testimony, but, based upon it, the jury made special findings to the effect that appellant did not believe that appellee was guilty when he instigated the prosecution; that when he consulted with the county attorney in regard to the prosecution he did not fairly or fully state the facts to him; and, further, that appellant caused the arrest and prosecution of appellee from malicious motives.

There is complaint that there was error in permitting counsel for appellee, in his opening statement to the jury, to characterize the breeding of dogs in the basement under the residence of appellee as a "nefarious" business. It is true that an emphatic adjective was used in describing such conduct, but it certainly affords no ground for reversal.

[1, 2] Error is assigned on a statement by the court in one of its instructions that "the prosecution of a person with any other motive than to bring the guilty person to justice is, in the law, a malicious prosecution." Although this is a very condensed statement of the law, it cannot be regarded as erroneous. In this action malice is an essential element to be proven, but malice is not restricted to personal hatred, spite, or revenge.

It is enough if the prosecution was instituted from any wrongful or improper motive. The law contemplates that criminal prosecutions shall only be brought to punish crime and to bring criminals to justice. When a proceeding is intentionally instituted to further a private or wrongful purpose, it is, in law, a malicious prosecution. As stated in *Kelley v. Sage*, 12 Kan. 109, page 112: "The criminal law was not designed to assist in the collection of debts, and he who attempts to so use it must expect to smart for it."

It has also been said that: "In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Commonwealth v. Snelling*, 82 Mass. (15 Pick.) 321.

In *Vinal v. Core and Compton*, 18 W. Va. 1, page 27, the court expressed the idea of the challenged instruction in equally brief terms, where it said that malice, in its legal meaning, was "some motive other than a desire to have punished a person believed by the prosecutor to be guilty of the crime charged."

In speaking of malice in the enlarged sense of the law, the Supreme Court of Oregon held that it included every unlawful and unjustified motive, adding: "In an action for malicious prosecution any motive, other than that of simply instituting a prosecution for the purpose of bringing a party to justice, is a malicious motive." *Gee v. Culver*, 13 Or. 598, 11 Pac. 302 (syl. par. 1).

Language substantially similar to that used by the court in this case is found in 19 A. & E. Encycl. of L. 675, where it is said that "malice may consist, it has been held, of any motive other than a desire to bring a guilty party to justice," and numerous cases are cited in support of the text.

The twenty-third instruction given is also the subject of complaint, on the alleged ground that there was no dispute in the material facts, and that the court should have told the jury expressly that there was probable cause for instituting the prosecution. As already shown, there was a dispute in the testimony, and certainly there was plenty to show that the prosecution was instituted without probable cause.

[3] No error was committed in refusing to submit a special question asking the jury to detail the facts withheld by appellant from the county attorney when he submitted the matter to that officer. As well might he have asked the jury to state the testimony on which the verdict was based. Only single, ultimate facts are to be submitted in any special interrogatory.

The objections to questions are not deemed to be material; nor is there any substantial basis in the claim that the special findings conflict with each other or with the general verdict.

[4] Appellant finally insists that there was

error in entering judgment against him for \$500. His claim is that under the petition and special findings the judgment against him should not have exceeded \$35. In appellee's petition he includes allegations to the effect that the malicious prosecution had caused injury to his feelings, reputation, and business, and that he had been put to the expense of \$25 to procure an attorney to defend him in the prosecution and the sum of \$10 to procure the attendance of witnesses at the trial of the criminal charge. In the prayer of the petition he asks judgment for "the sum of \$35 actual damage, and for five thousand (\$5,000.00) dollars punitive damage, and for costs of this action." On the trial proof was offered showing actual damages far beyond the damages mentioned, and also testimony was received which warranted a substantial award as exemplary damages. One of the special interrogatories and answers was: "If you should find for the plaintiff, state separately the amounts allowed for actual damages and exemplary damages, if you allow any exemplary damages? Ans. Actual damages, \$500. Exemplary damages."

It is plain that the pleader blundered in formulating the prayer of the petition and confused actual expenses with actual damages. The pleading of injuries to his business, reputation, and feelings in the body of his petition and the offering of proof in support of these averments shows that the case was tried on the theory that the actual damages were not limited to the actual expenses incurred at the trial of the criminal charge. The court directed the trial and instructed the jury as if actual damages beyond the amount claimed for expenses of the prosecution were involved. Appellant insists that he did not try the case on that theory; but, while he made numerous objections to the introduction of evidence, it is manifest that when the evidence was admitted and the instructions given, relating to actual damages, no specific objection was made that under the pleadings the actual damages should be limited to the money paid as expenses of the criminal trial. The case having been tried as a case of substantial damages for injury to the business, good name, and feelings of appellee, the jury must have made their award upon that theory. Instead of finding the actual damages as \$35, the special finding disclosed an award of \$500 as actual damages, which necessarily included the \$35 paid out as actual expenses. The findings are to be construed so as to support the general verdict, where that is possible, and within the rule of *Burnell v. Bradbury*, 69 Kan. 444, 77 Pac. 85, we think the verdict can be upheld.

Finding no material error in the proceedings, the judgment of the district court will be affirmed. All the Justices concurring.

MAFFET v. SCHAAR.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 334*)—REMEDY OF PURCHASER — DAMAGES — MISREPRESENTATION.

Honestly believing that a tract of land contained 272 acres, a vendor so represented to his vendee, who purchased relying upon the representation. As a part of the same oral negotiations a price of \$45 per acre was agreed upon, and the total consideration was arrived at by multiplying the price by the number of acres. A written contract of sale was signed, which described the land, and stated the total consideration without referring to the number of acres or the price per acre. The contract was consummated by payment of the price, and the execution and delivery of a deed in the ordinary form, which contained no reference to the price per acre, but stated the consideration as \$12,240, and gave a description of the land followed by the words: "Containing in all 272 acres more or less." The tract contained only 257.71 acres. The vendee sued to recover the excess consideration, stating all the facts relating to the sale in his petition. *Held*: (1) The plaintiff was entitled to recover because of misrepresentation as to the quantity of land, although the representation was made without intent to deceive.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

2. VENDOR AND PURCHASER (§ 334*)—REMEDY OF PURCHASER — DAMAGES — MUTUAL MISTAKE.

The plaintiff was also entitled to recover, irrespective of fraud, because of the mutual mistake of the parties regarding the quantity of land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

3. EVIDENCE (§§ 433, 434*)—PAROL EVIDENCE—ACTION.

The oral negotiations were admissible in evidence to sustain both grounds of recovery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990-2004, 2005, 2520; Dec. Dig. §§ 433, 434.*]

4. VENDOR AND PURCHASER (§ 334*)—ACTION BY PURCHASER — DEFICIENCY — WILLFUL FRAUD.

The plaintiff was not entitled to recover on the ground of willful fraud.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

Appeal from District Court, Kingman County.

Action by John N. Maffet against Carl Schaar. From a judgment for plaintiff, defendant appeals. Affirmed.

H. E. Walter, of Kingman, for appellant. Geo. L. Hay and L. F. Walter, both of Kingman, for appellee.

BURCH, J. After oral negotiations upon the subject, the defendant entered into a written contract to sell to the plaintiff a tract of land. The material portions of the

contract follow: "The said party of the first part will convey and assure to the party of the second part in fee simple, clear of all incumbrances the following described real estate situated in the county of Kingman, and state of Kansas, to wit: All of the northwest quarter of section thirty-six, except R. R. right of way and all the southwest quarter of section thirty-six lying west of the R. R. right of way, all in township No. twenty-seven and range No. eight west of the sixth principal meridian. The said party of the second part agrees to pay \$12,240.00 for the above described land." In due time the contract was consummated by the execution and delivery of a deed, which recited a consideration of \$12,240, and which described the land as follows: "All of the northwest quarter of section number thirty-six, except the railroad right of way and all that part of the southwest quarter of section number thirty-six, lying and situated west of the railroad right of way, all in township number twenty-seven, south, and of range No. eight, west of the sixth principal meridian, containing in all 272 acres more or less." Afterwards the plaintiff caused the land to be surveyed, and found that it contained only 257.71 acres. Thereupon he sued the defendant for the proportion of the consideration paid for the land represented by the deficiency in quantity. The defendant contended that the written contract and deed show the sale of a tract in gross for a gross sum, and that the rule of caveat emptor should be applied. The plaintiff contended that the oral negotiations were for the sale of a tract of 272 acres at the price of \$45 per acre, and that the defendant represented the tract to contain that quantity, which representation the plaintiff believed and relied upon. Over the objection of the defendant the oral negotiations were admitted in evidence.

The jury returned the following findings of fact:

Asked by the plaintiff:

"Q. 1. Was the consideration for the sale of the land in controversy arrived at by multiplying the number of acres by the price per acre? A. Yes.

"Q. 2. Was it understood between the plaintiff and the defendant at the time of the sale of the land in controversy that the quantity of land was 272 acres? A. Yes.

"Q. 3. Was it understood between the parties that the price of the land per acre was \$45? A. Yes.

"Q. 4. Did the defendant, Schaar, represent to the plaintiff that the quantity of land described in the deed made by Schaar to the plaintiff contained 272 acres? A. Yes.

"Q. 5. Was the measurement made by the county surveyor of the land conveyed by the defendant to the plaintiff correctly made and stated at 257.71 acres? A. Yes.

"Q. 6. Did the defendant, Schaar, at the

time the deed was made know that the land mentioned in the deed offered in evidence contained less than 272 acres? A. No."

Asked by the defendant:

"Q. 6. Did the defendant, Schaar, or Ida Schaar, his wife, represent that said tract of land sold to this plaintiff, Maffet, contain 272 acres? A. Yes.

"Q. 7. How many acres did defendant, Schaar, believe was contained in the tract that he sold to plaintiff, Maffet, at the time the sale was made? A. 272.

"Q. 8. If you answer question 6 in the affirmative, state whether or not the said defendant, Schaar, had reason to believe the representation false? A. No.

"Q. 9. In case you answer question 6 in the affirmative, state whether or not the same was relied upon by plaintiff, Maffet, or did he rely upon his own investigation? A. Relied on Schaar's representation.

"Q. 10. Did the defendant, Carl Schaar, ever agree to convey 272 acres of land to the plaintiff at \$45 per acre? A. Yes."

Judgment was entered for the plaintiff, and the defendant appeals.

The principal error assigned is the admission of the oral evidence. The argument is that the preliminary negotiations were merged, first, in the written contract of sale, and then in the deed, and that the parol evidence rule forbade the court to go behind those instruments. Controversies over deficiencies in quantity are common enough in which now the vendor, and now the vendee, seeks relief, sometimes at law, and sometimes in equity. Very often the vendee's action is based on false representations as to quantity. In such cases some courts have held that, in order to warrant recovery, the vendor must have entertained an actual purpose to defraud. Other courts have held the vendor liable if the representation was made without knowledge of its truth or falsity and was relied on by the vendee to his injury, although no intention to deceive existed.

[1, 2] In this state statements regarding quantity are statements of fact, and not of opinion (*Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496), and a positive statement of fact not known to be true, made as an inducement to contract, binds the vendor, although innocently made, if the statement be untrue and be relied on by the vendee to his prejudice. *Morrow v. Bonebrake*, 84 Kan. 724, 115 Pac. 585, 34 L. R. A. (N. S.) 1147; *Wickham v. Grant*, 28 Kan. 517.

[3] When the basis of the action is false representation, parol evidence regarding the inducement held out to the vendee is always admissible. The purpose in giving the conversation between the parties is not to contradict the written contract or to enlarge or vary its terms, but to show that the contract, such as it is, was procured by imposition amounting in law to fraud. *Wickham v. Grant*, 28 Kan. 517, 523. In the case of *Leicher v. Keeney*, 98 Mo. App. 394, 405, 72

S. W. 145, 148, it was said: "As was said in *Crim v. Crim*, 162 Mo. 544 [63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521]: 'The written contract is conclusively presumed to merge all prior negotiations and expresses the final agreement of the parties.' But the doctrine of merger of all previous negotiations and representations in a written contract and the merger of the written contract in the deed can have no application in a case like this where the action is based on the fraud of the defendant and not upon any warranty on contract on his part in regard to the quantity of land. Fraud cannot be merged. * * * The difference between the quantity represented and that which was in fact contained in the tract as described was so large as to be material and substantial. The representation as to quantity was prior to and outside of the contract, and not at variance with the deed." Here the jury found that the defendant represented the tract to contain 272 acres when it contained only 257.71 acres; that the plaintiff relied on this representation; that the sale was made at the price of \$45 per acre; and that the consideration was arrived at by multiplying the price by the number of acres. As a result the defendant obtained from the plaintiff \$45 per acre for 14.29 acres of land which the defendant did not possess and which the plaintiff did not receive. Very clearly the plaintiff was entitled to the relief which he sought. The statement in the deed of the number of acres conveyed, with the addition of the words, "more or less," was a matter of description only. *Armstrong v. Brownfield*, 32 Kan. 116, 4 Pac. 185. In the opinion in that case it was said: "The authorities agree that, if the statement of quantity in a conveyance be matter of description only, the vendor, in the absence of fraud, is not bound to make good the deficiency, and the vendee is not required to surrender any excess." 32 Kan. 121, 4 Pac. 188. The district court took a different view of the law, both in the admission of the oral evidence and in the instructions to the jury, and for this reason the defendant claims the judgment ought to be reversed. If error had been committed, it would not be material because this court would order judgment on the special findings showing false representation. But the district court was right. The dictum in the *Armstrong* Case overlooks certain principles approved by competent authority which, when applied to the facts, sustain the action of the trial court irrespective of the matter of fraud. Thus the vendor and vendee were mutually mistaken regarding a fact upon which the consideration was computed and paid. The true consideration of a deed may always be shown by parol, and consequently an action for money had and received, accruing to the plaintiff for the excess payment, may be supported by such proof. Again, the written memorandum of sale and the deed did not express fully the

agreement of the parties. Those instruments did not embody the agreement respecting the price per acre. Therefore the preliminary contract was not completely merged, and elements not contradictory of either writing could be shown by parol.

A discussion of these principles, with references to decided cases, may be found in the case of *Butt v. Smith*, 121 Wis. 566, 99 N. W. 328, 105 Am. St. Rep. 1039. In that case the deed recited that "in consideration of the sum of four thousand dollars" land was conveyed which was described as "the east half of the northeast quarter of section 36, township 13, range 5." Evidence was received that the sale was made at the price of \$50 per acre on the mistaken belief that the tract contained 80 acres, when it contained but 77.88 acres. In the course of the opinion the court said: "Appellant contends that parol evidence of the preliminary agreement cannot be received upon the ground that this preliminary agreement for the sale and purchase of the farm merged in the deed, and such parol evidence would alter, vary, or contradict it. That this rule does not apply to the consideration expressed in the deed is confirmed by many decisions. Parol evidence is admissible to show the real consideration of the conveyance, though it be different from that expressed in the deed, if it be consistent therewith. * * * Nor is the deed conclusive upon the parties when it appears that the amount of the consideration was computed upon a mutual mistake of the parties as to the quantity of land actually conveyed. Whenever the fact appears that the deed does not express the previous agreement of the parties by reason of mutual mistakes, courts of equity have not hesitated to grant relief to meet the exigencies of the situation in conforming the nominal agreement to the real one, or by abatement from the purchase money when the mistake was susceptible of correction in this way. * * * Recovery has been awarded in cases wherein it appeared that land was purchased under a preliminary agreement, which was not intended to be fully embodied in the deed, but which fixed the terms of the sale by the acre, and wherein it appeared that there was an overpayment of the purchase price through the mutual mistake of the parties as to the actual number of acres included in the tract conveyed. The ground of recovery in such cases is based upon the preliminary contract, which has been in part performed by the conveyance and payment of the consideration, but which has not been wholly merged in the deed. The additional elements of such contracts, relied on for a recovery, must be such as are not embodied in and in no way contradict, vary, or modify the effective part of the conveyance as agreed to and accepted by the parties. This relief is given upon the equitable consideration that the overpayment resulted from a mutual mistake of the parties,

which should preclude either from reaping an advantage to the injury of the other on account of such error. Since such circumstances do not require a reformation of the deed, there is nothing which calls for the extraordinary powers of the court of equity. The controlling question is, Was there an overpayment under terms of the contract of sale, which terms have not been merged in the deed? If so, the vendor ought to be held liable therefor to the vendee in an action for money had and received. The cases upon this subject, though seemingly somewhat in conflict, can be harmonized by distinguishing those which pertain to transactions which are merged and embodied in the deed, and those wherein recovery is sought to be enforced upon the terms of the preliminary contract not embodied in and merged in the conveyance. * * * We must hold that the terms of the agreement, fixing the price of the land of \$50 per acre, were not incorporated and merged in the deed, and that the objection to the reception of any evidence under the complaint was properly overruled." 121 Wis. 569, 571, 99 N. W. 328, 830 (105 Am. St. Rep. 1039).

The two principles here considered really come to the same thing. There must be an agreement to sell at a specific price per acre or an agreement to sell a specific number of acres, and not an agreement to sell a tract in gross for a lump sum. This agreement, not expressed in the deed, must be entirely consistent with its terms, and there must be a mutual mistake as to the quantity of land. While, as the Wisconsin court indicates, there is a conflict in the authorities, the better rule is that under the circumstances stated the terms of the deed are not final, and the vendee may recover the excess consideration which he has paid upon oral proof of the portion of the contract not reduced to writing. The defendant claims there was no foundation in the petition for recovery on the theory just discussed because it contained no allegation in set phrase that the parties were mutually mistaken regarding the number of acres. One count of the petition set out all the facts of the entire transaction. There was no charge that the defendant intended to deceive. His representations disclosed the state of his mind, and it was alleged that the plaintiff purchased upon the supposition, belief, and understanding in good faith that 272 acres was the correct quantity. Under these circumstances, mutual mistake was sufficiently pleaded. Besides this, the findings of the jury clearly show that the parties were mutually mistaken, and, if it were necessary, the petition could be amended to conform to the fact.

[4] Another count of the petition, charging willful fraud on the part of the defendant, was properly withdrawn from the jury.

The judgment of the district court is affirmed. All the Justices concurring.

TEMPFER v. JOPLIN & P. RY. CO.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 326*)—INTENDING PASSENGER ON TRACK—CONTRIBUTORY NEGLIGENCE.

One who carelessly sits down upon the ties of an interurban electric railway track to await the arrival of a car is not continuously and concurrently negligent by reason of becoming unconscious from sleep or coma, and thereby unable to avoid injury from a car wantonly run upon him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1349; Dec. Dig. § 326.*]

2. CARRIERS (§ 341*)—INJURY TO PASSENGER ON TRACK—WANTON NEGLIGENCE.

A motorman who sees and realizes the helpless condition and peril of such person in time to stop his car and avoid injuring him, but recklessly runs it upon and over him without attempting to stop until almost upon him, is guilty of wanton negligence, rendering his employer liable for such injury, although he does not run over him willfully and intentionally.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. § 341.*]

3. CARRIERS (§ 348*)—INJURY TO PASSENGER ON TRACK—INSTRUCTIONS—LAST CLEAR CHANCE.

The company pleaded contributory negligence in sitting down and remaining upon the tracks knowing that a car would soon pass, and the court, having instructed correctly as to concurrent negligence and last clear chance, charged that, if the deceased was guilty of carelessness continuing down to the time of the negligence of the defendant, if any, which contributed to the injury, there could be no recovery unless the defendant came within the exception to the rule precluding the defense of contributory negligence. *Held*, properly applicable to the defense pleaded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1405; Dec. Dig. § 348.*]

Appeal from District Court, Cherokee County.

Action by Joseph Tempfer against the Joplin & Pittsburg Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John P. Curran, of Pittsburg, E. C. Wright, of Kansas City, Mo., and Skidmore & Walker, of Columbus, for appellant. McNeill & McNeill, Al F. Williams, and Chas. Stephens, all of Columbus, for appellee.

WEST, J. Plaintiff sued to recover damages for the loss of his son, whom he alleged was killed by one of the defendant's cars. The petition averred, in substance, that on August 21, 1910, and for a long time prior thereto, the defendant at a point on its line known as Fleming station kept a rest room or depot for the accommodation of passengers; that shortly before that date the depot was removed, but that the place continued to be used as a stopping place for passengers where they were received and discharged, and that a large number of passengers constantly congregated there and used such stop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ping place; that on the day mentioned the son went to the station at this place for the purpose of becoming a passenger; that he had been accustomed to going there and knew that the defendant still stopped its cars at that point; that he arrived there at about 9 o'clock p. m., and, finding no place provided to sit down and rest, sat down on the end of one of the ties of the defendant's road, that being the only place to be found at or near the stopping place to rest and wait for one of defendant's cars, and while so waiting he fell asleep and became unconscious of his surroundings or the approach of any car, and about 9:15 o'clock the defendant wantonly, willfully, recklessly, and with gross carelessness and negligence, after its motorman, who was running the car, saw the deceased several hundred feet away and asleep and unconscious and in plenty of time to have stopped the car, ran the same over and killed him. The answer alleged, among other things, that, if the plaintiff's son was killed, it was on account of his own carelessness, fault, and negligence in going upon the tracks and sitting down and remaining there.

Testimony was introduced to the effect that the car was loaded and running in the neighborhood of 15 miles an hour and could have been stopped in from 150 to 200 feet, and that the motorman saw the deceased 300 feet or more before running over him. One witness testified that he was a passenger on the car and saw something on the track that looked like a man and told the motorman; that he again arose and told the motorman that it was a man, but that the motorman made no reply and simply turned his head; that the car was 300 or 350 yards from the object when this witness first saw it; that the motorman did not slacken the speed until within 10 or 15 feet of the deceased, who was sitting on the tie close up to the east rail facing east, in a stooping position with his head in his hands. Another witness testified that: "A big tall fellow said there was a man on the track, but it never took no effect at all; it kind o' stirred them up. I got up and saw something sitting on the tie there stooped over like. I think the tall man said, 'There is a man there.' The car did not slacken up after that that I noticed." Another witness testified that he was on the car. "When I first heard this tall man say there is a man on the track, the car, in my judgment, was about 300 or 350 feet from him. The car did not seem to slow a bit." Numerous witnesses denied that there was any tall man on the car who thus notified the motorman, and various others gave evidence to the effect that the motorman did all he could to stop the car after discovering that the object on the track was a man.

The jury, among other things, found that the motorman saw the deceased several hundred feet away on the track in a dangerous place, apparently asleep, in time to have stopped the car without injuring him. That

had he taken such measures as were in his power at the time he first discovered the object on the track, and after he knew and recognized it to be a man who would not leave the track, he could have stopped the car before striking him. That the motorman was in no doubt as to the nature of the object on the track when he first discovered it. In answer to a question whether the motorman, as soon as he discovered that it was a man and that he was in peril and would not move, applied the air to the brakes and reversed the motion of the car, they answered, "No." Question 24 was: "Did the motorman, Dan Daetweiler, while operating car No. 64, on the night of August 21, 1910, while approaching Louis Tempfer, wantonly, willfully, and intentionally after he knew that such object was a human being, and that it would not leave the track, run his car upon and over him?" To this the jury first answered, "Don't know," and, on being sent back, returned instead the answer "Carelessly." The jury were instructed that their chief inquiries were whether the deceased met his death through the wanton, willful, reckless negligence of the defendant, and, if so, of what such carelessness and negligence consisted; whether the defendant used ordinary care and caution in the operation of its car after the motorman saw and recognized that the deceased was a human being on the track in a perilous or dangerous position asleep or apparently helpless, and whether the deceased was killed by reason of his own negligence or by reason of the defendant's gross, wanton, or reckless carelessness and negligence. That the contributory negligence of the plaintiff would not avail the defendant "if it be shown that the defendant, by the exercising of reasonable care and prudence after having discovered the deceased in a dangerous position, and in a place of peril, apparently asleep, or unconscious of said dangerous and perilous position he was in, and in time to stop the car and thereby not injure him, and failed to do so, and ran over and killed him," that under such circumstances "the doctrine of contributory negligence has no place, the defendant would be liable for any injury inflicted, irrespective of the faults which places the injured party in the way of such injury."

Recklessness and wantonness were correctly defined. It was left to the jury to determine whether the act of the deceased in going upon the premises of the railroad company to become a passenger and, finding no place provided, sat down on a tie to rest was contributory negligence, but they were told that in any event he should use due care and diligence in looking out for the cars and doing everything a reasonably prudent person would do to avoid injury; "but if he falls asleep while there and becomes unconscious of his surroundings and is in danger, and the defendant's agents observe such conditions and facts in time to stop its cars and

avoid an injury and fails to do so and kills him, the company would be liable."

In the fifteenth instruction the jury were specifically told that, if the deceased was guilty of carelessness and negligence, continuing down to the time of the negligence or carelessness, if any, of the defendant which contributed to the injury or death, "there could be no recovery, unless, as I have said, the defendant comes within the exception to the rule which I have stated, precluding the defense of contributory negligence."

[2] The defendant requested certain instructions which were refused, but some of which were substantially covered by those given. One, however, was refused and not otherwise covered that, before they could find the defendant guilty of wilful and wanton negligence, they "must find that the defendant's motorman, after he discovered said Louis Tempfer on the track and realized that he could not and would not leave it, purposely and willfully ran his car on and over said Louis Tempfer." It is contended by the defendant that the court erred in overruling a demurrer to the evidence in giving and refusing instructions and in refusing a judgment for the defendant. We have examined the instructions given as well as those refused, and are of the opinion that the law was fairly and correctly stated by the trial court.

That the demurrer to the evidence was properly overruled is indicated by quotations from the evidence already made. It is contended that the finding that the motorman ran upon the deceased carelessly is equivalent to a finding that it did not do so willfully or intentionally. But the court made it plain to the jury that the plaintiff could not recover unless the motorman did recklessly or wantonly run the car upon the deceased after realizing that he was unconscious or helpless and in a place of peril; and the answer to the question just referred to, taken in connection with the general verdict and the other finding, is not so inconsistent therewith as to destroy its force or effect, and is by no means a sufficient basis for a judgment in favor of the defendant. It was not necessary, in order for the plaintiff to recover, that the jury should find that the motorman ran over the deceased willfully or intentionally, and we attribute to him no such malevolent purpose. It was essential, however, to find that he did so recklessly or so heedlessly as to amount to wanton indifference to the rights of Louis Tempfer, and the testimony already referred to supported such conclusion. *Telegraph Co. v. Lawson*, 66 Kan. 660, page 663, 72 Pac. 283; *Railway Co. v. Lacy*, 78 Kan. 622, 97 Pac. 1025; 29 Cyc. 509; *Railway Co. v. Baker*, 79 Kan. 183, 98 Pac. 804, 21 L. R. A. (N. S.) 427.

It is vigorously contended that the testimony of the witness, referred to as the tall man, was false; but it was corroborated by two other witnesses, and the jury and the

trial court appear to have given it credence, and it is not for us to reject it. *Wible v. Street Railway Co.*, 88 Kan. 55, 127 Pac. 625. It is also sought to be pressed upon us that neither the evidence nor the instructions were in accord with the doctrine of the last clear chance, but the instructions appear to have stated the rule clearly and correctly. It would seem, however, that the defendant, in reiterating the correct rule that the doctrine has no place in cases wherein the negligence is concurrent, assumes that, if the deceased negligently sat upon the tie, then he was continuously negligent in falling asleep or becoming unconscious. But this is not correct.

[1] However negligently he came to the place of danger, if when the car approached he had done all in his power to get out of its way, it could not be said that this was a continuation of his negligence. On the contrary, his negligence would have turned to the highest degree of diligence. If, however, he was unconscious from sleep or coma, he had no ability, while in that condition to extricate himself, and, having no power to exercise diligence, he was not negligent for failing to exercise it. Had he gone upon the track for the express purpose of trespassing and fallen and broken both legs and lain there helpless, the defendant would have had no right to run over him after actually discovering his condition and peril. As the evidence does not disclose the cause of his unconsciousness, it cannot be attributed to a criminal design to derail the car or to commit suicide. According to the findings, we have the simple fact that he was there totally oblivious of his danger because of a cessation of his mental faculties from some unknown cause. This cannot be said to constitute continuing negligence, which could exist only in case he was in condition to realize his danger and help himself.

[3] That portion of instruction No. 15, already quoted, that if the deceased was guilty of carelessness and negligence continuing down to the time of the negligence or carelessness, if any, of the defendant, which contributed to the injury, there could be no recovery unless the defendant came within the exception to the rule precluding the defense of contributory negligence, is said to be entirely inapplicable to a case of last clear chance, because it charged that the plaintiff could recover even if he "was guilty of negligence that continued down to the time of the accident." But negligence down to the time of the negligence of the defendant is not negligence down to the time of the accident. It must be remembered, too, that the principal defense pleaded was the contributory negligence of the deceased in "sitting down on the tracks and remaining there, knowing that a car would soon pass along said tracks, and knowing the danger of sitting on said tracks"; and the defendant was entitled to an instruction framed on this theory, and we

think this was what the court was giving, and that it was proper and not in conflict with others expressly stating the doctrine of the last clear chance.

Error is assigned in receiving what is asserted to have been a quotient verdict. Following what the writer regards a vicious custom, affidavits pro and con were received in evidence to show the mental processes used by the jury in arriving at their verdict. The trial court weighed the evidence thus produced and decided the question of fact thereby added to the litigation in favor of the plaintiff, and this, like any other supported finding of fact, must remain undisturbed.

Finding no prejudicial error in the record judgment, it is affirmed. All the Justices concurring.

AUTO-FEDAN HAY PRESS CO. v. WARD.†
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. SALES (§ 285*)—CONTRACT OF WARRANTY—CONSTRUCTION.

Where a farm implement is purchased under a warranty including a provision that, if it does not work satisfactorily, the purchaser shall notify the seller, who may send an expert to adjust it, and, if the seller's expert or agents fail to make it work satisfactorily, the seller shall take it back and refund the purchase price, if paid, *held*, that the purchaser must test the machine fairly, and, if it does not comply with the contract, must give the required notice, and, if the seller fails to make it work satisfactorily, the purchaser must return the machine within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 806-808, 810; Dec. Dig. § 285.*]

2. SALES (§ 287*)—ACTION FOR PRICE—DEFENSE—QUESTION OF FACT.

What constitutes such reasonable time is a question of fact to be determined from all the circumstances of the case.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 811-816; Dec. Dig. § 287.*]

3. SALES (§ 284*)—CONTRACT OF WARRANTY—CONSTRUCTION.

If, at the time of this transaction, hay presses of different sizes and designed to make different sized bales of hay were in use, and if the hay press in question was of a smaller size and designed to make smaller bales than some of the others, but worked satisfactorily in making the bales it was designed to make, there was no breach of warranty if the press required more power when used to make larger bales.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 808-806; Dec. Dig. § 284.*]

Appeal from District Court, Marion County.

Action by the Auto-Fedan Hay Press Company against Gale Ward. From judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

D. W. Wheeler, of Marion, for appellant.
W. H. Carpenter, of Marion, for appellee.

SMITH, J. This action was brought by appellant to recover on a promissory note

for \$125, with interest, and upon an unpaid balance of an account of \$75 and interest; the note and account being for the purchase price of a hay press.

The answer of the defendant set up four grounds of defense; the first was a general denial; the second admitted the purchase of the hay press, but alleges that it was sold to him by the plaintiff upon the following written and printed warranty: "The Auto-Fedan Hay Press is sold under the following guaranty and agreement: That every press is well made and of good material. The Auto-Fedan Hay Press Company agrees to furnish free f. o. b. Kansas City any parts shown to be defective within 6 months from the date of sale; that if operated according to printed directions, with proper management, it will do more work, with the same exertion, than any two horse power press on the market; that it is durable and easy to operate with a self-feed that actually feeds; that, in case purchaser fails to operate the machine satisfactorily, he shall notify our authorized agent selling him the press and the home office; that, if said agent fails to make the press work successfully, the home office shall have opportunity to send an expert to make the machine work properly, unless the difficulty is of such nature that they advise by letter, but, if the Auto-Fedan Hay Press Company fails to make it work satisfactorily, the press shall be taken back and the purchase price, if paid, refunded." Two other defenses were pleaded and a demurrer thereto was properly sustained. The defendant prayed judgment against the plaintiff for \$50, not including claims made in the two defenses demurred to.

[1, 2] Thereupon the plaintiff filed a motion to require the defendant to make his answer more definite and certain by setting up the names of the agents or employes of the plaintiff to whom the alleged verbal notice was given, also to state the time and place at which such notice to the employes was given. The motion was sustained as to the name of the person to whom notice was given, but overruled as to the remainder of the motion. Thereupon the defendant amended his answer by interlineation as follows, "to wit, one Mr. Ross, whose first name is to the defendant unknown, who was acting as the authorized agent of plaintiff." The ruling on this motion was erroneous. It was necessary to the defense that the appellee show reasonable diligence in notifying the appellant of any claimed failure in the warranty to give appellant a reasonable opportunity to remedy the defect, if any existed. There appears to be no evidence of any interview between the appellee and the agent, Ross, until about 18 months after the purchase of the hay press, and about the time the appellee claims to have notified Ross that the machine was his or the company's.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

[3] There was evidence that there were hay presses on the market of different sizes; that the press in question was of the smaller size and was designed to make a bale of reasonable size, but smaller than the large presses were designed to make; also that, when the larger sized bales were made upon this press, the draught on the team was very heavy. The appellee himself testified that the machine ran easy enough in making a 60 or 65 pound bale, but very heavy in making an 80 or 85 pound bale.

The contract of warranty is silent as to the size of the bales in the making of which the machine was warranted to "do more work with the same exertion than any two horse power press on the market." In this situation it is to be presumed that the machine was to be used to make bales of the size which it was designed to make, provided the machine was designed to make a bale of ordinary or fair size. There is no evidence that a 60 or 65 pound bale is not an ordinary or fair size.

The appellant requested the court to instruct the jury, in substance, that, to entitle the defendant to rescind the contract, he must return, or offer to return, the property within a reasonable time, and that if the appellee kept and operated the hay press, knowing it did not comply with the warranty, from July or August, 1909, to the latter part of the summer of 1910, without offering to return it, the verdict should be for the plaintiff for the unpaid portion of the purchase price. This request was refused. There being no allegation that the appellee was induced to keep the machine by the promise of the appellant or its agent that it would or could make the machine work satisfactorily, we think this instruction should have been given.

The court, however, did give instruction No. 4, which is as follows: "You are instructed that if the hay press in question in this case did not comply with the warranty, and that the defendant honestly believed that it did not so comply, the defendant would have the right to return, or offer to return, the same to plaintiff or its duly authorized agent, if said machine did not comply with said warranty, and to have the contract of purchase rescinded or canceled, but, under such circumstances, it would be defendant's duty to return, or so offer to return, the machine with a reasonable promptness after having used the machine for such reasonable time as would be required to give the machine a fair test; and if the defendant failed to return the same within such reasonable time after having discovered its defects and that it failed to comply with the warranty, and if he failed to do so, defendant would thereby waive the defects in said machine and waive the conditions and terms of the warranty, unless the delay of defendant in returning the machine or offering to return the

machine, and thereby rescinding the contract, was occasioned by the promise of plaintiff or its agents to fix the machine so that the same would work. In transactions of this kind, both parties are required to act in good faith, and neither can be permitted to take advantage of his wrong."

In his testimony as a witness, the appellee does not testify that any agent requested him to keep the machine to give the opportunity to make it work right. The appellee does testify that at one time he wrote the company about the draught, and they told him to keep the machine; that they would send another man. In reply to a question as to what time that occurred, he said he could not tell.

The jury, in answer to special questions requested by appellant, found, among others, the following facts:

"Q. 3. How long after the defendant discovered the defects in said hay press did he keep and use said hay press? A. About 13 months."

"Q. 5. Did the defendant ever tender back the hay press before September, or the time Mr. W. F. Ross was at his premises? A. No.

"Q. 6. Did the defendant discover the defects he claims in the hay press before he paid the \$50 in November, 1909? A. Yes."

"Q. 9. Did the defendant ever make any tender of the hay press back to any person authorized to receive it, and demand his note and payment back before the maturity of the note mentioned in question 8; if so, when and to whom? A. No."

One witness testified that in January or February, 1909, the appellee used the machine in pressing 75 tons of hay for the witness and his father.

The jury also returned the following answers to special questions requested by the appellee:

"(1) After defendant discovered that the hay press in question would not work satisfactorily, did the plaintiff, from time to time, send out its agents to fix said hay press so it would work? Ans. Yes.

"(2) Were said agents sent out by the plaintiff, from time to time, while defendant had said hay press in his possession to fix said machine for the purpose of inducing defendant to keep said machine? Ans. Yes.

"(3) Before said agents came out to fix said hay press, did defendant complain to plaintiff and its authorized agents concerning the working of said hay press? Ans. Yes.

"(4) Did plaintiff's expert fail to make said hay press work according to its guaranty? Ans. Yes.

"(5) If you answer the last question, 'Yes,' state whether defendant immediately after such expert failed to make such hay press work according to the guaranty, he offered to return said hay press to the plaintiff or its authorized agent? Ans. Yes."

As shown by answers to questions 3 and 5, requested by appellant, this was 13 months after the purchase.

In *Weybrick & Co. v. Harris*, 31 Kan. 92, 1 Pac. 271, it is said: "Where personal property, such as a mowing or reaping machine, is sold with a warranty, and there is a breach of that warranty, the property sold not being as represented and warranty by the vendor, the purchaser has two remedies: (1) He may return the property and rescind the contract; or (2) he may affirm the contract and sue for damages for the breach of the warranty. In the latter case, he affirms the contract, and the amount which is then *prima facie* due the vendor is not the reasonable value of the machine, but the contract price, and the only reduction is that which results from the breach of the warranty."

The doctrine has been repeatedly reaffirmed in this court and is the settled law of the state on the subject. Ordinarily it is said to be a question of fact whether the purchaser returned, or offered to return, the property within a reasonable time, but in the *Weybrick Case*, *supra*, Mr. Justice Brewer, in writing the opinion, used this language: "In the case at bar, as the purchasers retained the header and used it, not only during the seasons of 1880, but also during those of 1881 and 1882, they clearly abandoned the remedy by rescission of contract. A purchaser cannot retain and use property, and at the same time say he repudiates and rescinds the contract to purchase. The only remedy, therefore, the purchasers had in this case was to recover damages of vendors, by reason of the breach of warranty." 31 Kan. 94, 1 Pac. 272.

The decisions in *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. 95, and *Manufacturing Co. v. Moore*, 46 Kan. 324, 28 Pac. 703, sustain the same doctrine. In the latter case it is said: "This defect, if it existed, was a patent one, which the defendant, who used the implement, must have seen and known from the beginning. Within the authorities cited, it must be held that the continued use of the implement, after learning of the alleged defects, should be regarded as a waiver of defendant's right to rescind, and that the offer to return was not made within a reasonable time." These remarks are applicable to this case. See, also, *Implement Co. v. Haley*, 77 Kan. 72, 93 Pac. 579. In this case the defect, if one existed, was patent. One witness testified that it took only a few minutes to determine that the press was of heavy draught. He referred to the time when they were trying to make large bales. There is also evidence, undisputed, by a witness who was called for the appellee, in fact the son of the appellee, that the hay press was used after the time that appellee claims to have turned it over to appellant's agent, although this was only for a short time. If

appellee wished to rely on the statement he testified to have made to the agent, "This is your machine," he had no right to use it at all thereafter.

By the continued use of the hay press long after the discovery that it did not comply with the warranty, and also by using the press after he claims to have delivered it to the appellant's agent, the appellee is held to have waived the defect, if any there was, therein and to have affirmed the contract of purchase. His remedy was in damages for the breach of the warranty, which remedy was not sought in this action.

The judgment is reversed, and the case is remanded, with instructions to render judgment for the appellant as prayed for. All the Justices concurring.

WINKLER v. CITIZENS' STATE BANK OF GUEDA SPRINGS.†

(Supreme Court of Kansas. April 12, 1913.)

(*Syllabus by the Court.*)

BANKS AND BANKING (§ 143*)—ACTION FOR DEPOSIT—EXEMPLARY DAMAGES.

In an action by a depositor to recover money placed by him in a bank as a general deposit, the bank having wrongfully refused payment and having protested a check drawn by the depositor for the amount thereof, the bank is not liable for exemplary damages, unless it was guilty of fraud, malice, gross negligence, or oppression in so doing.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 414, 517; Dec. Dig. § 143.*]

Appeal from District Court, Cowley County.

Action by W. H. Winkler against the Citizens' State Bank of Gueda Springs, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

C. T. Atkinson, of Arkansas City, for appellant. Paul R. Nagle, of St. John, for appellee.

SMITH, J. It appears by the evidence in this case, without substantial controversy, that the appellee had on general deposit in the appellant bank the sum of \$2,000, subject to the check of the appellee; that the appellee gave to another bank his check for the full amount of the deposit; that the check was forwarded to appellant, and appellant refused payment thereof and caused the check to be protested and notice thereof to be given. This suit was brought to recover the money and for damages.

The reason given by appellant's cashier for the refusal of payment was that the sum of money was deposited in pursuance of an agreement between the appellee and a third party, but not to the credit of such third party, by the terms of which the cashier thought the transaction with such third party ought to be closed and the money paid to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

the third party. It is not pretended that the bank received the money or was to hold it as security for the third party, or that the appellant had any legal obligation in this matter to protect the third party.

At the close of the evidence the court gave the following instructions relative to the damages recoverable:

"If you should find for the plaintiff, in addition to the amount that you find he is entitled to recover because of the money deposited in the bank, you should also find the amount, if any, of the actual damages he has sustained, if any, by reason of the failure and refusal of the bank to pay over the money on said check. And in determining what his actual or general damages are you may take into consideration the evidence of what expense he has been put to, caused by said refusal, what damage, if any, it has been to his standing and credit as a business man, what he has been compelled to pay for attorney's fees and otherwise in connection with looking after the matter prior to the commencement of this suit, what he has been compelled to pay out, if anything, for protest fees, and allow to the plaintiff such actual or general damages as, in your judgment, from all the evidence in the case, will compensate him for his actual injury sustained, if any, by reason of the refusal of the said bank to pay his check.

"And if you shall find that he is entitled to recover actual damages in this case, outside of the money on deposit, then, if you shall further find that the refusal of the bank to pay said check was without good reason, was oppressive, was malicious, then you would be justified in allowing the plaintiff exemplary damages—that is, what is called smart money or punitive damages—as punishment for the conduct of the defendant in such malicious act, and the amount of this is left to the good judgment and discretion of the jury."

The first paragraph of this instruction is approved, except the clause, "what he has been compelled to pay for attorney's fees and otherwise in connection with looking after the matter prior to the commencement of this suit," which is disapproved. *Evans v. Central Life Ins. Co.*, 87 Kan. 641, 125 Pac. 86.

There is, however, no evidence that in the refusal of payment the bank was guilty of fraud, malice, oppression, or of any wrongful purpose that would, in any way, justify the last paragraph of the instruction. It is erroneous. See *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994; *Cady v. Case*, 45 Kan. 733, 26 Pac. 448.

The jury found for the appellee \$2,000, the amount of the deposit, \$135 interest thereon, \$365 actual damages, and \$135 exemplary damages. Judgment was accordingly rendered.

The judgment is ordered to be modified by reducing the same \$135, and when so modified is affirmed. All the Justices concurring.

In re FOWLES.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 18*) — JURISDICTION — NONRESIDENT.

One state will not seek to censor or control the conduct of citizens and residents of other states unless such conduct results in an infraction of its own laws.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 7; Dec. Dig. § 18.*]

2. CRIMINAL LAW (§ 97*) — JURISDICTION — NONRESIDENT—PLACE OF OFFENSE.

A citizen and resident of another state, who without lawful excuse knowingly permits his child under 16 years of age to be and remain here in destitute or necessitous circumstances without providing for the support and maintenance of such child, thereby violates the Desertion Act (chapter 163, Laws of 1911), and may be punished therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-189, 191; Dec. Dig. § 97.*]

3. CRIMINAL LAW (§ 97*) — JURISDICTION — PLACE OF OFFENSE.

When upon such charge the father is arrested in another state and, waiving requisition, comes in the custody of an officer, the courts of this state have jurisdiction to try him upon such charge although he has never before been within this state. But when after having thus come he is discharged by writ of habeas corpus by the probate court of the county where the charge was laid, and before having an opportunity to return is rearrested on the same charge, the state has no right to retain and try him for failure to support such child after he (the father) was thus brought here, without showing that after so coming he, without lawful excuse, knowingly failed or refused to furnish such support and maintenance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-189, 191; Dec. Dig. § 97.*]

4. PARENT AND CHILD (§ 17*)—PROSECUTION FOR NONSUPPORT — PROOF — NONRESIDENT PARENT.

To render a father liable to punishment for such failure before being thus brought here, it must be shown that he knew or ought to have known the location and condition of his child, or that he had by act of omission or commission permitted him to be and remain here in destitute or necessitous circumstances without providing for his support and maintenance.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

5. EXTRADITION (§ 41*)—RIGHTS AFTER DISCHARGE—PROSECUTION FOR ANOTHER CRIME.

A sovereign state will not be less fair in its treatment of parties than it requires its citizens to be, and, having brought here a citizen and resident of another state upon criminal process to answer for an offense alleged to have been committed while in the state of his residence, it will not upon his discharge, and before he has an opportunity to return, forcibly retain him to answer for an act of omission since he was thus brought here, unless such omission was conscious and willful on his part.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 51-53; Dec. Dig. § 41.*]

Porter, J., dissenting.

Original application by A. T. Fowles for writ of habeas corpus. Writ denied.

R. E. Melvin, of Lawrence, for the application. S. N. Hawkes, Asst. Atty. Gen., and J. S. Amick, of Lawrence, opposed.

WEST, J. This is an application for a writ of habeas corpus submitted upon an agreed statement of facts.

The petitioner for more than 18 years, excepting a brief sojourn in Missouri, has been a citizen and resident of Dallas, Tex. With him at that place his wife and their two children lived intermittently from about 1895 to about 1905 or 1906, when she left Texas with their two children and brought them to Lawrence, Kan. It is stipulated that no blame is attached to the husband or wife for the separation. One of the children is a boy now about 14 years old, healthy, and able-bodied, and it is inferable that he has remained at Lawrence since coming there in 1905 or 1906, but with whom it is not shown. On a date not given a complaint was filed before a justice of the peace of Douglas county charging the petitioner with neglecting or refusing to provide for the support and maintenance of this son. A warrant was issued and the petitioner was arrested at Dallas, Tex., and brought to Lawrence; the issuance of requisition papers having been waived, and on February 24, 1913, he was discharged from custody by writ of habeas corpus issued by the probate court. Almost immediately, and before he had an opportunity to leave, he was again arrested on the same charge upon information filed by the county attorney. February 28th his plea in abatement was sustained, whereupon he demanded to be released, but instead was again arrested on a justice's warrant on the same charge originally made, and placed in jail. The petitioner asserts his right to be discharged from custody upon the theory that he has committed no crime against the state of Kansas in which he never set foot until brought here in custody as already stated. The state insists that failure to support a destitute child in Kansas is a crime against our laws and that the petitioner, having come into the custody of an officer without a requisition, is here voluntarily and subject to the jurisdiction of our courts.

The statement of facts, the substance of which has already been stated, is more remarkable for what it omits than for what it contains. From statements made upon the argument and in the briefs, however, we shall assume that about six or seven years ago the wife brought the boy to Lawrence, Kan.; that when the complaint was filed he was in necessitous or destitute circumstances; and that the father was not at that time providing for his support and maintenance. We cannot assume, as it is not charged, that the father abandoned the boy

at any time; that he sent him to Kansas; or that he had knowledge of his destitute circumstances. Whether during the years since leaving Texas he has lived with the mother or with their relatives, or during what portion of that time he has been provided for and by whom, we are not advised.

The statute (section 1, c. 163, Laws of 1911) provides: "That any husband who shall, without just cause, desert or neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any parent who shall, without lawful excuse, desert or neglect or refuse to provide for the support and maintenance of his or her child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime and, on conviction thereof, shall be punished by imprisonment in the Reformatory or Penitentiary, at hard labor, not exceeding two years."

[1-3] The general rule is that the laws of a state have no extraterritorial force and that its crimes act is for the punishment of those within its own borders. Section 10 of the Bill of Rights provides that in all transactions the accused shall have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." No argument is needed to show that if the authorities in one state should undertake to censor and punish the conduct in their state of citizens of another state, the domestic tranquility and general welfare mentioned in the preamble to the federal Constitution would be seriously disturbed. However, mere physical presence, citizenship, or residence within the state is not always essential in order to render one amenable to its laws and subject to its prosecution. The Legislature has provided (Gen. Stat. 1909, § 6595) that "every person being without the state, committing or consummating an offense by an agent or means within the state, is liable to be punished by the laws thereof in the same manner as if he were present and had commenced and consummated the offense within the state."

In the case of Carr, 28 Kan. 1, page 5, it was said: "We fully recognize that the power of the state to punish criminals extends to all persons who, being without the state, commit or consummate violations of the penal statutes within our state, 'by an agent or means within the state.' Such persons, although out of the state, are, in contemplation of law, within the state."

"The Legislature of one state cannot make laws by which people outside the state must govern their actions, except as they may have occasion to resort to the remedies which the state provides, or to deal with property situated within the state. * * * But if the consequences of an unlawful act committed outside the state have reached their ulti-

mate and injurious result within it, it seems that the perpetrator may be punished as an offender against such state." Cooley's Con. Lim. (6th Ed.) 149.

In *Rex v. Garret*, 17 Jur. 1060, page 1062, Lord Campbell, C. J., said: "I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the court, for if a man employ a conscious or unconscious agent to commit an offense in this country, he is amenable to the laws of England, although at the time the offense was committed he was living beyond the jurisdiction."

In *Town of Barkhamsted v. Parsons*, 3 Conn. 1, page 8, a prosecution was had under a statute providing a forfeiture for the bringing of paupers into the state and leaving them there. It was argued that evidence had been improperly received to show the conduct of the defendant in another state, the only ground of his amenability to the criminal laws being that he owed allegiance, and he could owe no allegiance unless within their protection, and he could not be within their protection unless either a citizen or personally within their jurisdiction. The court said it was conceded that the defendant did not personally bring the paupers but that he sent them under the care of his son. "The principle of common law, 'Qui facit per alium, facit per se,' is of universal application, both in criminal and civil cases; and he who does an act in this state, by his agent, is considered as if he had done it in his own proper person."

In *State v. Peabody*, 25 R. I. 544, 56 Atl. 1028, a complaint alleging nonsupport of minor children in Washington county by a defendant in Kent county was held good for the reason that one is answerable for his neglect in the place where others suffer in consequence. It has been held that one can be prosecuted for procuring a drug in another state and sending it by mail to a woman within the state for the purpose of procuring an abortion. *State v. Morrow*, 40 S. C. 221, 237, 18 S. E. 853, 859. "Assuming, however, for the purposes of this discussion only, that there was no evidence of any act done in pursuance of an intention to effect an abortion, except such acts as were done by the defendant in the city of Washington, then if the acts there done were intended to take effect in this state, and did there actually take effect, we still think the court in this state had jurisdiction of the offense charged." This quotation is supported by numerous authorities cited in the opinion which rests on the assumption that the defendant voluntarily came into and submitted himself to the jurisdiction of the trial court. The doctrine was announced that it is the duty of a state to protect the lives and persons of its citizens and others temporarily resident therein against unlawful violation or injury whether committed by citizens or others, jurisdiction of the subject-matter and of the person be-

ing different questions. Forgery in another state of titles to lands in the state of Texas was held to be an offense against the laws of the latter state, under a statute providing that persons out of the state may commit and be liable to indictment and conviction for offenses which do not in their commission necessarily require personal presence in the state. *Hanks v. State*, 13 Tex. App. 289. A resident of Missouri who turned cattle out of his inclosure knowing that they would go across the line into Arkansas was held not guilty of violating an act of the latter state prohibiting stock running at large. *Beattie v. State*, 73 Ark. 423, 84 S. W. 477. A nonresident of a city was held liable to prosecution by its police court for permitting his cow to be at large within the city contrary to a municipal ordinance, although the owner was not within the city at the time. *Tutt v. Greenville*, 142 Ky. 536, 134 S. W. 890, 33 L. R. A. (N. S.) 331. A note to this decision collates a large number of authorities touching the subject under consideration. In the opinion (142 Ky. page 538, 134 S. W. page 891, 33 L. R. A. [N. S.] page 335) it was said: "It is the act or thing that is done within the city limits in violation of the ordinance that subjects the doer to the penalty. Where the doer in fact is at the time is a matter of no consequence. Possibly in some cases it might be difficult to get jurisdiction of the person of the offender, so that he might be punished; but this fact would not affect his guilt or his liability to punishment if he could be brought to trial. * * *

When appellant permitted his cow to wander at large within the city limits, he as certainly committed an act in violation of its laws as if he had himself driven his cow within the limits and turned her at large. There could be no difference between the legal effect and consequence of appellant's act in standing just outside the city limits, and driving his cow into the city, to run at large, and in leading her into the city, and then turning her loose."

In *Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362, it was decided that the federal court at the place where the agreement was made for compensation to perform services forbidden by statute had jurisdiction to try the offense even if the agreement was negotiated or accepted at another place; its final acceptance and ratification being within the district. *Horner v. United States*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126, was cited, which ruled that the Illinois district court had jurisdiction to try one for violating the lottery statute who had sent to persons within that district lottery circulars by mail deposited at New York.

In *State v. Gillmore*, 88 Kan. 835, 129 Pac. 1123, it was said that the statute in question may be violated either by deserting and leaving in destitute or necessitous circumstances or by neglect or refusal to provide after

such desertion when such destitute or necessitous circumstances arise.

In *Bennefield v. State of Georgia*, 80 Ga. 107, page 110, 4 S. E. 869, 870, it was held that the gist of the offense of abandoning a child is the voluntary and willful abandonment of it, leaving it dependent and destitute. There the husband voluntarily and willfully separated from his wife in one county and sent her and their child by an agent to another county, where they became dependent and destitute, and the father was held indictable in the latter county for abandonment, because it was by his act that they were removed from one county to the other. The court said: "It was the same as if he had stood upon the county line between Heard and Carroll, and had pushed his child across the line into Carroll, and then left it dependent and destitute."

In *State v. Dvoracek*, 140 Iowa, 266, page 270, 118 N. W. 399, page 401, it was ruled that the venue in a prosecution for failure to provide for a wife or children is in the county where the duty of providing for them should be discharged. "The penalty is denounced, not on the commission of any affirmative act, but on the omission of the plainest duty. Necessarily, then, the venue depends on where the omission to perform the duty occurred. * * * He owed no such duty elsewhere, and, because of the situation of his wife and children, must have omitted the duty in Story county, or not at all. Somewhat akin in principle is the line of cases deciding that the venue in embezzlement cases may be laid in the county in which it was the duty of the accused to account. * * * The presence of the offender within the county where a crime is committed is not always essential, but some portion of the act or omission to act must have taken effect therein."

In *State v. Sanner*, 81 Ohio St. 393, 90 N. E. 1007, 26 L. R. A. (N. S.) 1093, under an act providing that the offense shall be held to have been committed in any county of the state in which the destitute child or children may be at the time the complaint is made, it was determined that a parent may be guilty of the crime of failing to provide for his minor children although a resident of another state during the time laid in the indictment; that the venue is in the county where the child is when the complaint is made. Before the provision as to venue already quoted was added by amendment, it had been decided that one could not be thus prosecuted who resided in another state during the time laid in the indictment. *State v. Ewers*, 76 Ohio St. 563, 81 N. E. 1196. The latest decision we have found is in *re Poage*, by the Supreme Court of Ohio, 100 N. E. 125, page 128, delivered November 12, 1912. A citizen and elector of Kentucky was indicted in Lawrence county, Ohio, for failure to provide for his minor children therein. On application for habeas corpus he averred

that he was married in Kentucky, established a home for himself and family there, where he had ever since resided and where the child was born; that without any just cause and without his knowledge or consent and against his wishes his wife abandoned their home and took the child with her and came into Ohio, where she had remained ever since and refused to return or permit the children to return, although the father had at all times maintained the home in Kentucky for her and the child and had been ready and willing at all times to provide for them their food, shelter, and clothing. It was held that, it appearing that the child received support from the mother or some one else at her request, the mere failure and neglect of the father, after considering his legal right to the custody and control of the child, did not bring him within the operation of the statute. It was said that a parent may be guilty of failing to provide, although a resident of another state, and that the venue may be properly laid where the child is domiciled when the complaint is made, but that it by no means follows that the Legislature may control domestic relations of citizens of another state who have never resided in the complaining state, or compel the performance of parental duties and obligations arising under the laws of the state of their residence, where the defendant is not responsible either by acts of omission or commission for the child being temporarily in the complaining state. "It is sufficient to say that it must at least appear that he has brought or compelled them to come into this state and then abandoned them, or that having been brought into this state by others, even against his will, they were then abandoned and permitted to become homeless and unprovided for. Clearly, in such case it would be the duty of the father to assert his legal right to their care and custody, and provide them with a home, food, shelter, and clothing, and his failure to do so would be an offense against our laws. This legislation is for the benefit of the child. It is passed for the purpose of enforcing the natural duties of parents to their children. This duty is owing to the child wherever the parent entitled to its control and custody places it, or wherever, in disregard of his parental duty and obligation, he permits it to remain unprovided for. So that citizens of another state cannot permit their children to become objects of charity in this state and defend against a prosecution under our laws to compel parents to provide for their minor children by the plea that they are not citizens of this state; but where such child is brought into this state against the will and consent of the parent and is provided with a suitable home, food, shelter, and clothing by those responsible for bringing it into the state, or by others procured by them to furnish the same, it is then no concern of our state and no offense against our laws."

The officer who arrested the petitioner was clothed only with the authority of a warrant issued by a justice of the peace of this state; but, as the person sought came across the line without demanding a requisition, he must be held in law to have come into the state voluntarily to the extent and in the sense that the court had jurisdiction to try him for a crime already committed here by him. *State v. Garrett*, 57 Kan. 132, 45 Pac. 93; *State v. McNaspy*, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 758. However, he came to Lawrence in custody and not of his own motion or volition. In the *Gillmore Case*, 88 Kan. 842, 129 Pac. 1125, it was said: "That he had come voluntarily into Stafford county to appear as a witness in a case between other parties was no bar to his arrest for a violation of the criminal laws of Kansas. His plea that he believed that his domicile had been in Texas since 1908, or even such fact, if it were a fact, of itself, furnished no reason why his wife should be left or permitted to remain in Kansas in destitute circumstances. Had it been shown that she had wrongfully refused to follow him to his domicile in Texas, and thus in law abandoned or deserted him, this might be a defense." The decision in the case just quoted from is based upon the proposition that, having come voluntarily into the country where he had previously abandoned his wife, and having voluntarily remained there some days and failed to provide for her support or maintenance, she being in destitute and necessitous circumstances, he was liable to prosecution. Here the petitioner did not come into the state voluntarily in the sense in which *Gillmore* came, and only in a strict legal sense; he did not voluntarily remain here at all, and was prevented from a speedy return upon his discharge by the probate court by another arrest on the same charge and is now involuntarily in jail.

[6] A sovereign state cannot afford to be less fair and decent in its treatment of parties than it would require its citizens to be, and it would be taking an unfair advantage of the applicant to assume or imagine that the state is really attempting to prosecute him for knowingly and voluntarily permitting his son to be in Douglas county in destitute circumstances and failing to provide for him since being brought here by the officer. The only fair and straightforward way to treat the situation is to regard it as a prosecution for a failure to support before the petitioner came into the state. The county attorney advises us that the complaint under which the restraint is now attempted to be justified charges that the defendant on or about the 1st day of December, 1912, willfully and feloniously and without lawful excuse refused to provide for the support and maintenance of the boy, and has ever since refused so to provide, "and that said William D. Fowles is in destitute and necessi-

tous circumstances." In all fairness two observations should be made. We cannot assume under the statement of facts on which this case is presented that the petitioner while in Texas knew that the son was destitute in Douglas county, Kan., and therefore cannot assume that he willfully failed to provide for his support. Again, a charge that in February, 1913, the son "is in destitute circumstances," is hardly tantamount to an allegation that he was thus destitute or necessitous before the father was brought here in custody of the constable.

[4] We think the question of jurisdiction to prosecute the defendant for failure to support his son before the arrest depends upon what he really had to do with the boy's presence in Douglas county, what means were in fact provided for his support, and what knowledge the father had or should have had of his condition, and whether or not he was, in the language of the statute, "without lawful excuse." If as a matter of fact the father, unmindful of his duty and obligations, permitted the mother to remove the child to this state under such circumstances that he was obligated for his support and with knowledge or reasonable means of knowledge that his child was destitute and likely to become a public burden upon Douglas county, then we think without question his conduct was as reprehensible and as punishable as it would have been had he brought the child here and abandoned him on purpose. On the contrary, the mere facts that without fault of the parents as to their separation the child was brought here something like seven years ago by his mother, and presumably has remained here since, and as the stipulation shows has become a healthy able-bodied boy at least 14 years of age, and was at some time after the father had been brought here in custody of an officer, actually in destitute circumstances, would not of themselves constitute a crime or vest the court with jurisdiction to try him.

What the real facts of the case are we do not know, and, as the petitioner has not shown affirmatively that he is entitled to a discharge, the writ is denied.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and BENSON, JJ., concurring.

PORTER, J. (dissenting). On the agreed statement of facts I think the petitioner should be discharged.

FIRST NAT. BANK OF SMITH CENTER v. HARDMAN et al.†
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 115*) — DISCHARGE OF SURETY—GROUNDS.

Where a surety on a note, who was induced to become such by the assurance of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

payee that its payment was to be fully secured by a chattel mortgage upon a stock of merchandise, intended when he signed the note that the mortgagor should be permitted to remain in possession of the goods, and to make sales in the usual course of business, without applying the proceeds to the debt, and this course was followed, the mortgage was thereby rendered invalid by conduct in which the surety participated, and he cannot escape liability on the note by showing that without his knowledge the mortgage had been withheld from record, and that it had been held to be void as to creditors by a court of competent jurisdiction, as a result of which the note remained unpaid.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.*]

2. TRIAL (§ 385*)—FINDING—CONSTRUCTION.

Where the jury are asked whether it was the intention that a mortgagor of a stock of merchandise should remain in possession, selling the goods and using the proceeds as he saw fit, and answer, "Yes; to carry on in regular way," this reply is to be construed as meaning that the intention was that the mortgagor was to carry on the business in the usual way, selling the goods and disposing of the proceeds as he saw fit; and this notwithstanding such construction results in a conflict between the finding and the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.*]

Appeal from District Court, Phillips County.

Action by the First National Bank of Smith Center against M. W. Hardman and another. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

R. Frank Stinson, of Phillipsburg, and E. S. Rice, of Smith Center, for appellant. McCormick & Countryman, of Phillipsburg, and Hamilton & Hamilton, of Topeka, for appellees.

MASON, J. On August 21, 1907, a note for \$3,000, payable to W. D. Womer and I. H. Rogers, was executed by C. E. Nelson as principal and M. W. Hardman and H. A. Selbe as sureties. On July 9, 1909, the First National Bank of Smith Center brought action against the sureties upon the note, claiming to be an indorsee for value before maturity. A jury trial resulted in a verdict and judgment for the defendants, and the plaintiff appeals.

The defendants' answer raised an issue as to the plaintiff's being an innocent purchaser, but our decision does not turn on this matter, and further reference to it may be omitted. The defendants also pleaded that the payees, Womer and Rogers, were acting in the transaction for the First National Bank of Phillipsburg, which was the real owner of the note. This allegation is important only as explanatory of the relations of the parties. The defense pleaded was that the defendants had been released from liability by virtue of the following facts: They were induced to sign the note by representations, participated in by the

real and nominal payees, that they incurred no risk in doing so, because it was to be fully secured by a chattel mortgage on a stock of merchandise owned by Nelson, the principal. Such a mortgage was executed at the time, but the owners of the note withheld it from record, by agreement with the mortgagee, in order to give him a false appearance of good credit, and for that reason it was adjudged void in bankruptcy proceedings which were instituted against Nelson December 9, 1907, and to which Womer and Rogers and the Phillipsburg bank were parties.

[1] Many questions are discussed in the briefs, but the view taken of one of them renders a consideration of the others unnecessary. The plaintiff contends, and we regard the contention as well founded, that certain facts established by the special findings require a judgment in its favor. By an instruction numbered 17 the court told the jury, in substance, that (assuming a loss of the mortgage security to have resulted, and leaving out of account the plaintiff's claim of being an innocent purchaser) a complete defense was established if these facts had been proved: The owners of the note agreed with the mortgagee that the mortgage should be withheld from record, and that he should be allowed to hold himself out as the absolute owner of the goods; this agreement was carried out, and he was permitted to sell a part of the goods and use the proceeds as he saw fit. To this was added: "In connection with instruction number 17 and as a part thereof I will say to you that if the said defendants intended and understood at the time of the execution of said note that said mortgage given to secure the same was to be withheld from record, or if they intended or understood that the said C. E. Nelson was to remain in possession of the property mortgaged, and be permitted to sell the same, or any part thereof, and to use the proceeds of such sale as he saw fit, then in such case the defendants would not be entitled to be released from the payment of the said note because thereof." The jury found that after the execution of the mortgage Nelson remained in possession of the goods, making sales in the ordinary course of business, without applying the proceeds to the payment of the note. They were asked: "At the time of signing the said note, did the said M. W. Hardman intend that the said C. E. Nelson, mortgagor, should remain in possession of said mortgaged goods, and sell and dispose of same or parts of same as he saw fit, and use proceeds as he saw fit?" They answer: "Yes. To carry on in regular way." They returned the same answer to the same question with respect to H. A. Selbe, the other surety. Treating this answer as an unqualified affirmative, it is fatal to the defense under the instruction

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quoted, and under the law as we view it. Where a chattel mortgage is executed upon a stock of merchandise, and the mortgagor by consent of the mortgagee, whether expressed in writing or not, makes sales in the ordinary course of business, without applying any of the proceeds to the payment of the mortgage debt, the transaction amounts to a legal fraud upon creditors, and the instrument is void as to them. While a different view is taken in some jurisdictions, this is the settled doctrine in Kansas. *Implement Co. v. Schultz*, 45 Kan. 52, 25 Pac. 625; *Smith v. Epley*, 55 Kan. 71, 39 Pac. 1016. See, also, other cases cited in 6 Cyc. 1108, and *Brooks v. Bank*, 82 Kan. 597, 109 Pac. 400. Whether the mortgage is recorded or not can make no difference with the application of this rule. If here the mortgagor made sales of the mortgaged property without reducing the mortgage debt, and this was in accordance with the intention of the mortgagees, the arrangement made the mortgage void as to other creditors. If the sureties participated in this intention, they cannot claim a discharge by reason of the mortgage being thereby rendered invalid. And, if it was rendered invalid for that reason, they were not injured by the failure to record the mortgage, and are not entitled to a release on that account. Conceding that they acted in the best of faith, without the slightest thought that creditors were to be delayed, or defrauded, if they understood that the mortgagor was to make sales of the goods without reducing the debt they knew a course was to be followed the natural consequence of which was to impair the safety of creditors, and which the law, therefore, regards as fatal to the enforcement of the mortgage.

[2] It is argued in behalf of the sureties, however, that the affirmative reply of the jury is qualified by the addition of the words, "To carry on in regular way"; that the entire answer should be construed so as to uphold the general verdict, if such construction is possible; that in view of this rule of interpretation the jury should be deemed to have used the word "regular" in the sense of "proper" or "legal," their meaning being that the intention of the surety was that the mortgagee should sell goods and dispose of the proceeds in such way as the law would permit, under such an arrangement as would be consistent with the validity of the mortgage. We are unable to accept this view. The natural meaning of the jury's answer seems to be that the business was to be carried on in the regular way—that is, the usual way—that sales were to be made at retail in the ordinary course of business. The question was made very specific. It required the jury to say whether the intention was for the mortgagor to use the proceeds of the sales of goods as he saw

fit. The affirmative answer is inconsistent with the theory that the proceeds were required to be applied to the reduction of the mortgage debt. Moreover, this reading of the answer accords with what the sureties said upon the stand. The following is a literal transcript of the testimony of one of them upon the subject, that of the other being substantially the same: "Q. You say you were going to help Dr. Nelson get this money; what for? A. He told me he wanted to buy George James out. Q. What was he going to do after he bought George out? A. Run the drug store, I suppose. Q. You wanted to help him raise the money? A. Yes, sir. Q. That was your intention when you loaned him the money and signed the note? A. Yes, sir. Q. What did you expect him to do with the drug store? A. I expected him to run it. Q. Buy and sell goods? A. Yes, sir. Q. Didn't you expect this note to be paid—you did not expect this note to be paid until it was due? A. No, sir. Q. You did not expect him to apply any of the proceeds from the sale of that stock to the payment of the note? A. No, sir. Q. You expected him to do as he pleased, buy and sell goods and use the money where it was best to be used? A. Yes, sir."

The precise grounds upon which the mortgage was set aside in the bankruptcy proceedings are not shown. From a statement of an admission made by the plaintiff, which was seemingly acquiesced in by the defendants, it appears that the fact that the mortgagor was allowed to sell goods without accounting for the proceeds was at least one of the reasons. Inasmuch as under the facts here found the mortgage was invalid apart from any question of notice or recording, the presumption must be that it was held void for reasons that would have been sufficient, even if it had been recorded. As, according to the findings, the sureties were not injured by the omission to record the mortgage, and are not in a position to complain of its invalidity by reason of the manner in which the mortgagor was allowed to conduct the business, they have failed to establish a defense.

The judgment is reversed and the cause remanded, with directions to render judgment on the findings for the plaintiff. All the Justices concurring except WEST, J., who did not sit.

EBERHART et al. v. RATH et al.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 80*)—AGREEMENT AS TO PROPERTY—VALIDITY.

A widow residing and owning lands in this state married a man residing and owning property in Nebraska. As part of the marriage contract it was orally agreed that he should re-

ceive nothing of her estate in case she died first, and that she should receive the sum of \$1,000 only of his estate in case he died first. After the marriage in Kansas, the parties established their home in Nebraska, where they resided for 17 years, when she died, leaving children by a former marriage and a son by her last marriage. Soon after the marriage the husband and wife entered into a written contract, in view of the oral agreement, and of the same purport. In this action for partition brought by the children of the former marriage, the surviving husband claims one-half of the land in this state owned by his wife at the time of the marriage and at her death. It is held that the written contract is valid and effectual, although it does not recite or refer to the previous oral agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 169-177, 882; Dec. Dig. § 80.*]

2. DESCENT AND DISTRIBUTION (§ 62*)—HUSBAND AND WIFE—AGREEMENT AS TO PROPERTY—VALIDITY—WHAT LAW GOVERNS.

The validity of the relinquishment by the husband of his rights in the wife's land in this state under the contract above referred to must be determined by the laws of Kansas, although the instrument was made in Nebraska.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 150, 168, 186-189; Dec. Dig. § 62.*]

3. EVIDENCE (§ 571*)—OPINION EVIDENCE—PROBATIVE EFFECT—LAWS OF ANOTHER STATE.

The opinions of witnesses, practicing lawyers of Nebraska, that the agreement and contract referred to in the first above paragraph are invalid, are not conclusive in the absence of a controlling decision in that state. Upon an examination of statutes in evidence, and decisions of the Supreme Court of Nebraska, it is concluded that such contracts are regarded in that state in the same light as they are viewed here.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.*]

4. WITNESSES (§ 159*)—COMPETENCY—TRANS-ACTION WITH DECEASED PERSON.

The surviving husband was incompetent to testify to a conversation with his wife, since deceased, by which he claimed that the post-nuptial contract between them had been abrogated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

Appeal from District Court, Cheyenne County.

Action by John Eberhart and others against John Rath and another. From the judgment the defendant named appeals. Affirmed.

Fred Robertson, of Atwood, and E. E. Kite, of St. Francis, for appellant. Ambrose C. Epperson, of Clay Center, Neb., for appellees.

BENSON, J. The defendant John Rath appeals from a judgment excluding him from any interest in land owned by his wife at the time of her death. John Rath, a resident of Nebraska, and Katherine Eberhart, a resident of Kansas, entered into an oral agreement in this state in contemplation of marriage that he, in case she died first, should take nothing of her estate; and that

she, in case he died first, should receive \$1,000 only of his estate. They were married in Kansas and made their home in Nebraska soon afterwards, where they resided for 17 years, when Mrs. Rath died. Shortly after establishing their home in Nebraska, they entered into a written contract which provided, as stated in the findings: "That in the event he should survive her that he should not receive any of her property, by reason of marital relations, but that if she survived him she should receive \$1,000 in lieu of all her rights and interests, given her by law and reason of marital relations. Said instrument was written up with the understanding that it was part of the original antenuptial agreement and in view of that agreement a part of the marriage contract." The plaintiffs are children of the deceased, Mrs. Rath, by a former marriage. In this action for partition they allege that they and the defendant Henry Rath, who was born of her last marriage, are the owners of the land, as the sole heirs of their mother whose surviving husband is barred by the agreements referred to. The defendant John Rath denied the validity of the oral agreement, alleged that a written agreement was made in Nebraska after the marriage substantially as stated in the petition, but that it was without consideration and void, and that it had been renounced and destroyed by his wife with his consent. The answer also set out several sections of the Nebraska statutes relating to wills, dower, and jointure. An examination of the pleadings shows that there is no dispute concerning the oral agreement before marriage nor the execution of the written instrument afterwards, but their validity is challenged.

[1] The plaintiffs contend that the oral agreement has been fully executed and should be enforced notwithstanding the statute which provides that no action shall be brought "to charge any person upon any agreement made upon consideration of marriage." Weld v. Weld, 71 Kan. 622, 81 Pac. 183, 114 Am. St. Rep. 517, and Knights of Pythias v. Ferrell, 83 Kan. 491, 112 Pac. 155, 33 L. R. A. (N. S.) 777, are cited in support of this claim. They also rely upon the written instrument executed afterwards confirming the verbal agreement. The exact terms of the instrument are not contained in the abstract. The court found that it was made with the understanding that it was a part of the marriage contract, but it does not affirmatively appear that it contained any recital of or reference to the oral agreement. In such a situation it has been said that the authorities are in hopeless conflict. Frazer v. Andrews, 134 Iowa, 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593, 13 Ann. Cas. 556. In that case it was held that an oral antenuptial agreement by which each party relinquishes rights of property to the other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may be given effect by a written postnuptial contract if the written instrument contains a recital that it is made in consideration or as evidence of the previous agreement. The opinion cites *Moore, Adm'r, v. Harrison, Adm'r*, 26 Ind. App. 406, 59 N. E. 1077, *Burlington v. Burlington, Ex'r*, 151 Ind. 200, 51 N. E. 323, and other cases holding that the postnuptial contract may be enforced although it does not refer to the previous agreement, and *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552, *Powell's Adm'r v. Meyers*, 64 S. W. 429, 23 Ky. Law Rep. 795, and other cases holding that without such reference it is invalid. Other cases discussing this question will be found in a note in 13 Ann. Cas. 556. See, also, *Browne on Statute of Frauds* (5th Ed.) § 224, and notes. In the *Frazer Case* it was said that a statute of Iowa forbade a contract of this nature between the parties after marriage, and therefore a postnuptial contract could be made available only as a ratification of the former oral agreement. As the instrument in that case contained no reference to any former agreement, it was held that it was invalid. Referring to Indiana cases holding to the contrary, the court observed: "In passing, it may be remarked as worthy of consideration that in Indiana they have no statute similar to our section 3154, which may perhaps account for the rule in that state."

There is no statute in this state that makes a postnuptial contract of this nature void. Apart from the previous agreement, it is true that the written instrument was not made upon consideration of marriage, for that had already occurred; but a reciprocal relinquishment by each in the property of the other is sufficient. Reciprocal agreements varying marital property rights are referred to as among the considerations for antenuptial agreements in *Hafer v. Hafer*, 33 Kan. 449, 460, 6 Pac. 537. Mr. Bishop says: "For the principle is well settled that, though parties marrying must take the status of marriage as the law has established it, and cannot vary it by antenuptial contract, yet, within certain legal limits, and proceeding by legal rule, they may by such contract vary any or all of those property rights which the status superinduces." 1 Bishop on the Law of Married Women, § 427.

While these citations refer to antenuptial agreements, the principle applies to those made after marriage unless the marriage disqualifies the parties from contracting with each other. Under the statute relating to married women, the property of a woman at the time of her marriage remains her own and she may after marriage sell and convey it, in the same manner and with like effect as a married man. Gen. Stat. 1909, c. 74. A wife may purchase property from her husband. *Going v. Orns*, 8 Kan. 85; *Dickson v.*

Randal, 19 Kan. 212. A conveyance by a husband to wife and contracts between them will be upheld as valid so far as they are just and equitable. *Sproul v. Atchison Nat. Bank*, 22 Kan. 336; *Miller v. Krueger*, 36 Kan. 344, 13 Pac. 641; *Horder v. Horder*, 23 Kan. 391, 33 Am. Rep. 167; *Munger v. Baldridge*, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273. The fiction of the unity of husband and wife which under the common law made contracts between them impossible is no longer a ground of disability, and venerable rules and precedents based upon that fiction must yield to modern legislation liberally interpreted in the light of present conditions. *Harrington v. Lowe*, 73 Kan. 1, 18, 84 Pac. 570, 4 L. R. A. (N. S.) 547; *Nagle v. Tieperman*, 74 Kan. 32, 85 Pac. 944, 9 L. R. A. (N. S.) 674, 10 Ann. Cas. 977. The legal identity of the wife with respect to her separate property is as complete as that of the husband. It is not necessary, however, to resort to our statutes to uphold the conveyance of property by one spouse directly to the other. While void at the common law, they have long been upheld in equity when just, fair, and reasonable. 2 Kent, Com. (10th Ed.) 161, 178; 2 Story, Eq. Jur. § 1395. The author last named at the section cited says: "The doctrine is now firmly settled in equity that a wife may bestow her separate property, by appointment or otherwise, upon her husband as well as a stranger." Direct conveyances between husband and wife, when not prejudicial to creditors, have been upheld in many jurisdictions. *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908; *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Wilder et al. v. Brooks et al.*, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; and note *Currier v. Teske*, 84 Neb. 60, 120 N. W. 1015, 133 Am. St. Rep. 602. The intervention of a trustee, although once common, is not now essential. 2 Story, Eq. Jur. § 1380.

Postnuptial as well as antenuptial agreements are upheld when consistent with the principles of equity. In *King v. Molloyhan*, 61 Kan. 683, 60 Pac. 731, it was held that postnuptial settlements controlling the division and affecting the descent of property freely and intelligently made and which are just and equitable in their provisions are not invalid. The court, applying the principles governing antenuptial agreements, said: "Marriage settlements controlling the division and affecting the descent of property, freely and intelligently made, and which are just and equitable in their provisions, are not invalid." In that case the contract had been made in view of a separation, but that fact only afforded a reason for making the contract. Mutual relinquishments of property rights and the payment of money in addition by one to the other afforded sufficient consideration. In *Dennis v. Perkins*, 88 Kan.

428, 129 Pac. 165, a postnuptial contract embracing a conveyance of land by the husband to the wife was upheld, and, although the settlement had been made in contemplation of separation, it was held that the resumption of marital relations did not rescind the agreement which it was said will remain in force unless the parties intend that it shall be abrogated. The validity of such agreements depends upon equities arising out of the circumstances which may be just as strong when the parties are living happily together as exist after domestic tranquility has been destroyed.

Recognizing the equality of men and women in respect to their property and contractual rights, emphasized in Kansas and other states by the privilege of the ballot and their participation in government as well as in business, no good reason is perceived for any practical distinction between antenuptial and postnuptial agreements with respect to their validity. The marriage ceremony and living together work no magical change in the understanding or capacity of either to make contracts. The equitable principles upon which one class of agreements is upheld apply with equal force to the other. They both tend to settle questions of property succession, and promote peace and good will, especially where there are, as in this case, children by a former marriage.

We are constrained to hold that the written contract in this case, although it did not refer to the prior agreement, is valid and effectual. The instrument would also have been valid had no prior agreement been made.

[2] It is contended by the appellant that, as the written instrument was made at the matrimonial domicile in Nebraska, the law of that state governs, and that by that law the agreement is void. In considering this contention it is not deemed necessary to discuss the subject of the law of place generally. Only a few general principles need be stated. The transmission of title to real estate is governed by the laws of the state where it is situated. In the absence of an express contract, the effect of marriage upon real property is determined by the law of the place where the property is situated. This rule is stated as a summary from authorities reviewed in *Rush v. Landers*, 107 La. 549, 32 South. 95, 57 L. R. A. 353, 372. The controversy here is over land in this state. The agreement provides for a relinquishment of the prospective rights of inheritance of the husband in that land. The effect of the instrument purporting to relinquish such rights as well as the nature of the rights relinquished must be determined by the laws of this state. *Watson v. Holden*, 58 Kan. 657, 50 Pac. 883; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; *Estate of J. B. Baubichon*, 49 Cal. 18.

[3] The opinions of witnesses, lawyers

practicing in Nebraska, that the agreement is void by the laws of that state, read in evidence, while entitled to proper respect, do not convince this court that such is the fact in the absence of any controlling decision of the Supreme Court of that state. *Hutchings v. Railway Co.*, 84 Kan. 479, 114 Pac. 1079. Neither do the statutes pleaded and read in evidence prove that fact. In many other states there are statutes concerning jointure and prescribing the method by which dower may be barred, but they are not generally held to prevent the bar in equity by agreement. 1 *Bishop on the Law of Married Women*, §§ 363, 418-425; *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537. The judicial rule in Nebraska appears to be the same. Thus it was held in *Rieger v. Schaible*, 81 Neb. 83, 115 N. W. 580, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700, that the provisions of the statutes of that state that a jointure is a bar to dower do not ordinarily prevent an equitable bar, and further that: "The provisions of the statute that a jointure is a bar of dower do not ordinarily deprive the intended wife of the power to bar her dower by any other form of antenuptial contract." Another decision in that state, upon facts quite similar to the facts of this case, should be referred to. An oral antenuptial contract was entered into between parties intending to marry. After the marriage the agreement was reduced to writing and signed. By the agreement the husband was to have \$1,000 from the wife's estate upon her death, and he was to release all further claims. He received part of the money before she died, and she made a will by which he was to have the remainder. The surviving husband contended that the agreement was invalid and claimed an interest in her real estate. The court said: "Even if the contract were wholly invalid, which we do not decide, under these circumstances the plaintiff is estopped to allege its invalidity." *Erb v. McMaster*, 88 Neb. 817, 130 N. W. 576. The same principle of estoppel was also applied by this court in the *King Case* on rehearing, although the grounds stated in the opinion were adhered to. From these decisions it is concluded that nuptial contracts are regarded in Nebraska in about the same favorable light in which they are viewed here. Even if the law of that state governs this controversy, the result would be the same.

[4] The surviving husband was incompetent to testify to a conversation with his wife, since deceased, by which he claimed that the postnuptial contract between them had been abrogated. His offer to give such testimony was properly excluded. Civil Code, § 320 (Gen. St. 1909, § 5914); *Dennis v. Perkins*, 88 Kan. 428, 437, 129 Pac. 165.

The finding and conclusion of the district court are approved, and the judgment is affirmed. All the Justices concurring.

WEISNER v. WEISNER et al.
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 793*) — ELECTION OF WIDOW — "CONSENT."

In case of an election by a widow to take under the will of her deceased husband, it is essential that the probate court explain to her its provisions and her rights under it, and also her rights under the law in the event of her refusal to take under the will. But, in case of a written consent by her that the husband dispose of more than one-half of his property to others than his wife, it is only essential that she act freely and understandingly.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2053-2055; Dec. Dig. § 793.*

For other definitions, see Words and Phrases, vol. 2, pp. 1437-1441.]

2. WILLS (§ 797*)—ELECTION OF WIDOW—REVIEW.

When a widow promptly takes steps to have her written consent to the will of her deceased husband set aside, and the court, upon sufficient testimony, finds that she did not understand its effect upon her property rights, and acted under the strong persuasion and implied threat of her husband in his last sickness, so that such consent was not given freely and understandingly, *held*, that such finding and determination will not be disturbed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2069; Dec. Dig. § 797.*]

Appeal from District Court, Riley County.

Action by Elizabeth Weisner against William Weisner, Executor, and others. From judgment for plaintiff, defendants appeal. Affirmed.

R. P. Evans, of Manhattan, and R. J. Brock, of Portland, Or., for appellants. John E. Hessin and John C. Hessin, both of Manhattan, for appellee.

WEST, J. Elizabeth Weisner brought this action August 23, 1911, to set aside a written consent to the will of her husband executed June 8, 1911. The parties had been married 25 years and had raised a family of children. The husband had been sick for some months, and, about six weeks prior to his death, was taken to the hospital, and while there he called upon an attorney to consult with him with reference to making a will. A will was prepared and brought to the hospital and read to the husband and wife by the attorney; the wife making no objections to its provisions, except the one naming an executor to which she at first objected, but, after conversing with her husband, she acquiesced, and the will was signed in her presence by her husband and witnessed by the attorney and the nurse. She also signed a written consent indorsed on the will in which it was stated that having been duly informed of her legal rights to an interest in the property of her husband, and having read the will and being acquainted with the contents thereof, she consented to the same, thereby waiving her property rights under the statute as the wife of George Weisner.

After hearing all the evidence, which was conflicting, the trial court decided in favor of the plaintiff. In the decision of the question, the court, among other things, said: "If she intelligently consented to it, then she has no right to complain; but, if she didn't consent to it (that is, legally consent to it), then she has still her right to consider, to know, and to decide. The evidence discloses in connection with this, too, a very pertinent fact. There isn't anything to suggest in the evidence but that there was the utmost harmony between the husband and wife. Under the circumstances in which she was placed, it ought not to be said, it seems to me, that a wife was in that position to have given the intelligent and considerate judgment to her rights as to properly protect her rights." This view was based on the proposition that it was stated to her that she would remain in the same relationship to the property as though another than the one chosen was executor or the same as if she were executor; that when she first declined to sign the will the husband wept and exhibited strong feeling, which wrought upon the emotions of the wife, and that an intimation was made that if she did not consent another will, less advantageous to her, might be made; that she consented; and it was said: "It is under such conditions that this alleged consent was executed, and my judgment and finding in this action is that the applicant or petitioner in this case has not executed, in writing, the consent of the character contemplated by law, and the judgment is that it be set aside, and that the probate court of this county be directed and required to afford her an opportunity to exercise her election as provided by the statute on full and fair information that the law directs the probate court to give her, whether or not she desires to accept the provisions of this will, or stand upon her rights under the law."

[1] The plaintiff contends that the same rules apply as in case of an election. The defendant insists that the statutes do not require that the person consenting to the provisions of a will shall have its provisions explained or his rights under it or under the law, and that if the consent be intelligibly given, with fair knowledge of the contents of the instrument, the person consenting is bound thereby. Two questions are involved: In order to make the consent binding, is it necessary that the person consenting be advised and informed as in case of an election? Was the plaintiff in this case so advised and informed, and were all the circumstances such as to make her consent binding?

The statute as to election (Gen. Stat. 1909, § 9819) requires the probate court "to explain to her the provisions of the will, her rights under it, and also her rights under the law, in the event of her refusal to take under the will." The manifest object of this requirement is to apprise the widow

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fully and understandingly as to her rights touching her late husband's property under the will and under the law. Her election is different from an ordinary contract wherein parties are supposed to look after their own interests, and must be bound by their agreements entered into, with fair opportunity to know what they are doing. But, even after an election, it has been held that the widow may not have it set aside unless it is satisfactorily shown that she did not act voluntarily and knowingly. *Buchanan v. Gibbs*, 26 Kan. 277. But it has also been held that acts sought to be held as equivalent to an election must be such as show a full knowledge of all the circumstances and of her rights, and that by plain and unequivocal conduct she showed her intention to take under the will. *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556; *James v. Dunstan*, 38 Kan. 289, 16 Pac. 459, 5 Am. St. Rep. 741; *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522; *Cook v. Lawson*, 63 Kan. 854, 66 Pac. 1028.

The statute concerning consent (Gen. Stat. 1909, § 9811) provides that either husband or wife "may consent in writing, executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so consenting." This has not been regarded with the same strictness as the matter of election. The form of the writing is not important if it sufficiently shows that the one consenting agrees to accept the provision made in the will in place of the share given by statute. *Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203. Neither is it essential that the will in fact make any provision for the one so consenting. *Hanson v. Hanson*, 81 Kan. 305, page 308, 105 Pac. 444. Such consent cannot be repudiated because of a subsequent discovery that the estate was larger than the consenting spouse anticipated; her rights having been fully explained and understood when the consent was given. *Pirtle v. Pirtle*, 84 Kan. 782, 115 Pac. 543. The written consent need not specify the property to be devised or bequeathed, and need not designate the will to which it applies. *Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541. The consent may be given any time during the life of the testator. *Gallon v. Haas*, 67 Kan. 225, 72 Pac. 770. Nevertheless, it cannot be that the Legislature intended that a wife, who under the stress of expected widowhood, actuated by a desire to please her husband who on his deathbed expresses with tears his intense desire for her to consent to the terms of a will presented to her without previous warning or consideration, should be held bound by such consent when it fairly appears that she did not understand its effect upon her property rights, and acted under the strong persuasions and implied threat of her husband in his last sickness, and especially so when she moves promptly for revocation before others' interests become involved.

[2] A reading of the cold unimpassioned record discloses fair ground for holding either way. But the trial court, who saw and heard the witnesses, felt convinced that consent was not given freely and understandingly. Counsel for the appellants concede that: "It is true, probably, that to intelligently consent to the will it is necessary that one so consenting should have a fair knowledge of the contents thereof."

In view of the entire evidence, we cannot say that the findings and conclusions are unsupported, and the judgment is therefore affirmed. All the Justices concurring.

WARD v. BENNER et al.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 60*)—PROPERTY SUBJECT—INTEREST OF DEVISEE.

The interest of a devisee in real estate is subject to attachment although the will directs the executor to sell the property and distribute the proceeds among the devisees.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 157-161; Dec. Dig. § 60.*]

2. ATTACHMENT (§ 217*)—JUDGMENT—INTEREST OF DEVISEE—SALE.

A clause of a final judgment, in an action wherein the interest of a devisee in real estate had been attached, allowing the executor to sell the attached property as directed by the will and providing for the application of the defendant's share of the proceeds upon the judgment against him, is approved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 732-752; Dec. Dig. § 217.*]

3. ATTACHMENT (§ 219*) — JUDGMENT — ENFORCEMENT AGAINST PROPERTY NOT ATTACHED.

Where the interest of a defendant as devisee in real estate is attached and service is made upon him by publication only, the court does not thereby obtain jurisdiction to apply, upon the judgment rendered against him, his share in the proceeds of personal property in the hands of the executor upon which the attachment was not levied.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 753; Dec. Dig. § 219.*]

4. ATTACHMENT (§ 219*) — JUDGMENT — ENFORCEMENT AGAINST PROPERTY NOT ATTACHED — EFFECT OF INJUNCTION AGAINST TRANSFER.

The issuance of a temporary injunction to restrain the disposition of a defendant's interest in personal property does not give the court authority to apply such property or its proceeds to the payment of the plaintiff's claim.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 753; Dec. Dig. § 219.*]

Appeal from District Court, Doniphan County.

Action by Ella M. Ward against Elmer E. Benner and Estella M. Breon, as executrix of Mary A. Benner, deceased. From judgment for plaintiff, the executrix appeals. Remanded with directions.

Arthur C. Bell, of Troy, for appellant. C. S. Hull, of Atchison, and C. W. Reeder, of Troy, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BENSON, J. This is an action upon a judgment of an Indiana court. The defendant Elmer E. Benner and the plaintiff were husband and wife residing in Vigo county, Ind., when a judgment was regularly rendered in the superior court of that county in favor of the wife for divorce and for monthly payments to her for the support of their minor children. At the time this action was commenced the payments due upon the judgment referred to amounted to \$1,286. An order of attachment was issued, and Benner's interest in real estate in Doniphan county was attached, and a temporary injunction was issued restraining the defendant Estella M. Breon, as executrix, from distributing or paying over to the defendant Benner any money or property in her hands. Service by publication was made upon Benner, who did not appear. The petition set out the Indiana judgment and the amount due thereon and alleged that Mary A. Benner, deceased, the mother of Elmer E. Benner, died leaving a will, a copy of which was attached, by which she devised one-fourth of the real estate above referred to and one-fourth of her personal property to her son Elmer, after deducting a specified sum to be paid to his minor children, directing the sale of the real estate and division of the proceeds among the devisees. The petition also alleged the insolvency of Benner and the probable loss of the claim if the relief should not be granted. The answer of the executrix admitted the death, the will and probate thereof, and disposition of property thereby as alleged. It also contained a general denial and an allegation that partial distribution had already been made to Elmer E. Benner under an order of the probate court. It challenged the jurisdiction of the district court to interfere with the settlement and distribution of the estate. Judgment was rendered on the pleadings: "That the plaintiff recover of the defendant Elmer E. Benner judgment in rem for the sum of \$1,286 with interest thereon of 6 per cent. from the 20th day of June, 1910, extending only to the property real and personal now or hereafter in the hands of said executrix or the proceeds of said property to the extent of said judgment and interest and costs that would otherwise go or belong to said defendant Elmer E. Benner." It was further adjudged that the attachment should be dissolved so far that the executrix should be allowed to carry out the terms of the will and make conveyance of the property as though the attachment had not been levied; and that the executrix should be enjoined from turning over to Elmer E. Benner any property, real or personal, or proceeds of the estate until the judgment is satisfied. It was further ordered that upon final settlement of the estate the executrix should turn over to the clerk of the district court the share of Elmer E. Benner in the proceeds of the

estate as found by the probate court in amount sufficient to satisfy the judgment. From this judgment the executrix alone appeals.

The assignments of error are based upon the alleged want of jurisdiction in the district court to issue the order of attachment and injunction, and to enter judgment on the petition.

[1] The principal defendant was a nonresident of this state, and owned an interest in lands situated in the county. This interest was subject to attachment. Civil Code, §§ 53, 78, 190 (Gen. St. 1909, §§ 5646, 5671, 5783); Gen. Stat. 1909, § 9037, sub. 8; *Bullene v. Hiatt*, 12 Kan. 98. It is argued that the title to the real estate was in the executrix in trust to execute the power of sale. This, however, is not the fact. The property was not devised to the executrix in trust, but was devised to Elmer E. Benner and others, and only a power of sale was given to the executrix. In such a situation it was held that the interest of a devisee was subject to the lien of a judgment against him. *Bank v. Murray*, 86 Kan. 766, 121 Pac. 1117, 39 L. R. A. (N. S.) 817. Applying the reasoning of the opinion in that case, it must be held that the interest of Benner in the real estate is bound by the attachment, subject to the orders made to preserve control of the proceedings by the probate court until distribution should be ordered.

[2] The provisions in the judgment allowing the sale of the attached property by the executor as provided in the will and the determination of the defendant Benner's interest therein by the probate court preserved the jurisdiction of that court, while the application of his share or interest in such real estate when so determined to the plaintiff's claim was a proper exercise of the jurisdiction of the district court in the situation presented. *People v. Van Buren*, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446, and note.

[3] By the attachment and constructive service the court obtained jurisdiction to appropriate the attached property to the payment of the debt. *National Bank v. Peters*, 51 Kan. 62, 32 Pac. 637; *Parmenter v. Lomax*, 68 Kan. 61, 74 Pac. 634. The judgment, however, while reciting that it is in rem, purports to adjudicate and appropriate to the payment of the plaintiff's claim not only the defendant's interest in the property attached, but also his share in the personal property of the deceased in the hands of the executrix. No authority for this can spring from the attachment of the real estate, and the only suggestion of its source is the injunction.

[4] It is true that an injunction may be allowed to prevent the removal or disposition of property with intent to render a judgment ineffectual. Civil Code, § 250 (Gen. St. 1909, § 5844). The injunction in this case

was issued for that purpose and was effectual as to the attached property. But it afforded no authority for the application of the personal property not attached or its proceeds upon the plaintiff's claim. The issuance of an injunction is not a ground for constructive service. Jurisdiction to apply property upon a creditor's claim is not obtained by merely issuing an injunction restraining the disposition of the property.

The judgment appealed from is erroneous in so far as it directs the application of money or property not attached to the payment of plaintiff's claim.

The provisions in the judgment for the application of the proceeds of the personal property not attached must be set aside.

The cause is remanded with directions to modify the judgment in accordance with these views. All the Justices concurring.

ROGERS v. LINDSAY.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

GUARDIAN AND WARD (§ 146*)—ACCOUNTING—LACHES.

In an action in the nature of an accounting, brought against the representatives of the deceased guardian by the ward more than six years after the final settlement of the guardian in the probate court and the attainment of majority by the ward, and where it appears from the evidence that the mistake or constructive fraud could have been discovered at the time of the settlement, it is held that the finding of the court that the ward has been guilty of laches and cannot maintain the action will not be disturbed.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 480-495; Dec. Dig. § 146.*]

Appeal from District Court, Neosho County.

Action by Elizabeth Rogers against Minnie M. Lindsay, as administratrix, etc. From judgment for defendant, plaintiff appeals. Affirmed.

A. S. Lapham and J. W. Lapham, both of Chanute, for appellant. Smith & Brobst, of Chanute, for appellee.

SMITH, J. This action was brought by the appellant to recover from the administratrix of the estate of George N. Lindsay the sum of \$413.73, with interest, which, it is claimed, George N. Lindsay had received as guardian of appellant, and had failed to account for in the final settlement of the estate. Lindsay was appointed guardian of the appellant and her younger brother in 1898, and made several annual reports. On the 1st day of July, 1903, at which date the appellant attained her majority, he made final settlement as to her share of the estate in the probate court of the county, which settlement was approved by that court. On Au-

gust 19, 1903, the appellant signed and delivered to Lindsay a receipt for \$2,604.36 in full for her distributive share of the moneys held by Lindsay as her guardian.

Appellant testified that her mother was with her in the probate court when the settlement was made and thereafter when the receipt was given, and during all the time Lindsay was her guardian she depended largely upon her mother to look after her interests in the business. It appears that two items of the amount claimed appeared in the final account filed, and that all the items appeared upon the guardian's books. There is no evidence that there was any attempt at concealment, either of the book account, or the final settlement account, from the appellant or her mother.

All of the evidence construed together indicates that there was a mistake on the part of the guardian and the probate court rather than any intentional fraud. Indeed, the evidence tends to show that there were errors in the account to the prejudice of the guardian, although he was a man of large business experience.

In *Donaldson v. Jacobitz*, 67 Kan. 244, 72 Pac. 846, in an action to set aside a fraudulent conveyance, it is said: "The fraud is deemed to have been discovered whenever, in the exercise of reasonable diligence, it might have been discovered, and in such a case reasonable diligence required an examination of the record, which would have necessarily disclosed the fraud alleged." See, also, *Black v. Black*, 64 Kan. 689, 68 Pac. 662.

In the exercise of reasonable diligence it is apparent that the fraud or mistake could have been discovered at the time of the final settlement, July 1, 1903, and that the action was commenced about 6½ years thereafter. The court found that the appellant was guilty of laches in bringing the action, and she could not recover thereon.

The judgment is affirmed. All the Justices concurring.

HEALER v. INKMAN et al.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 594*)—UNCONTROVERTED EVIDENCE—JURY.

While a jury is at liberty to disbelieve the uncontradicted testimony of a witness which is deemed to be unreasonable and untrue, it is never justified in arbitrarily and capriciously disregarding unimpeached evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

2. APPEAL AND ERROR (§ 1169*)—REVERSAL—GROUNDS—FINDINGS.

Where undisputed testimony appears to have been arbitrarily disregarded by the jury and the special questions submitted unfairly answered, and where the special findings returned upon important issues are unsupported by the evidence, and some of them are incon-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

sistent with each other and with the general verdict, a new trial should be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.*]

Appeal from District Court, Leavenworth County.

Action by Kenneth Healer, etc., against Henry Inkman and another. From judgment for plaintiff, defendants appeal. Reversed and remanded.

A. E. Dempsey and F. P. Fitzwilliam, both of Leavenworth, for appellants. W. W. Hooper, of Leavenworth, for appellee.

JOHNSTON, C. J. On the trial of this action the jury returned a verdict in favor of Kenneth Healer and against Henry Inkman and Anton R. Hartwig, awarding Healer damages in the sum of \$5,000 for personal injuries alleged to have been caused by them in negligently razing a house, so that one of the walls fell on appellee. He resided with his grandmother, Isabella Healer, who acted as his next friend in this proceeding, and was about 3½ years old when he was injured. Hartwig was the owner of a house and lot adjoining the premises of Mrs. Healer. It was a one-story structure, and he contracted with Henry Inkman to remove it and to build a new house on the same site. Inkman employed one Diehm to tear down the old house, and after he had been engaged on the work for several days, and had removed the roof and ends of the building, one of the walls fell toward the Healer premises, and Kenneth, who had just passed over the Hartwig premises before the wall fell, was caught under it, near the line between the two properties, and was very severely hurt. In the petition of Healer it was alleged that Hartwig and Inkman were both negligent in employing Diehm, an "old, deaf, and incompetent" man, to tear down the house, that both knew of the dangerous condition of the wall before it fell, and were aware that persons were near the building and liable to be injured by the fall of an unsupported wall. Each answered by a general denial and an averment of contributory negligence, and Hartwig alleged that he dealt with Inkman as an independent contractor, whereby Inkman was to raze and remove the old building, and erect a new one, and that he, Hartwig, retained no direction or control of the work, but that it was to be done by Inkman according to his own plans, with his own workmen and under his own direction. The main controversy in the case was the relationship that existed between Hartwig and Inkman; that is, whether Inkman was acting under the orders or control of Hartwig, so that Hartwig was responsible for the negligence of Inkman or whether Inkman was acting independently, free from any control of Hartwig, and was alone responsible for

negligence in razing the house. The trial resulted in a verdict against both of them.

[1] On this appeal it is contended by appellants that the jurors intentionally ignored testimony, which was undisputed, that they purposely refused to make findings in harmony with the evidence fearing the effects of the findings on the general verdict which they intended to return, that their answers to special questions were not candid nor fair, and that some of the findings were not only in conflict with the testimony, but also with each other and with the general verdict. Each appellant submitted a long list of special questions, and many in each list were substantially repetitions of those found in the other. Quite a number of them asked for statements of evidence instead of ultimate facts, and some were involved in form, and included inquiries about several facts in a single question. There are good reasons to complain of the actions and findings of the jury, and also of the conduct of the trial.

As already stated, one of the vital questions was whether Inkman undertook to do the work according to his own methods without being subject to the orders or control of Hartwig. All of the testimony on the subject was to the effect that after several conversations between owner and contractor they entered into an agreement on May 13, 1910, by which Inkman was to take the old house down in his own way and to furnish the material and build a new house on the same site of the size and kind as one he had built in the neighborhood the previous year, he to remove and have the material in the old house, but with the privilege of using any part of the material of the old which was fit for use in the new, and besides the old material he was to receive the sum of \$1,100. Both appellants testified in regard to the contract and its terms, and yet in response to a question whether a contract was made between the parties for tearing down the old house and putting up a new one in its place the jury first answered, in effect, that no such contract was made, and finally under the stress of court pressure they answered, "No." The answer was contrary to the evidence of all the witnesses who testified on the subject as well as against the evidence shown by the circumstances of the transaction and the conduct of the parties themselves. There was evidence that Inkman was a capable carpenter and builder, and had been engaged in the business for about 25 years; and, although no evidence to the contrary was produced, the jury in answer to the question whether he was a competent and experienced carpenter and builder said, "No," and in answer to a similar question on the other list of questions submitted to the jury they answered, "We do not know." One answer assumes that there was testimony upon which to make a finding, and the other that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there was no testimony upon which a finding on the subject could be made. Both answers indicated the purpose to arbitrarily reject competent and unimpeached testimony. While a jury is at liberty to disbelieve the testimony of a witness who has not been contradicted which they think is unworthy of belief, it is never authorized to arbitrarily and capriciously disregard uncontradicted and unimpeached testimony. To one question, "Was Chris Dean, the workman who was tearing down the building at the time plaintiff was injured, employed and paid by Henry Inkman and under his immediate orders and direction?" the jury answered, "We do not know." Upon a question as to whether Hartwig gave Diehm or Inkman any orders or directions with reference to the manner of removing the old building, they answered, "We do not know." There was testimony on these important questions, and upon which a direct answer should have been given. To another question, "Did Anton Hartwig employ Chris Dean to tear down the old building?" the answer was, "Yes; indirectly." A question relating to the same subject was, "Did Henry Inkman (the contractor) proceed in his own way and according to his own plans and without any direction from the defendant Anton R. Hartwig, in removing the old building from the premises?" and the answer to that was, "No." Another question was, "Did Inkman remove the building in his own way and use his own means for that purpose, being accountable only for final performance?" and this was answered, "We do not believe any contract was made at time stated by defendants, and Inkman could have proceeded in his own way either with or without instructions from Hartwig."

[2] It appears from the many inconsistencies in the findings and the lack of support of the same in the testimony that a fair and intelligent consideration of the case by a jury has not been had. This is indicated also to some extent by a very unusual discussion as to the evidence and findings, and also as to the law and procedure which took place near the end of the trial, and in which judge, jurors, and counsel participated. When the court proposed to send the jury out to make fuller and more definite answers to special questions, a number of the jurors argued with the court as to the propriety of such a course, and seemed to be unwilling to follow the suggestions and instructions given to them by the court. In their colloquy with the court and counsel it appeared that facts not in evidence were given consideration, and that the reluctance of jurors to make special findings in accordance with the testimony was the apprehension that the findings, if made, would be inconsistent with the general verdict which they desired to return.

On the whole, it appears that a fair trial of some of the important issues in the case has not been had. The judgment will, therefore, be reversed, and the cause remanded for a new trial. All the Justices concurring.

In re DURANT'S WILL †
CAMPBELL v. DURANT.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

WILLS (§ 358*) — PROBATE — REVIEW — JURISDICTION.

An appeal will lie to the district court from a decision of the probate court refusing to admit a will to probate, notwithstanding the amendment of 1907 (Laws 1907, c. 429) to sections 19 and 20 of the act relating to wills (sections 7956, 7957, Gen. Stat. 1901), by which such order may be contested in a civil action in the district court brought within three years after the refusal to probate; the remedy provided by such amendment being held merely cumulative to that authorizing appeals from final decisions in the probate court (section 3624, Gen. St. 1909.)

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 822; Dec. Dig. § 858.*]

Appeal from District Court, Cloud County.

The will of Thomas J. Durant was offered for probate by Alvin Campbell and opposed by Christina Durant, and probate was denied, whereupon proponents appealed to the district court. From a judgment of the district court admitting the will to probate, opponent appeals. Affirmed.

Pulsifer & Hunt, of Concordia, for appellant. Sturges & Sturges, of Concordia, and T. F. Garver and R. D. Garver, both of Topeka, for appellee.

PORTER, J. The widow of Thomas J. Durant, deceased, opposed the probate of his will when it was presented to the probate court, and the will was denied probate. The proponents, who are beneficiaries under the will, appealed to the district court. The widow moved to dismiss the appeal upon the ground that the court had no jurisdiction. Her motion was overruled. A hearing was had, the court refusing to hear the testimony of any witness other than those subscribing to the will, although the widow offered to prove by a number of witnesses that at the time of the execution of the will the deceased was not of sound mind and free from restraint. The district court admitted the will to probate, and taxed the costs of the proceeding to the widow who appeals from the judgment.

The first contention is that the motion to dismiss the appeal should have been sustained; and it is urged that as the law now stands and as it stood when the appeal was taken the only remedy of the aggrieved person in case of a refusal to admit a will to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

probate is an action in the district court to contest such order. The law with respect to the contest of wills prior to the act of 1907 (Laws 1907, c. 429) was sections 7956 and 7957 of the Gen. Stat. of 1901, which provided:

Section 19: "If no person interested shall within two years after probate appear and contest the validity of the will, the probate shall be forever binding, saving, however, to persons under legal disability the like period after the disability is removed."

Section 20: "The mode of contesting a will shall be by civil action in the district court of the county in which the will was admitted to probate, which action may be brought at any time within two years after the probate of the will, and not afterwards, by any person interested in the will or estate of the deceased."

By chapter 429 of the Laws of 1907, these two sections were amended so as to read:

Section 19: "If no person interested, or claiming to be interested, shall appear within three years from the time of the making of any order by a probate court probating or refusing to probate the will and contest the same, such order shall be forever binding, saving, however, to persons under legal disability the like period after the disability is removed. The provisions of this act shall apply to any order of the court probating or refusing to probate the will, made at any time within three years prior to the taking effect of this act. Provided, however, that no proceedings to contest or set aside such order of the probate court shall affect the rights of innocent parties who have acquired title to property under the laws as they existed prior to the passage of this act."

Section 20: "The mode of contesting a will after probate or an order of the court refusing to probate the will shall be by civil action in the district court of the county in which the will was admitted to probate or the order of the court refusing to probate was made, which action may be brought at any time within three years after the probate or the order of the court refusing to probate the will, and not afterwards."

Prior to the amendment of 1907 we had held in a number of cases that a ruling of the probate court refusing to admit a will to probate was a final order and appealable to the district court, under the general provisions in the act relating to executors and administrators in reference to appeals. *Lawrie v. Lawrie*, 39 Kan. 480, 18 Pac. 499. In the opinion in that case a distinction was drawn between the situation of a person who was aggrieved by the refusal to admit a will to probate and that of one who was defeated in his attempt to oppose the probate. The proponent who was defeated by the ruling denying probate of the will had no remedy save by an appeal, while the one who was aggrieved by the order admitting it to pro-

bate had no occasion to appeal having ample remedy by a contest of the will itself. In *Hospital Co. v. Hale*, 69 Kan. 616, 77 Pac. 537, it was said: "The order which may be entered is either for the admission to probate of the will or the denial thereof. If the former, such order may be attacked at any time within two years in the district court in an action for that purpose by any person interested in the will or estate of the deceased. If the latter, an appeal may be had to the district court." The same distinction was made by the Ohio Supreme Court in *Holrah v. Lasance et al.*, 63 Ohio St. 58, 57 N. E. 964. Prior to 1905 the procedure in reference to the probate of wills contemplated that only witnesses offered by those interested in having the will admitted to probate should be examined. Section 12 of the act relating to wills (section 7948, Gen. Stat. 1901). In 1905 section 12 was amended so as to provide for the admission of such other testimony as the court may order, and provision was also made for using the depositions of absent witnesses. In *Wright v. Young*, 75 Kan. 287, 89 Pac. 694, this amendment was under consideration, and it was held to mean merely that the court should hear evidence in addition to that of the subscribing witnesses, but only as to the due execution of the will, the soundness of mind of the testator, and his freedom from restraint; and it was held that the "issues involved in the application were not changed or enlarged by the act, so as to authorize a contest of the will in the probate court" (syl.); that the examination is still preliminary in its character, notwithstanding the change giving to the party opposed to the probate what was formerly denied him, the right to have his witnesses examined upon the issues involved. The contention of appellant is that, by giving the defeated proponent of a will the same right to contest that the unsuccessful opponent to such probate has, the Legislature by the amendment of 1907 nullified the reasoning of the cases of *Lawrie v. Lawrie* and *Hospital Co. v. Hall*, supra, holding that a decision against the probate was final and therefore appealable, and that the Legislature intended by the amendment to destroy the right to appeal from a decision refusing probate. The argument does not convince us that such was the intent of the Legislature. If such had been the intent, language in express terms denying the right to appeal would, we think, have been employed. It is true as appellant argues that the district court on appeal has no greater jurisdiction than the probate court, and can only try the issue of whether the will is entitled to probate, and that the successful opponent in the probate court must follow up the appeal and "again combat his adversary within the narrow issues provided for such hearings, and, if on appeal the will be ordered probated, he must after

having twice litigated the matter start a new action in the district court."

In the present case it appears that the probate court not only denied the probate of the will, but taxed the costs against the proponents. We think that, notwithstanding the act of 1907 permitting the contest of such an order by an action in the district court, it is still a final order from which an appeal lies to the district court under the provisions of the act relating to executors and administrators concerning appeals. Section 3624, General Statutes of 1909. The provision permitting proponent of a will in the probate court who is defeated to contest the order in an action in the district court at any time within two years is merely cumulative. A further contention is made that the court erred in refusing to admit certain testimony offered. It is sufficient to say that there was no offer on the motion for a new trial to show by affidavit what the testimony was. The claim of error cannot therefore be considered. Besides, it was within the discretion of the court to limit the scope of the examination to matters directly bearing upon the due execution of the will, the testator's soundness of mind, and his freedom from restraint. No possible error can be predicated upon the admission in evidence of the affidavits of the subscribing witnesses, since the witnesses were present and testified orally. *McConnell v. Keir*, 76 Kan. 535, 92 Pac. 540.

The judgment is affirmed. All the Justices concurring.

CHASE et al. v. CHAPMAN.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 10*)—POWERS (§ 27*)—PRINCIPAL AND AGENT (§ 34*)—POWER COUPLED WITH INTEREST.

To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power. An agency or privilege to sell real property and receive all the proceeds above a certain sum as commission is not a power coupled with an interest; nor does an agreement on the part of a managing agent to be responsible to the principal for all general losses in the conduct of a business result in making him an agent with such an interest.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 11; Dec. Dig. § 10;* *Powers*, Cent. Dig. § 78; Dec. Dig. § 27;* *Principal and Agent*, Cent. Dig. § 55; Dec. Dig. § 34.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5478-5480; vol. 8, p. 7753.]

2. PRINCIPAL AND AGENT (§ 78*)—TERMINATION OF RELATION—ACCOUNTING.

A contract between plaintiffs, who were the owners of a flouring mill, and the defendant, provided that the owners were to furnish money to repair the mill and capital to operate it until it could be sold; the defendant to have full management and control of the property and business, and, if he found a pur-

chaser, he was to have as his commissions all the proceeds of the sale above a specified sum. He was to be paid a fixed salary, and agreed to become responsible for all general losses incurred in the operation of the mill, giving security to plaintiffs for that purpose, but was to have no interest in the profits of the business. Held, that his relation to the property was not that of an agency "coupled with an interest," nor was it beyond the power of equity to control, and that plaintiffs might maintain a suit before the expiration of the contract to compel an accounting, and to rescind and annul the contract so far as the same authorized his employment on the ground of his misconduct as manager.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 162-177; Dec. Dig. § 78.*]

Appeal from District Court, Brown County.

Action by Lewis E. Chase and others against H. R. Chapman. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. S. Glass, of Marysville, T. J. Madden, of Kansas City, Mo., K. M. Pearl and W. F. Means, both of Hiawatha, for appellant. Sample F. Newlon, of Hiawatha, and C. F. Reavis, of Falls City, Neb., for appellees.

PORTER, J. The appellees were the owners of a flouring mill which they had purchased in 1900 at a trustees' sale in bankruptcy. The appellant is an experienced miller, and appellees claim that he represented to them that, if the mill were properly repaired, he could operate it with profit to them, and after it had become a going concern he could sell it at an advanced price. A written contract was entered into by which the appellees agreed to furnish \$2,000 to repair the mill and to provide \$9,000 as capital with which to operate it. The appellant was to have the sole management and control of the mill and the business, and receive a salary of \$1,500 per year. The contract was to extend for two years, unless he succeeded before that time in finding a purchaser, and he was to have as commission for effecting a sale of the property all the proceeds above the sum of \$30,000. As indemnity against general losses from the operation of the mill he executed a note for \$25,000 payable to the appellees and secured by a mortgage on property of his own. The repairs to the mill proved to be more expensive than was expected, and the appellees advanced for that purpose about \$5,000. After the mill had been operated for one year, they became dissatisfied with the way in which he had managed the business, and brought this suit to compel an accounting, and to cancel and annul the contract so far as it concerned his employment as manager. Only a partial rescission was asked, for they were willing to allow him to retain the privilege of selling the property according to the terms of the contract.

As grounds for the intervention of equity the petition alleged that the appellant had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so mismanaged the business that the losses already amounted to more than \$11,000; that he had denied their request for an accounting; and that, unless he was removed from the position as manager, the losses would exceed the mortgage held by them as indemnity. It was alleged that the appellant had unlawfully and willfully appropriated to his own use large sums of money from the business without their knowledge or consent, and had attempted to misappropriate other funds belonging to the appellees in payment of his personal obligations. The answer admitted the execution of the contract, and denied generally the other allegations of the petition; and as a further defense alleged a failure of appellees to furnish the amount of capital for carrying on the business as agreed upon, and set up a counterclaim for damages caused by a number of alleged breaches of the contract.

On the trial appellant demanded a jury, which was refused, and the case was tried to the court resulting in findings in substance that the facts alleged in the petition were true, and that the appellant had conducted the business in such a careless and unbusiness-like manner as to cause heavy losses to the appellees; that, if his management and control continued, the losses would in all likelihood exceed the indemnity and result in a destruction of the business. The court further found that while acting as manager appellant had in many instances unlawfully and willfully misappropriated the funds of the business to his personal use, and had attempted to appropriate other large sums in the payment of his personal obligations; that the general losses in the business amounted to the sum of \$9,167.75; that before bringing the suit the appellees had demanded of appellant an accounting, and that the same had been refused. The court therefore rendered a judgment canceling and annulling the contract so far as it authorized the employment of appellant as manager, and holding appellees entitled to an accounting of the business in order that the amount due upon the mortgage might be determined.

There was a conflict in the evidence upon all the issues of fact; and, since the court found the facts against the appellant, there remains but little for this court to pass upon. There is a contention, to begin with, that the contract was so unconscionable and one-sided that a court of equity ought to decline to enforce it as against the appellant. The evidence, however, shows that it was entered into with deliberation, at the suggestion of the appellant himself, who was an experienced miller. None of the appellees seem to have had any previous knowledge or experience in the business. We find nothing in the contract to prevent equity from enforcing its provisions as against the appellant, or that would justify a court of equity in declaring it unconscionable or void.

Another contention is that the very ground upon which it was asked to have the contract annulled—that is, losses in the business—was anticipated and provided for in the contract, and that, while equity will lend its aid to enforce, it will never assist in the violation of a contract. This contention loses sight of the fraudulent acts charged against him as manager which are sustained by the findings of the court. It can hardly be said that the indemnity was given or accepted in contemplation of losses expected to result from the willful and unlawful appropriation of funds by the appellant. But in any view the violation of the trust and confidence reposed in him by his employers was enough to authorize equity to intervene to prevent further losses resulting from his malfeasance and misfeasance. The contract itself necessitated an accounting and the refusal of a demand for one was an additional ground for equitable relief. The demurrer to the petition was properly overruled, and for the same reasons the appellant was not entitled to a jury trial as a matter of right.

Passing numerous assignments of error based wholly upon the claim that the evidence was not sufficient to support the findings and judgment, there remains the contention that, because appellant became responsible to answer for the general losses of the business, his employment with his agency to sell was coupled with an interest, and that, therefore, it is beyond the province of equity to cancel or set aside the contract.

[1,2] The main purpose of the contract as we view it, and as the trial court obviously construed it, was the sale of the property. In order to secure a sale on favorable terms, it was deemed advisable to put the mill in operation as a going concern. The more successful the business might prove to be, the more was the property likely to sell for to the mutual advantage of all concerned. The operation of the mill as a business was merely incidental. It was believed that it might require as much as two years operation of the business to bring about the desired result; it might require less time. The appellant was not employed for the full term of two years except conditionally. Nor did he acquire an interest in the property itself. His compensation was a fixed salary for a conditional term, and, in the event he procured a purchaser, he was to have all the property sold for above a specified sum. "To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power." *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 174, 203 (5 L. Ed. 589). It has been often decided that a commission out of the proceeds of a sale of real estate to be made is not such an interest. *Kolb v. Land Co.*, 74 Miss. 567, 570, 21 South. 233; *A. & E. Encycl. of L.* 1219, note 3. "A mere power to sell real property and receive all the pro-

ceeds above a certain sum as commission is not a power coupled with an interest." Simpson et al. v. Carson, 11 Or. 361, 8 Pac. 325.

Besides, the privilege or power to sell the property and to earn the commissions provided for by the contract was not revoked or annulled; but, on the contrary, appellant's powers and privileges in that respect were expressly preserved in the decree. By his contract to be answerable for the general losses in the operation of the mill he acquired no interest in the property itself. "It is not enough to constitute a 'power coupled with an interest' that plaintiff was to have an interest in the proceeds arising from the execution of the agency. There must be an interest in the thing itself which is the subject of the power, and not merely in that which is produced by the exercise of the power. A 'power coupled with an interest' is one ingrafted on an estate, or on the thing itself; and the power and the estate must be united and co-exist." Alworth v. Seymour, 42 Minn. 528, 528, 44 N. W. 1030. The contract here, in express terms, provided that all the profits of the business should belong to the appellees, and that the appellant should have no interest in or to them. The facts do not warrant the claim that at any period of the existence of the contract the appellant's relation to the property was that of an agency "coupled with an interest" that was irrevocable or beyond the power of equity to control.

As we observed before, he sustained to his employers a fiduciary relation. The court has found that he violated his trust, that a continuance of the relations created by the contract would in all likelihood result in further loss, and that the appellees were entitled to an accounting. These facts are in our opinion sufficient to sustain the judgment, and it will be affirmed. All the Justices concurring.

CHEEK v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. DEATH (§ 31*)—ACTIONS—PARTIES.

Section 4992 of the General Statutes of 1909, giving a right of action against the party in fault to the widow and lineal heirs of a mine employé who loses his life because the requirements of the act to protect the health and safety of coal mine workers are not observed, takes its place among the provisions of the Civil Code relating to death by wrongful act, and the action may be prosecuted by the widow when no personal representative of the deceased has been appointed.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

2. MASTER AND SERVANT (§ 124*)—INSPECTION OF MINES.

Sections 4996 and 5006 of the General Statutes of 1909, requiring that coal mines generating fire damp shall be carefully exam-

ined every morning with a safety lamp by a competent fire boss before the miners and other employes enter their respective working places, apply to all mines generating such gas in appreciable quantities; the purpose being to detect the gas as soon as it appears, so that danger from it may be averted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

3. MASTER AND SERVANT (§ 124*)—INSPECTION OF MINES—ACTIONABLE NEGLIGENCE.

While the sections just referred to were designed to prevent injury from gas accumulating in the working places of a mine while the workmen are away, their full purpose was to protect mine workers from explosions of quantities of gas which a careful examination by a competent person will reveal; and liability attaches for the results of an explosion of a volume of gas released from an abandoned mine in dangerous proximity to such working places, when its presence would have been disclosed by examinations such as the statute requires.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

4. MASTER AND SERVANT (§ 118*)—FIRE BOSS—NEGLIGENCE OF INSPECTOR—DEFENSE.

While it is the duty of the state mine inspector to see that all the provisions of the act to protect the health and safety of mine workers are observed and strictly carried out (Gen. St. 1909, § 4993), neglect on his part to require the appointment of a fire boss in a mine generating fire damp does not justify or excuse the failure of the mineowner or operator to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

5. EVIDENCE (§ 7*)—INJURY TO MINE EMPLOYE—JUDICIAL NOTICE.

Section 4987 of the General Statutes of 1909, requiring bore holes to be kept not less than 12 feet in advance of the faces of working places of a coal mine when driven toward and in dangerous proximity to an abandoned mine suspected of containing inflammable gases, recognizes that abandoned coal mines in Kansas do generate and may accumulate such gases, and the courts are authorized to take judicial notice of the fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 6; Dec. Dig. § 7.*]

6. MASTER AND SERVANT (§ 125*)—MINES—PRECAUTIONS AGAINST GASES—"SUSPECTED."

The word "suspected" in the section just referred to has its usual and ordinary signification. It does not necessarily involve knowledge or belief or likelihood; and if a person responsible for compliance with the statute entertain even a slight or vague idea of the existence of inflammable gases in an abandoned mine, no matter how it arose, whether on weak evidence or no evidence at all, his duty to take action is imperative under the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 8, p. 6833.]

7. MASTER AND SERVANT (§ 118*)—MINES—REGULATIONS—LIABILITY.

Section 4992 of the General Statutes of 1909, giving a right of action for "any violation" of the mining act or any "willful failure" to comply with its provisions, prescribes a single standard of liability, embracing voluntary acts done in violation of the statute and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

voluntary inaction when the statute requires something to be done.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

8. MASTER AND SERVANT (§ 118*)—MINES—REGULATIONS—"WILLFUL FAILURE."

In the case of omissions, neither bad purpose nor determined obstinacy is essential to create liability; and, if one charged with the duty to observe the statute intentionally suffer mining operations to proceed without taking prescribed precautionary measures, he is guilty of a willful failure within the meaning of the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

9. MASTER AND SERVANT (§ 118*)—MINES—PRECAUTIONS AGAINST GASES—COMPLIANCE WITH REGULATIONS.

The obligation imposed by section 4987, Gen. St. 1909, is not discharged by ordering bore holes to be drilled not less than 12 feet in advance of the faces of working places. Bore holes must be drilled and kept drilled to the proper depth or a willful failure to comply with the law occurs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

10. MASTER AND SERVANT (§ 118*)—MINES—PRECAUTIONS AGAINST GASES—COMPLIANCE WITH REGULATIONS.

The requirement of the section just referred to is satisfied if 12-foot bore holes are kept drilled in advance of the faces of working places, and it is not necessary that bore holes be drilled a reasonable distance beyond 12 feet, although by so doing danger might be discovered and averted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

11. MASTER AND SERVANT (§§ 204, 228*)—INJURY TO MINE EMPLOYÉ—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Assumed risk and contributory negligence are not defenses to an action prosecuted under the mining act for loss of life occurring by reason of failure to examine working places for fire damp and failure to keep bore holes drilled in advance when approaching an abandoned mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.*]

12. MASTER AND SERVANT (§ 118*)—DUTY OF MASTER—SAFE PLACE TO WORK—IMPROVEMENTS.

The act providing for the health and safety of persons employed in and about the coal mines of Kansas does not abrogate the common-law duty of coal mineowners and operators to furnish their employes safe places in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

13. ACTION (§ 45*)—JOINDER—INJURY TO MINE EMPLOYÉ.

Causes of action under the mining act and under the common law may be joined and tried together.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 385-448; Dec. Dig. § 45.*]

14. APPEAL AND ERROR (§ 302*)—PRESENTATION BELOW—NECESSITY.

Certain evidence offered by the defendant considered, and *Acid*, that material prejudice

did not result from its exclusion, and that the defendant is not entitled to have the rulings thereon reviewed because the evidence was not presented to the trial court at the hearing of the motion for a new trial. Code Civ. Proc. § 307 (Gen. St. 1909, § 5901).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

15. MASTER AND SERVANT (§ 276*)—DEATH OF MINE EMPLOYÉ—SUFFICIENCY OF EVIDENCE.

The evidence examined, and found to be sufficient to sustain the general verdict and special findings of the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

Appeal from District Court, Cherokee County.

Action by Miriam Cheek against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Madden and W. W. Brown, both of Parsons, and Al F. Williams, of Columbus, for appellant. McNeill, Stephens & McNeill and Skidmore & Walker, all of Columbus, for appellee.

BURCH, J. The plaintiff's husband, Thomas Cheek, was killed by an explosion of marsh gas or fire damp (CH₄), which occurred on the evening of March 18, 1911, in the defendant's coal mine No. 16, where he was employed as a shot firer. The plaintiff sued for damages for herself as widow and for her two children, the lineal heirs of Thomas Cheek, and recovered. The defendant appeals.

The workings of mine No. 16 lay in the southeast quarter of a section of land. The northeast quarter of the same section belonged to the defendant, and the bulk of the coal underlying it had been taken out through a mine known as No. 7. The shaft of No. 7 was near the northwest corner of the tract, but the mine had been extended into the southeast portion, and an entry (mine roadway) known as the Eighth East had been driven a short distance into the southeast quarter of the section. No. 7 had been abandoned some three or four years before the occurrence of the casualty in question. The shaft of No. 16 was near the center of the tract in which it was located. The mine, like No. 7, was worked on the room and pillar plan, and had been extended northward and eastward as well as in other directions. Two parallel entries, with an eight-foot pillar of coal between them, known as the Little North straight and the Little North back entries, were being driven in the direction of No. 7 from an entry of No. 16 known as the Fourth East. Day and night shifts were employed. The work progressed at the rate of about 100 feet per month, and the entry had been extended some 700 or 800 feet from the point of its origin. The purpose was to

break through into No. 7 in order to reach some coal adjoining it, and to secure certain advantages in the operation of No. 16.

John Jopling was the defendant's general superintendent, having charge of several of its mines. He had been superintendent of No. 7. Francis Ryan was mine foreman, or pit boss, having immediate charge of the inside workings of No. 16. He had been pit boss of No. 7. Mike Lundy and James Cahill were driving the back entry, which was 12 or 14 feet wide. Lundy worked in the daytime and Cahill at night. Barney Buchella and Charles Troy were driving the straight entry. Cahill worked on the night of March 16th. He went into the mine at 10 o'clock p. m., and came out at 5:30 the next morning. The 17th was a holiday. On the afternoon of March 18th, before discontinuing work, Lundy put two shots in the face of the entry, one on the right side about 5½ feet deep and the other on the left side about 6 feet deep, with a 4-foot cutting between them. Similar shots were placed by the entryman in the face of the straight entry, and others were placed by workmen in various rooms turned off to the right and left from the two entries. At about 4:30 in the afternoon the miners left the mine, and three shot firers went in. One of these, W. D. Jeffreys, worked on the south side of the mine, while Jake Burgin and Thomas Cheek fired the shots in the Little North; Burgin working on the back entry and Cheek on the straight. Jeffreys completed his work and returned to the bottom of the shaft. Burgin and Cheek did not return. In due time an alarm was given, and Jopling and Ryan were called by telephone. Jopling arrived first, and immediately went into the mine with four volunteers, all of them carrying open lights. One member of Jopling's party was left at the mule stable in the mine. Jopling and the other men went forward, and soon afterwards met death by a second explosion of gas. Ryan with a second rescue party arrived at the mule stable, and learned the direction which the Jopling party had taken. Ryan directed the men with him to take one course forward while he took another. He carried an open light which a little later ignited gas, and caused a third explosion. The flame went away from him, and he was not injured. Hearing this explosion, the men who had taken the course which he suggested threw themselves upon the bottom of the entry they were in, and buried their faces in the mud, and the explosion passed over them. The flame rolled over them with a sound like thunder. The resulting heat was intense. All the members of the party were stunned, their lights were put out, and they crawled on hands and knees in darkness back to a place of safety. These events demonstrated that the mine had been filled, and was still filling, with fire damp. Safety lamps were then used,

and by their aid it was discovered that the wall between the two mines had been perforated, and that the gas was pouring into No. 16 from No. 7 in great volumes. Through persistent efforts the opening was stopped up with hay and other material, and by utilizing the ventilating apparatus to its full capacity the mine was ultimately cleared of gas. Burgin had fired all the shots in the rooms of the back entry from the sixteenth, which was next to the face, to the first, near which he was found dead. His clothing had been burned from his body. Cheek had fired all the shots in the straight entry from the sixteenth to the sixth. His body was not found until March 24th. It was lying in room 8, a room in which there had been no shot, under tons of rock which had been thrown down from the roof of the room by one of the explosions. His head and hands, which were exposed, were burned. His cap and lamp were found in room 8, where his last shot had been fired, indicating that he had run from there to the room in which there was no shot. Subsequent investigation disclosed that the right-hand shot placed by Lundy in the face of the back entry had broken through the pillar of coal between the two mines, which was only 9 or 10 feet in thickness. The opening was about 2 feet in height, and about 14 inches in width on the side of No. 16. It narrowed to a width of about 8 inches on the side of No. 7. Fire damp had been stored up in No. 7 in such quantities and under such pressure that with only this small aperture for a vent it filled and refilled No. 16, and produced the catastrophe which has been described.

The petition charged that the defendant failed in its common-law duty to furnish Thomas Cheek a safe place in which to work, and failed to comply in a number of particulars with statutory requirements designed to promote the safety of persons employed in the mine. Among the requirements which the petition alleged were violated are the following:

"All mines generating fire damp shall be kept free of standing gas, and every working place shall be carefully examined every morning with a safety lamp by a competent person, before any workman is allowed to enter therein."

"Mines generating fire damp shall be kept free of standing gas, and every working place shall be carefully examined every morning with a safety lamp by an examiner or fire boss before miners or other employes enter their respective working places. Said examiner or fire boss shall register the day of the month at the place of the workings, and also on top, in a book which shall be kept in the weighmaster's office for such special purpose; and as proof of inspection, he shall daily record all places examined in said book, and in case of danger where fire damp may have accumulated during the ab-

sence of any person or persons employed therein, said examiner or fire boss must notify the miners or those employed therein, or those who may have occasion to enter such places. And the hydrogen or fire damp generated therein must be diluted and rendered harmless before any person or persons enter such working or abandoned part of the mine with a naked light."

"Bore holes shall be kept not less than twelve feet in advance of the face of every working place, and when necessary, on the sides, if the same is driven toward and in dangerous proximity to an abandoned mine suspected of containing inflammable gases, or which is inundated with water." Gen. Stat. 1909, §§ 4986, 5006, 4987.

The answer consisted of a general denial and pleas of assumption of risk and contributory negligence. To the question, "If you find for the plaintiff, on what act or acts of negligence do you base your verdict?" the jury replied, "They did not comply with the law."

[1] At the threshold of the inquiry the plaintiff was met by the objection that there was a defect of parties plaintiff. The statute reads as follows: "For any injury to person or property occasioned by any violation of this act, or any willful failure to comply with its provisions by any owner, lessee or operator of any coal mine or opening, a right of action against the party at default shall accrue to the party injured for the direct damage sustained thereby; and in any case of loss of life by reason of such violation or willful failure, a right of action against the party at fault shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained." Gen. Stat. 1909, § 4992. While the suit was properly commenced so far as the common-law cause of action was concerned, the verdict was based upon a breach of the mining law alone, and it is now urged that the rights of two persons besides the plaintiff, the lineal heirs of Thomas Cheek, have not been litigated or determined. The statute does no more than create a right of action for loss of life sustained through violations of its provisions and designate the beneficiaries. No procedure is prescribed for the enforcement of the right, and whenever the Legislature gives an action, but does not designate the kind of action or prescribe the mode of procedure therein, such action shall be held to be the civil action of the Code of Civil Procedure, and shall be proceeded in accordingly. Gen. Stat. 1909, § 6348 (Code Civ. Proc. § 752). The result is that the mining statute takes its place among the provisions of the Code of Civil Procedure relating to death by wrongful act and becomes subject to those provisions in all respects not differentiated by the mining statute itself. The action must be brought within two years; the damages can-

not exceed \$10,000; and they are to be distributed in the same manner as personal property of the deceased. The action may be prosecuted by the personal representative of the deceased; but, if no personal representative has been appointed, it may be brought by the widow. Gen. Stat. 1909, §§ 6014, 6015 (Code Civ. Proc. §§ 419, 420). In this case the widow and lineal heirs are the widow and children of the deceased, and consequently the entire proceeding takes the same form and course as if conducted under the general code provisions relating to death by wrongful act. The defendant complains of the rejection of evidence which it offered at the trial. Some of this evidence may be considered briefly.

Experienced miners were asked to state from their knowledge of the history of the Southeast Kansas coal field their experience in breaking into other abandoned mines, and their information as to what occurred when other abandoned mines were broken into, whether or not the explosion in question was unprecedented; whether it was an ordinary or usual occurrence or otherwise; and what had been encountered when other abandoned mines had been broken into. The court no doubt felt that, if it undertook to investigate the history of the Southeast Kansas coal field, it might have great difficulty in concluding the trial. The question to which the evidence related was whether or not mine No. 7 was suspected of containing inflammable gases, and that subject was fairly capable of elucidation without the introduction of an indefinite number of collateral issues. The likelihood that an abandoned mine, when broken into, will contain inflammable gases, depends upon the presence or absence of numerous conditions which must be understood before that mine can become a precedent, and it was scarcely practicable for the court to consider the cases of all abandoned mines in Southeast Kansas which had been broken into, and which were in the minds of the various witnesses. In the course of the trial, it developed that mine No. 7 was characterized by conditions which made a consideration of other mines of slight importance. The defendant believed the evidence would tend to show that abandoned mines in that field do not generate or accumulate explosive gases. That inference could be drawn only in the case of mines sealed up so that, if gas did generate, it could not escape. But beyond this the statute quoted assumes that abandoned mines do generate such gases, and no amount of indirect and uncertain evidence of the kind proposed could contradict the event of March 18, 1911.

The evidence of several experienced miners was offered, based upon their experience in the Southeast Kansas field and their knowledge of the location of No. 7 and the conditions existing in it when it was worked, that

they would not have suspected it to contain fire damp, and would not have kept bore holes in advance of the workings of No. 16 when approaching it. This evidence would have merely shifted the issue from the state of the minds of Jopling and Ryan, and their duty, to the state of the minds, and the probable conduct, of persons not charged with official responsibility in the observance of the laws enacted to protect the lives and limbs of mine workers. Besides this, the question whether mine No. 7 was suspected of containing fire damp and the question whether bore holes should have been kept in the face of the Little North entry of No. 16 were the very matters in controversy, to be determined by the jury from the facts, and the opinions of witnesses as to what they would have thought and done were irrelevant.

[4] Testimony was rejected that the state mine inspector did not require mine operators to employ fire bosses prior to March 18, 1911. No neglect on the part of the state mine inspector to exercise his authority could excuse a violation of the law. The plaintiff proved conversations with Jopling in which he made statements showing that he not merely suspected, but expected that fire damp as well as black damp would be encountered when mine No. 7 was entered. The defendant offered to prove that in other conversations Jopling referred to black damp only, and did not refer to fire damp, when he likely would have done so had it been in his mind. The offers were rejected. The court is of the opinion that the evidence should have been received, but it does not follow that the judgment must be reversed. A perusal of the transcript, made necessary because each party contests the abstract made by the other, shows that the defendant did succeed in getting before the jury much evidence that the explosion was unprecedented; that upon breaking into other abandoned mines black damp only, and not fire damp, had been encountered; that mine No. 7 was not regarded as one in which fire damp was to be suspected; that black damp only was anticipated; that there were no fire bosses anywhere in the mining district; and that Jopling in conversations regarding breaking into No. 7 mentioned black damp only and not fire damp. Special findings favorable to the defendant were returned upon some of these matters. The jury found specially that Ryan suspected fire damp in No. 7, and, if it were necessary, Jopling's attitude might be wholly disregarded.

[14] But, besides all that has been said, the defendant did not regard the subject of sufficient importance to present any of the excluded evidence to the district court upon the hearing of the motion for a new trial in the manner prescribed by the Code of Civil Procedure. Gen. Stat. 1909, § 5901 (Code Civ. Proc. § 307). Conceding, therefore, that the court should have been more liberal in the admission of testimony relating to the va-

rious matters which have been referred to, the defendant was not materially prejudiced, and is not entitled to have the rulings of which it complains reviewed.

[15] The jury returned, among others, the following special findings of fact:

"(3) Was mine No. 7 before the explosion on March 18, 1911, suspected by the defendant, its officers, or agents of containing inflammable gases? Ans. Yes."

"(5) When mine No. 7 was being worked, was it a gassy mine? Ans. Yes."

"(17) Was the explosion caused by gas or gases coming through the hole into mine No. 16 from mine No. 7 and there mixing with air and being ignited? Ans. Yes."

"(26) Did any gas exude from mine No. 7 into mine No. 16 before the hole was blown through between the two mines? Ans. Yes; we think so.

"(27) How was the deceased, Thomas Cheek, killed? Ans. By an explosion of gas."

"(36) Before March 18, 1911, was mine No. 16 a gassy mine; that is, generating fire damp, so that a fire boss was necessary? Ans. We consider it was."

"(36) Before March 18, 1911, was mine No. 16 generating fire damp to such extent that it required examination in the working places every morning with a safety lamp by the examiner or fire boss before miners or other employes entered the working places? Ans. We consider it was."

"(47) If a hole had been bored ahead 12 feet from the face, would the ordinary and usual place for such a hole to be bored have been at a point at about the center of the entry and straight ahead? Ans. Yes."

"(71) Before the shot was fired that blew through into No. 7, how thick was the body of coal between the two mines at that point? Ans. About 9 or 10 feet.

"(72) Did John Jopling, the superintendent of mine No. 16, suspect that inflammable gas would be encountered on breaking into mine No. 7 from the Little North entry before the explosion? Ans. We think so.

"(73) Did Francis Ryan, the pit boss of mine No. 16, suspect that inflammable gas would be encountered on breaking into mine No. 7 from the Little North entry? Ans. We think so."

The defendant argues that most of these findings are not sustained by the evidence. It is sufficient, of course, if they are sustained by some competent evidence; weight and preponderance being matters for the jury, and not for this court. While every essential fact in the case was contested, there is abundant evidence, not only to support the findings of fact, but to establish liability on the ground that the working places of mine No. 16 were not examined for gas each morning, and that bore holes were not kept in advance of the face of the Little North back entry. The court has little time to spend in the discussion of disputed questions of fact, and is not disposed to summarize from a

transcript of more than 900 pages the testimony upon which the jury evidently relied; but some of the defendant's challenges may be noted, as briefly as possible, because of their bearing upon questions of law.

It is said that mine No. 7 was not a gassy mine while in operation, the only gas encountered being small quantities found after cutting through horsebacks, which are cracks in the coal veins filled with rock and clay. It is true that inflammable gas is generally found after penetrating horsebacks, but this field was noted for the number of horsebacks and slips and faults which it contained, and they were continually encountered in both No. 7 and No. 16. It was scarcely practicable to give the full history of mine No. 7, but numerous instances of men being burned at various times and in all parts of the mine were proven, and explosions of gas were so frequent that the miners became inured to them. A witness who worked in No. 7 testified: "Q. Ever have any experience there with gas? A. Yes, sir. Q. What? A. I got burned. Q. You never encountered inflammable gas except as you went through a horseback or fault? A. No, sir. Q. What was the cause of your getting burned? A. Well, it was my own fault. I went in there and lit it. Q. And you knew that in advance? A. Yes, sir. Q. And you had gone through a horseback, and your knowledge as a miner informed you you were likely to find gas there? A. I knew it was there. Q. Then from your experience in the Kansas field what would you say as to mine No. 7 being just about the average run of mine? A. The average run out in that district. Q. Was it what you would call a gassy mine? A. Not any more than any of the rest of them. Q. From your experience in the Southeast Kansas field there are very few mines that don't encounter horsebacks and faults? A. Yes, sir. Q. The fact is this field is full of them? A. Yes, sir. Q. And from practical experience you miners know you are going to encounter inflammable gas? A. Yes, sir. Q. You say that this field or district is noted for being full of faults and slips and horsebacks? A. Yes, sir."

A witness who worked in the southeast part of mine No. 7, the part nearest to mine No. 16, testified as follows: "Q. You find more gas after you pass through a horseback than you do while you are in it? A. Not necessarily. Q. Find plenty while in it? A. Yes, sir. Q. None of the gas you encountered was of sufficient quantity to be dangerous was it? A. Yes, sir. Q. Did it burn you? A. No; but it would if I hadn't protected myself. Q. Well, like all other miners, you protected yourself? A. If you want me to tell you, I can tell you. I turned the room, and drove it 30 or 40 feet and struck a horseback, and I cut that and drove it 20 feet further and struck another 2-foot horseback, and I cut through that and put in my shot, and never encountered any gas at all,

and next morning I dressed and went in there just like any other fool miner would do, and, when I got in there, it just rolled in a flame to the face, and I fell on my face, and it went clear back out through the other horseback. Q. That is customary, to roll to the face first? A. Yes, sir. The next morning I went in there, and I was just a little bit dubious, and I put my light on a crowbar, and that went out clear to the entry and popped like a cannon, and the next morning there wasn't any gas. Q. And that is your experience as far as the gas is concerned? A. Yes, sir; that part of gas. And that is the reason I said it was not always necessary to go through a horseback to encounter gas."

Manifestly the jury were not concluded by the testimony of miners, so accustomed to peril that they accepted it as a matter of course, that mine No. 7 was not considered a gassy mine. The facts spoke for themselves, and the statute quoted was enacted to break up the practice of subjecting mine workers to such hazards, although they are only occasionally burned or killed. Ordinarily in an operated mine, which is necessarily a ventilated mine, gas found upon penetrating horsebacks is not noticeable after from one to ten days. But coal is porous and fire damp travels, not only through coal, but through other strata. Small feeders are found. Horsebacks may draw from long distances, and the evidence was ample to compel the conclusion that the generation of gas does not by any means cease concurrently with the discontinuance of work in a mine.

The state mine inspector testified as follows: "Q. Now, have you a judgment, based upon your experience as a coal miner and experience and observation as a mine inspector, as to what produced the gas in mine No. 7, which you found had rushed through there at the time you were down there? A. I have. Q. What is that opinion? A. In mine No. 7 I learned that there were about 6 or 8 entries and about 100 rooms standing in that section of the mine. My opinion is that a little gas would be oozing out of that coal for a period of four years about, and sealed up, excluded from the air, and the decomposition from whatever vegetable matter and other substances that might be there, such as props, etc., and in the presence of water, would form carbureted hydrogen gas. Q. And is it inflammable gas? A. Yes, sir. Q. From your observation and experience in and about coal mines, and based upon your experience as a miner and mine inspector, have you an opinion whether or not the mines in this mining district generate more or less gas? A. I have. Q. What is that opinion? A. I think they generate carbureted hydrogen gas. Q. And is that also true of abandoned mines as well as active mines? A. It is."

Indeed, the court might well have taken

judicial notice of the fact, which was recognized by the Legislature when it framed the statute relating to bore holes. The defendant strove to show that after mine No. 7 was abandoned gas could not be bottled up in the southeast portion of the mine, but physical conditions naturally and necessarily productive of such a result were disclosed by the plaintiff's evidence. The result is that independently of the confirmatory explosion of March 18, 1911, the jury were warranted in believing that this mine generated fire damp in dangerous quantities, and that the portion nearest to No. 16 was left to fill with the gas without any outlet for its escape. It is said there is no evidence to prove that gas exuded from mine No. 7 into mine No. 16, and that a fire boss and examinations of the working places of No. 16 were necessary.

Fire damp is lighter than air, and rises to the roof of open spaces in which it is found. Cahill encountered gas on the 16th of March in the back entry, and lighted it six or seven times. He would light it about three feet from the face, and it would flash back eight or nine feet. He told Lundy that there was gas in there and for him to be careful. He was not able to say whether or not the gas came from the face of the entry. While working at the face of the back entry Lundy lighted gas twice on the 18th and twice on the 16th, and on the 16th warned another employé, who approached with an open light, not to come any closer, or he would get into gas, and to be careful with his light. After he came out of the mine on March 18th, and before Burgin and Cheek went down, Lundy told them to be careful, that there was a little gas in there. Although pressed to do so, he several times refused to say as a practical miner that the gas did not come from the old mine. On the 16th a mule driver set fire to gas 100 feet back from the face of the entry where Cahill was working. Allen Harrison worked in the mine on March 15th, 16th, and 18th, turning a room at the extremity of the straight entry. He drilled the last hole for a shot before the explosion occurred. He put his lamp to the hole three times and lighted gas. A short time before the explosion the coal was set on fire by burning gas at the face of the straight entry and on other occasions miners were burned by setting fire to gas with their open lamps. Considering the migratory nature of the gas these facts warrant the inference that it did exude from No. 7 into No. 16.

[2] The statute does not require that mines must generate gas in dangerous quantities before the precautionary measures prescribed by sections 4986 and 5006 must be observed. All mines generating fire damp shall be carefully examined every morning with a safety lamp by a fire boss before the miners and other employés enter their respective working places. This means mines generating fire

damp in appreciable quantities, the purpose being to cause the gas to be detected as soon as it appears so that danger from it may be averted. In this case Cahill and Lundy were left to look out for themselves and to warn each other and other employés, including the shot firers, of danger.

[11] It is said that the failure to examine for gas was not a proximate cause of the death of Cheek. Under the mining statute, as under the factory act, the terms, proximate cause, remote cause, efficient cause, and the like are not properly applicable in discussing the relation of an omission of duty to an event. *Alkire v. Cudahy*, 83 Kan. 373, 111 Pac. 440. Under the mining statute, if loss of life occur by reason of a violation of its terms or a willful failure to comply with its provisions, liability attaches.

[3] The requirement of the statute that working places be examined for gas every morning was designed to prevent injury from gas accumulating in such places while the workmen are away, but that was not its full purpose. The full purpose was to protect mine workers from explosions of quantities of gas which a careful examination by a competent person would reveal. In this case the explosion occurred because Jopling and Ryan neglected to avail themselves of clear evidence of the impending danger. They did not know how near they were to No. 7, although they had been expecting to break through at any time for a number of days before March 18th. By far too much gas was manifesting itself in the Little North entries. While a small slip had been found some 7 or 8 feet back, the quantity of gas was too great and its disclosure too persistent to be satisfactorily accounted for by the horseback theory. Yet, the information which regular inspections would have furnished was not utilized. The jury were warranted in believing that careful examinations by a competent person would have indicated that this gas was a portion of a large volume which was saturating the thin wall of coal separating the two mines. This being true, the explosion was caused by the omission to make such examinations in the same sense that it was caused by failure to drill revealing bore holes, and liability under the statute ensued. There is no dispute that no bore holes were driven in advance of the face of either entry. It is argued, however, that, if that had been done, the bore holes would not have disclosed the pent-up gas in the abandoned mine. The argument is based in part upon the claim that the distance between the two mines was much greater than the jury found it to be. When the state mine inspector was able to do so after the explosion, he made his way to the break through, removed the temporary stopping from the crevice, examined it, and looked through into No. 7, with the aid of an electric searchlight. He testified that the pillar

of coal left standing between the two mines after the shot was fired was about $2\frac{1}{2}$ feet thick. Then there was a slab of coal which had been cracked loose by the shot and left standing in No. 7, and altogether the distance between the two mines was in his judgment $3\frac{1}{2}$ feet. The shot which caused the break through was placed $5\frac{1}{4}$ feet deep. The manner in which the shot spent its force was described, and from this evidence the jury found that the distance between the two mines before the shot was fired was 9 or 10 feet. Ryan himself placed it at only 13 feet. On cross-examination the state mine inspector freely conceded that his estimate of distance was not perfectly accurate, but he said that a drill hole 12 feet deep would at least have gone to very soft coal if it did not go completely through, that the gas in No. 7 was very apt to seep through the wall of coal into No. 16 without any bore holes, and that with 12-foot bore holes it could have been readily detected. This evidence was corroborated in many ways; but, coming as it did from an experienced and impartial state official, it would support the findings and verdict without corroboration.

[8] It is urged that there is no evidence that Ryan suspected mine No. 7 of containing inflammable gases, and no evidence that he willfully failed to comply with the provisions of the law relating either to bore holes or examinations for gas. The state of Jopling's mind on the subject may be left out of account. The word "suspected," as used in section 4987 (page 4, *supra*), has its usual and ordinary signification. It need not involve knowledge or belief or likelihood. If Ryan entertained even a slight or vague idea of the existence of inflammable gas in No. 7, no matter how it arose, whether on weak evidence or no evidence at all (Webster's New International Dictionary, title, suspect), his duty to act under the statute was imperative. In a conversation with the shot firers, Burgin and Cheek, two or three days before the explosion, Ryan said: "We expect to cut through pretty soon into No. 7, and, if you should happen to encounter anything, go out through the Fourth East. Don't go out the main traveled way as you have been doing." He did not speak of black damp as if that were the only kind of gas he had in mind, but used a broader term which included fire damp as well. He had been pit boss of No. 7, and had full knowledge of all the conditions which prevailed there. He knew the topography of the mine. He knew that the southeast portion lying next to No. 16 generated fire damp. He said he lighted gas there himself, and on one occasion he wrapped up in linseed oil the head of a miner who had been burned there. On Tuesday or Wednesday before the explosion he recognized his duty under the statute by ordering bore holes to be placed in the faces of the Little North entries. He

notified the men working in each entry, and told them to notify their partners on the other shift. No doubt he was astounded at the quantity of gas which was released from No. 7, but the jury were perfectly fair to him when they accredited him with a notion that some fire damp might possibly be encountered there. It is insisted that he could not have suspected explosive gas in No. 7 because he went to the rescue of Burgin and Cheek with other men for whose safety he was responsible with open lights. No doubt the jury were satisfied that he believed the mine had been cleared of gas by the explosion.

[7] Section 4992, quoted above (page 5), gives a right of action in case of loss of life occasioned by "any violation" of the act, or by "willful failure" to comply with its provisions. The Legislature had in mind active and passive conduct and intended to cover both. No voluntary act in violation of the statute is excused, and no inaction where the statute requires something to be done is excused unless it be involuntary.

[8] In the case of omissions neither bad purpose nor determined obstinacy is required, and one charged with the duty to observe the statute who intentionally suffers mining operations to proceed without taking prescribed precautionary measures when the circumstances demand that they should be taken is guilty of a willful failure within the meaning of the law. Ryan was foreman of the mine, and said he kept in close touch with the work. He was back to the face of the Little North entry on Wednesday, on Thursday, and on Saturday, the day of the explosion. No fire boss had ever been appointed to examine the working places of the mine for fire damp, and he said that there were no bore holes in the face of the entry the last time he was there. Under these circumstances, it is clear that he voluntarily chose to disregard the plain provisions of the law.

Error is assigned because the court refused to give certain instructions to the jury requested by the defendant. Two of these instructions depended upon a finding that mine No. 7 was not suspected of containing inflammable gases, and the third depended upon a finding that a drill hole 12 feet deep would not have reached through the pillar of coal between the two mines. The jury having returned contrary findings, the propriety of these instructions need not be considered.

Instructions given to the jury are criticised.

The court advised the jury that assumed risk and contributory negligence are not available as defenses to the charge that the defendant violated the safety provisions of the mining law. This instruction was based upon the decisions of this court in the following cases: Assumed risk: *Manufacturing Co. v. Bloom*, 76 Kan. 127, 90 Pac. 821, 11

L. R. A. (N. S.) 225, 123 Am. St. Rep. 123; Fowler v. Enzenperger, 77 Kan. 408, 413, 94 Pac. 995, 15 L. R. A. (N. S.) 794; Brick Co. v. Stark, 77 Kan. 648, 95 Pac. 1047; Lewis v. Barton, 82 Kan. 163, 107 Pac. 783; Bailey v. Spelter Co., 83 Kan. 230, 109 Pac. 791; Sibley v. Cotton-Mills Co., 85 Kan. 256, 259, 116 Pac. 889. Contributory negligence: Caspar v. Lewin, 82 Kan. 604, 109 Pac. 657; Gambill v. Bowen, 82 Kan. 840, 109 Pac. 670; Bailey v. Spelter Co., 83 Kan. 230, 109 Pac. 791; Sibley v. Cotton-Mills Co., 85 Kan. 256, 259, 116 Pac. 889; Smith v. Street Railway Co., 86 Kan. 982, 122 Pac. 896. The statute makes no exception of the widows and lineal heirs of negligent persons who lose their lives through nonobservance of its provisions, and consequently the court can make none. It is said that legislation to protect a person from the consequences of his own negligent conduct is not justifiable as a constitutional exercise of the police power. This question was fully considered in the Caspar-Lewin Case. It is not the purpose of the mining statute merely to protect miners from the consequences of their own carelessness. It bears the same relation to the business of mining that the factory act bears to the business of manufacturing. Concerning the purpose of the factory act, the court said: "It is to stop the insufferable waste of human life and limb which has been the universal accompaniment of the conduct of manufacturing industries. The law is a police regulation, adopted to reform the inhumanity of factory methods, and to prevent the casting into the world of dependent cripples and widows and orphans left without means of support. This purpose includes the reduction of the number of casualties to the careless as well as to the prudent. If the prescribed precautions be taken and the required safeguards be installed, killing and maiming will cease, or at least will be reduced to a minimum." Caspar v. Lewin, 82 Kan. 604, 629, 109 Pac. 657.

[9] The court instructed the jury that a corporation must act through agents; that, if a duty which the corporation must perform be delegated to one of its agents, he becomes a vice principal, taking the place of the corporation itself; and that the corporation is liable if he fails to perform the duty delegated to him. It is said that the instruction is erroneous as applied to the facts of this case, in that, if a miner has been ordered by the mine foreman to place bore holes in the face of an entry and the miner has failed to do so, the corporation is not liable for a willful failure to comply with the law unless the foreman knew that his order had not been obeyed, or should have known the fact in the exercise of reasonable diligence. The statute is not open to such an interpretation. Given dangerous proximity to an abandoned mine suspected

of containing inflammable gases, bore holes must be kept not less than 12 feet in advance of the work. The defendant was obliged as a matter of law to know the boundaries of its mines and the thickness of the wall of coal between them. Plaster Co. v. Reedy, 74 Kan. 57, 85 Pac. 824; Little v. Norton, 83 Kan. 232, 109 Pac. 768. From the time the proximity of one to the other became dangerous the duty was absolute not only to drill bore holes, but to keep them drilled in advance of the work, and that obligation could not be discharged by giving an order which was disobeyed. Whenever the law requires the employer himself to take a precautionary measure for the safety of his employes it is not enough that he make provision for the performance of the act. The precautionary act itself must be performed. Brick Co. v. Shanks, 69 Kan. 306, 76 Pac. 856; Brice-Nash v. Salt Co., 79 Kan. 110, 98 Pac. 768, 19 L. R. A. (N. S.) 749, 131 Am. St. Rep. 284; Hanson v. Railway Co., 83 Kan. 553, 112 Pac. 152, 31 L. R. A. (N. S.) 624. Besides this, the objection to the instruction is not well founded because Ryan admitted that he knew on Saturday that the bore holes which he had ordered on Tuesday or Wednesday had not been drilled.

[13] The defendant argues that the case was confused by the multiplicity of issues presented both by the pleadings and by the instructions. The plaintiff, however, had the right to plead as many grounds of negligence as she believed contributed to her husband's death, whether based on the common law or the statute, to sustain them, if possible, by proof, and to have the law applicable to her entire case stated to the jury. Sibley v. Cotton-Mills Co., 85 Kan. 256, 116 Pac. 889; Raines v. Stone, 87 Kan. 116, 123 Pac. 871; Warfield v. Morgan, 86 Kan. 524, 121 Pac. 489. All this was done in an orderly manner, and there is nothing in the result to indicate that the jury were led astray because of the magnitude or intricacy of the proceeding, or the joinder of common-law and statutory causes of action.

[12] It is argued that the mining statute, which covers the conduct of the mining industry quite fully, entirely supersedes the common law so far as it relates to the duty of a mineowner or operator to furnish his employes a safe place in which to work. In the Caspar-Lewin Case it was said: "The common law already gave a right of action to some employes under some circumstances. If the master failed to exercise reasonable care to provide reasonable safeguards, and if the servant did not assume the risk, and if he was not guilty of contributory negligence, then a liability existed. The sole purpose of the statute was to wipe out this narrow and conditional liability and substitute another." 82 Kan. 604, 628, 109 Pac. 657,

666. The court was there speaking of the nature of the liability imposed by the factory act, and was endeavoring to point out the distinctions between that liability and liability at common law. The destruction of one kind of liability and the creation of another in its stead were not under consideration. The factory act and mining act give additional rights and impose additional duties beyond those recognized by the common law (*Gibson v. Packing Box Co.*, 85 Kan. 346, 353, 116 Pac. 502, Ann. Cas. 1912D, 1103), but the common law was not abrogated. If, however, the common law were superseded by the statute, the defendant's situation would not be improved, because the jury based its verdict on noncompliance with the statute.

[10] The court instructed the jury as follows: "You will note that the language employed in the statute as to the boring of holes in advance of the working place is 'not less than 12 feet in advance of the face of every working place.' Now I instruct you that if you find from the evidence in this case that the defendant was driving an entry, or working place, toward and in close proximity to an abandoned mine suspected of containing inflammable gases, then it was the duty of said defendant to make bore holes such distance as was reasonably necessary to ascertain whether or not such abandoned mine did in fact contain inflammable gases. It was not required to drill ahead an unreasonable distance, nor can it be said that a drilling 12 feet ahead only would be sufficient. If the conditions and circumstances were such that it would appear that the dangerous and unsafe condition would have been discovered, and the place made safe by drilling a reasonable distance beyond a distance of 12 feet." The writer is of the opinion that the instruction correctly interpreted the statute which prescribes a minimum, and not a maximum, measure of protection to miners working in dangerous proximity to an abandoned mine suspected of containing inflammable gas. The other members of the court are of a contrary opinion, and the decision is that the requirement of the statute is satisfied if 12-foot bore holes are kept in advance of the working places. The error committed in giving the instruction is wholly immaterial, however, since bore holes 9 or 10 feet deep would have reached the face of No. 7 and none whatever were drilled.

The court refused to submit to the jury several special questions asked by the defendant designed to develop the fact that it was not the usual or customary practice in the Southeast Kansas coal field to bore ahead when approaching abandoned mines. The defendant's conduct could not be justified or palliated by any custom of mineowners to disregard the law. Some other questions

were not submitted; but, if answers favorable to the defendant had been returned to them, the verdict would not be affected. For the same reason no error was committed in refusing to require the jury to answer certain questions more specifically.

Other assignments of error have been considered, and none of them require a reversal.

The judgment of the district court is affirmed. All the Justices concurring.

STATE ex rel. DAWSON, Atty. Gen., v.
ANTHONY FAIR ASS'N.

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. GAMING (§ 1*)—NUISANCE (§ 61*)—
"GAMBLING."

Ordinarily bookmaking and pool selling, by which bets on horse races are recorded and tickets sold, showing the purchaser's proportion of the money won on such races, constitute gambling, and the place where it is carried on is a nuisance.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 1; Dec. Dig. § 1;* *Nuisance*, Cent. Dig. §§ 142-151; Dec. Dig. § 61.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3023-3028; vol. 8, p. 7668.]

2. AGRICULTURE (§ 4*)—FAIR ASSOCIATIONS
—FORFEITURE OF FRANCHISE—GAMBLING.

A fair association, chartered by the state under authority of the statute to form private corporations for the encouragement of agriculture and horticulture, has no right or authority to sell the privilege of using its buildings for pool selling and bookmaking, and such association will, at the suit of the state, be ousted from the exercise of such power.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

3. AGRICULTURE (§ 4*)—FAIR ASSOCIATION—
FORFEITURE OF FRANCHISE—GROUNDS—QUO
WARRANTO.

The state, which gave such an association its corporate life, may require it to refrain from conduct clearly against good morals and which ordinarily constitute a crime; and such association cannot demand that the courts enter upon a critical examination of the effect and validity of statutes passed for the general purpose of suppressing gambling in order to remove the seal of condemnation.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

Original proceedings in quo warranto by the State on the relation of John S. Dawson, Attorney General, against the Anthony Fair Association. Demurrer overruled.

Jno. S. Dawson, Atty. Gen., and F. P. Lindsay, of Topeka, for plaintiff. T. A. Nofztger and George Gardner, both of Wichita, and Fred Washbon, of Anthony, for defendant.

WEST, J. The state on the relation of the Attorney General brings this action to oust the Anthony Fair Association from its exercise of the right to acquiesce in and authorize pool selling and bookmaking. The charge is: That the defendant was chartered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"to give county fairs annually, also race meetings at Anthony, Kan., buy and own and hold real estate and personalty necessary for such purposes, and to do such and every lawful thing necessary for the proper carrying out of said purposes." That the defendant, in the month of August of each year since its organization, has held a race meet and fair in an inclosure consisting of about 20 acres, at which meeting, during a period of four days, the association by and through its officers, servants, and agents, and by the consent of its directors and managers, has erected near the grand stand, within the inclosure of the fair ground, but immediately outside of the race track, a large shed which is divided into booths, and has at each of said meetings and fairs sold to certain persons and issued the right to register and record bets and wagers and the selling of pools upon the result of the races carried on within the race track, and that there has been at such fairs and race meetings from one to three persons engaged in the selling of pools and in bookmaking in such booths, issuing to the party purchasing them a ticket, and registering the same, and after the race paying out the amount evidenced by such ticket, which depended upon the result of such race. That, during the various race meetings, large amounts of money have been hazarded and lost as the result of races through such system of selling pools. To this complaint a demurrer was filed, and it is argued by the defendant fair association that the Legislature has practically licensed pool selling by fair associations, and hence that the amended petition does not state a cause of action.

Chapter 15 of the Laws of 1874, an act relating to agricultural organizations, provided that: "Any person who shall sell pools, engage in any games of chance or gambling devices of any kind, * * * upon any fair ground in this state during the holding of any fair and any officer of any fair association who shall authorize or permit such pool selling, * * * shall upon conviction be fined not less than \$25 nor more than \$100 for each and every offense." It is contended that this provision was nullified by chapter 155 of Laws of 1895, an act to prohibit bookmaking and pool selling. This act makes it a misdemeanor punishable by imprisonment in the county jail for one year and by fine of \$1,000 to keep any room, shed, booth, or building, or to occupy one upon any public or private grounds within the state with any book, instrument, or device for the purpose of recording or registering bets or wagers or selling pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast which is to be made or take place within or beyond the limits of this state. A similar penalty is prescribed for any owner, lessee, or occupant of any tent, booth, or building who owns or permits

the same to be used or occupied for the purposes already mentioned. The act contains the following exception: "Except within the inclosure of a race track and upon races or trials of speed being conducted within the said inclosure: Provided, that the exception herein shall not apply to any race track or inclosure for more than two weeks in any one year."

[1] It is insisted that this act covers the entire ground of the one first referred to, and therefore by implication repeals it and amounts to the last expression of the legislative will to the effect that pool selling upon races within the inclosure of a race track is legal for two weeks in any one year.

It is interesting to note that in 1895 the Missouri Legislature passed an act (Laws 1895, p. 150) almost identical with the one here involved, and in *State v. Walsh*, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231, it was held unconstitutional as being in violation of the provisions of the Missouri Constitution against special laws granting exclusive rights, privileges, or immunities. In the opinion it was said: "If such an act as that being discussed can stand the test of judicial scrutiny, then the above-cited provisions of section 53, aforesaid, relative to prohibition against granting by special law any special or exclusive right, privilege, or immunity, will have been ordained in vain. Nay, more, if such legislation as that here presented could be sanctioned, then it would be an easy legislative task to provide for the punishment of robbery, arson, murder, indeed, the whole category of crimes, with a proviso that nothing in this act shall be so construed as to prohibit or make it unlawful for any person 'to rob, burn, or murder,' on the premises or within the limits or inclosure of a regular race course," etc. This ruling was affirmed in *State v. Thomas*, 138 Mo. 95, 39 S. W. 481. However, from the opinion in *State v. Thompson*, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468, it appears that in 1897 the Missouri Legislature departed from the plan adopted by Missouri and Kansas in 1895, and passed an act against pool selling and the like without first having obtained a license, and providing that "any person of good reputation," desiring to obtain a license to sell pools, should apply in writing under oath to the State Auditor, who, "if satisfied of the good character" of such an applicant and of the good repute of the race course or fair ground, might issue a license. This was held to be constitutional, although it was expressly said in the opinion (160 Mo. 341, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468) that it was apparently clear that bookmaking and pool selling within the scope of the act were gaming or gambling. It was also noted that it had been held in *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471, that St. Louis could license bawdyhouses, and that a

license taken out in conformity with the ordinance would shield the holder from criminal proceedings by the state. In February, 1902, the same court in *Ullman v. St. Louis Fair Ass'n*, 167 Mo. 273, 283, 66 S. W. 949, 951, 56 L. R. A. 606, 609, decided that one who paid the owner of a race track for the exclusive business of bookmaking and pool selling could not, after enjoying his privilege for a time, abandon it and recover back the money paid in excess of the pro rata amount. In the opinion it was said that it was not to be questioned that the phrases "bookmaking" and "pool selling" are but other names for betting and gambling, and it was held that the courts should not enforce the contract, as the plaintiff was particeps criminis and not entitled to the assistance of judicial process. The Court of Appeals of the District of Columbia in *Miller v. United States*, 6 App. D. C. 6, decided that bookmaking on a horse race is a game of chance or gambling device or contrivance within the meaning of the act of Congress of January 31, 1883, and that a bookmaker's booth is a place for gambling within the meaning of that act, and common-law authorities, as far back as the statute of Anne, were cited to show that a horse race is a game of chance where wagers have been made upon it. In *Moulton v. Westchester Racing Ass'n* (Sup.) 84 N. Y. Supp. 871, a New York statute of 1895, providing that money bet on a race course or on the result of any race could be recovered in a civil action by the person with whom the bet was made, was considered. It was suggested in the opinion that the Legislature in its wisdom had appointed the forfeiture of money wagered the sole sanction for the constitutional prohibition against gambling, so that on race tracks only the operation of the Penal Code regarding gambling was suspended, and betting on horse racing was not, as elsewhere throughout the state, a public nuisance and a crime. The court said: "Such a segregation of practices, called in their recognition contrary to good morals, is novel, though not wholly new in this country. It has been tried and abandoned in one state of the Union, and is said to be in vogue in the Orient and elsewhere abroad as to a less namable occupation." 84 N. Y. Supp. 874. It was stated that whether such legislation, making "one rule for rich and poor, for the favorite at court and the countryman at the plow," was constitutional, need not be determined.

In *Levy v. Kansas City*, 168 Fed. 524, 93 C. C. A. 523, 22 L. R. A. (N. S.) 862, the Court of Appeals of the Eighth circuit upheld the trial court in sustaining a demurrer to a complaint brought to recover back a license fee alleged to have been accepted from plaintiff and wrongfully retained by defendant after repudiation of the privileges granted by the license, on the ground that no action may

be maintained which arises out of the plaintiff's moral turpitude or out of his violation of a general law enacted to effectuate the public policy of a state or nation. Kansas City granted Levy a license to carry on pool selling and bookmaking for one year for \$5,000, and the second day after he had paid for it stopped him and prevented him from carrying on his business, and he sued the city to recover back the \$5,000. The court referred to the act of 1895 making pool selling unlawful, except within the inclosure of a race track not exceeding two weeks in any year, and said that, although the action of the city in taking Levy's money and then depriving him of it two days later was abhorrent to the sense of fairness and justice and despicable, nevertheless he had knowingly engaged in a contract which involved his own moral turpitude or the violation of a general law enacted to carry into effect a public policy, and therefore he could not be heard to complain. It was held that section 50 of the act of 1903 (chapter 122), authorizing cities to restrain, prohibit, and suppress games and gambling houses, was not intended to modify or repeal the act of 1895, and did not repeal it.

In *Levy v. Kansas City*, 74 Kan. 861, 86 Pac. 149, it appeared that the same plaintiff sought to enjoin the city from interfering with his conducting a gambling business pursuant to the same license involved in the case just referred to. The court said that this was probably the first instance in the history of the state that a professional criminal had had the effrontery to apply to a court of equity for protection from arrest and prosecution while pursuing his criminal vocation. "It would indeed be a sad commentary on our jurisprudence if a justification could be found for holding that a license to commit crime, issued by a city administration, could be made the basis of equitable interference for the protection of the holder from public prosecution while he continues to violate the law." 74 Kan. 862, 86 Pac. 150.

[2, 3] That a fair association, whose corporate life has been granted by the state, should claim the right to authorize and rent a place for gambling at its fair grounds is somewhat novel. The Legislature of 1895 also enacted chapter 153, an act to prohibit gambling and to repeal certain sections of the General Statutes of 1863, and providing that any person who shall either directly or indirectly bet any money or property at any common gaming house or at any place at which persons are accustomed to resort for gambling purposes, or any place kept for the purpose of being used for the purpose of gambling, whether such betting be upon any game of skill or chance, either with or without cards or dice or by the use of any kind of device for determining chance, shall be guilty of a felony. Also chapter 154 provid-

ing for the destruction of all gaming tables or devices. Also chapter 151 making it a felony to set up or keep any table or gaming device adapted, devised, or designed for the purpose of playing any game of chance for money or property, and making it a felony for any person knowingly to lease or rent to another any house, building, shed, booth, lot, or other place for any of the unlawful uses referred to, and declaring such places nuisances, and providing for their abatement. Chapter 263 of Laws of 1907 declares such places common nuisances and provides for their abatement and the destruction of the property therein found, and authorizes the county attorney or Attorney General to proceed as in case of violation of the prohibitory act, when notified that such places are being conducted. This legislation will be found in General Statutes of 1909, §§ 2725 to 2739. In addition to this, section 2745 makes it a misdemeanor to set up or keep a common gaming house, and section 2746 makes it a misdemeanor to knowingly lease or rent to another any house or building for the purpose of setting up or keeping therein any gaming tables or devices for use as a gaming table. From these various provisions, it is readily seen that gambling in any form has not been a favorite with the Legislature of this state.

The corporation act (Gen. Stat. 1909, § 1699) authorizes the formation of a private corporation for "the encouragement of agriculture and horticulture." Just how agriculture, much less horticulture, could be encouraged by betting on horse races so that, as the amended petition alleges and the demurrer admits, "there has been a large amount of money in large sums received, hazarded, and lost on the result of races through such device and system of selling pools," is not self-evident, and no solution is suggested by the defendant. Certain it is that nothing found in the charter granted this association can be construed to authorize it to lease its buildings for and profit by conduct which the common judgment of modern times deems immoral, and which the Legislature has generally denounced as a crime, or which makes such buildings common nuisances.

True, it is argued that pool selling at the time and place charged is legalized by the act of 1895, and doubtless the theory is that, if the state permits natural persons to sell pools, it cannot or should not prevent an artificial person from renting a place for such selling. We do not deem it imperative to decide at this time whether an act making gambling a crime at all times and places, punishable by severe penalties, and excepting out two weeks in each year at certain locations, is valid, or whether such a statute is of "uniform operation throughout the state" (Const. art. 2, § 17; *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915), or whether, if valid, it repeals the act of 1874. It is necessary only to hold that, aside from such consideration, the state has the right to say that a fair association, to which it has given corporate life in order to encourage agriculture and horticulture, shall refrain from conduct which is clearly against good morals and is a crime under ordinary circumstances, and which cannot escape the condemnation of criminality, save, if at all, by a critical examination into the validity and effect of statutes enacted for the general purpose of suppressing gambling.

"Willful assumptions and intentional usurpations of corporate authority or any abuse, misuse, or nonuse of its franchises, justify a proceeding by or in the nature of quo warranto, and a judgment of forfeiture of the franchise possessed. * * * It is well settled that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated, and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken. * * * And it (quo warranto) may be resorted to in cases of public nuisance such as affect or endanger the public safety or convenience and require immediate judicial interposition." *Beach on Private Corporations*, § 434.

As to the second cause of action, no question is presented, and nothing need be said.

The demurrer to the first cause of action is overruled. All the Justices concurring.

SINGER v. MISSOULA ST. RY. CO. et al. (Supreme Court of Montana. April 7, 1913.)

1. STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A street railway maintained a single track in the middle of a bridge about 1,000 feet long, with a roadway nearly 29 feet wide. One end of the bridge was higher than the other. A traveler on horseback entered on the bridge, and when he had reached a point about 300 feet from the end he observed a car approaching from the opposite direction, a distance of about 300 feet. At the sight of the car the horse became restive. The traveler struggled to hold it under control, but was unable to do so, and the horse entered on the rails and was struck by the car. *Held*, that the traveler was not guilty of contributory negligence, as a matter of law, either in going on the bridge, or in remaining on it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL—QUESTION FOR JURY.

Whether a motorman, operating a car colliding with one riding a horse which became unmanageable, was guilty of actionable negligence in failing to take proper precautions to avoid the collision after discovering the peril, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

3. STREET RAILROADS (§ 90*)—OPERATION—OBLIGATION OF MOTORMAN.

A motorman need not stop his car on first observing one approaching on horseback, or on observing that the horse is becoming unmanageable; but he is chargeable with the duty, on observing that the horse is likely to go in front of the car, to take immediate precautions to avoid a collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-193; Dec. Dig. § 90.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by George Singer against the Missoula Street Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. M. Bickford, V. S. Kutchin, and Wm. F. Wayne, all of Missoula, for appellants. Harry H. Parsons, of Missoula, for respondent.

BRANTLY, C. J. This is an action for damages for personal injuries sustained by the plaintiff in a collision with one of the electric cars of the defendant railway company upon Higgins avenue bridge, in the city of Missoula, on January 7, 1911. The defendant Miner was the motorman in charge of and operating the car at the time of the accident. The bridge extends across the Missoula river at the foot of Higgins avenue, connecting the city proper with South Missoula. It is 1,023.6 feet in length, and consists of a roadway, 28.90 feet in width, with a footway on either side separated from it by railings. A single car track, 4 feet in

width, lies in the middle of the roadway. Allowing for the overhang of a car when passing over the track, there is left between it and the footway railing on either side a clearance for vehicles, etc., of 10.6 feet. The south end of the bridge is 7.54 feet higher than the north end. From the south the roadway ascends on a grade of about 1 per cent. for a distance of 174 feet, and then descends on substantially the same grade to the north. After a car passing in either direction reaches the highest point, the power is shut off, and it is allowed to drift down the incline; the motorman controlling the speed by means of air brakes. The plaintiff's home is in South Missoula. On the day of the accident he started from Missoula to go to his home. He was riding a heavy draught horse, weighing about 1,500 pounds, which had on it a light single harness with a blind bridle. He did not have a saddle, but was using a piece of blanket instead. The different parts of the harness were so secured as not to interfere with the horse's movements. When the plaintiff had reached a point on the bridge about 300 feet from the north end, he observed a car approaching from the opposite direction at a distance of about 300 feet. At the sight of the car, and presumably owing to the noise created by its movement, the horse became restive and attempted to turn and run. The plaintiff struggled to hold it under control, but was not able to subdue it. The result was that it got between the rails as the car was about to pass, and was killed by collision therewith; the plaintiff being thrown to the roadway and seriously injured.

The substantive issue made by the pleadings was whether defendant motorman was guilty of negligence in failing to stop the car in time to avoid the collision, and this negligence was the proximate cause of the injury; the defendants alleging that plaintiff's own negligence was a contributing cause. The jury found for the plaintiff and assessed his damages at the sum of \$4,390. The appeal is from the judgment.

[1] The only question submitted for decision is whether there was any evidence justifying the submission of the case to the jury. The instructions submitted to the jury are not in the record. It is not, therefore, apparent what was the court's view of the rule of law applicable. The theory of counsel for defendants, as presented in their brief, proceeds upon the assumption that the right of the railway company to the use of the bridge is so far superior to that of another person that when a car is passing over it such other person must give to it the exclusive right of way, or be subject to the imputation of negligence, which will preclude a recovery for any injury which he may sustain from a collision or other accident, unless he can show that the operator of the car

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

has discovered his presence and has failed, when a condition of peril has intervened, to use such means as are in his power to avoid the accident. They insist that the burden was upon the plaintiff to show (1) that his position of peril was discovered by the motorman, and (2) that the latter was able by the use of ordinary care to avoid the accident. In other words, the plaintiff, first by going upon the bridge when a car was approaching him, and, second, by failing to retire from it when his horse became restive and unmanageable, put himself in the position of a trespasser upon the rights of the company, which, for this reason, owed him no duty other than to use ordinary care to avoid injuring him, after his position of peril was discovered. They thus invoke the rule of the last clear chance, and argue that there is no evidence tending to show, either that the motorman discovered the position of plaintiff, or that, if he did, he failed to use ordinary care to avoid the collision. Whether the rule is technically applicable to a case of this kind, we shall not undertake to determine. We do not think plaintiff was guilty of negligence, as a matter of law, either in going upon the bridge, or in remaining on it, though he saw a car approaching. But, accepting the theory of counsel as correct, we nevertheless think the evidence made a case for the jury. It may be summarized, in part, as follows:

[2] The plaintiff had advanced from the north end of the bridge a distance of 300 feet. The horse was a gentle work horse, accustomed to being on the streets when cars were passing. It began to exhibit fright when the car was at a distance of 300 feet away. Passengers upon the car noticed this fact. At that time it did not appear to be under plaintiff's control. It was then "prancing" back and forth across the track. From that point on there was no change in the speed of the car; the motorman making no effort to check or stop it. It proceeded at the same rate until it struck the horse. One witness, who was a passenger, stated: "I noticed at the time we were going fast across the bridge. * * * We went as fast as we go on Third street going out to the fort, * * * and on Third street they go as high as 20 and 25 miles an hour." This last statement was made by a witness who had theretofore been employed as a motorman by the defendant company. Another witness stated that the plaintiff tried to keep the horse off the track, but that it backed upon it two or three times, and plaintiff could not hold it. This witness testified: "I saw the motorman at that time. He did not do anything at all until, I should say, 10 seconds; then he threw the current off. He stood there practically paralyzed, it appeared to me, I should say for about 10 seconds. I should not say how far the car had gone past the horse before he threw the current.

As to my best judgment upon that, he may have gone 30 feet. Right after he hit the horse he stood still, my recollection is. After he had gone about 30 feet, he threw the handle round like that. At that time he was going at full speed. * * * In my opinion, there was not any lessening of speed from the time I first saw the car at the south end of the bridge until the time that it hit the horse." This witness observed the accident from the upper floor of a building at the north end of the bridge, 400 or 500 feet distant from the place of the accident, but had a clear view. He stated further that the car was 300 feet away when the horse began to be restive. "As the car drew nearer, the horse became more frightened. * * * The horse backed on the track two or three times, but Singer tried to keep him off. Singer could not hold him. A rule of the company requires cars to be moved over the bridge, when teams are upon it, at a speed not to exceed 6 miles an hour, and at such times the cars must be under complete control. At the time of the accident there were four teams upon the bridge.

The motorman in charge of the car stated that he was drifting at the rate of 5 or 6 miles an hour, without power; that he had the car under control; that under such circumstances a car could be stopped in about 40 feet or the length of the car; that he did not see the horse on the track at all; that he first saw it 300 or 400 feet away; that at a distance of 30 feet the horse began to dance toward the track; that he then used all the emergency appliances to bring the car to a stop; that the horse threw up its head and began to dance toward the track, and was struck by the corner of the car as it was about to pass; that he did not know of anything else he could have done to avoid the collision; that in observing the horse he supposed that when it got right to him it would do like lots of other horses and "shoot past" him. A car allowed to drift from the highest point of the bridge without restraint would go at the rate of 20 or 25 miles an hour when within 250 feet of the north end of the bridge. Sometimes when the bridge was clear, the motorman would make up time in crossing. The car was of an improved pattern and fitted with the most approved appliances. The motorman in charge had had an experience of two months, having learned to operate a car within that time. The car struck the horse on the rump with force sufficient to turn it end for end, and threw it off the track into the roadway, killing it. The vestibule of the car was broken in. When the car was finally stopped, it was from 90 to 120 feet beyond the point of collision.

[3] The evidence is voluminous. There is much conflict in the statements of the different witnesses as to the particulars of the

incident; but the foregoing statement of it is sufficient to demonstrate that, upon the assumption that plaintiff negligently put himself in a position of peril and remained there, whereas by retreating from the bridge he could have avoided the accident and thus saved himself, there was presented a case for the jury upon the question whether the motorman took such precautions as he ought to avoid the collision, after he discovered plaintiff's perilous position. The facts bring the case clearly within the rule as applied by this court in *Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 97 Pac. 944, 19 L. R. A. (N. S.) 446, and 41 Mont. 480, 110 Pac. 228. Of course, it was not incumbent upon the motorman to stop the car when he first observed the plaintiff approaching from the north, or even when he observed that the horse was becoming unmanageable. It was nevertheless his duty, when he observed that the horse was likely to carry the plaintiff in front of the car, and therefore into a perilous position, immediately to take such precautions as he could to avoid a collision. The evidence justified a finding that he failed to do so.

The judgment is therefore affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

STATE v. TUDOR.

(Supreme Court of Montana. April 1, 1913.)

1. GAMING (§ 79*)—CRIMINAL OFFENSES—STATUTES—CONSTRUCTION.

Rev. Codes, § 8416, punishing any person who carries on, opens, or conducts or causes to be conducted, or operates or runs, as principal or agent, any game of chance for money, makes it a crime for any person to open, carry on, or conduct any games of chance, including those who act as agents or employés as distinguished from mere players.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 206-217; Dec. Dig. § 79.*]

2. INDICTMENT AND INFORMATION (§ 120*)—INFORMATION—SUFFICIENCY—SURPLUSAGE.

An information, alleging that accused carried on, opened, caused to be opened, conducted, caused to be conducted, operated, and ran, "as owner and proprietor thereof," a game of chance for money, charges a violation of Rev. Codes, § 8416, punishing gaming; the quoted words being surplusage and not restricting or enlarging the meaning of the information.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 315; Dec. Dig. § 120.*]

3. INDICTMENT AND INFORMATION (§ 196*)—OBJECTIONS—DEMURRER—WAIVER.

The purpose of Rev. Codes, §§ 9157, 9200, 9201, 9208, providing that any defect in matter of form not prejudicing the substantial right of accused does not render an information insufficient, and enumerating the objections which may be made by demurrer, distinctly specifying the grounds of objection, is to require accused to raise questions touching the form of the information, not going to

the jurisdiction of the court or the sufficiency of the facts, by demurrer, and where he fails to do so the objections are waived.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

4. CRIMINAL LAW (§ 1163*)—APPEAL—QUESTIONS REVIEWABLE.

Where counsel for accused, alleging error in rulings on evidence sought to be elicited on cross-examination, does not point out wherein the rulings are prejudicial, the court on appeal need not make a detailed examination of the rulings to determine whether they in fact are prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 8090-8099; Dec. Dig. § 1163.*]

5. CRIMINAL LAW (§ 1170½*)—EVIDENCE—PREJUDICIAL ERROR.

Errors in rulings on the cross-examination of state's witnesses, employed by third persons to detect crimes and furnish evidence, are not prejudicial where substantially all the pertinent facts were brought before the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 8129-8135; Dec. Dig. § 1170½.*]

6. CRIMINAL LAW (§ 386*)—COMPETENCY—DETECTIVES—DECOYS.

The testimony of witnesses employed to detect crimes and furnish evidence is competent, though they acted as decoys, taking part in the criminal transaction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 768, 875; Dec. Dig. § 386.*]

7. CRIMINAL LAW (§ 562*)—APPEAL—EVIDENCE—QUESTION FOR JURY.

A conviction sustained by the testimony of two detectives and contradicted by the testimony of accused and a third person will not be disturbed; it being for the jury to ascertain the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1253, 1263; Dec. Dig. § 562.*]

8. CRIMINAL LAW (§ 804*)—INSTRUCTIONS—WRITTEN INSTRUCTIONS—WAIVER.

Under Rev. Codes, § 9271, requiring the instructions in criminal cases to be in writing and filed, the court must submit all instructions in writing, in the absence of a waiver of written instructions by the parties.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1948-1957; Dec. Dig. § 804.*]

9. CRIMINAL LAW (§ 1088*)—APPEAL—RECORD.

Where the record on appeal is silent on the question whether the instructions were reduced to writing, except the heading "Oral Instructions of the Court to the Jury," followed by the instructions, and contains no intimation that the court did not reduce the instructions to writing as required by statute, it does not show that the instructions were oral, and the assignment of accused's counsel in his brief to the effect that they were oral will be disregarded.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2676, 2746-2751, 2757, 2766, 2782-2802, 2899; Dec. Dig. § 1088.*]

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Overton Tudor was convicted of gaming, and he appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

J. L. Staats, of Bozeman, for appellant. D. M. Kelly, Atty. Gen., and S. P. Wilson, Asst. Atty. Gen., for the State.

BRANTLY, C. J. The defendant was charged by information by the county attorney of Gallatin county with the crime of gaming, as follows: "That the said Overton Tudor, in the city of Bozeman, in the county of Gallatin, state of Montana, on or about the 1st day of November, A. D. 1911, * * * did then and there willfully and unlawfully carry on, open and cause to be open, conduct and cause to be conducted, operate and run, as owner and proprietor thereof, a certain gambling game, or game of chance, commonly called studhorse poker, then and there played with cards for money, checks and representatives of value," etc. He was found guilty and sentenced to pay a fine of \$500 and to undergo imprisonment in the county jail for a term of seven months and until the fine should be paid. This appeal is from the judgment. The cause was submitted upon briefs, without oral argument.

[1, 2] 1. The contention is made that the court erred in overruling defendant's demurrer to the information. The grounds of the demurrer are (1) that the facts alleged do not constitute a public offense, and (2) that they are not stated in ordinary and concise language in such manner as to enable a person of ordinary understanding to know what is intended. Section 8418, Revised Codes, declares: "Any person who carries on, opens or causes to be opened, or who conducts or causes to be conducted, or operates or runs, as principal, agent or employé, any game of * * * studhorse poker * * * or any game of chance played with cards * * * for money, checks, etc., is punishable by a fine," etc. Its purpose is to declare it a crime for any person to open, carry on, or conduct any of the games enumerated, including those who act for him as his agents or employés, as distinguished from mere players. The charge in the information does not pursue accurately the language employed in the statute; nevertheless the allegation that the defendant did carry on, conduct, and cause to be conducted the game mentioned, is sufficient to charge him with the offense. *State v. Wakely*, 43 Mont. 427, 117 Pac. 95. The expression "as owner and proprietor thereof" does not clearly convey the meaning of the pleader. By the use of it he evidently intended to state definitely the relation of the defendant to the game to be that of principal or chief actor, but its presence does not affect the sufficiency of the charge. It may be rejected as surplusage, because it does not restrict or enlarge the scope or meaning of the information.

[3] Section 9200, Revised Codes, enumerates the objections which may be made by demurrer to the indictment or information. Among them is the one sought to be availed of by the second ground laid in the demurrer here.

If it be conceded that the expression in question renders the pleading uncertain or indefinite, the defendant is not in position to take advantage of it because he does not specify the particular ground of his objection. Section 9201 provides that the demurrer "must distinctly specify the grounds of objection to the indictment or information, or it must be disregarded." Section 9208 provides: "When the objections mentioned in section 9200 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment." Section 9157 declares: "No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." The purpose of these provisions is to require the defendant to raise all questions touching the form of the charge made against him, not going to the jurisdiction of the court or the sufficiency of the facts, by demurrer, and if he fails to do so, he must be conclusively presumed to have waived them. *People v. Matuszewski*, 138 Cal. 535, 71 Pac. 701.

[4] 2. Assignments of error from 2 to 16, inclusive, relate to rulings of the court upon the competency and materiality of evidence sought to be elicited from the state's witnesses Zimmerman and Kelly, upon a cross-examination. Since counsel for defendant, though alleging error in all of these rulings, does not undertake to point out wherein they were prejudicial, we do not think it is incumbent upon us to make a critical detailed examination of them, to determine whether they in fact wrought prejudice. Such examination as we have been able to make, however, without the assistance of either oral or printed argument, leads us to the conclusion that the substantial rights of the defendant were not prejudiced.

[5] As in the case of *State v. Wakely*, supra, the two witnesses upon whose testimony the state relied for conviction were detectives. They were employed by some person or persons residing in Gallatin county to detect violations of the statute prohibiting gaming and other offenses, and to furnish evidence to convict the guilty parties. They testified that they were invited to take part in a game of stud poker which was being carried on by the defendant in the city of Bozeman; the players purchasing checks from him and settling their balances with him at the close of the game. On cross-examination they were questioned as to who employed them; what compensation they received; who paid it; the sources from which they obtained expense money, in-

cluding the amounts they used in the game; what reports they made to any local officer or citizen; and other similar matters. Upon objection by the county attorney most of these inquiries were excluded; but in so far as it was material as reflecting upon the character of the witnesses or their credibility—it was not material for any other purpose—sufficient of the information sought found its way into the possession of the jury during the course of the cross-examination, to enable them to form a clear judgment as to whether the witnesses were entitled to credit. We think the court committed technical error in some of the rulings, but we think substantially all the pertinent facts were brought out. Therefore it does not appear that the defendant suffered prejudice.

[6, 7] 3. Contention is made that the court erred in refusing to direct the jury to acquit the defendant because the testimony of Zimmerman and Kelly was unworthy of credit. It is argued that while they were acting under the guise of detectives they were committing unlawful acts, and hence that their testimony was so far impeached that the court should have disregarded it as of no evidentiary value. This point is disposed of by the discussion in *State v. Wakeley*, supra. The evidence was competent even though the witnesses did act as decoys, taking part in the transaction which itself was criminal; and the cases are numerous in which convictions on this character of evidence have been sustained. In *re Wellcome*, 23 Mont. 450, 59 Pac. 445, and cases cited. Though the defendant and one witness who was present when the game is said to have been played denied that there was any game opened or played, it was for the jury to ascertain the truth from the evidence such as it was.

4. The motion in arrest of judgment was properly denied. The contentions of counsel in this connection are the same as those urged against the action of the court in overruling the demurrer. They have already been disposed of.

[8] 5. It is argued that the court committed gross error in delivering its instructions to the jury orally instead of in writing. In considering this subject in *State v. Fisher*, 23 Mont. 540, 59 Pac. 919, this court held that section 2070, Penal Code of 1895, made it obligatory upon the trial court in a criminal case to deliver its instructions in

writing, and the defendant in that case was awarded a new trial because of the failure of the court to observe the requirement of the statute. This section, as amended by the act approved March 4, 1907 (Laws 10th Sess. c. 82), appears in the Revised Codes as section 9271. The provision of the old section touching the mode of instructing the jury was not changed, however, by the amendment. The old section also prohibited comment by the court upon the instructions unless by the consent of the parties. The amended section contains no provision on this subject. It was further held, in effect, in *State v. Fisher*, that mere silence of the parties was not sufficient to justify the court in disregarding the injunction of the statute, and that nothing short of a formal consent was sufficient. Whether this requirement is to be deemed affected by the omission from the later section of the provision last mentioned, we need not inquire. It is sufficient to say that the necessity to observe the mandate of the statute as construed in *State v. Fisher*, to submit all instructions in writing is, we think, in the absence of a waiver of the parties, still imperative.

[9] The record in this case, however, is not sufficient to disclose what occurred in the district court. Whether the court delivered the instructions orally or in writing does not appear. True, the instructions found in the record appear under the title, "*Oral Instructions of the Court to the Jury.*" Otherwise the record is silent. There is no exception or other intimation that the court violated the statute. The only definite information conveyed is by the assignment of counsel in his brief. Under these circumstances, there being no complaint that there is error in any of the instructions as delivered, we are not disposed to reverse the judgment. If counsel in any case desire this court to review the action of the trial court with reference to any matter occurring during a trial, it is incumbent upon them to cause to appear definitely in the record the facts and circumstances characterizing the action. We cannot act upon bare inferences or statements of counsel for which we can find no substantial support in the disclosures made by the authenticated record.

The judgment is affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

MOORE v. BUTTE ELECTRIC RY. CO.
et al.

(Supreme Court of Montana. April 5, 1913.)

1. NEW TRIAL (§ 123*)—NOTICE OF MOTION—
"MINUTES OF THE COURT."

A notice of intention to move for a new trial, reciting that it would be based upon a bill of exceptions and upon the "pleadings, papers, minutes, files, and records of said cause," was sufficient to support a motion on the minutes of the court, since, while it did not follow the statutory language, the word "minutes" was obviously used in connection with the phrase "of said cause"; and "minutes of the court," as used in the statute, means the minutes of the court in that particular cause, and contemplates that the trial court may take into consideration all the pleadings, records, minute entries, etc.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.*]

For other definitions, see Words and Phrases, vol. 5, p. 4528.]

2. NEW TRIAL (§ 131*)—MOTION ON BILL OF
EXCEPTIONS OR MINUTES.

Under Rev. Codes, § 6795, providing that when an application for a new trial is made for any other cause than those previously specified it may be made at the option of the moving party, either upon the minutes of the court or upon a bill of exceptions, a party is not required to make his motion upon all of such grounds either upon the minutes or bill of exceptions, but may move upon one ground upon the minutes and another ground on the bill of exceptions.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. § 131.*]

3. APPEAL AND ERROR (§ 933*)—REVIEW—
PRESUMPTIONS.

Where the notice of intention to move for a new trial recited that it would be based upon a bill of exceptions and upon the pleadings, papers, minutes, files, and records, and on affidavits, and the record failed to show whether the motion on the grounds of the insufficiency of the evidence, and that the verdict was against the law, was made on a bill of exceptions or on the minutes, it would be presumed that the order granting a new trial was on the minutes, since the action of the court is presumed to be regular, and the burden of showing error is on the appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Patrick J. Moore against the Butte Electric Railway Company and another. From an order granting a new trial after verdict and judgment for defendants, they appeal. Affirmed.

George F. Shelton, Peter Breen, Fred J. Furman, and A. J. Verheyen, all of Butte, for appellants. McCaffery & Tyler and B. K. Wheeler, all of Butte, for respondent.

SANNER, J. In this action the verdict of the jury and judgment thereon were for the defendants. Thereafter the plaintiff filed his notice of intention to move for new

trial, and later his motion was heard and granted. This appeal is from the order of the district court granting said motion.

The notice of intention to move for a new trial specifies seven grounds, to wit, irregularities in the proceedings by which plaintiff was prevented from having a fair and impartial trial, misconduct of the jury, accident and surprise, newly discovered evidence, insufficiency of the evidence to justify the verdict, that the verdict is against the law, and errors of law. The notice recites: "This motion for a new trial will be based upon a bill of exceptions to be hereinafter prepared and served upon you, and upon the pleadings, papers, minutes, files, and records of said cause, and upon affidavits to be hereinafter served." The transcript on appeal, as filed in this court, does not pretend to be a complete record of the proceedings below, and it does not contain anything to put the trial court in error in granting the motion for new trial, if the motion was, or could have been, presented "upon the minutes of the court."

[1] As we understand the appellants' contention, it is that the motion for new trial could not have been presented upon the minutes of the court for two reasons: (1) The notice of intention does not state that the motion will be made upon the minutes of the court; that the word "minutes" in the notice does not mean "minutes of said cause," and that "minutes of said cause" is not "minutes of the court;" and (2) that as to the ground, errors of law, the plaintiff having elected to cover this in a bill of exceptions, "he could not under any circumstances move for a new trial upon the minutes of the court." This is entirely too technical. The word "minutes" is used in the notice in obvious connection with the phrase "of said cause," and means "minutes of said cause." The term "minutes of the court," as used in the statute, means, of course, the minutes of the court in the particular cause, and contemplates that, "upon a motion for a new trial made upon the minutes of the court, the trial court may take into consideration all the pleadings, records, minute entries, and the evidence offered at the trial, and, from the entire case thus presented, determine the motion." (State ex rel. Cohn v. District Court, 38 Mont. 125, 99 Pac. 141); the phrase, "pleadings, papers, minutes, files and records of said cause," as used in the notice, can mean nothing else than the minutes of the court, as above defined. So that, although the notice of intention before us illustrates an unhappy tendency to depart from the statutory language, which, in matters of this kind, is much to be preferred, yet it gave the same information that the statute intends should be given, and it was, as to all purposes now considered, substantially equivalent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] The second criticism is founded upon the following language of the statute: "For any other cause it may be made, at the option of the moving party, either upon the minutes of the court or upon a bill of exceptions." Section 6795, Rev. Codes. This is supposed by appellants to mean, not only that if a party move for a new trial for errors of law he must do so upon either the minutes of the court or a bill of exceptions, and not upon both, but also that if he have two grounds, such as errors of law and insufficiency of the evidence, he may not choose one method for the first and the other for the second. That construction is erroneous, as this court has indicated on several occasions. *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Sanden v. Northern Pac. Ry. Co.*, 39 Mont. 209, 102 Pac. 145; *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904.

[3] The record here discloses that on his motion for new trial the plaintiff presented affidavits in support of his claims of misconduct of the jury and newly discovered evidence, and that as to irregularities and certain errors of law he presented a bill of exceptions; but as to the ground of insufficiency of the evidence, and that the verdict is against the law—grounds of motion reviewable upon the minutes of the court—we are not advised what the course of proceeding was. The situation is thus precisely similar to that in *Sanden v. Northern Pacific Ry. Co.*, supra, in which this court said: "The district court has general jurisdiction to grant new trials, and the action of that court is presumed to be regular. * * * Under the law relating to motions for new trials in force at the date of the proceedings, such motion could be made and granted on the minutes of the court. * * * As the notice of intention to move for a new trial recited that the motion would be made on the minutes of the court, and there is nothing to indicate that the order was not based upon the minutes, we cannot say that the court acted entirely upon the bill of exceptions. It may be that the bill was not considered by the district court, but that the order was based entirely on what was disclosed by the minutes. * * * The burden is on the appellant to show that the district court was not warranted in granting the motion for a new trial, either on the bill of exceptions or the minutes of the court. * * *"

No useful purpose would be served by determining whether any of the particular matters set forth in the transcript was sufficient to justify the action of the trial court; for, the appellant having failed to show that it was unwarranted, the order granting plaintiff's motion for new trial must be affirmed. Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

SALT LAKE CITY v. DORAN.

(Supreme Court of Utah. March 31, 1913.
Rehearing Denied April 21, 1913.)

1. GAMING (§ 68*)—GAMBLING DEVICES—STATUTES—CONSTRUCTION.

Comp. Laws 1907, § 4261, as amended by Laws 1911, c. 134, provides that every person who deals, or carries on, opens, or causes to be opened, or who conducts any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, "or any game played with cards, dice, or any other device," for money, checks, credit, or other representative of value, shall be deemed guilty of a felony. Held, that the maxim "ejusdem generis" was not applicable to such section, and that the phrase "or any other game played with cards, dice, or any other device" was not limited by the preceding games specified, and hence the statute prohibited the operation of slot machines as a means of selling goods, whereby trade was stimulated by the hope that the customer, by producing certain card combinations on the machine, would increase the quantity of merchandise that he could purchase for money deposited.†

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 140-162, 164, 165; Dec. Dig. § 68.*]

2. GAMING (§ 68*)—SLOT MACHINES—"GAMBLING."

The use of a slot machine by a merchant to stimulate trade pursuant to a scheme by which the purchaser was given the value of his money deposited in the machine in any event, but in doing so had a chance of obtaining from twice to a hundredfold the value in goods of what he could buy for the money deposited, in case the machine showed certain card combinations, constituted "gambling."

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 140-162, 164, 165; Dec. Dig. § 68.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3023-3028; vol. 8, p. 7668.]

3. GAMING (§ 68*)—GAMBLING DEVICES—SUPPRESSION—STATUTES.

A slot machine used by a merchant to stimulate trade, under a scheme by which the customer, by depositing money in the machine, is bound in any event to get the value in merchandise of the money deposited, and may in addition, by producing certain card combinations, obtain very much more, is within Comp. Laws 1907, § 206, subd. 40, providing that the authorities of cities of a certain class shall have power to suppress and prohibit gambling, lotteries, and all fraudulent devices and practices, and all kinds of gaming played at dice, cards, or other games of chance.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 140-162, 164, 165; Dec. Dig. § 68.*]

4. MUNICIPAL CORPORATIONS (§ 590*)—SUPPRESSION OF GAMING—POWER OF CITIES.

The power of city authorities conferred by Comp. Laws 1907, § 206, subd. 40, to suppress all kinds of gaming, playing at dice, cards, and other games of chance, is not limited to the suppression of the precise games mentioned in section 4261, as amended by Laws 1911, c. 134.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2354, 2361-2367; Dec. Dig. § 590.*]

5. GAMING (§ 63*)—FORMS OF GAMBLING—LEGALIZATION—CONSTITUTION.

Under Const. art. 6, § 23, providing that the Legislature shall not authorize any game

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† *Bruce v. Sharp*, 127 Pac. 343; *Plaster Mfg. Co. v. Juab County*, 33 Utah, 134, 136, 93 Pac. 67, 68.

of chance, lottery, or gift enterprise, under any pretense, or for any purpose, the Legislature cannot, under any circumstances, legalize any form of gambling within the state.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 120; Dec. Dig. § 68.*]

6. MUNICIPAL CORPORATIONS (§ 594*) — DEVICES—SLOT MACHINES.

An ordinance of Salt Lake City making it unlawful for any person to use within the city any clock, slot, or card machines on which money is staked, or any commodity, merchandise, or other valuable thing is hazarded, or as the result of the operation of which any merchandise or thing of value is obtained, includes a slot machine used by a merchant to stimulate sales, notwithstanding the customer was given the value of his money deposited in the machine in merchandise in any event.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316-1320, 1327, 1328; Dec. Dig. § 594.*]

7. MUNICIPAL CORPORATIONS (§ 594*)—SLOT MACHINES—CITY ORDINANCES.

Such ordinance did not prohibit the use of slot machines for an innocent and harmless purpose, not amounting to gambling, and was therefore not invalid on that ground.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316-1320, 1327, 1328; Dec. Dig. § 594.*]

Appeal from District Court, Salt Lake County; F. C. Loofbourov, Judge.

B. F. Doran was convicted of violating a gambling ordinance of Salt Lake City, and he appeals. Affirmed.

Powers & Marioneaux, of Salt Lake City, for appellant. H. J. Dininny and Aaron Myers, both of Salt Lake City, for respondent.

FRICK, J. Appellant was convicted in the city court of Salt Lake City, and, upon appeal to the district court of Salt Lake county, was again convicted for the violation of a certain ordinance of said city. The appeal to this court is based upon the claim that, for the reasons hereinafter stated, the ordinance in question is invalid. The portions of the ordinance that are deemed material are as follows:

"Section 1. All gambling and gaming of every kind and description, by playing at cards, dice, faro, roulette, keno, poker, slot machines, devices known as trade machines, or any like machines or devices by whatever name known, or any other contrivance or device by or which money, merchandise or other thing of value may be staked, bet or hazarded, won or lost, upon chance, or at any other game or scheme of chance whatever, * * * for money or other property or thing of value within Salt Lake City, is hereby declared to be unlawful.

"Sec. 6. It shall be unlawful for any person to keep or maintain any slot machine, or trade machine, or any like machine or device, for the purpose of suffering or permitting other persons to play at or with the same for money or anything of value.

"Sec. 7. It shall be unlawful for any per-

son, either as owner, lessee, agent, employe, mortgagee, or otherwise, to operate, keep, maintain, rent, use, or conduct, within the City of Salt Lake, any clock, tape, slot, trades or card machines, or any other machine, contrivance or device upon which money is staked or hazarded upon chance, or into which money is paid, deposited or played, upon chance, or upon the result of the action of which, money or any commodity or merchandise, or any other article or thing of value is staked, hazarded, won or lost upon chance.

"Sec. 8. It shall be unlawful for any person, either as owner, lessee, agent, employe, mortgagee or otherwise, to operate, keep, maintain, rent, use or conduct within the city of Salt Lake, any machine, contrivance, appliance or mechanical device upon the result of the action of which money or any commodity, merchandise or other valuable thing is staked or hazarded, and which is operated or played by placing or depositing therein any coins, substitutes for coins, checks, slugs, balls or other article or device, or in any other manner, and by means of the action whereof, or as a result of the operation of which, any merchandise, money, representative or article of value, check or token redeemable in, or exchangeable for money, or any other thing of value is won or lost, or taken from or obtained from such machine, when the result of the action or operation of such machine, contrivance, appliance or mechanical device is dependent upon hazard or chance."

The ordinance became effective March 1, 1912, and for each violation thereof imposes a fine not exceeding \$50 or imprisonment not exceeding 30 days in the city jail, or both such fine and imprisonment.

The complaint filed against appellant was based on sections 7 and 8 of said ordinance, which sections we have given in full. The material part of the complaint is as follows: That on the 16th day of March, 1912, appellant, in a certain room in Salt Lake City, did "unlawfully keep, maintain, use, and conduct five certain machines, known as trade or card machines, being then and there contrivances and devices into which money was and is paid, deposited, and played upon chance, and, upon the result of the action of said machines, cigars and merchandise, then and there of value, was staked, hazarded, and won or lost upon chance, which said trades machines then and there were gambling and gaming devices, contrary to the provisions of an ordinance of said city to prohibit gambling and gaming enacted by the honorable board of commissioners of said city and in force on and after March 1, A. D. 1912."

The case was submitted to the district court upon an agreed statement of facts which are substantially as follows: That, at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the time the complaint was filed, appellant was the owner of a certain bar and cigar stand in Salt Lake City; that he was at that time engaged in the retail liquor and cigar business, and in connection therewith "kept, maintained, used, and operated five machines, known as trade or card machines," in the interior of which there was a contrivance consisting of five wheels or cylinders about one inch wide, all of which revolved upon independent axes; that upon each one of said wheels or cylinders are fastened 11 small playing cards, making 55 in all, being three cards in excess of a common deck of playing cards; that said wheels and cards are in a small box or cabinet of which only a certain space is open through which a certain number of the cards are visible when the wheels stop revolving; that, in case a nickel is dropped into a certain slot of said cabinet, all of the wheels or cylinders, with the cards thereon, are, by a concealed mechanism or device, set in motion, and each wheel revolves upon its own axis, so that, when all of the wheels stop, just five of the cards appear in a longitudinal row and are visible through the space aforesaid, and the five cards so visible represent or constitute what is called a "hand"; that any person who desires may drop a nickel in the slot and set the wheels in motion, and the person dropping the nickel in the slot for each nickel deposited therein is entitled to receive one five-cent cigar of any kind kept on sale by appellant in his business; that if in revolving said wheels the cards are so arranged upon them that by chance they are stopped so as to exhibit in a single row the following cards, ace, king, queen, jack, and ten spot of one suit, it is called a royal flush, and entitled the person depositing the nickel to 100 cigars in addition to the five-cent cigar, as before stated; that a straight flush is composed of five cards, all of one suit, when they appear in the following order, namely, two, three, four, five, and six, or any other five numbers in their natural order or sequence, and this entitled the depositor of the nickel to 25 cigars; that, when four of a kind appear (for example, four aces, four kings, four queens, etc.), the depositor is entitled to 15 additional cigars; that if three of one kind and two of another kind happen to be in a row, the depositor is entitled to 10 additional cigars; that, if a "flush" (that is, five cards all of one suit) appear, the depositor is entitled to 5 additional cigars; that, if five cards of any kind or suit appear in regular rotation or sequence, the depositor is entitled to 4 additional cigars; that, if three cards of one kind (that is, all tens or jacks, etc.) appear, the player is entitled to 3 additional cigars; that if two pairs appear the player is entitled to 2 additional cigars, and if only one pair appears then he is entitled to one additional cigar. If none of the foregoing combinations appear, the depositor, as we have said, obtains

at all events one five-cent cigar. The order in which the cards appear is a mere matter of chance, depending upon the revolutions of the several wheels or cylinders.

We have a statute (Comp. Laws 1907), known as subdivision 40 of section 203, which, so far as material here, provides that the authorities of cities of the class of Salt Lake City shall have the power to "suppress and prohibit gambling houses and gambling, lotteries, and all fraudulent devices and practices, and all kinds of gaming, playing at dice, cards, and other games of chance." The ordinance in question is based upon the power conferred in the foregoing section. There is a further statute (Comp. Laws 1907, § 4261, as amended in 1911 [Laws 1911, p. 265]), which, among other things, provides: "Every person who deals, or carries on, opens or causes to be opened, or who conducts, either as owner or employé, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards, dice, or any other device, for money, checks, credit, or any other representative of value shall be deemed guilty of a felony. * * *" (Italics ours.) The remaining portion of the section is of no importance here. The validity thereof was under consideration by this court in the recent case of *Bruce v. Sharp*, 127 Pac. 343, where we held the portion we have quoted above valid, regardless of whether the remaining portion was subject to the objection urged against it in said case or not.

Appellant, however, insists that the ordinance in question is void, in so far, at least, as it undertakes to prevent him from using, or permitting the use of, the slot machines in question when used for the purposes and in the manner we have hereinbefore set forth. This contention is based upon the theory that, under the general terms of section 4261, supra, the use of the slot machines in the manner and for the purposes stated is not prohibited by said section. As a corollary of the foregoing claim, it is insisted that the city authorities had no power to prohibit or punish any act as gambling which does not come within the terms of said section, and which is not prohibited thereby. Is this contention tenable?

[1] The claim that the slot machines in question do not come within the provisions of section 4261 seems to us cannot be sustained. The only basis for such a claim is that the phrase "or any other game played with cards, dice, or any other device," following the statement of the statute, wherein the names of specific games are mentioned, must be construed in accordance with the doctrine of *ejusdem generis*, and that in applying that doctrine or maxim the slot machines in question do not come within any of the games mentioned in said section. If it be conceded that slot machines do not come within any of the games specifically mentioned in said section, yet, in our judgment,

they clearly come within the term used in the phrase which we have italicized. In our opinion the doctrine or maxim of *ejusdem generis* does not have, and was not intended to have, any application to section 4261. In our judgment the Legislature, in adding the phrase in italics, clearly intended to cover and include any and all other games played with cards, in whatever form the cards should be used, and also all other devices where the use thereof amounted to gambling as that term is popularly understood. We had occasion to discuss somewhat at length the application of the doctrine or maxim of *ejusdem generis* in the case of *Plaster Mfg. Co. v. Juab County*, 33 Utah, 124, 126, 93 Pac. 57, 58. We there pointed out that the doctrine is but a rule of construction to aid courts in ascertaining the meaning and to prevent their transcending the intention of the Legislature when using general terms following particular ones in the enactment of laws. It is there held, in effect, that, when the meaning or intention of the lawmaker is clear, the doctrine cannot be applied for the purpose of narrowing or limiting the meaning of a word or phrase so as to defeat the legislative intent. We cannot, nor is it now necessary, to add anything to what is said upon the subject in the case referred to. It must suffice to say that it is as clear in this case as it was in that that the doctrine has no application. *Woodworth v. State*, 26 Ohio St. 196; *Foster v. Blount*, 18 Ala. 687; *State v. Solomon*, 33 Ind. 450; *Tisdell v. Comb*, 7 A. & E. (Eng. Com. Law) 233; *Black, Interpretation of Laws* (2d Ed.) 218, 219. Upon the point now under consideration, the case of *City of Seattle v. MacDonald*, 47 Wash. 298, 91 Pac. 952, 17 L. R. A. (N. S.) 49, is not distinguishable from the case at bar. See, also, *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128.

[2] It is further contended, as we understand counsel for appellant, that the use of the slot machines, when used in the manner detailed herein, does not constitute "gambling," as that term is defined in section 4261, supra, and further that the city authorities were not given the power by the Legislature to suppress or prohibit gambling, except as defined in said section. It is not necessary to pause now for the purpose of again defining the term "gambling." The books are full of such definitions. In our judgment, the use of the slot machines in the manner hereinbefore described constitutes gambling, pure and simple, within most any of the definitions. It is true that the person who deposits the nickel in the slot receives an ordinary five-cent cigar for every nickel so deposited, and therefore he risks nothing. If nothing were considered, therefore, save one transaction, the depositing of one nickel and receiving therefor one five-cent cigar, the transaction would seem quite innocent. But, if there were nothing more than this, appel-

lant, in all probability, would not continue the use of the slot machines for the simple reason that his customers would not resort to their use for the purpose of obtaining a cigar, but would purchase the cigar in the usual way by passing the nickel over the counter. The customer resorts to the use of the machine because, in depositing the nickel therein, he has various chances of winning from twice to a hundredfold the number of cigars for the nickel deposited by him. He therefore wagers or stakes, if you please, the nickel in the hope of gaining much more than the value thereof in case the chances are in his favor. In view, however, that he may obtain a hundredfold in return for the nickel, it would seem that the chances for winning that amount must be limited indeed. The chance to do so, however, exists, and the player deposits nickel after nickel in the hope of winning. Upon the other hand, the owner of the machines hopes that chance will favor him by not permitting the customer to receive more than one cigar. In the hope that he may gain by chance, the customer will keep on depositing nickels, and in doing so swell the sales and profits of the owner of the machines far beyond what his sales and profits would be if cigars were sold in the ordinary way, and the chance or gambling element were eliminated. In illustrating this feature, it is well said by the Supreme Court of Maine (*Lang v. Merwin*, 99 Me. at page 489, 59 Atl. at page 1022, 105 Am. St. Rep. 293) that: "The element of chance is the soul of the transaction. The operator hopes by chance to get something for nothing. The dealer hopes chance will save him from giving something for nothing. Each is peculiarly interested adverse to the other in a result to be determined solely by chance. To use the language of the street, 'it is a gamble' which will win, and we have no doubt the transaction is 'gambling' in the statutory sense of the word." To the same effect are the recent cases of *City of Seattle v. MacDonald*, supra; *Loiseau v. State*, 114 Ala. 34, 22 South. 138, 62 Am. St. Rep. 84; *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128; *Lytle v. State* (Tex. Cr. App.) 100 S. W. 1160; *Meyer v. State*, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17; *In re Cullinan*, 114 App. Div. 654, 99 N. Y. Supp. 1097. Upon the question that playing slot machines constitutes gambling, neither of the foregoing cases is distinguishable from the case at bar.

[3] But assuming, for the sake of argument, that slot machines are not included within the terms of section 4261, yet they, in our opinion, come clearly within the terms of subdivision 40, § 206, supra, wherein the power to suppress and prohibit gambling is conferred upon city authorities. In making this statement, we are not unmindful of the general rule that city authorities may exercise such powers only as are expressly con-

ferred by the Legislature, or such as are necessarily or clearly implied, and those which are necessary to carry into effect any power which is expressly conferred, or necessarily implied. We think the power to suppress slot machines is clearly and intentionally conferred by what is said in subdivision 40 of section 206, supra.

[4] Nor do we think that the power to suppress gambling by city authorities is limited to the precise games mentioned in section 4261. In our opinion the city authorities are given the express power to suppress all gambling and gambling devices regardless of whether they are enumerated in or in express terms covered by said section or not. There is absolutely nothing contained in the Constitution of this state which prevents the Legislature from conferring power upon the cities of this state to suppress all forms of gambling. The power to do so is clearly given in the statute to which we have referred. Under the power thus given, we think the cities of the state to which the statute applies not only have the power to punish all gambling which is punishable by the state law (McQuillin, Mun. Ord. § 500), but they may also suppress gambling, gambling devices, and games that are not enumerated in the state law. That is, under such a power, as it is expressed by the Supreme Court of California in *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799, "there may be different regulations without conflict," covering the same subject-matter, one for the cities and another for the state at large. Or as is said in 28 Cyc. 701: "Additional regulation by the ordinance does not render it void." To the same effect are *Rosberg v. State*, 111 Md. 394, 74 Atl. 581, 134 Am. St. Rep. 626; *City of Chicago v. Ice Cream Co.*, 252 Ill. 311, 96 N. E. 872, Ann. Cas. 1912D, 675.

[5] This doctrine applies with full force in this state to all gambling and gambling devices for the reason that the Legislature cannot, under any circumstances, legalize any form of gambling whatever under the provisions of article 6, § 28, of the Constitution of this state. In view of this, and that it is a well-known fact that numerous games and gambling devices are often resorted to for gambling purposes within the corporate limits of municipalities, and especially within the limits of the larger and more populous ones, for the reason that the opportunities for patronage are much greater therein than in sparsely settled districts of the state, it

is easy to perceive why cities are and should be given a free hand in suppressing the vice of gambling in whatever form it may present itself. In the enactment of subdivision 40, § 206, the purpose of giving cities plenary power to suppress gambling in all its forms is clearly manifested. We are of the opinion, therefore, that, although it were conceded that the use of slot machines in the manner in which those in question are used were not prohibited by section 4261, yet that, under the power conferred by subdivision 40 of section 206, the city authorities of Salt Lake City had the power to adopt the ordinance in question.

[6] Nor can it be doubted that the provisions of said ordinance clearly include appellant's slot machines.

[7] Finally, it is contended that the ordinance in question is void because it prohibits the use of slot machines, although the use made thereof may not be for the purpose of gambling, and therefore a use that is innocent and harmless is prohibited. It is contended, and properly so, that neither the Legislature nor the city authorities can pass a law or ordinance punishing the mere use of a machine when used for innocent purposes. We are of the opinion that the ordinance is not open to such a construction. The ordinance prohibits and punishes the use of slot machines only when they are used for the purpose for which they are evidently intended, to obtain something for nothing by chance in the manner herein stated. Such a use, as we have seen, clearly constitutes gambling, and no other use, if any can be made of the machine, is prohibited or denounced by the ordinance. No disinterested person can read the different sections of the ordinance which we have quoted herein without arriving at the conclusion that the ordinance prohibits the maintenance or use of the machines only when used and intended for gambling purposes; that is, when used for the purpose of gaining something by chance.

In view of what has been said, we need not determine the question argued at the hearing, whether the use of the machines, as stated, also constitutes a lottery, and that they are therefore prohibited for that reason.

The judgment is affirmed. Respondent to recover costs for printing its brief.

MCCARTY, C. J., and STRAUP, J., concur.

HAMMOND et al. v. HILLMAN et al.

(Supreme Court of Washington. April 30, 1913.)

1. APPEAL AND ERROR (§ 867*)—APPEAL FROM ORDER GRANTING NEW TRIAL—MATTERS REVIEWABLE.

On an appeal by plaintiffs from an order granting a new trial upon their refusal to consent to a reduction of the verdict, where no cross-appeal was or could be taken by defendants, no final judgment having been entered, defendants' various claims of nonliability could not be considered; the only question being whether the trial judge abused his discretion in granting the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

2. APPEAL AND ERROR (§ 979*)—REVIEW—MATTERS OF DISCRETION.

In an attorney's action for services, where their witnesses testified that the services were worth \$30,000, while defendants' witnesses testified that they were worth \$2,000 or less, the trial court's action in granting a new trial, unless plaintiffs would consent to a reduction of the verdict from \$10,000 to \$8,000, would not be disturbed, since there was as much evidence to sustain the amount fixed by the trial court as that fixed by the jury, and hence no abuse of discretion was shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by J. M. Hammond and another, copartners as Hammond & Hammond, against C. D. Hillman and another. From an order granting a new trial after a verdict in their favor, plaintiffs appeal. Affirmed.

John W. Roberts, of Seattle, for appellants. James R. Chambers, of Seattle, for respondents.

CROW, C. J. This action was commenced by J. M. Hammond and F. E. Hammond, copartners as Hammond & Hammond, against C. D. Hillman and the American Investment & Improvement Company, a corporation, to recover \$30,000 for attorney's fees. A verdict for \$10,000 was returned in their favor against the American Investment & Improvement Company. The defendant corporation thereupon moved for judgment notwithstanding the verdict, and also for a new trial upon all statutory grounds. The trial judge denied the motion for judgment, but announced that, unless plaintiffs would accept a judgment for \$8,000, a new trial would be granted. Plaintiffs declined to accept the reduction, whereupon an order was entered granting a new trial, from which they have appealed.

[1] Appellants contend that the trial court erred in requiring them to accept a reduction, or, in lieu thereof, to submit to a new trial. A bill of particulars shows that appellants' services, for which they demand

judgment, were rendered in six different actions in the superior court of King county, a number of which were appealed to this court. Respondent denied the alleged value of their services, pleaded the statute of limitations to several items, contended that, as one of the appellants was not admitted to the bar of this state until after a considerable portion of the alleged services were rendered, he cannot recover, and further contended that, as a receiver for the corporation was appointed, services thereafter rendered by appellants were unauthorized. Respondent concedes that no cross-appeal could be taken by it in the absence of any final judgment; yet it now urges these defenses and insists that we pass upon them. They are not before us and will not be considered. The only question we can consider is whether the trial judge abused his discretion in granting the new trial after appellants refused to accept any reduction.

[2] The record, which is voluminous, shows that a number of attorneys, called as expert witnesses by appellants, in answer to a 40-page hypothetical question, testified that the services were reasonably worth \$30,000 or more; that other attorneys, called as expert witnesses by respondent, after making an examination of the files in the various actions in which appellants claimed to have performed the services, and after familiarizing themselves with the work thus shown to have been done, testified to a value of \$2,000 or less. Appellants insist that their hypothetical question included all material facts established by the evidence; that the testimony of their experts, predicated thereon, is undisputed; that the testimony of respondents' experts did not take into consideration all services performed; that there is no substantial dispute of the evidence of appellants' witnesses; and that there was no evidence upon which the trial court could fix \$8,000 as reasonable compensation, and that the trial court erred in reducing the verdict. There was as much evidence to sustain the trial court in holding \$8,000 to be a reasonable compensation as there was to sustain the jury in awarding \$10,000, as no witness named either figure as compensation for all services claimed to have been rendered. Yet appellants ask us to sustain the jury to reverse the order of the trial judge and to direct a judgment upon the verdict. Appellants cite *Thorp v. Ramsey*, 51 Wash. 530, 99 Pac. 584, quoting therefrom the following expression of this court: "It is lastly contended that the verdict is not sustained by the testimony. Where a question of attorney's fees is submitted to the trial court for decision, this court may review its action, but, where the question is submitted to a jury, their verdict stands on the same footing as a verdict in any other case and will not be disturbed by this court if sustained

by competent testimony. There is such testimony in this record."

Having made the above quotation, appellants in their brief then say: "We pin our faith to that decision. It is the rock upon which we build our contention."

In the Thorp Case the verdict in plaintiff's favor was approved by the trial judge, judgment was entered thereon, and the evidence was sufficient to sustain the verdict. On the record thus presented, the judgment could not be reversed, as this court cannot exercise that discretion, which the statute reposes in a trial judge. In this action the trial judge exercised his discretion by granting a new trial, and the Thorp Case is not in point. This case falls within the rule announced in *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109, which was an action to recover attorney fees, in which a new trial was granted under circumstances similar to those here presented.

In *Snider v. Washington Water Power Co.*, 66 Wash. 598, 607, 120 Pac. 88, 92 speaking of this discretion of the trial judge, this court said: "Being himself a factor in the trial, he is better able to observe, and in a measure to feel, the effect of these things upon the minds of the jury than an appellate court can be. It is upon this wholesome principle that this court has said that the trial court has an inherent power to grant a new trial to the end that justice may be attained. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175. We have held by an unbroken line of decisions that a motion for a new trial is necessarily addressed to the sound discretion of the trial court, and, when the motion has been granted for insufficiency of evidence, the order will not be disturbed unless the evidence is undisputed or the discretion has been clearly and, as said in one case, grossly abused."

Upon the entire record, we conclude that no question of law decided by the trial judge in granting the new trial is now before us for review, and that no abuse of discretion upon his part has been shown.

The judgment is affirmed.

MOUNT, GOSE, and PARKER, JJ., concur.

WARD et al. v. PANTAGES et al.
(Supreme Court of Washington. April 28, 1913.)

CONTRACTS (§ 280*)—HEATING AND PLUMBING SYSTEMS—INSTALLATION—DEFECTS.

Where plaintiffs installed heating and plumbing systems in defendant's house in strict conformity with the plans and specifications, but the work was unfit because of defects in the plans and specifications, such insufficiency was no defense to plaintiffs' action for the price.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1249-1280; Dec. Dig. § 280.*]

Department 1. Appeal from Superior Court, King County; Ralph Kauffman, Judge.

Action by John J. Ward and another, doing business as Ward & Scherer, against Alexander Pantages and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

John E. Ryan and Grover E. Desmond, both of Seattle, for appellants. John W. Roberts, of Seattle, for respondents.

CROW, C. J. Two actions to foreclose liens upon real estate in the city of Seattle were commenced by John J. Ward and John A. Scherer, copartners as Ward & Scherer, against Alexander Pantages, Lois Pantages, his wife, E. Horton, and others. In the first action plaintiffs claimed a balance due upon a plumbing contract, and in the second a balance due upon a heating contract. The actions were consolidated and tried together. In 1909 the defendants Pantages and wife built a residence in the city of Seattle. The plans and specifications were prepared by their architects, under whose superintendence the building was erected. Plaintiffs, as subcontractors, agreed to install the plumbing in accordance with the plans and specifications, which called for the installation of toilets of a certain type. Plaintiffs also contracted to install the heating plant. Defendants contend that the toilets were improperly installed; that they could not be used; and that it was necessary to replace them with toilets of a different type. They also contend that the heating plant was defective; that the adopted system, which was suggested and guaranteed by plaintiffs, was improper and insufficient; and that extensive changes had to be made before it would do satisfactory work. Counterclaims for damages were pleaded by defendants in each action. The trial court made findings upon which a final judgment of foreclosure was entered in plaintiffs' favor for \$326.08, with interest and attorney's fees, upon the plumbing contract, and for \$1,391.02, with interest and attorney's fees, upon the heating contract, including some extras. The defendants Pantages and wife have appealed.

After a careful examination of the pleadings and evidence, we conclude that issues of fact only are involved. The substance of appellants' contention is that the respondents did not perform the work of plumbing in a workmanlike and skillful manner, and that as to the heating plant the system suggested and warranted by them was defective and insufficient. Respondents contend as to the plumbing that the architects specified the toilets to be installed; that those specified were not practical for dwelling houses; that respondents installed them as specified; that appellants and their architects insisted upon the particular type adopted; that re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spondents followed their instructions; that the toilets afterwards proved to be fundamentally wrong; and that appellants did not attempt to repair them, but removed them and substituted others. As to the heating plant, respondents contend that they notified appellants and their architects that the plans adopted were not practicable; that certain air chambers, constructed under the architect's direction, were of insufficient size; that respondents in all respects followed the architects' directions; and that the fault, if any, was not respondents', but that of the architects. The trial court, in substance, found that respondents, as subcontractors, entered into a verbal agreement for the installation of the plumbing; that in pursuance thereof they performed the work, furnished material, and installed the system; that work was completed on December 4, 1909, in accordance with the specifications prepared by appellants' architects, who were in charge of the work; and that, if the plumbing system failed, the fault was not respondents', but was due either to defective plans and specifications or to improper and erroneous instructions given to respondents by the architects. The court further found that prior to May 10, 1909, respondents entered into a contract with appellants and their architects for the installation of the heating plant in accordance with the plans and specifications, which have at all times been, and are now, in appellants' possession; that respondents followed all instructions of the architects who were in charge of the work; that respondents advanced their time and money in good faith; that the work which they did was done in a workmanlike manner; and that if, as it was originally installed, the heating plant failed to perform its functions, such failure was solely the fault of the architects, who were appellants' agents.

Appellants earnestly contend that the systems adopted, especially for the heating plant, were suggested and warranted by respondents. This respondents deny. The evidence upon the issue thus raised was resolved by the trial court in respondents' favor. If, as respondents contend, and the trial court properly found, the plans were adopted by appellants' architects, all that the respondents can be held to have warranted was that they would install the systems in a workmanlike manner, in strict compliance with the adopted plans, and there is sufficient evidence to sustain the finding that this was done. We conclude from the evidence that respondents made no warranty of the systems adopted, but that their only warranty was to install them in strict compliance with the plans and specifications, which they did. "Where the builder performs his work strictly in conformity with plans and specifications, he is not liable for

defects in the work that are due to faulty structural requirements contained in such plans and specifications, and may recover under the contract, unless he has warranted that the plans and specifications are correct. * * *" 61 Cyc. 63. MacKnight, etc., Co. v. Mayor, 160 N. Y. 72, 54 N. E. 661; Tide Water, etc., Co. v. Hammond, 144 App. Div. 920, 129 N. Y. Supp. 355.

In *Rosenblum v. New York Butchers' Dressed Meat Co.*, 61 Misc. Rep. 263, 113 N. Y. Supp. 604, the plaintiff entered into a contract whereby he agreed to construct folding lift gates across a street and sidewalk according to certain specifications, and further contracted that the gates should be of first class workmanship and material and should operate satisfactorily when erected. The gates were constructed in strict compliance with the plans and specifications, but proved to be a failure in their operation. In reversing a judgment against the contractor, Ford, J., said: "Defendant contends that the agreement of the plaintiff that the gates 'shall operate satisfactorily when erected' is absolute and covers the practicability of the structure. The plaintiff insists that the agreement was satisfied when he produced gates that would operate as well as any such gates could be made to operate. The former contention goes to the design as well as to the actual construction; the latter throws the responsibility of the design onto the defendants and charges the plaintiff only with the obligations of proper materials, workmanship, and construction according to that design. It seems to me that the plaintiff's contention is the more reasonable one, both in the light of the evidence adduced by the plaintiff (the only evidence we have before us on this appeal) and on the authority of *MacKnight Flintic Stone Co. v. Mayor, etc.*, 160 N. Y. 72, 54 N. E. 661. The judgment should be reversed."

The evidence before us sustains a finding that respondents completed their contracts in strict accordance with the plans and specifications.

The judgment is affirmed.

MOUNT, GOSE, and PARKER, JJ., concur.

RASTELLI v. HENRY et al.

(Supreme Court of Washington. April 28, 1913.)

1. TRIAL (§ 252*)—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to an employé pushed from the footboard of a dinky engine by an iron rod placed on the footboard, the employé testified that he did not know who placed the rod there, and the foreman stated that he saw the employé place it there, a charge that, if the foreman told the employé to ride on the footboard, the employé could assume that it would not be unsafe, and, if it was made unsafe by reason of any act of the foreman placing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the rod thereon, the employé could recover, was erroneous because submitting to the jury the question whether the footboard was made unsafe by the act of the foreman, though there was no evidence on the issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. TRIAL (§ 306*)—EVIDENCE—VERDICT.

A verdict must be based on the evidence, and the jury may not indulge in conjecture.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 731, 742; Dec. Dig. § 306.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

It is error to submit a vital issue to the jury when there is no evidence pertaining thereto, and a specific request has been made to withdraw it from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Dominic Rastelli against L. C. Henry and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

Peters & Powell and George E. de Steiguer, all of Seattle, for appellants. Burton E. Bennett, of Seattle, for respondent.

MAIN, J. This is an action brought for the purpose of recovering damages for personal injuries. The defendants were contractors doing railroad construction work. At the time of the injury they were constructing at Earlington, Wash., for the Chicago, Milwaukee & Puget Sound Railway Company, switch tracks in the switch yards located at that place. The method of operation was briefly this: By means of a steam shovel, earth was taken from the pit, placed in dump cars, and then, by means of what is known as a dinkey engine, transported some distance up the track where the sides of the dump cars were loosened and the dirt fell on either side of the track just outside of the rails. This caused ridges or mounds of earth to exist near the track. The track was of substantial construction, having been built with the rails and ties which were to remain upon the ground for a switching track.

About September 14, 1911, the plaintiff was employed by the defendants as a laborer, and a day or two thereafter was placed at work in the pit where his duties were to assist in moving forward the steam shovel as occasion might require. There were with him three other pit men and a man who was designated as a "coal man."

On the morning of the 21st, the foreman directed all the men that were working in the pit to get two pinch bars and some other articles and place them upon the dinkey engine, which was then standing near the steam shovel; the purpose being to go about a half mile up the track and there place upon the track a plow car which had been delivered at that point; a plow car being a car which would be used for leveling down

the bumps or mounds of earth at the side of the track already referred to. In response to the direction of the foreman, the pinch bars and other articles were brought out of the pit by the men therein. The men then got aboard the engine, four of them on the running board at the rear, two on either side of the center. The plaintiff took a place on the footboard in front at the left, he claims, at the express direction of the foreman. This the foreman specifically denies. One of the pinch bars had by some one been placed upon the footboard where the plaintiff stood. The running board and footboard were each about seven feet long. Above each was a heavy timber, commonly called the "dead-wood." The engine started up the track with the men in the places indicated; the engineer and the foreman in the cab. After going some distance, crossing the main line of the railroad track and at a point about 300 feet beyond, the pinch bar, which was an iron rod, wedge shaped at one end and round at the other and about four or five feet long, which had been placed on the footboard, gradually jostled outward until the end thereof came in contact with the mounds of earth at the side of the track. This caused it to push the feet of the plaintiff off the footboard. He fell upon the track and the engine passed over one limb, severing it, or lacerating it in such a manner that it was necessary to be amputated above the knee.

The plaintiff claims that the defendants were negligent in that the engine was operated at an excessive rate of speed; that the track was uneven and unsafe; that the leaving of the mounds at the side of the track on which the end of the pinch bar caught was an unnecessary hazard and a dangerous risk; and that the pinch bar had been placed upon the footboard either by the foreman himself or at his express direction and command. The plaintiff, when asked the direct question as to who placed the pinch bar upon the footboard, stated that he did not know. The foreman, when asked the same question, stated that he saw the plaintiff place it there himself. There is no other evidence in the record on this question.

The case was tried to the court and a jury, and a verdict for the plaintiff returned. Motion for new trial being overruled, judgment was entered on the verdict, from which the defendants appeal.

Error is assigned in the refusal of the court to give requested instructions and as to instructions given. Two of these will be noticed.

[1] The court was requested by the appellants to instruct the jury that there was no evidence that the foreman either placed, or caused to be placed the pinch bar on the footboard in front of the engine, and that, unless they found that the appellants were guilty of some other act of negligence charged in the

complaint, they should return a verdict for the appellants. This request was in the following form: "There is no evidence in this case by which the defendants can be held responsible for the placing of a pinch bar upon the front end of the engine, and, if you do not find by a preponderance of the evidence some other acts or omissions constituting negligence on the part of the defendants in this action, then you must find for the defendants."

The court did not give the instruction requested either in form or substance, but did give an instruction as follows: "If you further believe from the evidence that the foreman told the plaintiff to ride upon the front part of the engine and directed him so to do, then the plaintiff in this case would have a right to assume and believe that it would not be an unsafe place to ride, and if it was made unsafe to ride by reason of any act of the foreman, such as the placing thereon of pinch bars or frogs by the foreman or superintendent in charge, and that this became the proximate cause of his injury, then the master would be responsible in compensatory damages." The instruction given in effect submitted to the jury the question whether or not the place where the plaintiff was riding was made unsafe by the act of the foreman in placing, or causing to be placed, the pinch bar where it was. The question as to who placed the pinch bar on the footboard is vital, for if it were an act of the plaintiff himself, or of any of his fellow workmen, and was the proximate cause of the accident, there would be no liability on the part of the appellants. As above stated, there was no evidence as to how the pinch bar came to be where it was, except that of the foreman, who testified that the plaintiff himself placed it there. This would not be sufficient to justify submitting to the jury the question as to whether the foreman either placed or caused it to be placed where it was. The jury could not find that the act of placing the pinch bar upon the footboard was chargeable to the foreman, and thereby to his principals, without indulging in guess and conjecture.

[2] Verdicts must be based upon evidence and not upon surmise. In *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405, it is said: "Outside of the fact that Williams testified positively that he did not remove the stake, the testimony of the respondent did not make a prima facie case on that proposition, and the jury could not reach the conclusion that Williams did remove the stake, without resorting to guesswork and surmise. Of course it is well established that the jury is the judge of the credibility and reasonableness of the testimony. But it is just as well established that verdicts must be based on facts proven, and not on speculation and surmise."

[3] It is error to submit a vital issue to

the jury when there is no evidence pertaining thereto, and a specific request has been made to withdraw the same from the jury's consideration. The requested instructions should have been given. In *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 300, 93 Pac. 430, it is said: "This instruction does not cure the error above mentioned, as it submits an issue not authorized by the evidence tending to confuse the jury. Had the jury, in answer to special interrogatories, found (1) that the appellant had not failed to properly instruct or warn the respondent, (2) that it had performed its duty in furnishing a proper safeguard for the top head of the machine, but (3) that the belt shifter was not a proper appliance for the purpose for which it was intended, a general verdict for respondent, upon the evidence before us, would not be permitted to stand. Yet we are unable to say that the jury did not reach its verdict in this manner."

The judgment will be reversed, and the cause remanded for new trial.

MOUNT, MORRIS, and ELLIS, JJ., concur.

THORESEN v. ST. PAUL & TACOMA LUMBER CO.

(Supreme Court of Washington. April 18, 1913.)

1. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action against the seller of lumber for injuries to a stevedore employed by a contractor for the job to help load the lumber into a vessel, by the seller's lumber car running off the tramroad and the lumber falling upon plaintiff, whether plaintiff was guilty of contributory negligence *held* a question for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 72*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

One was entitled to act upon appearances in stopping a runaway tram car in an emergency, and was not negligent if he acted as a reasonably prudent person under the circumstances, though he may have been deceived as to the danger.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 99, 100; Dec. Dig. § 72.*]

3. NEGLIGENCE (§ 136*)—JURY QUESTION.

Negligence is a question of law only when the facts authorize but one inference, and is for the jury if different minds might honestly reach a different conclusion.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. NEGLIGENCE (§ 132*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action by an employé of a contractor to load a vessel with lumber, against the seller of the lumber, for injuries by a tram car load of the lumber, which fell on him while trying to stop the car, evidence by plaintiff that he tried to stop the car because he thought that injury might result to persons or property if the car reached the end of the track without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

being stopped was admissible on the question of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 257-286; Dec. Dig. § 132.*]

5. EVIDENCE (§ 151*)—MOTIVE.

Whenever motive, belief, or intention is material, the direct testimony of the person as to what his motive, belief, or intention was, is competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

6. TRIAL (§§ 140, 142*)—QUESTIONS FOR JURY—WITNESSES.

The credibility of witnesses and the inferences to be drawn therefrom is for the jury in the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335, 337; Dec. Dig. §§ 140, 142.*]

7. NEGLIGENCE (§ 2*)—NATURE.

Negligence arises only from an omission of duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.*]

8. NEGLIGENCE (§ 52*) — DEFECTIVE APPLIANCES—WARNING.

It was the duty of a lumber company to inform an employé of a contracting stevedore, engaged in loading lumber for the stevedore from a tram car, of the fact that one rail of the track was shorter than the others and of the want of bumpers on the car, or of the grade in the track, if those things added to the danger of the work; his coemployés not being required to inform him thereof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 65; Dec. Dig. § 52.*]

9. TRIAL (§ 194*)—INSTRUCTIONS.

A requested instruction, that one injured from lumber falling from a tram car could not recover if he was apprised of the approach of the car in time to avoid injury therefrom, and could have avoided it, was properly refused, where the evidence made it a jury question whether the injured person was negligent in trying to stop the car.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

10. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE.

If plaintiff was injured by the negligence of defendant, the latter is liable for the injuries irrespective of whether the negligence of others also contributed to the injuries.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

11. TORTS (§ 22*)—JOINT TORT-FEASORS—LIABILITY.

A recovery may be had against all joint tort-feasors jointly, or against a number less than the whole.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.*]

Department 2. Appeal from Superior Court, Pierce County; Miles L. Clifford, Judge.

Action by Louie Thoresen against the St. Paul & Tacoma Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed upon remittitur; otherwise reversed and remanded.

Clayton Chapman and L. M. Bailey, both of Tacoma (F. S. Blattner and Herbert S. Griggs, both of Tacoma, of counsel), for appellant. Bates, Peer & Peterson, of Tacoma, for respondent.

FULLERTON, J. In this action the respondent, Louie Thoresen, recovered against the appellant, St. Paul & Tacoma Lumber Company, damages in the sum of \$15,000 for personal injuries received while at work as a stevedore upon the appellant's docks, assisting in loading lumber upon an ocean-going vessel.

The evidence tended to show that the appellant sold a cargo of lumber to the Charles Wilson Company agreeing to deliver the same on its own dock within reach of ship's tackle. The stevedoring firm of Rothschild & Co. contracted to load the lumber onto the vessel, and employed the respondent with some 45 others to assist in the work. The respondent began work on the morning of the day he was injured. At that time he found quite a quantity of lumber piled upon the dock, and he, together with one Tellefson, was directed to pile the lumber into sling loads preparatory to hoisting it onto the vessel. Later on in the day the appellant began to bring lumber onto the dock from its millyards, and the respondent and his collaborer were directed to unload the cars which brought the lumber to the dock. These cars had flat tops which were about four feet wide and eight feet long, set upon two sets of trucks of two wheels each, placed about four feet apart. They ran on a track something similar to that of an ordinary railroad. The track ended on the dock within a few feet of the side where the vessel which was being loaded was anchored. Some 120 feet back towards the lumber yards of the appellant there was a rise or elevation in the track above its common level of some 15 inches, giving the track a gradual slope downwards towards the dock for about 60 feet, from which point to the end of the track it was again comparatively level. Loaded cars were brought to the top of the rise from the appellant's lumber yards by horses, where they were blocked and left until such time as the stevedores got ready to unload them. When it was desired to unload the cars, the stevedores pushed them by hand to such place on the dock as they deemed it most convenient for that purpose. The lumber being carried by the cars at the time of the accident to the respondent consisted of timbers, 10 inches by 10 inches in size, ranging in length from 8 to 20 feet. The timbers were loaded on the cars in tiers, having a width of 5 pieces and a height of 6 pieces. The load was usually secured on the car by small pieces of boards called "binders" laid across the load between the tiers, and sometimes by stays or over-riders placed across the top of the load. One of the end rails of the track on which the respondent was working was about 20 inches shorter than the corresponding rail on the other side, and no buffer or block of any kind was placed to prevent the cars from running off the end of the track.

Just prior to the happening of the acci-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dent, the respondent and his collaborer unloaded a car, and piled the lumber to the side of the track and some three or four feet therefrom. As they finished their work and lifted the unloaded car from the track preparatory to bringing in another loaded car down the incline, the respondent observed a loaded car coming down the incline from the rise in the track at a considerable speed. Fearing, as he testified, that the car might run off the end of the track and destroy property, or kill or injure some one, he gathered a plank and endeavored to stop the car by placing the board in front of the hind wheel. This he did twice, the car running over the board each time without stopping. He then prepared to place the block for the third time, when the front wheel of the car ran off the end of the short rail and turned over sufficiently to cause a part of the load to fall off. The falling lumber caught the appellant between the car and the lumber pile which had been placed along the side of the track, crushing and breaking both of his legs and otherwise bruising his body; being the injuries for which he sues.

The car causing the injury was brought to the top of the grade by one of the appellant's teamsters, and, according to the respondent's testimony, was let loose by the teamster and allowed to run down the incline without warning and contrary to the usual custom, and was not observed by the respondent until it was almost upon him. The respondent's testimony tended to show, also, that the load was without the usual binders, and consequently more liable to fall off than it would have been had it been loaded in the usual way. On these facts, and the further facts that one of the end rails was shorter than the other and there was no buffer to prevent the car from leaving the rails entirely, the respondent bases his claim of negligence on which he predicates his right to a recovery.

Answering the complaint, the appellant denied all of its material allegations, and set up affirmatively, in separate defenses, contributory negligence, assumption of risk, and that the respondent's injuries, if any he received were caused by the carelessness and negligence of his fellow servants. On the trial at the conclusion of the evidence the appellant moved for a directed verdict on the ground that the evidence showed conclusively that the respondent had directly and proximately contributed to his own injury. The appellant also after the entry of judgment moved to set the same aside on the ground of irregularity, and on certain statutory grounds, all of which motions the trial court overruled.

[1-3] The appellant first assigns that the court erred in overruling its motion for a directed verdict in its favor on the ground of contributory negligence on the part of the respondent. The claim of contributory negligence is based on the conduct of the re-

spondent while he was endeavoring to stop the car from which the lumber fell that injured him. Attention is called to the fact that the lumber pile between which and the car the respondent found himself when the lumber on the car started to fall, and which it is claimed cut off his chance of retreat, was placed there by the respondent himself, also to the further fact that no harm could have come, as the sequel proved, had the car been allowed to run to the end of the rails. But notwithstanding the respondent's acts may not have been essential either to preserve the property from loss or protect other individuals from harm, we think nevertheless that the question whether his act constituted contributory negligence was a question for the jury. He was entitled to act upon appearances, and, if his conduct was that of a reasonably prudent person under the circumstances, he is not to be charged with contributory negligence even though he may have been deceived thereby. Negligence is a question of law for the court only when there can be but one conclusion drawn from the facts proven. If different minds might honestly reach different results from the facts, the question is one for the jury. We have set out the facts in our statement of the case, and we think men may from a consideration thereof honestly differ whether the respondent's conduct was reckless or ordinarily prudent.

[4, 5] The respondent was permitted to testify, as we have said, to his motive and purpose in attempting to stop the car, saying that he thought damage to property might be done by it or some person killed or injured if it was permitted to reach the end of the rails with its speed unchecked. It is thought that this evidence is inadmissible, but the rule is that whenever the motive, belief, or intention of a person is a material fact to be proven, the direct testimony of such person as to what his motive, belief, or intention was, is competent. Here the particular evidence was material on the question of the respondent's contributory negligence. It is further argued in this connection, however, that the evidence was not worthy of credence, and if excluded there is nothing in the record to justify the respondent's voluntary exposure of himself to danger in his attempt to check the flight of the car.

[6] It is claimed that the evidence is not worthy of credence because given in testimony when the witness was called to the stand after the court and after he had gone over his entire case in response to questions by his counsel before the adjournment, and further because it was not shown that there were any persons to be injured by letting the car go unchecked, and because the sequel proved that there was no danger of it running off the dock after it left the track. But the credibility of the evidence, and the inferences properly to be drawn from the manner in which it is given, were for the jury;

the inferences are not so conclusive as to make the question one of law.

The court gave the jury the following instruction: "The answer also contains an affirmative defense that the negligence which caused the plaintiff's injury was due to the acts of fellow servants, but, as to that, the court instructs you that there is no evidence to sustain such defense, and therefore you will disregard the question of the defense of fellow servant in considering your verdict." The appellant contends that the instruction was erroneous because it precluded the jury from considering whether or not respondent's working companions signaled the respondent's teamster to send the car causing the injury down to the dock, as the teamster testified; and also precluded the jury from considering whether Rothschild & Co.'s foreman, or other employes, were negligent in failing to warn the respondent of the danger, if danger there was, from the short rail, the want of bumpers, or the grade of the track, or whether any of the other fellow servants of the respondent were negligent in failing to get the pile of lumber out of the way between which and the car the respondent was caught at the time of his injury, or whether the respondent's co-workman was negligent in not getting to the car in time to stop it.

[7, 8] But negligence arises from an omission of duty, and the respondent's coemployes owed him no duty to inform him of the short car rail, the want of bumpers, or the grade in the track. The duty to give this information was the appellant's or the immediate employer of the respondent, not his collaborators and those in fellow service with him. Whether the respondent's collaborer did or did not use sufficient diligence to stop the car, there is nothing in the record to show. It was shown that he made an effort in that direction, but if it did appear that his efforts were not sufficiently exacting it would be too much to say that the jury might determine therefrom that the respondent's injuries were chargeable to his negligence in that behalf. Moreover, the court did not take from the jury the question whether the appellant's teamster sent the car down the grade in response to a signal from the respondent's co-workers. On the contrary, he stated to the jury explicitly that if they found "that the employe of the St. Paul & Tacoma Lumber Company let go of the car from which the lumber fell and injured the plaintiff, in the usual manner of letting the cars go down the grade, and in response to a signal from plaintiff or some employe of Rothschild & Co. that they were ready to receive the same, then such a letting go would constitute a delivery to Rothschild & Co., and Rothschild & Co. would be responsible for its management thereafter." This sufficiently covered the question, even assuming that it was technically erroneous to say that there was no evidence supporting the allegation

that the respondent's injuries were due to the negligence of a fellow servant.

The appellant requested the following instructions: "You are instructed that an act is not to be deemed the proximate cause of an injury unless the injury was such a consequence of the act as under the circumstances of the case might and ought to have been foreseen or anticipated by an ordinarily reasonably prudent man as reasonably likely to flow from such an act. In other words, where the proximate cause is the efficient cause from which the injury follows in unbroken sequence without intervening cause to break the continuity or connection, and if in this case you should find from the evidence that the defendant, St. Paul & Tacoma Lumber Company, started and allowed a car of lumber to start down an inclined track towards the place where plaintiff was working without giving him warning, and not in obedience to a signal from the plaintiff and his fellow workmen, and not in obedience to any custom so to do, and that such act was negligent, still, if you further find from the evidence that the plaintiff, with or without his coemployes, was apprised of the approach of the car in time to avoid injury therefrom, and could have avoided the same, then you are instructed that the said negligence of the defendant was not the proximate cause of the injury to plaintiff, and said defendant, St. Paul & Tacoma Lumber Company, would not be liable therefor.

"Should you find from the evidence that Rothschild & Co., or any of the employes of Rothschild & Co. who were working with plaintiff, or plaintiff himself, by their own acts in handling said car after the same had been delivered to them, contributed to the conditions which were the proximate cause of the injury to plaintiff, then such acts would bar plaintiff from recovery against said St. Paul & Tacoma Lumber Company."

[9] These instructions were properly refused. The first because of the clause therein to the effect that there could be no recovery against the appellant if the respondent "was apprised of the approach of the car in time to avoid injury therefrom, and could have avoided the same," as this was practically equivalent to an instruction to find for the appellant, since it cannot be seriously questioned, in the light of the record, that the respondent saw the car in time to avoid injury therefrom and could have avoided the same. His right to recover, however, is not to be tested by this fact. If, after observing the car, his conduct in endeavoring to stop it was that of a reasonably prudent person, he is not guilty of contributory negligence or barred of his right to recover, while, on the other hand, if his conduct in that behalf was not that of a reasonably prudent person, he is guilty of such negligence and is barred of his right to recover. The instruction therefore, be-

cause of the objectionable feature noted, was properly refused.

[10] The second requested instruction quoted was also properly refused as an incorrect statement of the law. The rules of law governing the relations between master and servant have no application to persons who do not bear to each other that relation; hence, if the appellant's negligence contributed to the injury of the respondent, it is liable for such injury, no matter whether the negligence of others contributed thereto or not, or what were the relations between such others and the respondent. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64; *Williams v. Ballard Lumber Co.*, 41 Wash. 338, 83 Pac. 323.

[11] It is claimed that the judgment is irregular and should have been set aside on the appellant's motion because entered against the appellant separately and not jointly against it and its codefendants who made default. But the appellant and its codefendants, if all were equally liable to the respondent, were joint tort-feasors, and the rule is that a recovery may be had against all of them jointly, each severally, or against any number less than the whole. In this instance it was optional with the respondent whether he pursued his case to judgment against all of the defendants, and his failure so to do is not error of which the codefendant can complain. *Doremus v. Root*, 23 Wash. 710-713, 63 Pac. 572, 54 L. R. A. 649.

The appellant finally contends that the verdict is excessive, and with this we are inclined to agree. The respondent was unquestionably injured seriously and permanently, and the avocations in life which he has formerly pursued for a livelihood are no longer open to him. But nevertheless he is not cut off absolutely from all employment, and in fixing the amount of the recovery cognizance should be taken of such fact, and we think the jury did not sufficiently consider it. We shall not, however, order a new trial in the first instance. But if the respondent will within 30 days after the remittitur from this court reaches the lower court file in that court a written consent to accept judgment for \$10,215, then judgment shall be entered in his favor for that sum against the appellant and its surety on the supersedeas bond; otherwise the lower court will grant a new trial.

CROW, C. J., and MAIN, ELLIS, and MORRIS, JJ., concur.

ROSS v. KENWOOD INV. CO. et al.
(Supreme Court of Washington. April 21, 1913.)

1. PRINCIPAL AND AGENT (§ 148*)—AGENT'S POWERS—NOTICE TO THIRD PERSONS.

Persons dealing with property sold pursuant to a recorded power of attorney are only

charged with such knowledge as to the extent of the powers of the attorney in fact as the power of attorney conveys, in the absence of actual knowledge as to the extent of the powers; the agent's apparent authority being his real authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 534-552; Dec. Dig. § 148.*]

2. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASERS—CONSIDERATION.

One purchasing land need only notice that a sufficient consideration is named in the deeds constituting his chain of title, not being bound to compare the consideration recited with the market value of the property at the time the several conveyances were executed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

3. PRINCIPAL AND AGENT (§ 103*) — POWER OF ATTORNEY—CONSTRUCTION.

The power to sell and convey only authorized the agent to sell and convey for a fair money consideration, and not to make an exchange of property.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

4. PRINCIPAL AND AGENT (§ 103*) — POWER OF ATTORNEY—CONSTRUCTION.

A power of attorney authorizing the agent "to bargain, contract, agree for, purchase, receive, and take lands," and to "bargain, sell, remise, release, convey, mortgage, and hypothecate lands," authorized the attorney to exchange land as well as to buy and sell.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

5. VENDOR AND PURCHASER (§ 3*)—SALE DISTINGUISHED FROM EXCHANGE.

Though the consideration of a conveyance was other property, where the real property involved is dealt with as having a fixed and agreed value, the transaction is usually regarded as a sale and not an exchange.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 3; Dec. Dig. § 3.*]

6. PRINCIPAL AND AGENT (§ 97*)—CONSTRUCTION OF POWER—STRICT CONSTRUCTION.

While powers of attorney to convey realty are generally construed strictly, they should not be so construed as to defeat the evident intent of the principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 344-376; Dec. Dig. § 97.*]

7. PRINCIPAL AND AGENT (§ 31*) — POWER OF ATTORNEY—EXTENT OF AUTHORITY.

Where an attorney in fact had absolute power to convey his principal's realty, such power could not be lessened by any provision in a contract executed by the attorney to convey land, though the full extent of his powers is not exercised by such contract; failure to exercise not being a surrender.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 53; Dec. Dig. § 31.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Elizabeth Ross against the Kenwood Investment Company and others. From a judgment for plaintiff, certain defendants appeal. Reversed in part.

Palmer & Askren, of Seattle (A. J. Falknor, of Seattle, of counsel), for appellants Yocum and others. Brady & Rummens, of Seattle, for appellant Allen. John S. Jurey, of Seattle, for respondent.

PARKER, J. The plaintiff, claiming to be the owner of lots 1 and 2 of block 54, division 6, Capital Hill addition to Seattle, seeks to have certain instruments of record in the auditor's office of King county, canceled as clouds upon her title, and have her title quieted as against the claims of the defendants. At the conclusion of the trial upon the merits, the court rendered a decree canceling the instruments complained of by the plaintiff and quieting her title as against the claims of the defendants, but awarding to certain of the defendants liens upon the lots for money expended by them in satisfaction of the tax and other liens thereon. The defendants, claiming title to the lots under certain of the instruments canceled by the decree, and also the defendant Elizabeth Allen, claiming a lien upon the lots under a mortgage canceled by the decree, have appealed.

The rights of appellants rest upon certain deeds of conveyance in their chain of title which were executed by an attorney in fact of respondent. The extent of the power of attorney in fact, as appellants were entitled to view such power, is the main problem for our solution here. Counsel for respondent states, in the introduction of his able and voluminous brief, that: "The case is a long, complex, and intricate one, both as to the facts and the law involved." Were we dealing with the rights of respondent as against her attorney in fact, and her immediate grantee named in the deed executed by her attorney in fact, the controversy might well be regarded as being very complex and intricate. But since appellants are not the immediate grantees of respondent and were entire strangers to her at all times prior to acquiring their respective interests in the lots under subsequent conveyances, we think it will appear as we proceed that the controlling facts are not seriously involved, nor are they subject to serious controversy.

The lots involved are now and have been at all times unoccupied, and not in the physical possession of any one. During a period of some eight years prior to October, 1911, respondent spent most of her time in Alaska, being there all of the time from June, 1907, to October, 1911. During the larger part of this period she was in remote and somewhat inaccessible places in Alaska, so far as communication with her friends at Seattle was concerned. She evidently went to Alaska expecting to be so situated, and the last time she left Seattle for Alaska in June, 1907, she now admits that she then expected to remain a number of years. While her power of attorney here involved had been

executed prior to that time, she then had a conversation with her attorney in fact in Seattle, resulting in the understanding between them that the power of attorney should remain in force during her absence. It reads as follows: "Know all men by these presents: That I, Elizabeth Ross, of Council City, Council Precinct, Second Division, District of Alaska, have made, constituted and appointed, and by these presents do make, constitute, and appoint Hattie Boyker, of the city of Seattle, county of King, in the state of Washington, my true and lawful attorney for me and in my name, place and stead and for my use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me, and have, use, and take all lawful ways and means in my name, or otherwise for the recovery thereof, by attachments, arrest, distress, or otherwise, and to compromise and agree for the same, and to make, sign, seal and deliver acquittances, or other sufficient discharges for the same, for me and in my name, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds, and other assurances in the law therefor; and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants as she shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choses in action and other property, in possession or in action, and to release mortgages on lands or chattels, and to make, do and transact all and every kind of business of what nature and kind soever. And also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomaries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage judgment and other debts, and such other instruments in writing, of whatever kind or nature, as may be necessary or proper in the premises: 'Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, I, Elizabeth Ross, hereby ratifying and confirming all that my said attorney Hattie Boyker shall lawfully do or cause to be done, by virtue of these presents.' 'In witness whereof I have here-

unto set my hand and seal the 16th day of August in the year of our Lord one thousand nine hundred and four."

This power of attorney was duly signed and acknowledged by her before a notary public at Council City in Alaska, and was thereafter duly recorded in the office of the auditor of King county. At that time respondent had acquired some real property in Seattle, and thereafter, in 1906, she acquired the lots here involved. In April, 1907, Hattie Boyker, as attorney in fact for respondent, executed a mortgage upon these lots to one Shorratt to secure the sum of \$1,238. This mortgage was duly recorded in the office of the auditor of King county on May 13, 1907. This exercise of the power by Hattie Boyker as attorney in fact became known to appellants upon their examination of the abstract of title, preliminary to acquiring their respective interests in the lots, and there was nothing on record suggesting to appellants that the power had not been lawfully exercised. Indeed, respondent concedes that it was so lawfully exercised and within the scope of the power given. This was a circumstance suggesting to appellants that the power was being exercised, and that, so far as shown by the public records, it was unquestioned by respondent up to the time appellants acquired their interest in the lots. On April 10, 1909, Hattie Boyker, as attorney in fact for respondent, executed a warranty deed, absolute in form, for these lots to the defendant Samuel C. Freels, reciting a consideration of "fifty-five hundred dollars lawful money of the United States." Two days later, on April 12, 1909, defendant Freels executed a mortgage upon the lots to Elizabeth Allen to secure an indebtedness of \$2,000 evidenced by his promissory note to her. This deed and mortgage were recorded in the auditor's office of King county on April 26, 1909, at 11:42 a. m. and 11:43 a. m., respectively. Thereafter Freels caused the Shorratt mortgage to be paid and satisfied of record.

On October 22, 1909, Freels entered into a contract for the sale of the lots to appellant John L. Yocum for the sum of \$5,500, receiving \$200 cash payment thereon and signing an earnest money receipt accordingly; the agreement being that the sale should be completed within 30 days. Yocum was acting for himself and appellants other than Elizabeth Allen. The abstract of title to the lots being examined by attorneys for the prospective purchasers, and the sale being about to be completed, John H. Allen, an attorney of Seattle, notified Yocum by letter that there existed a contract between Freels and respondent by her attorney in fact, relating to the purpose of the execution of the deed conveying the lots to Freels; that the contract had been filed in the office of the auditor of King county; and that respondent would have "until the 1st day of August,

1910, in which to redeem said property." This was the first notice Yocum and his associates received of the existence of this contract, and, upon an examination of the records in the auditor's office thereafter caused to be made by them, they first learned of its contents. It had been recorded at the request of J. H. Allen on November 23, 1909. This contract was drawn at the same time the deed was given by respondent by her attorney in fact to Freels, on April 10, 1909, and was evidently intended by all parties to be then executed. The evidence indicates that it was then actually signed by the parties, though upon its face it appears to have been formally executed and acknowledged on October 20, 1909. Its language is somewhat involved; but it evidences an intent on the part of Freels and respondent's attorney in fact to have the lots conveyed to Freels in consideration of the conveyance to respondent of certain other real property and the assumption by Freels of incumbrances, including taxes and local assessments, amounting to a considerable sum then against the lots, all in lieu of the \$5,500 money consideration expressed in the deed to Freels. The contract also refers to the \$2,000 mortgage given by Freels to Elizabeth Allen in such manner as to evidence an understanding that Freels should execute such mortgage immediately upon receiving the conveyance for the lots. The contract also evidences an intention to have Freels take title to the lots, subject to redemption or repurchase by respondent, by her deeding back the other real property received by her in part consideration therefor and paying certain sums to Freels, and also makes provision for taking care of the Allen mortgage. The following provisions of the contract relate to these matters: "It is understood and agreed that, should Elizabeth Ross disapprove of said sale of said lots, then, in that event, the said Elizabeth Ross, either in person or by her said attorney in fact, should be entitled to repossess herself of the title to said lots. * * * It is further understood and agreed between the parties hereto that all of the papers together with the abstract, receipt and this contract shall be deposited in escrow and remain with the said J. H. Allen, until this contract shall terminate as herein provided. * * * It is further distinctly understood and agreed between the parties hereto that the said Elizabeth Ross shall have until the first day of August next ensuing to redeem said property as herein provided. * * * Should the said Elizabeth Ross fail to redeem said property as herein provided, then said Allen shall deliver deeds, etc., to the said property on Capital Hill shall be and remain the property of the said Freels."

While the contract seems to contemplate the leaving of the papers in escrow in the hands of J. H. Allen, we think the evidence

shows that the deed to Freels and the mortgage to Elizabeth Allen were intended to be then recorded, and were in fact recorded, by consent of all of the parties, on April 26, 1909. Appellant Yocum and his associates, thus learning of this contract giving respondent the right to repossess herself of the title to the lots under the conditions therein specified, insisted on Freels' procuring a release of such right on the part of respondent before completing the purchase. To satisfy this requirement of Yocum and his associates, Freels procured a quitclaim deed from respondent, executed by her attorney in fact, releasing her right to redeem the lots, reciting as a consideration therefor, "The sum of five dollars and other good and valuable considerations," and further reciting as follows: "This deed is made to convey the title to property aforesaid, free from any equities or contingent rights that may exist therein, in favor of the party of the first part by reason of a certain instrument dated October 20, 1909, and recorded November 23, 1909, File No. 650860, vol. 683, page 473, of Deeds, in the office of the auditor of King county, Washington, executed by the said Elizabeth Ross by her attorney in fact, Hattie Boyker, and Samuel C. Freels, the said instrument being by inadvertence dated the 20th day of October, 1909, but it should have borne date the 12th day of April, 1909, and the said month of August therein referred to as 'the first day of August next ensuing' was the month of August, 1909." Thereafter, on January 12, 1910, the sale to Yocum and his associates was completed by Freels executing a deed to appellant Lewis C. Troughton, who thereafter conveyed the lots to appellant Kenwood Investment Company. This company is a corporation. Its entire stock is owned by Yocum, Troughton, and E. B. Palmer, who have entire control of its interests. These constitute the associates of Yocum in whose interest he acted in making the contract of purchase with Freels. Therefore, so far as notice of respondent's equities is concerned, we may regard all of these as standing in the same position. The consideration of \$5,500, specified in the contract of purchase and deed from Freels to Troughton, executed in pursuance thereof, was the actual amount of the consideration paid by Yocum and his associates, including the assumption by them of the \$2,000 Allen mortgage and some local assessments then against the lots. It is conceded that neither Yocum nor any of his associates was acquainted with the respondent or her attorney in fact, Hattie Boyker, until after the closing of their deal with Freels and the entire consummation of their purchase of the lots from him, and a careful reading of this entire record fails to disclose any fact pointing to any knowledge on the part of Yocum or any of his associates touching respondent's interests in the lots, or the authority possessed by her attorney in fact, or the

nature of Freels' dealings with respondent and her attorney in fact, other than that disclosed by the recorded instruments we have noticed. It is conceded that the power of attorney was not revoked until long after appellants had acquired their interest in the lots.

While there appears a vast array of facts in this voluminous record which would have some bearing upon the question of respondent's right to relief as against Freels and her attorney in fact, we think the foregoing is a fair statement of all facts which can have any relation whatever to the rights of respondent as against either of these appellants, and this is all we are here concerned with.

Counsel for respondent rests her right to the relief prayed for as against appellants, upon the theory that the power of attorney did not vest in Hattie Boyker, as her attorney in fact, the power to convey the lots in the manner here shown; that both deeds executed by Hattie Boyker, as attorney in fact for respondent, were in fraud of respondent's rights; and that appellants had such knowledge thereof as to render those deeds void and ineffectual as to them, furnishing no support to their present claim of title in the Kenwood Investment Company. Looking to the terms of the power of the attorney alone, it would seem difficult, indeed, to frame a granted power to acquire and convey real property by an attorney in fact in more comprehensive language, not only as to the mere power to acquire and convey, but also as to the discretion vested in the attorney in fact to determine the conditions and purposes of such contemplated acquisition and conveyance, and when such acquisition and conveyance should be made. The language of the power of attorney evidencing these powers is: "For me and in my name, to bargain, contract, agree for, purchase, receive and take lands, * * * and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands. * * * And also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, * * * and such other instruments in writing, of whatever kind or nature, as may be necessary or proper in the premises."

[1] These are the powers which appellants were advised by the record that Hattie Boyker possessed as attorney in fact for respondent when she executed the deeds to Freels for the lots, and appellants are chargeable with no other knowledge relative thereto unless, at the time of acquiring their respective interests in the lots, they had notice of some facts suggesting inquiry upon their part that Hattie Boyker did not possess all of the powers evidenced by this language, or that the power had been exercised in fraud of respondent's rights. Her apparent

authority thus evidenced to appellants was in law her real authority, so far as their rights are concerned. 31 Cyc. 1331; Mechem on Agency, § 289.

Counsel for respondent seems to rest his contentions principally upon the facts and circumstances attending the execution of the first deed from respondent by her attorney in fact to Freels, which he argues was an unwarranted exercise of power on the part of Hattie Boyker, as attorney in fact, in that that transaction was an exchange and not a sale of respondent's lots, and that it was attended by fraud on the part of Freels, working to the injury of respondent. We have seen that the only notice appellants ever had of the nature or purpose of that conveyance, aside from the recitals of the first deed, is that contained in the recorded contract between Freels and respondent, and the quitclaim deed, both executed by respondent by her attorney in fact. It is true that that contract informed appellant that respondent had a right to redeem or repurchase the lots, and, if that deed be viewed as a mortgage only, she would probably have such right even beyond the time fixed for the redemption or repurchase, and until Freels foreclosed such right by appropriate proceedings in court. Viewing that deed as an absolute conveyance and respondent's rights as being only a right to purchase back the lots within the time agreed upon, it might well be argued that her right to so purchase back the lots expired before appellant Yocum and his associates acquired their interest in the lots. The recitals in the quitclaim deed from respondent to Freels by her attorney in fact clearly state facts so indicating. Appellants' rights do rest alone upon the first deed, however that may be. Respondent on December 1, 1909, by her attorney in fact, executed this quitclaim deed to Freels for the lots, reciting both a money and valuable consideration therein, and additional facts showing that it was the very purpose to thereby convey all of the interest of respondent in the lots, and especially to free the lots from any equities or contingent rights which might then be existing in respondent by virtue of the contract accompanying the first deed. Did Hattie Boyker, as attorney in fact for respondent, have power to execute this quitclaim deed? The only argument advanced to the contrary is that it was without consideration and was a part of the fraud practiced by Freels in acquiring title to the lots from respondent.

[2] It was not without sufficient consideration expressed upon its face, and that is all that appellants were required to notice, so far as the consideration was concerned. They were informed, by the first deed and the terms of the contract, that respondent had some contingent interest in the lots. They were further informed, by the recitals in the quitclaim deed, that that contingent interest had then expired by limitation; and

we think no facts are shown in this record that would induce an ordinarily prudent person, in the position of appellants, to suspect that any of these recitals in the deed or the contract indicated a want of fair consideration moving to respondent or fraud upon the part of Freels or Hattie Boyker, respondent's attorney in fact, in the ultimate transfer of the absolute title to Freels by the quitclaim deed. In *Kinney v. McCall*, 57 Wash. 545, 548, 107 Pac. 385, 386, Justice Rudkin, speaking for the court, said: "A person who purchases property for a nominal or grossly inadequate consideration is not a bona fide purchaser, and one who purchases from such a purchaser with notice stands in his shoes; but a purchaser of real property is not bound to compare the consideration recited in every deed in his claim of title with the market value of the property at the time of the several conveyances, under penalty of having the property impressed with a secret trust in his hands. If such a rule were sanctioned by the courts, no person could safely purchase, hold, or deal in lands." This is indeed a just and wholesome doctrine for practical application in this new and growing state, where real property has become the subject of barter, exchange, and sale, to an extent, it seems safe to say, which is equaled by comparatively few localities in the world. Some contention is made upon the theory that the acquiring of title to the lots by Freels through these deeds was in effect an exchange and not a sale by the attorney in fact.

[3] This contention is rested upon the general rule that the power to sell and convey does not mean power to sell or convey except for a fair money consideration.

[4] Recurring to the power of attorney, we find that Hattie Boyker, as attorney in fact, was thereby given the power "to bargain, contract, agree for, purchase, receive, and take lands," as well as to "bargain, sell, remise, release, convey, mortgage, and hypothecate lands." In view of this language, we are of the opinion that the execution of the conveyances to Freels was a valid exercise of the power of Hattie Boyker, as attorney in fact, even though the transaction may have been an exchange.

[5] It is worthy of note in this connection that, while the transaction may in a sense be considered an exchange, the real property involved was dealt with therein as having a fixed and agreed value. Under such circumstances, a transaction of this nature has generally been regarded in law as a sale rather than a mere exchange. 11 Am. & Eng. Ency. of Law (2d Ed.) 570.

[6] Counsel invoke the general rule of strict construction of the language of powers of attorney to convey real property. While we recognize such to be the general rule, it should not be permitted to defeat the evident intent of the principal. In the case

of *Posner Bros. v. Bayless*, 59 Md. 56, involving a granted power to mortgage, the court said: "It is contended on the part of the appellants that all powers of attorney must receive a strict interpretation; that the authority is never extended by intentment or construction beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect; and hence the power in this case to borrow money and pledge the property therefor by way of mortgage authorizes merely a strict formal mortgage, and sanctions no other form of security and a pledge of no other description. But the rule that the authority conferred by a letter of attorney must be strictly pursued cannot override the general and cardinal rule that the intention of the party creating the power must prevail in its construction, and that such intention is to be ascertained from the language employed and the object to be accomplished."

Some contention is made seemingly upon the theory that the reserved contingent rights of respondent, under the first deed and contract accompanying it, lessened the power of the attorney in fact, in so far as her future dealings with that particular property is concerned. We are quite unable to follow counsel in this contention.

[7] The attorney in fact having the power of absolute disposition and conveyance of respondent's real property, we are unable to conceive of the lessening of that power by any language in the contract, an instrument executed by the attorney in fact herself. We are of the opinion that she still possessed all the power to convey the remaining contingent interest of respondent that she possessed before she conveyed subject to that interest. This was not a surrender of her power, but simply a withholding of the exercise of her entire power. Hence we think the quitclaim deed conveyed to Freels all of the remaining interest of respondent in the lots. Some contention is made upon the theory of the inadequacy of the consideration passing from appellants in the acquiring of their interest in the lots. The only foundation for this is the fact that some of the witnesses, touching the question of value, testified that the lots were worth \$7,000. It may be remarked that, upon the other hand, there were seemingly equally credible witnesses who testified that the lots were worth less than \$5,500, the amount of the consideration which appellants actually gave therefor. Clearly this condition of affairs does not in the least impair appellants' rights.

Having arrived at the conclusion that appellant Troughton and his associates acquired good title to the lots, through the deeds to Freels from respondent by her attorney in fact, especially through the quitclaim deed, there need be but little said as to the

rights of the mortgagee Elizabeth Allen. It necessarily follows that respondent is not in any position to resist the claims of Elizabeth Allen under her mortgage. Her claims, as against the land and as against Freels who executed the note secured by her mortgage, may be the subject of future negotiations with, or litigation against, appellants and Freels, but that is not a matter in which respondent has any interest.

We are of the opinion that the decree of the trial court must be reversed in so far as it decrees cancellation of the instruments involved and the quieting of title to the lots in respondent as against the rights of these appellants. It is so ordered, and the superior court is directed to enter a decree quieting the title of appellant Kenwood Investment Company to the lots, as prayed for in its answer, against all claims of respondent.

CROW, C. J., and CHADWICK, GOSE, and MOUNT, JJ., concur.

McGUIRE v. POST FALLS LUMBER & MFG. CO.

(Supreme Court of Idaho. April 11, 1913.)

1. NAVIGABLE WATERS (§ 39*)—RIGHT TO USE—CARE REQUIRED—FLOATING OF LOGS.

One who engages in floating logs and lumber down a stream must exercise reasonable care in order to avoid injury to the property of others. The fact that the stream is navigable does not give one the right to dump logs and timber into the stream and allow the same to go unattended and without being cared for, and form jams and dams in the stream and divert the current of the stream onto the property of other persons, and thereby injure and damage the same.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 108, 112, 117, 127, 239-244; Dec. Dig. § 39.*]

2. NAVIGABLE WATERS (§ 39*)—INJURIES FROM FLOATING LOGS—NEGLIGENCE—QUESTION FOR JURY.

Evidence in this case examined, and held sufficient to go to the jury to establish the charge of negligence.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 108, 112, 117, 127, 239-244; Dec. Dig. § 39.*]

3. EVIDENCE (§ 501*)—OPINION EVIDENCE—DAMAGES—INJURY TO PROPERTY.

In an action for damages on account of injuries to property, witnesses should not ordinarily be allowed to testify to the gross amount of the damage sustained without first detailing the injuries to the property and the damage to each part, piece, or parcel or the value of the same at the time of the injury or destruction. The witnesses should be required to give to the jury the detailed items and incidents of damage so as to enable the jury to make their own calculation and form their own conclusions as to the aggregate damage sustained.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

4. DAMAGES (§ 113*)—INJURY TO PERSONAL PROPERTY—MEASURE OF DAMAGES.

In actions for damage to personal property, the measure of damage should be the value of the property at the time of its destruction,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

where the property has been totally destroyed or so badly injured or impaired as to render it valueless for the use to which it was originally designed and appropriated. Where, however, the property is merely damaged and is capable of being repaired, the measure of damages should be the cost of repair, together with the value of the use of the property during the time it would take to make the repairs.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 279, 280; Dec. Dig. § 113.*]

5. NAVIGABLE WATERS (§ 39*)—INJURIES FROM FLOATING LOGS—EVIDENCE.

Evidence in this case as to the amount of damage sustained examined, and held, that it is insufficient to support a verdict and judgment in the amount rendered in this case.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Henry McGuire against the Post Falls Lumber & Manufacturing Company, a corporation. From a judgment for plaintiff, defendant appeals. Modified.

E. N. La Veine and W. F. Morrison, Jr., both of Coeur d'Alene, for appellant. A. G. Kerns, of Wallace, for respondent.

AILSHIE, C. J. Respondent obtained a judgment in the lower court for \$2,250 as damages sustained on account of appellant allowing logs that it was floating down Pritchard creek, in Shoshone county, to pile up and cause a jam and dam the stream, and thereby wash out and destroy respondent's ditch and flume and sawmill. Respondent's mill is situated near Pritchard creek, and he had a ditch about 1,800 feet long taking water from Pritchard creek and dropping it into a pond near his mill. From the pond the water was carried by means of a flume a distance of 560 feet to respondent's mill. During the high-water period of 1910 appellant company commenced floating a large quantity of logs it had banked along Eagle and Pritchard creeks, and it seems that many of these logs piled up and formed a jam in the channel opposite respondent's property and diverted the main stream on to his property, filling up the ditch and washing away the flume and damaging his property generally. The damage here claimed is the result of the same flood and log drive set out and involved in *Idaho Northern Railroad Co. v. Post Falls Lumber Co.*, 20 Idaho, 695, 119 Pac. 1098, 38 L. R. A. (N. S.) 114, and the "McGuire's millrace" referred to in the opinion in that case is a part of the same property involved in the present case. The evidence was submitted to the jury, and they were thereafter taken to the place and allowed to inspect the stream and the premises where the damage is alleged to have been committed.

The chief contention made is that the evidence is insufficient to support the verdict and judgment. It is contended that the evidence shows that the Idaho Northern Rail-

road Company was responsible for the injury, and that appellant was not responsible, and that it had used such care and diligence in floating logs down the stream as the law devolves upon one using a navigable stream as indicated by this court in *Idaho Northern R. R. Co. v. Post Falls Lbr. Co.*, supra. The railroad company was not a party to this action; and, whatever negligence may be attributable to the railroad company, we are satisfied that there has been enough shown in this case to hold appellant for negligence in allowing the logs to form jams and dam up the stream and turn the current on respondent's property and thereby injure and destroy the same.

[1] What was said by this court in *Idaho Northern R. R. Co. v. Post Falls Lbr. Co.*, supra, with reference to the responsibility of one floating logs and lumber down a stream, is equally applicable in the case at bar. In that case the writer of this opinion, speaking for the court, said: "The person who undertakes to float logs and lumber down a stream must exercise reasonable care in order to avoid injury to the property of others. The fact that a stream is navigable does not give any one a right to dump logs and timber into the stream and allow the same to go unattended and without being cared for, and as a consequence to form dams and divert the current of water to the injury and damage of others. * * * The party who is attempting to navigate such a stream must exercise care proportionate to the dangers and difficulties of the undertaking and the liability of inflicting injury upon others."

[2] Appellant contends that it had a sufficient number of log drivers along the stream to properly take care of the logs, and that it exercised reasonable care and precaution in attempting to navigate the stream and protect the property of others. These were all proper questions to go to the jury, and the jury have found against appellant on the question of negligence and due care and precaution.

[3] The next question presented is a more serious one. It is contended that the verdict is excessive, and that it affords evidence on its face that it was the result of passion and prejudice against the appellant. The evidence as to the amount and character of the damage sustained is unsatisfactory, and was of such a nature as to leave it in a large measure to speculation and guesswork by the jury as to the amount that should be awarded. It seems that the flume was constructed and the mill built about nine years previous to this occurrence, and the material was necessarily old, and much of it must have been in a badly worn and deteriorated condition. There was really no evidence as to the value of the property at the time of the injury. It is not clear from the evidence as to how much of the flume of 560 feet

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was actually washed away or destroyed; neither does it appear to what extent the engine, boiler, and machinery in the mill were damaged. It does appear, however, that they were not totally destroyed or rendered worthless. Notwithstanding this fact, there is no evidence to show the extent of injury or damage to any particular piece of property or the expense of repairing the same or the expense that would be incurred in replacing or repairing the flume. All the evidence there is on the question of the amount of damage is simply the statement of the opinion of witnesses as to the total damage incurred. The respondent testified that the property had cost about \$2,000 when put in. Another witness said that the property could not be duplicated for less than \$3,000, but when he was urged to particularize and specify the different articles and value he said he could not do so. He was not very familiar with the property.

[3] Objection was made to the class of evidence that was introduced, on the ground that it was the mere opinion and guess of a witness, rather than any statement of fact, and error is assigned on the action of the court in admitting evidence of that character. The inquiry as to the amount of damage a person has sustained by reason of wrongful acts is ordinarily difficult at best and attended with more or less uncertainty and speculation. Juries at the best are bound to base their verdicts in some measure upon the opinions and speculation of witnesses. For these reasons, courts ought to compel parties claiming damages to specify and particularize as much as possible both as to the class and nature of the property injured or destroyed and the value of each piece or parcel of property. Damages should be awarded for the purpose of compensating a person who has been injured and not for profit or speculation. As said by the Supreme Court of Washington in *Berg v. Humptulips Boom & River Improvement Co.*, 38 Wash. 342, 80 Pac. 528: "It is only in exceptional cases, if at all, that a witness is permitted to testify to the gross amount of damages sustained. That question is ordinarily for the jury." In *T. C. Power & Bro. Co. v. Turner*, 37 Mont. 521, 97 Pac. 950, the Supreme Court of Montana said: "While the witness might, after stating that he had been damaged and after giving the particular items, have been permitted to state the sum total, the statement by him of his conclusion as to the lump sum furnished no basis for calculation by the jury. A verdict based upon such evidence is based upon the conclusion of the witness, and not that of the jury."

Considerable has also been said in this case touching the measure of damage to be adopted in such cases. We see no reason why the rule applicable in cases of damage to real estate should not apply in cases of personal property or fixtures.

[4] Where the property is totally destroyed or so badly injured and impaired as to render it valueless for the use to which it was originally designed and appropriated, the measure of damages should be the value of the property at the time of its destruction. Where, however, the property is merely damaged and is capable of being repaired, the measure of damage should be the cost of repair, together with the value of the use of the property during the time that it would take to repair it. This is substantially the rule adopted by this court in *Boise Valley Construction Co. v. Kroeger*, 17 Idaho, 384, 105 Pac. 1070, 28 L. R. A. (N. S.) 968; and *Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296. For cases dealing with the subject in reference to personal property, see *Layton v. Sarpy County*, 83 Neb. 628, 120 N. W. 179; *McClure v. City of Broken Bow*, 81 Neb. 384, 115 N. W. 1081; *Western Maryland R. R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267; 13 Cyc. 148.

In the light of all the evidence in this case as to the amount of damage sustained and the ruling of the court on the admission of evidence, we are thoroughly satisfied that the verdict in this case is excessive. The evidence is such as to render it practically impossible for us to determine with any reasonable certainty the damage which the respondent has suffered. We have concluded, therefore, to render an alternative judgment in the case. A new trial will be granted for the purpose of determining the amount of damage sustained, subject, however, to the following proviso: If the respondent is willing to remit the excess over and above \$1,500 and costs and within 30 days after the date of this decision will file a waiver of the excess over and above \$1,500 and costs, the judgment will be affirmed to that extent. If, on the other hand, he prefers to try the case anew on the question of damages, subject to the rules of evidence with reference to proof of damages as herein considered and discussed, a new trial will be granted. Costs of this appeal will be awarded in favor of respondent, provided he accepts the modified judgment. If a new trial is had, costs of this appeal will be equally divided between the parties.

SULLIVAN and STEWART, JJ., concur.

KEIM v. GILMORE & P. R. CO.

(Supreme Court of Idaho. March 5, 1913.
On Petition for Rehearing,
April 19, 1913.)

1. RAILROADS (§ 358*)—PERSON ON TRACK—MEASURE OF DUTY.

Where K. was walking from a market to his residence, and was following a footpath across a railroad right of way, and walking down the side of the track at a reasonable distance from the track and along the station

grounds within 40 or 50 feet of the depot and in the same direction as a moving train, and was exercising reasonable care to avoid danger or injury, *held*, that the railroad company owed him the duty to exercise reasonable care and take reasonable precaution against inflicting an injury upon him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

2. RAILROADS (§ 359*)—TRESPASSER—MEASURE OF DUTY.

A greater and higher degree of care and diligence is required of a railroad company to protect even a trespasser against injury, where such person is upon its right of way at a station or depot grounds, where the company transacts business with the public, and where it invites persons to enter its premises, and has reason to expect at all times that there will be persons upon its grounds and premises, than it owes to a mere trespasser at an unfrequented place.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

3. RAILROADS (§ 364*) — INJURY TO PEDESTRIAN—LIABILITY.

Where a railroad company has attached to a train of cars a steam shovel car, and hauls the same over its road with jackarms extending to a distance of from 11 to 22 inches beyond the ordinary width of cars and beyond the sides of such car, the company is liable for damages inflicted by reason of the jackarm striking a truck on a station ground and hurling it upon a passing pedestrian. In such case the railroad company set a danger in motion of which the pedestrian had no notice or knowledge, and against which he could not reasonably guard.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1252, 1253; Dec. Dig. § 364.*]

4. TRIAL (§ 203*)—INSTRUCTIONS.

It is not error for a trial court to give instructions requested by counsel on each side of the case, setting forth the law applicable to the theory of the case advanced by the party requesting the instruction, if such instructions correctly state the law, and there is any evidence in the case which would justify the jury adopting the theory advanced by either the one or the other of the respective parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

5. TRIAL (§ 323*)—VERDICT—WAIVER OF ERROR.

Under the provisions of section 4394 of the Rev. Codes, the verdict of a jury is required to be in writing, signed by the foreman "if all the jurors agree, and by those agreeing if three-fourths, or more, but not all, agree," and must be read by the clerk to the jury and the inquiry made whether it is their verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 759; Dec. Dig. § 323.*]

6. TRIAL (§ 323*)—VERDICT—WAIVER OF ERROR.

Under the provisions of section 4394 of the Rev. Codes, where a verdict is reached, but is not agreed to by the entire jury, it should be signed by each member of the jury agreeing to the same, and the court should in such cases see to it that the requirements of the statute are complied with; but where this requirement is not observed, but the jury is polled in open court, and 10 of them answer that the verdict returned and signed by the foreman is their verdict and their names are entered on the minutes of the court, and no objection or exception is taken to the form of the verdict, and no request is made to have it signed by the jurors agreeing to it, the error is

not prejudicial, and the objection cannot be raised for the first time in the appellate court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 759; Dec. Dig. § 323.*]

7. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

Where a man, 76 years of age with a life expectancy of about 6 years, as estimated by the mortality tables, is permanently injured and maimed by a railroad company through its negligence, and is rendered a permanent sufferer for the remainder of his life, *held*, that the appellate court would not be justified in reducing or disturbing a judgment for \$10,000 damages as being excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from District Court, Lemhi County; J. M. Stevens, Judge.

Action by Samuel T. Keim against the Gilmore & Pittsburg Railroad Company. From judgment for plaintiff, defendant appeals. Modified and affirmed on petition for rehearing.

John H. Padgham, of Salmon, and A. O. Fording, of Pittsburgh, Pa., for appellant. F. J. Cowan and E. W. Whitcomb, both of Salmon, for respondent.

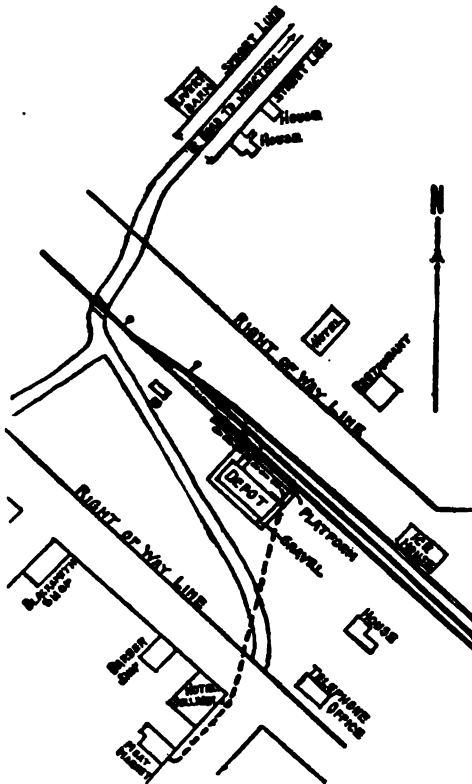
AILSHIE, C. J. This is an appeal from a judgment awarding respondent \$10,000 damages. The respondent was injured by a moving train on appellant's road. The accident occurred on the station grounds at the town of Leadore on about the 28th of August, 1911. Keim, the respondent, lived at the village of Junction, which is about one mile distant from the depot at Leadore. On the morning that the accident occurred, respondent left his home and went over to a meat market on Galena street, which is a short distance south of the depot in Leadore. After he got through at the meat market, he started home, and it was necessary for him to cross the railroad track. The wagon road extended diagonally northwesterly across the railroad right of way and to the south and west of the depot, crossing the track about 250 feet west of the depot. Respondent, however, left the wagon road south of the depot, and traveled north to the depot, passing between the depot and the railroad track and parallel with the track the length of the depot and some 40 or 50 feet down the track, where he met with the accident which inflicted serious injuries upon his person. When he reached the depot, he saw a train of cars on the track, either moving westward or just about starting up. A plank walk of from 5 to 7 feet wide extended parallel with the track in front of the depot from the easterly end of the depot to a point some distance beyond the westerly end thereof. Between the platform and the depot was a space of several feet filled with gravel. Respondent, as he walked past the depot and on to the west, kept off the platform, and walked on the gravel. He was therefore from 5 to 7 feet from the track. About 40 or

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50 feet down the track from the depot there stood a baggage truck. Just as he walked past this truck leaving it between him and the passing train, a projecting jackarm on a moving steam shovel car which was attached to the train struck the truck, and threw it with violence against respondent, knocking him over, severely injuring him and rendering him unconscious and permanently maimed and disabled.

Appellant has annexed to his brief a map or diagram showing the location of the streets, roads, and buildings at Leadore and Junction, and on this map a line is traced from the meat market down the street across the right of way and in front of the depot to the point where respondent was injured. This line is supposed to represent the course taken by Keim on his way home. We shall insert this map for the benefit of the illustration it will afford any one who may have occasion to examine this case. It is as follows:

This map shows the depot and vicinity. The dotted line shows Keim's course as described by himself.



A great many assignments of error have been made, but the real and vital questions necessary to be determined may be reduced to a very few propositions.

[1, 3] The first question to be considered is the alleged negligence of the appellant. Appellant insists that no negligence is shown on the part of the railroad company. Now it appears and is undisputed that the whole

mischief was caused by this projecting jackarm on the moving steam shovel car. It appears that these arms are placed on each side of such a car to be used in steadying the car when it is in operation, and that they are ordinarily either turned back or taken off when the car is being hauled over the road. On this occasion the jackarm on the side of the car next to the depot and to respondent was projecting. It is uncertain as to the exact distance of this projection, but it seems quite clear from the evidence in the record that it was anywhere from 11 to 22 inches. It is clear that the fault here was not with the employé who left the truck alongside the track. The truck was far enough away from the track to clear any ordinary car which was accustomed to pass over the track, and, indeed, it was not touched so far as the evidence shows by any cars until the steam shovel car came along. Clearly there was no negligence on the part of the man who left the truck at this place, unless he had notice that the steam shovel car was going to be pulled over the road at this time in the condition in which it was when it passed this truck. The whole trouble in this matter lay with those who were operating the train. If they were going to pull a car over the road with projections on the sides extending from 11 to 22 inches farther out than any of the cars usually transported over the road, then it was clearly the duty of such operators to notify other employés to govern their actions accordingly in the matter of leaving freight, baggage, trucks, etc., along the side of the track, and it was likewise the duty of such operatives to maintain a lookout for the protection of those who might be injured or taken unawares by reason of this increased danger from the projections from the steam shovel car. An employé or even a trespasser at the station grounds may know with almost exact accuracy the distance to which the cars which the company hauls over its road project over the track or beyond the rail. He may accordingly leave freight, baggage, or other articles along the track, where it would entail no danger upon any one except for just such an unforeseen condition as arose in this case. The only persons who had it in their absolute power to prevent such an accident as this were the operatives of the train. They might warn other employés or in this case they might have taken off these arms and reduced the car to the standard width, and in the latter event no injury would have befallen the respondent and no damage would have been entailed.

It has been argued with a great deal of force and ingenuity that the operatives of this train could not possibly foresee that Keim would be immediately opposite this truck when the steam shovel car would pass the truck, and that they are therefore guilty of no negligence. This argument, however, confesses that the operatives of that train

knew that the jackarm would strike the truck, and that they were carrying along with them a danger which might inflict injury upon Keim or any other person similarly situated either at a station ground or anywhere else along the track. The negligence lies back of and prior to the hitting of this truck by the jackarm of the steam shovel car. The real negligence was in carrying this car over the road in a train of cars without maintaining a proper lookout to prevent just such injuries as this. It is clear that they were maintaining no lookout to prevent accidents from the special hazard of this car. It is testified by a competent witness that one railroad company would not accept a car from another railroad company for shipment over its line in the condition this car was in, namely, with the jackarms in place and projecting as was the case with this car.

It is insisted that respondent was guilty of contributory negligence. Now there might be something in this contention if it were shown that respondent knew that the steam shovel car was attached to the passing train, and that the jackarms were projecting, or if he had notice that the company was accustomed to pull such a car over its road with the jackarms projecting, as was the case on this day. It is clear, however, that appellant was not aware of these facts. Neither did he have any information which would put a reasonably prudent man on notice that such thing was likely to take place. He was walking down the track at a reasonable distance from a train of cars. He had the right to assume that the truck was a sufficient distance from the track that it would not be struck by a passing car, and no doubt he saw the cars passing the truck one after the other without striking it or interfering with it. He did not attempt to go over the truck or under the truck, but he passed on his way, leaving the truck between him and the passing cars. He knew that the cars could not strike him unless they left the track, and he had no reason to suppose that any car would strike this truck and throw it upon him. He was in no way speculating with danger or taking any chances that reasonably prudent men would not have taken under similar circumstances. The railroad company set the danger in motion; they were the active agents carrying an unusual danger over their road.

[2] It has been argued that the respondent was a trespasser on appellant's station grounds, and that the company owed him no such duty as it owes to those who are invited to its station on business with the company. It is well settled that a railroad company is not under the same duty to look out and take precautions for the care and safety of a trespasser that it is under to those whom it invites to its stations and grounds for business purposes. It is settled, however, in this state that they are liable even to a

trespasser for reasonable care and precaution even before their negligence reaches the stage where it may be designated as wanton or willful negligence. *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91. They have no right to injure or kill a trespasser. To our minds, the care and precaution which the company took in this case in operating this car could not be termed ordinary care. If one of the employes of the company had been passing behind this truck when it was struck by the passing car in the condition in which this steam shovel car was on that day, there could be no question but that such employé could recover damage. In such case, the employé might be rightfully there under request and employment of the company, and yet he could no more have foreseen this danger than could Keim who is termed a trespasser. The evidence discloses that Keim was at least a licensee on these premises. Witnesses testify that there was a path from Junction to the markets at Leadore that had been traveled at least ever since the railroad was constructed, and that the course Keim was taking on this occasion was along the course of that path, and that this had been traveled continuously by pedestrians between the two towns ever since the construction of the road. It is well settled that, where such a custom or practice prevails, the railroad company is chargeable with notice that licensees or trespassers, if you please, may be on or along the track at such places. *Anderson v. Great Northern R. R. Co.*, 15 Idaho, 513, 99 Pac. 91; *Illinois Central v. Dick*, 91 Ky. 434, 15 S. W. 665. It should be remembered that respondent was at a place where the appellant might always expect licensees and employes, and where it was the duty of the company to maintain a lookout for persons who might rightfully be on the premises, and, even though the respondent were himself a trespasser at that place, the appellant, on the other hand, would be chargeable with a greater duty even to him at that place than it would have been at some remote or isolated place where it was not chargeable with the duty of looking out for those it might expect upon its premises and about its track. See notes to *Frye v. St. L., I. M., etc., Co.*, 8 L. R. A. (N. S.) 1069, and *Smith v. Norfolk & So. Ry.*, 25 L. R. A. 287.

[4] The objections made to the instructions of the court are not well taken. The instructions appear to fairly state the law, and the most that can be said against them is that they state the law applicable to different theories of the case. It often happens, however, in the trial of a lawsuit that such instructions are necessary because one party tries his case on one theory of the law and upon one view of the evidence, while the other party tries his side of the case upon a different theory and hopes to produce such evidence as to have his rule of law applica-

ble thereto. A court cannot foresee what conclusion a jury will reach as to the facts, and so the court often finds himself under the necessity of giving the jury the rule of law applicable to each theory of the case. That appears to have been done in this case. The complaint that the language of the instruction was unintelligible is not a cause for reversal. Instructions should not be confusing and should be couched in as simple, plain, everyday language as it is possible to use (*Thatcher v. Quirk*, 4 Idaho, 287, 38 Pac. 652), but the particular language in which instructions should be couched must be left to the judge who is giving the instruction so long as the language used states the law approximately correct.

[5, 6] The verdict in this case was concurred in by 10 jurors only, and was signed by the foreman only. It is urged that this verdict is erroneous and should be set aside. Section 4394 of the Rev. Codes provides as follows: "When the jury, or three-fourths of them, have agreed upon their verdict, they must be conducted into court, their names called by the clerk and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, if all the jurors agree, and by those agreeing, if three-fourths or more, but not all, agree, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. * * *" In this case the jury after returning their verdict were polled in open court, and ten answered that the verdict returned was their verdict, and two answered that it was not their verdict. It seems to us that the calling of the names of the jurors and ten of them responding that this was their verdict, and their names being entered upon the minutes of the court at the time, was a sufficient compliance with the statute, and answered all the purposes intended to be accomplished by the statute in requiring them to each sign the verdict where the verdict is not unanimous. Similar statutes elsewhere have been held directory only. *Morrison v. Overton*, 20 Iowa, 465; *Gurley v. O'Dwyer*, 61 Mo. App. 348; 38 Cyc. 1871. In this case no objection was made at the time the verdict was returned that it was not signed by the jurors, and no objection was taken whatever to the form of the verdict or the failure to sign the verdict by those who answered upon the call of their names. It would not be consonant with our practice to allow a reversal of the judgment in a case like this where no objection was taken to the irregularity or failure to comply literally with the statute at the time the error was committed in the lower court. *Johnson v. Fraser*, 2 Idaho (Hasb.) 404, 18 Pac. 48.

[7] Appellant also complains of the verdict, and charges that it is excessive. It appears that the respondent at the time of his

injury was about 76 years old, and that, according to the mortality tables, he had a life expectancy of about six years. 20 A. & E. Ency. of Law (2d Ed.) 885. It appears that he has suffered great pain and agony from his injuries, and that he is destined to be a great sufferer the remainder of his days, and will have to be cared for as long as he lives. Under such circumstances, we are not prepared to say that a verdict of \$10,000 is excessive. Under the circumstances we do not feel inclined to reduce this judgment.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

On Petition for Rehearing.

STEWART, J. A petition for rehearing has been filed in this case, and in the petition it is very earnestly contended that an injustice has been done the appellant by reason of the judgment in the case being excessive. Counsel has referred to the authorities bearing upon this question, and our attention is also called to the evidence in support of the judgment. Without entering into a discussion of the evidence and the authorities cited, and from such examination, the court is of the opinion, in view of the circumstances of the case and the age of the appellant, that the judgment is excessive, and that to do justice in this case the judgment should be modified and reduced to the sum of \$9,000.

The judgment is therefore reduced to \$9,000, and the petition is dismissed.

AILSHIE, C. J., and SULLIVAN, J., concur.

UNFRIED et al. v. LIBERT.

(Supreme Court of Idaho. April 10, 1913.)

1. PUNITIVE DAMAGES.

On the former appeal (see 20 Idaho, 708, 730, 119 Pac. 885) it was held that no punitive or exemplary damages could be recovered in this case and the cause was remanded for a new trial as to the actual damages sustained by the plaintiffs and the value of the wool clip of 1907.

2. TROVER AND CONVERSION (§ 46*)—MEASURE OF DAMAGES—MARKET VALUE.

Held, that the appellant's possession of said sheep was wrongful and that he was responsible to the plaintiffs for the market value of such sheep at the time they were taken.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 263; Dec. Dig. § 46.*]

3. APPEAL AND ERROR (§ 1195*)—LAW OF CASE—FORMER OPINION.

Held, that the issues made by the amended complaint after the reversal of this case on the former appeal, were identical with the said two causes of action as alleged in the original complaint, and that the former decision in this case was the law of the case on a new trial thereof, as the causes of action arose out of the same

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

transaction, involving the same wrongful trespass.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

4. LAW OF THE CASE.

On the former appeal the right of the plaintiffs to maintain this action was sustained, aside from punitive damages.

5. TRIAL (§ 333*)—VERDICT.

Held, that the evidence is sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 784, 786; Dec. Dig. § 333.*]

6. INSTRUCTIONS.

Held, that the instructions given by the court stated the law of the case as applied to the evidence.

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by Fred Unfried and another against William A. Libert. From a judgment for plaintiffs and a denial of a new trial, defendant appeals. Affirmed.

Chas. L. McDonald and Ben F. Tweedy, both of Lewiston, for appellant. I. N. Smith, of Portland, Or., Jas. L. Harn and Clay McNamee, both of Lewiston, for respondents.

SULLIVAN, J. This is an appeal by the defendant, who is appellant here, from a judgment based on the verdict of a jury which awarded to the respondents damages in the sum of \$5,513, alleged to have been sustained by reason of a certain sheep transaction.

[1] This case was once before this court (see 20 Idaho, 708, 119 Pac. 885), and on petition for rehearing (20 Idaho, 730, 119 Pac. 892) this court held that no punitive or exemplary damages could be recovered, and also that there could be no recovery for the wool clip in question for 1906, and remanded the case for a new trial as to the actual damages, if any, sustained by the plaintiffs. The facts are very fully stated in the former opinion and will not be repeated here. An amended complaint was filed after the case was remanded, wherein and whereby the plaintiffs claimed damages in the sum of \$6,153, with interest.

The action is based on three causes of action, and on motion the second cause was stricken from the complaint and the cause was tried on the first and third causes of action. From a judgment in favor of the plaintiff, and from an order denying a new trial, this appeal was taken.

[2] Counsel for appellant contend that, during the time appellant held said sheep, he had possession of them for the purpose of foreclosing his mortgage. The facts show that appellant's possession of said sheep was wrongful, taken, in the first place, under a void order purporting to appoint a receiver, which receiver was thereafter removed, and, notwithstanding his removal, the appellant

still unlawfully and wrongfully kept possession of the sheep.

This court held on the former appeal (see 20 Idaho, 729, 119 Pac. 891) as follows: "But where, as in this case, the facts show that the appellant wrongfully took possession of the mortgaged property and retained the same and converted such property to his own use or permitted it to be lost or injured or destroyed, he is responsible to the owner for the market value of such property at the time the same was taken." The Supreme Court of Washington also held that the possession under the void order appointing said receiver was wrongful. See *Libert v. Unfried*, 47 Wash. 182, 91 Pac. 774.

[3] Notwithstanding the fact that the Supreme Court of Idaho, as well as the Supreme Court of Washington, held that Libert's possession was wrongful and unlawful, counsel for appellant contend that Libert's possession was rightful under the mortgage, and contend in their brief for a reversal of the case on that ground as well as upon certain other grounds. Counsel for appellant contend that the issues of the second trial were so different from those on the first that the former decision in this case would not be the law of this case on the new trial. An examination of the pleadings and the issues made by them refute this contention.

The second trial of this case was had upon two causes of action: The first relates to the wrongful taking of the sheep and certain other property which the receiver took and the value of the property, with interest, from the time of its taking; the second cause involved the wool clip from said sheep for 1907. The two causes of action which were submitted to the jury are identical with the two causes of action which were involved on the former appeal. They arise out of the same transaction, relate to the same rights between the same parties, concern the same subject-matter, and involve the same wrongful trespass. There is no merit in that contention of counsel.

[4] On the former appeal this court directed that a new trial be had in this case upon the theory of the law as laid down in that decision and in harmony with the views therein expressed, and held that the cause ought to be submitted to a jury with a view of arriving at a correct estimate of the actual damages, "free from all notion of inflicting any punitive or exemplary penalty on the appellant." It appeared in the former case that the jury had allowed punitive damages, and on the former appeal this court concluded that the evidence was insufficient to sustain any award for punitive or exemplary damages. The right of the plaintiff to maintain the action was sustained, aside from punitive damages. It was there settled that Libert's possession of said sheep was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wrongful. A retrial of the case was ordered for the purpose of arriving at a correct estimate of damages, and the record shows that the case was retried upon that theory. It will serve no good purpose for us to enter into a discussion of the evidence here or to quote extensively from it, but on a careful examination of it we are satisfied that it amply sustains the verdict of the jury.

[8] Counsel contends that the verdict is greater than the prayer of the complaint or than the facts stated in the complaint would justify. The sums claimed and the interest which may be legally computed thereon amount to as much as the verdict of the jury. Even if that were not so, and the evidence on the trial clearly showed that the damages were greater than the amount prayed for, the court could have directed the prayer to be amended to conform to the evidence or could have entered judgment for the amount of damages established by the evidence. Section 4229, Rev. Codes.

[6] Some objection is made to the instructions given by the trial court to the jury. Upon a careful examination of those instructions, we are satisfied that the instructions were correct as applied to the facts of this case.

Finding no reversible error in the record, the judgment must be affirmed, and it is so ordered, with costs in favor of the respondents.

AILSHIE, C. J., and STEWART, J., concur.

BRINTON v. STEELE et al.

(Supreme Court of Idaho. April 12, 1913.)

1. APPEAL AND ERROR (§ 1010*)—QUIETING TITLE (§ 44*)—QUESTIONS OF FACT—FINDINGS—EVIDENCE.

Where the evidence is conflicting as to the facts, and there is substantial evidence supporting the findings of fact by the trial court, the findings and the decree entered in accordance therewith will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010; * Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

2. TRIAL (§ 398*)—FINDINGS BY COURT—CONSISTENCY.

Where there is substantial evidence supporting the findings of the trial court upon the issues of fact, and such findings can be reconciled as a whole, and the decree is in accordance with the findings supporting such issues, such findings will not be held to be contradictory or inconsistent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.*]

3. APPEAL AND ERROR (§ 1176*)—REVERSAL—DIRECTING FINDINGS IN LOWER COURT.

Where findings of fact are made and a decree entered wherein the boundary line between lots 12 and 13 in block 30 of the city of Lewiston is involved, and such findings are not certain, and will not enable the parties in interest to identify the exact line of division upon

the ground, the findings and decree will be set aside, and the trial court directed to make new findings and enter a decree describing the true line between the two lots by a correct and certain description, referring to monuments and markings upon the ground showing the true line.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by Caleb Brinton against Wesley Steele and another to quiet title. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

See, also, 19 Idaho, 71, 112 Pac. 319.

B. F. Tweedy, of Lewiston, for appellant. Geo. W. Tannahill and Fred E. Butler, both of Lewiston, for respondents.

STEWART, J. This action was brought by appellant to quiet title to a strip of land near the line of subdivision between lots 12 and 13, block 30, of the city of Lewiston. The trial court entered a decree quieting the title in the respondent to the following strip of land: "A triangular strip of land, and every part thereof, the same being a strip of land 11 feet — inches wide at the south end thereof, and at the north end both east and west boundaries terminate at the same point, the same being a part of lot 12, block 30, of the original plat of the city of Lewiston, Idaho, and the same being located on the west side of the row of poplar trees extending through and across said tract of land, marking the east boundary line of lot 12, block 30, of the original plat of the city of Lewiston, Idaho."

The evidence shows that the city of Lewiston was surveyed by E. B. True in August, 1874, and field notes were prepared and a plat of said city according to such survey was prepared and approved by the mayor and trustees of the city of Lewiston on June 26, 1875, and was filed for record July 1, 1879, in the records of Nez Perce county. This plat shows block 30; the names of the streets are not clearly shown, but lots 12 and 13, block 30, are designated. It appears that Wesley Steele, the respondent, is the owner of lot 12, block 30, and that the appellant Jones is the owner of the west half of lot 13, block 30, and that block 30 is a block in the original plat of the city of Lewiston, Idaho. The appellant Jones subdivided and platted the west half of lot 13, which was subdivided into lots, blocks, streets, and alleys, and lots were sold according to such plat to various parties who have built and constructed residences, business houses, and made substantial improvements in accordance with the plat of said west half of lot 13 of block 30.

The controversy arises from a dispute between the appellant and respondent as to the line dividing lots 12 and 13. Under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant's contention, the strip in controversy and described in the decree is a part of lot 13, and is owned by appellant; while the respondent contends that the triangular strip described in the decree is a part of lot 12, and is owned by the respondent. The trial court concluded that the evidence supports the contention of the respondent, and that the strip of land in controversy is a part of lot 12.

[1] This appeal is from the judgment. Several errors are assigned, all of which may be considered under the following contentions of the appellant:

First. That the evidence does not support the findings and decree. It appears that E. B. True made a survey of the city of Lewiston, and prepared field notes on the dates heretofore stated, and that Briggs, who had done surveying work for the government and the county, did work for Brinton in the way of subdividing lot 13, block 30, in the city of Lewiston, and in making a plat thereof. The survey was started at a monument at Kettenbach's on the east boundary of the old original town of Lewiston, and is shown by True's notes at a line east a half mile, north a quarter mile from the corner near the Normal School. Briggs testifies: "I brought that line down Main street and also along the foot of the hill until I came to the line between the public high school, * * * and * * * I got to that line and I found from surveys that had been made by Mr. Bell that there was a monument at the west end of Idaho street. I took that for a stopping point; that checked up with the monument at the end of what we call Schoolhouse Lane; then I went down to the monument on C street, and it says 40 feet west, and 40 feet south will establish the northeast corner of the block, now occupied by the Cash Hardware Store. I took the course of that, and it came to the south line of E street or Main street, and produced the southwest corner of Block 30; then from Mr. True's notes—he gives some courses and distances, and I checked those out, and then, in order to establish the points where his courses are not given, I measured south from Main street, and then swung that point so that the distance would fit that he gave in the notes, with the courses. Then I joined my work together and there was quite a discrepancy on the south boundary, but on the north boundary along the south line of Main street I think it checked out very close. Then I apportioned that distance in proportion—so many feet to the hundred. That gave lot 13 just about three feet lacking a very small fraction of an inch, that is on the angle that was made by extending lot 13 longer than the original survey made by True. I apportioned that distance, and also gave the schoolhouse their proportion and the lot that belongs to Mrs. Whitman, and also coming up along the brow of the hill, and from that distance I established

the boundary line of lot 13. Then I divided that lot, and I found that the excess there was about three feet as near as I can remember, and then I produced that line south to the center line of Main street, and I, of course, established the southwest corner from that line, found the distance by measuring back from Main street. And then I ran that line, and in running that line it hit the trees just as close to the center as I could see from off the hill. I found that I had to make an offset. By trees I mean the first tree that I struck in sighting; it was on the line between lots 12 and 13. The line hit the trees close to the center. I knew the trees were in the way, and I then went to Main street, that being the shorter distance than it was on the south side, and I measured the whole distance, and then I apportioned the distance that would be right south of the tree. That gave me my west point to run by from the southwest corner, and I produced that line and measured in and set the west boundary of the line. Then they talked about making some changes in the lots on the south where Mr. Steele's residence now is, and fixing some lots to get in through this alley, wanting an alley to come through. Mr. Brinton wanted an alley, but he wanted it himself, and he wouldn't dedicate it, he wanted a private alley, and I told him I wouldn't do anything with it if he didn't want to dedicate it. He could lay his land out any way he wanted to, but I wouldn't do that, and by that time I got a telegram from the Surveyor General, and I turned the matter over to Mr. Maxon. I was city surveyor at that time, and had that Normal Hill sewer on my hands and other work. That is about all I did in that block. I apportioned the excess in this way: Mr. True's measurements, and it is that way with all surveyors that have chainmen; we don't exactly agree in measurements; now, in this way, if Mr. True says that the south side of lot 12 is 88 feet, and I make it 89 feet, there is a foot of excess; there is a foot to be added, that is, in that proportion, not a foot, but the proportion that I make it. Now in the whole distance, supposing there is forty lots and there is forty feet, and they are all exactly the same width, then I give each lot a foot; that is, if I feel sure that my survey checked out exactly. After I came back from working for the government I went back and checked it over; that is, from this southeast corner of the schoolhouse; there is a permanent point; it is not a monument, it lays south of one, this monument at the schoolhouse, and the 5-acre tract which is called lot 5 of acres of the Risdon tract is tied onto the southeast corner of the schoolhouse lot; that is the only tie there is there. This St. John's place; there is no tie, only he shows here a post or corner. I apportioned that just as carefully as possible; and at that time I didn't know Mr. Brinton, had never met him in my life,

and I didn't know him. I came here to this monument in Schoolhouse Lane and measured down until I came to the point that I had made coming up on the street to where Kjos had bought some land; I found that correct, and I came back to the southeast corner of the schoolhouse lot and ran out the schoolhouse lot, and Mrs. Whitman's lot, and found the old original post; we hadn't dug it out then; that is at the southeast corner of lot 13, and from there I measured up the same distance and found my point, and just went over the same ground on this offset line and checked into these stakes for Mr. Steele just merely to check up the work; it checked up exactly; some measurements by a steel tape, and I apportioned it just as I did before. I couldn't designate the exact trees, but about the 10th of May, 1873, I came here with Major Truax to try to."

J. O. Maxon, a surveyor, testified that he did work in the way of platting the subdivision of lot 13, block 30, of Lewiston for Mr. Brinton and for Mr. Briggs, who was making a survey for Brinton, and who blocked out a part of the front lots at the north end; he had them staked out and the line of lots all set out, about 300 feet from the street along both sides of Ninth street, and he had the center line of Ninth street established, and then he turned over the matter to me. He also had a few of the stakes set on the west side of the alley, also on the east side of it, on the west side of lot 13. I found it absolutely correct as far as I checked it. I checked it all over, and he told me what he had done, and I checked it all over carefully and found it absolutely correct—it might have been an inch off maybe somewhere, but that alley was absolutely correct to a hundredth of a foot; the stakes are there now, they show for themselves. I subsequently made a resurvey and recheck of this for the purpose of proving my work and proving the work of Mr. Briggs. I don't remember when the survey was made. We started at monument 13 and measured down along the south side of Main street, and we were fortunate enough to find the point that had been previously established there establishing the line on Main street between lots 13 and 14. There was a point set there, a hub driven down right close to a wall, there was a little stone wall there that perhaps you have noticed between 13 and 14, and we were fortunate enough to find that hub with a tack in it, and it checked exactly, and we measured the distance from there on down and found the center of Ninth street. That was the first work we did on that, I am positive of that, and then we turned the angle and the hub was still in at the center of Ninth street; that is, at the south line of lot 13, the hub was still in that was placed there by Mr. Briggs when he first did this work, and we found that hub there, and we turned the angle to that hub, and proved the same course of the street that we originally had. We did not

assume there was any excess there because we had measured the proper distance to find the southwest corner of lot 13. I heard Mr. Wrighter's evidence that there was a strip of land there 11.65 feet at the south end and running to a point at the north. I found such a strip there between the fence and this line that was there, but not such a strip as that between the line—the east line of the Risdon tract, which is supposed to tie to this southwest corner of lot 13, or Mr. Storer's corner there. I did not find any excess west of this land that was platted by Mr. Brinton; there was a strip there between this fence and the line that was platted. I found the line between lots 12 and 13 exactly on the west line of that platted ground. I subsequently resurveyed the same; I think the plat gives the date; I would not be positive about that; it was along in November, 1911. The survey I made conformed to the survey made by Briggs absolutely; the hubs are there now to show them; our hubs are all there, every one of them can all be found, and most of the hubs that were set out when Mr. Briggs was there in 1904, I think it was, that this work was done for Mr. Nilsey and Mr. Cole and Mr. Brinton."

It appears that there is a row of poplar trees on or near the line between lots 12 and 13, and respondents contend that this row of trees has been absolutely regarded as marking the boundary line for more than 40 years; that no claimant to land in lot 13 has claimed land west of the row of poplar trees, and no claimant or owner of lot 12 has claimed land east of the poplar trees until this controversy arose.

Maxon also testified: "I know just exactly what kind of fence was there when I came to this country in 1877; the trees were set out afterwards along there; the fence was a post and rail fence; the trees were set out on the west side of the fence; the trees were set out about a foot west of the fence, and were set out on lot 12; the fence lasted a long time because cedar in this country lasts a long time; there was some of that cedar there a long while, 20 years ago; I remember seeing some there as much as 20 years that I could remember of. These trees have been there and there was some wire along, and the fence has been kept up partly between them. It has always been assumed and until this controversy came up I never heard anything else but that the trees there next to the fence were practically on the line—not until this controversy came up."

The respondent testified that he had been acquainted with the property since 1902. When he bought the property, he did not pay much attention to the line; he had a survey made and he located the stakes in there; that was about all he went on; he knew where they were. "The row of trees, there is one stake—there are some of those trees, the upper trees I don't know, but the stake that is the furthestest; it is about the

third tree from the end, or the fourth; the stake sets in on the east side of that tree, about a foot I should judge, or a foot and a half; and that is as far as I know about the line from there on; that was one of the pegs, and then the other peg, that they put down, was right at the root of the big trees on the east side; the trees are all on the other side, and when this disturbance came up I didn't know—I just looked at the plat when I bought the ground, and I didn't think about there being a piece of ground in there, and I kept all the time thinking when he told me anything that it would make this on Ninth street come over this way and would throw mine back, and I never thought of there being any extra land because the plat didn't show it. The trees down there are just as I tell you. I think there are four trees there, and there is a peg; this was starting out at Main street and going to the last tree in that row; there is one of them pegs it would cut one tree through one-fourth of the way. The trees are substantially on the line, and going back there is another peg that would throw the trees on my side of the fence, that would throw the trees on the west side of the line where the pegs are set. No one ever claimed land on the west side of this row of trees who owned lot 13 until this trouble came up."

It also appears that the fence was on the line with the trees, except at times it would be torn down and replaced, and at times was west of the row of trees and at times east of the row of trees.

On the part of the appellant D. C. Wrighter, a surveyor, testified that he made a survey for Mr. Brinton and that he did not recollect exactly where he started, but the witness did state that he had many points in that block that he had previously checked up and knew were correct and ran from there, and that he went to the known point of lot 10. He commenced the survey at the northeast corner of lot 10, and he testified that he had established to his satisfaction where 11 and 12 were. He had previously run around the block several times; he ran until he found that it coincided with the original notes, until they got it to check; until they got a survey that would plat, that would conform with what was intended on the original plat. He testifies: "Where we haven't any definite information to go by, we have to supply the omissions. When I made Brinton's survey, when I got those interior lines on this subsequent survey of lot 13, I found that they did not reach the western boundary of lot 13. For instance here, just let me explain a moment please: 'Beginning so and so,' it says here, 'beginning at the northeast corner of a certain block and running so and so.' Now I didn't go into that; I was not making an original survey there; simply tracing somebody else's survey. When I rechecked I was in it then; if I had known there was going to be any litigation I guess

I would have kept out of it. All I know is that I surveyed lot 13; I cannot tell you just exactly where I began or which stake is the last one I put in or where I ended. I checked the entire block; I knew I was right when I started. I would not start from an assumed point. Block 30 does not tie to any monument in True's survey; monument 13 is not mentioned in the notes; we only assume that; we checked on it; we did not start from it because the course of Main street to-day won't give you the exact course of what True's notes do; you can start in the center of Main street to-day and go by True's notes, and you wouldn't stay in the street. The southerly end of Ninth street is in the wrong place, if it was intended to run Ninth street through the center of lot 13. If Ninth street was moved west 5.65 feet, there would be an excess on the east half of lot 13; you would have a wedge 11.3 feet wide as the plat stands to-day, as it stands on the ground."

As a part of the evidence of Wrighter, the plat he prepared was admitted in evidence. There is a clear conflict between such survey and the plat of Maxon and Briggs as to the boundary or property line between lots 12 and 13, and the plat of appellant shows that the property line located by Wrighter was west of the row of trees, and not east of the trees, as testified to by Maxon and Briggs. The trial court in its findings and decree seems to have adopted the survey made by Maxon and Briggs. There is other evidence as to the line between lots 12 and 13. Some of this evidence supports plaintiff's claim and some supports the respondent's claim, and some of the evidence supports the contention that the fence as shown on the plat prepared by Wrighter shows the line coincides with the line of his survey. If the evidence was set forth in full, it would show that there is a strong conflict in the evidence as to the line between the lots 12 and 13, and the exact location of the row of trees, but the trial court evidently has taken the view that the evidence offered by the respondent fixed and described the line more clearly than the evidence on the part of the appellant. From our examination of the evidence we are inclined to think that the court made no mistake in its findings of fact, and that the evidence supports the findings and decree.

[2] Second. It is contended that the findings are inconsistent and contradictory. While the findings are not certain and specific as to the location upon the ground, we think there is substantial evidence supporting the specific findings made by the trial court, and that such findings can be reconciled as a whole upon which the decree was entered, and that there is no contradiction or inconsistency in the findings.

[3] Third. It is argued in appellant's brief that the findings of the trial court as to the

line between lots 12 and 13 do not definitely and with certainty locate the line by the description or upon the ground, so that the parties to the action are enabled to identify the exact line of division upon the ground. We are satisfied that this contention is well taken, and especially call attention to finding No. 11, wherein the court finds "that the row of poplar trees extending from the north boundary of said lot to the south boundary of the same is located upon the line between lot 12, block 30, of the original plat of the city of Lewiston, Idaho, and lot 13, block 30, of the original plat of the city of Lewiston, Idaho, and that the said row of poplar trees has marked the boundary line between the said two tracts of land for more than thirty years last past." Also the decree, which adjudges: "That the defendant Wesley Steele have judgment and decree against the plaintiff, quieting his title in and to the said triangular strip of land and every part thereof, the same being a strip of land 11 feet — inches wide at the south end thereof and at the north end both east and west boundaries terminate at the same point, the same being a part of lot 12, block 30, of the original plat of the city of Lewiston, Idaho, and the same being located on the west side of the row of poplar trees extending through and across said tract of land, marking the eastern boundary line of lot 12, block 30, of the original plat of the city of Lewiston, Idaho."

The evidence shows that the three poplar trees referred to by the trial court in the findings and decree are about three feet in diameter, and that such trees are not in line with the fourth tree. If the three trees were located upon the line between lots 12 and 13, and at the present time are about three feet in diameter, then the line between the two lots at the present time would have to be located through the center of the three trees, and not a foot and a half from the center of the trees, as the dividing line, and not on the west side of the trees or the east side of the trees. The line could not be a line running through the four trees. In the decree the court adjudges that the line between lots 12 and 13 is on the west side of the row of poplar trees extending through and across said tract of land marking the eastern boundary line of lot 12. The finding and decree therefore are uncertain as to the exact line of division between lots 12 and 13 as located by the trial court, and, if it was the intention of the trial court that the line of division is established on the west side of the row of poplar trees, such line would not follow the north line of lots 22, 23, and 24 of the survey made by Briggs and Maxon, which was adopted and approved by the trial court as establishing the true line between lots 12 and 13, as found in finding 11.

From the finding it is apparent that the dividing line between lots 12 and 13 is and

should be fixed from the survey made by Briggs and Maxon by making proper apportionment of excess land in the southern ends of lots 12 and 13; and, that being true, the true line between the two lots should be established and identified by a clear description in the findings and decree and also upon the ground by proper monuments.

This case has been in this court before (19 Idaho, 71, 112 Pac. 319) and the judgment should be certain and definite and establish and identify upon the ground the true line dividing lots 12 and 13, which cover the strip of ground involved in this suit. This can be done by placing proper monuments by a competent engineer, so that the parties to this action will be able to identify the true line dividing lots 12 and 13 in accordance with the findings of the trial court.

The judgment is reversed, and the trial court is directed to proceed and carry out the views expressed by this court and incorporate in the findings and decree the suggestions and directions of this opinion. The costs in this appeal are divided equally between the parties.

AILSHIE, C. J., and SULLIVAN, J., concur.

CHRISTENSEN v. BEUTLER et al.

(Supreme Court of Utah. March 28, 1913.)
BOUNDARIES (§ 48*)—ACQUIESCENCE—ESTOPPEL.

Where owners of adjacent lands occupied their respective premises to a fence, recognized as on the boundary line for more than 20 years, and during that time they claimed the land to the line, they and their grantees may not deny that the line is the true division line.¹

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

Appeal from District Court, Sevier County; G. G. Armstrong, Judge (Presiding).

Action by Simon Christensen against William Beutler and another. From a judgment for plaintiff, defendants appeal. Affirmed.

E. E. Hoffmann, of Richfield, for appellants. H. N. Hayes, of Richfield, and C. W. Collins, of Salt Lake City, for respondent.

MCCARTY, C. J. This is an appeal from a judgment rendered in the district court of Sevier county in favor of respondent, plaintiff below, quieting title to a tract of land 35 feet in width and about 58 rods in length.

The facts and circumstances out of which this controversy arose are about as follows:

In 1882 one C. A. H. Bulow obtained a patent from the United States to a tract of land in Sevier county. On November 23, 1882, Bulow had a portion of the land cov-

¹ Holmes v. Judge, 31 Utah, 269, 87 Pac. 1009; Moyer v. Langston, 37 Utah, 9, 106 Pac. 508; Young v. Hyland, 37 Utah, 229, 106 Pac. 1124; Binsford v. Eccles, 126 Pac. 333.

ered by his patent surveyed and platted by a competent surveyor. A copy of the plat attached to an abstract of title of the property was introduced in evidence and made a part of the bill of exceptions. From the plat and other evidence in the case it appears that at the time the plat was made certain tracts of the land had been conveyed by Bulow to various parties. On the 20th day of November, 1888, respondent, through mesne conveyances, became the owner of one of these tracts or parcels of land. The metes and bounds of the land purchased by respondent, as fixed by the calls in his deed, are as follows: "Commencing 50 links east and 10.85 chains south of the northwest corner of section 30, township 23 s., r. 2 w.; then east 14.45 chains; thence south 5 chains; thence west 14.45 chains; thence north 5 chains to place of beginning." When Bulow had a portion of his land surveyed and platted in 1882, he reserved a strip for a road three rods in width running easterly and westerly through the land. This road is contiguous to and runs parallel with the respondent's land on the north. There is also a road two rods in width contiguous to and on the west of respondent's land. The physical marks indicating the boundaries of the land at the time respondent purchased and took possession of it consisted of the roads mentioned, a waste and head ditch on the east, and a narrow strip of uncultivated land, about four or five feet wide, contiguous to and adjoining and running parallel with the tract on the south. The south boundary line is the one in dispute.

From the time respondent purchased and went into possession of his land in 1888 until 1896, a period of eight years, this strip of uncultivated land was recognized by him and his neighbors (appellant's predecessors in interest), who owned the land adjoining his property on the south, as the division or boundary line. In 1896 Samuel Bulow, son of C. A. H. Bulow, patentee, purchased and went into possession of the tract of land adjoining respondent's land on the south. During that same period (1896) respondent inclosed his land with a fence. The fence along the south side or boundary of the land was erected on the narrow strip of uncultivated land above mentioned, and Sam Bulow, the then owner of the land adjoining respondent's on the south, contributed to the cost of this south line of fence. On December 28, 1908, Bulow sold and conveyed to appellants herein the land lying south of and contiguous to respondent's land. Up to this time the fence above mentioned had been maintained where it was erected, namely, on what had been recognized as the division line, for more than 20 years. Samuel Bulow was called as a witness by appellants and testified in part: "That he was 34 years of age; that during the time [12 years] he owned the land to the south and adjoining respondent's land he recognized the fence as

being on the boundary line between the two tracts of land. Q. Now, that fence was built on the line that already existed between you and Mr. Christensen, wasn't it? A. It was what I supposed to be the line. Q. Yes; what you had always recognized as the division line? A. Yes, sir. * * * Q. It has been recognized as the division line, and you have been right around there ever since you were large enough to get out of the house? A. Yes."

In April, 1909, appellants employed a surveyor to survey and locate the boundary line as described in their deed. According to this survey the fence built in 1896, dividing the two tracts of land, was 35 feet south of the boundary line as described in the deed. A controversy at once arose between these parties over the boundary line; appellants claiming that a portion of the land within respondent's inclosure belonged to them. They accordingly moved the fence north 35 feet and to where they claimed the true boundary line to be. After the controversy arose, respondent employed a surveyor to survey his land, following the calls of his deed. The south boundary of his land, as located by this survey, is approximately in the same place as located by appellants' survey, and the north boundary is in the street to the north of his land. Respondent testified, and his evidence is not disputed, that "according to recent surveys the north line of my land would run over * * * pretty near two-thirds of the street." And again he said: "If I were moved north according to the surveys recently made, it would throw me into the street; it would take about two-thirds of the street."

The important question presented by this appeal is whether the boundary line between the two tracts of land mentioned is where the fence was erected, and where it was maintained until removed by appellants, or on the line established by the recent surveys.

The evidence, without conflict, shows that the fence was erected and maintained on what had been recognized and accepted, during respondent's occupancy of the land, as the boundary line both by respondent and appellants' predecessors in interest; that for more than 20 years next preceding the removal of the fence by appellants respondent farmed and tilled the land to that line. Respondent testified, and his testimony on that point is not disputed, that "during all this time [22 or 23 years] I have claimed the land as thus bounded [referring to the physical marks indicating the boundary lines] as my own."

In the case of *Young v. Hyland*, 37 Utah, 229, 108 Pac. 1124, this court, in harmony with its former decisions involving the principle of law here presented, said that in this jurisdiction "the doctrine is recognized that, where the owners of adjoining lands occupy their respective premises up to a certain line which they recognized and acquiesced in as their boundary line for a long period of time,

they and their grantees will not be permitted to deny that the boundary line thus recognized is the true line of division between their properties," citing *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; *Moyer v. Langton*, 37 Utah, 9, 106 Pac. 508. This doctrine is again declared in the case of *Binford v. Eccles*, 126 Pac. 333.

Applying the principle of law announced in these cases, which we believe to be a wholesome one, it necessarily follows that the judgment of the trial court must be affirmed. It is so ordered. Costs to respondent.

STRAUP and FRICK, JJ., concur.

HULL v. LARSON.†

(Supreme Court of Arizona. April 21, 1913.)

1. APPEAL AND ERROR (§ 623*)—RECORD—TIME FOR FILING IN APPELLATE COURT.

Where a motion for a new trial was denied on August 5th, the transcript of the reporter's notes filed with the clerk of the trial court and served on the attorney for appellee on October 3d, the reporter's transcript presented to the trial judge October 23d, certified by him as correct October 25th, and the record filed in the office of the clerk of the Supreme Court on November 22d, there was a strict compliance with the statutes and rules of the court governing appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2736; Dec. Dig. § 623.*]

2. APPEAL AND ERROR (§ 765*)—BRIEFS—TIME FOR SERVICE ON OPPOSITE PARTY.

Under the express provisions of Supreme Court Rule 4, subd. 5 (126 Pac. x), as amended, appellant's brief is timely served on appellee's attorney if served within 30 days after the record is filed in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3101, 3126; Dec. Dig. § 765.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTIONS OF FACT.

An appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence or not supported by the evidence, when the evidence is conflicting, or when there is any substantial evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. NEW TRIAL (§ 143*)—AFFIDAVITS OF JURORS—IMPEACHMENT OF VERDICT—"QUOTIENT VERDICT."

The affidavit of a juror could not be received to show that the verdict in a civil case was a "quotient verdict," arrived at by adding the amount which each juror considered proper and dividing by the number of jurors, since there is no statutory provision authorizing the receipt of jurors' affidavits to prove misconduct of the jury in civil cases as there is in criminal cases, and therefore the common-law rule prevails.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

For other definitions, see Words and Phrases, vol. 7, p. 5809.]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Action by Joe Larson against George W. Hull. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert E. Morrison, of Prescott, for appellant. P. W. O'Sullivan and Joseph H. Morgan, both of Prescott, and Carl M. Heim, of Jerome, for appellee.

O'CONNOR, J. This is an action brought by Joe Larson, as plaintiff, appellee herein, against Geo. W. Hull, defendant, appellant herein, in the superior court of Yavapai county, for damages for personal injuries alleged to have been inflicted upon Larson by Hull by striking Larson under the eye with a cane with great force and violence, inflicting a very dangerous wound and breaking a blood vessel and causing permanent injury to Larson's face and eye. Plaintiff alleged that he had expended the sum of \$37 for medical and surgical treatment on account of said injury, and that, being a practical miner, his services were reasonably worth \$5 per day, and that by reason of said injury he was unable to work for a period of at least 30 days; and prayed for judgment against Hull for \$2,500 general damages, \$37 paid out for medical and surgical care, and \$150 for 30 days' loss of time occasioned by said injury. The case was tried by a jury of six, by agreement of counsel, and a verdict was rendered in favor of plaintiff, fixing his damages at the sum of \$472.35. Motion for a new trial was overruled and judgment rendered. From which order and judgment defendant appeals.

[1, 2] Appellee moves this court to dismiss this appeal on the grounds: First. That the appellant failed to file, within 30 days after the record of the case in the superior court was completed and the appeal perfected, the record of said case in the Supreme Court of Arizona. Second. That the appellant failed to serve upon the appellee, within 30 days after the appeal was perfected and the statement of facts made a part of the record, a copy of his brief.

The record discloses: That the motion for a new trial was denied in the court below on the 5th day of August, 1912, and on the 3d day of October, 1912, appellant filed with the clerk of the superior court of Yavapai county a transcript of the reporter's notes and served upon the attorney for appellee herein notice of the filing thereof. That on the 23d day of October, 1912, the reporter's transcript was presented to the trial judge, and on the 25th day of October, 1912, the trial judge certified to the correctness of the said transcript and on the same day filed the transcript in the office of the clerk of the superior court. That on the 22d day of November, 1912, the record in this case was filed in the office of the clerk of the Supreme Court. On the 4th day of December, 1912, the brief of the appellant was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 20, 1913.

served on counsel for appellee and the requisite number of copies filed in the Supreme Court on the 5th day of December, 1912. This is a strict compliance with the statutes and with the rules of this court governing appeals and writs of error. Subdivision 5 of rule 4 of the Supreme Court (126 Pac. x), as amended, provides that "within thirty days next after the record in the cause has been filed in the Supreme Court, the appellant shall serve upon the attorney of the opposite party a copy of the brief," etc. The statute so provides, and the rule is in harmony with the statute. There being no merit in the motion to dismiss, said motion is therefore denied.

[3] The first assignment of error questions the sufficiency of the evidence to support the judgment. An examination of the testimony in the case clearly shows sufficient evidence to support the verdict of the jury. It is a well-settled rule in this state that the appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence or is not supported by the evidence, when the evidence is conflicting or when there is any substantial evidence to support the verdict. In *Goldman v. Sotelo*, 7 Ariz. 23, 60 Pac. 696, the court said: "The weight of the evidence and the credibility of the witnesses were matters peculiarly for the consideration of the jury, and for the lower court upon the motion for a new trial." See, also, *U. S. v. Copper Queen Mining Co.*, 7 Ariz. 80, 60 Pac. 885; *McGowan v. Sullivan*, 5 Ariz. 334, 52 Pac. 986; *Old Dominion, etc., v. Andrews*, 6 Ariz. 205, 56 Pac. 969.

[4] The only remaining assignment of error is that the verdict of the jury was arrived at by chance and lot and is what is known as a "quotient verdict." It appears from the affidavit of W. H. Bannister, one of the jurors who tried the case, that, when he and his fellow jurors retired to the jury room to deliberate upon their verdict, it was agreed that each juror should write down the amount which he considered was a proper verdict in favor of plaintiff, and that the amounts so set down should be added together and divided by six, the case being tried by a jury of six, and that the result should be the verdict in the case. That after such agreement each juror wrote down the amount which he considered should be the verdict, and that amount was thereafter added together, divided by six, and the result was the sum of \$472.35, and that the verdict returned by said jurors was the sum of \$472.35 in favor of the plaintiff and against the defendant. The question presented to us is whether or not the affidavit of the juror Bannister should be received as evidence of the alleged misconduct of the jury.

From very early times it has been nearly universally held that, in the absence of a statute permitting it, the affidavit of a juror will not be received to impeach the verdict. "Nothing is better settled as a general prop-

osition than that the affidavits of jurors are not admissible to impeach their finding." *Thompson & Merriam, Jur.* § 414. And, quoting from the same authority: "Upon the ground of public policy, the courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, or to explain it, * * * or that they agreed on their verdict by average, or by lot." *Thomp. & M. Jur.* § 440, citing many cases.

The Penal Code of Arizona, par. 988, subd. 14, provides that the voluntary affidavit of a juror shall be competent to prove any misconduct of the jury or to sustain the verdict, but there is no such provision contained in our Code of Civil Procedure for civil cases, and we are therefore bound by the common-law rule.

Counsel for appellant contends that the proposition that a juror would be heard to impeach his verdict is sustained by the English cases, but an examination of the English authorities fails to support his contention. In speaking of the admission of affidavits of jurors to impeach the verdict, Lord Mansfield, C. J., in an early case, said: "It is singular, indeed, that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend of one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with the view afterwards to set aside the verdict by his own affidavit if the decision should be against him." *Owen v. Warburton*, 1 Bos. & Pul. (N. R.) 326, with a long line of English cases quoting this decision.

In 29 Cyc. 987, we find the rule as follows: "In most jurisdictions, in the absence of statutes on the subject, the affidavits of jurors will not be received to show that the verdict is a quotient or chance verdict"—citing cases from many states in support of the rule.

In *Dana v. Tucker*, 4 Johns. (N. Y.) 487, where the affidavits of two jurors were read to show "that the jurors agreed that each of them should mark down such sum as he thought fit to find, and the sum total divided by 12, the quotient should be the verdict, and that the verdict was so ascertained," the court said: "The better opinion is, and such is the rule adopted by the court, that the affidavits of jurors are not to be received to impeach a verdict."

In *Moses v. Central Park, N. & E. Ry. Co.*, 3 Misc. Rep. 322, 23 N. Y. Supp. 23, where a motion to set aside the verdict was made, "because a 'quotient' verdict, that is, a ver-

dict rendered upon an agreement for one-twelfth of the aggregate amount of the several estimates by the jurors," it is said: "The rule is well established, and at this day rests upon well-understood reasons of public policy, as connected with the administration of justice, that the court will not receive the affidavits of jurors to prove misconduct on their part, or any act done by them which could tend to impeach or overthrow their verdict." *Allen, J., in Dalrymple v. Williams*, 63 N. Y. 361, 363 [20 Am. Rep. 544], and other cases on this point. "The reasons for the exclusion of evidence by jurors to impugn their verdict are obvious and unanswerable, namely: First, because it would tend to defeat their own solemn acts under oath; secondly, because its admission would open a door to tamper with jurymen after they had given their verdict; and, thirdly, because it would be the means in the hands of a dissatisfied juror to destroy a verdict at any time after he had assented to it."

In *Boston, etc., Ry. Co. v. Dana*, 1 Gray (Mass.) 83, 105, the rule is stated, as follows: "The only remaining question arises on the motion for a new trial founded on the alleged misconduct of the jury in making up their verdict. Without considering the question whether the matter stated in the affidavit of one of the jurors, if properly proved, would be deemed sufficient cause for invalidating a verdict and granting a new trial, it is only necessary to say that there is no competent evidence offered to sustain the motion in the present case. It has often been determined in this court that the affidavits of jurors cannot be received for the purpose of proving misconduct in the jury room. *Dorr v. Fenno*, 12 Pick. [Mass.] 525; *Murdock v. Sumner*, 22 Pick. [Mass.] 156."

In the following cases affidavits and testimony of jurors were sought to be introduced in aid of a motion for a new trial, to show that the verdict was found and returned in pursuance of an agreement in advance to be bound by a quotient or chance verdict, and were refused: *Montgomery St. Ry. Co. v. Mason*, 133 Ala. 508, 32 South. 261, 268; *Pleasants v. Heard*, 15 Ark. 407, cited and approved in *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 628; *City of Battle Creek v. Haak*, 139 Mich. 514, 102 N. W. 1005, 1008; *St. Martin v. Desnoyer*, 1 Minn. 156 (Gil. 131), 61 Am. Dec. 494, 496, 497; *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867, 869; *Cline v. Broy*, 1 Or. 90; *Stull v. Stull*, 197 Pa. 243, 47 Atl. 240; *Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Luft v. Linganie*, 17 R. I. 420, 22 Atl. 942; *International, etc., v. Gordon*, 72 Tex. 44, 52, 11 S. W. 1033; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488; *Purcell v. Southern Ry. Co.*, 119 N. C. 728, 26 S. E. 161, 162; *Turner v. Tuolumne County W. Co.*, 25 Cal. 398; *Boyce v. California Stage Co.*, 25 Cal. 460.

If it is considered advisable in the furtherance of justice that the verdicts of juries may be impeached by the voluntary affidavits of the individual jurors, the remedy must be provided by the lawmaking power and not the courts. It is the duty of this court to administer the law as we find it.

There being no error in the record and the case having been fairly tried and the verdict of the jury not being excessive, the judgment and order of the lower court are affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

N. B.—Judge ROSS being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. J. E. O'CONNOR, Judge of the Superior Court of the state of Arizona, in and for the county of Pinal, to sit with them in the hearing of this cause.

STATE ex rel. POWERS v. DALE, County Clerk.

(Supreme Court of Montana. April 7, 1913.)

COUNTIES (§ 28*)—COUNTY SEAT—UNINCORPORATED TOWNS—"TOWN."

An unincorporated town is eligible as a candidate for county seat of a county proposed to be created under Laws 1911, p. 205, authorizing new counties and providing for the printing on ballots the words "for the county seat" with the names of all cities or towns which may have filed a petition, since the word "town" is used in its popular meaning of an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together, and is not confined to a town as defined by Rev. Codes, § 3202, providing that a city or town is a body corporate and politic, though, where a term has both a technical and a common meaning, the technical meaning must be applied whenever reasonably possible.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 26, 27; Dec. Dig. § 28.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7019-7029.]

Mandamus by the State on the relation of William Powers against J. W. Dale, County Clerk and Recorder of Valley County, Mont. Writ issued.

Norris, Hurd & Lewis, of Great Falls, for relator. D. M. Kelly, Atty. Gen., and Louis P. Donovan, Asst. Atty. Gen. (Thomas Dignan, of Glasgow, and Walsh, Nolan & Scallon, of Helena, of counsel), for respondent.

SANNER, J. Mandamus to the county clerk of Valley county to compel the placing of the name of Bainville upon the ballot as a candidate for county seat at a special election for the creation of the county of Sheridan. Upon the hearing it was ordered that the peremptory writ issue as prayed. The effect of this ruling was to decide that an unincorporated town is eligible as a candidate for the county seat of a county

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proposed to be created under the so-called Leighton Act. Laws 1911, p. 205 et seq. It seems desirable, in compliance with section 6249, Revised Codes, that we give briefly the reasons which have moved us to this conclusion.

The Leighton Act was approved March 6, 1911, and its provisions touching the establishment of the county seat of a proposed new county are: "There shall also be printed upon said ballot the words 'for the county seat,' and the names of all cities or towns which may have filed with the county clerk a petition. * * * nominating any city or town within the proposed new county for the county seat, and the voter shall designate his choice for county seat by marking a cross (X) opposite the name of the city or town for which he desires to cast his ballot. * * * In case any city or town fails to receive a majority of all the votes cast, then the city or town receiving the highest number of all votes cast, shall be designated as the temporary county seat. * * * If upon the canvass of the votes cast at such election it appears that sixty-five per cent. of the votes cast * * * are for the new county * * * the board of county commissioners shall * * * declare such territory duly formed and created as a county * * * and that the place receiving the highest number of votes cast at said election for county seat shall be the county seat of said county. * * *"

The contention in the brief of respondent is that the term "city or town," as used in the foregoing extract, refers only to an incorporated city or town, for the following reasons: That, to be a city or town, a community must be incorporated, otherwise it is merely a village or camp; that, whenever the Legislature has intended an act to apply to so-called unincorporated cities or towns, it has explicitly so declared; that, in the absence of a contrary intention, the term "city or town" must be construed with reference to section 3202, Revised Codes, in which it is provided that "a city or town is a body corporate and politic," etc.; that there is nothing in the Leighton Act from which it can be reasonably inferred that the term "city or town," as used therein, is not intended to mean an incorporated city or town.

The term "town" has a general and popular, as well as a technical, meaning. In common parlance it has had an almost unvarying significance; derived from the Anglo-Saxon "tun," it originally meant "a collection of houses inclosed by a hedge, wall, or palisade" (Century Dictionary); it still means "any considerable collection of dwelling houses, as distinguished from the adjacent country" (Standard Dictionary), or "an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together" (38 Cyc. 506). That it is used in this sense many times in our Codes, and

that in the legislative, as well as in the popular, mind there is such a thing as an unincorporated town which is not a mere village or camp, is readily demonstrable. For instance, chapter 107, Acts of the Twelfth Legislative Assembly (Laws 1911, p. 190), was approved on the same day and was under consideration by the Legislature at about the same time as the Leighton Act. Chapter 107 is "An act providing for bonding fire districts in unincorporated cities and towns," and clearly presents, under the term "unincorporated city or town," the idea of a community entirely beyond the stage of a mere village or camp. So, also, in sections 3514 and 3519 of the Revised Codes, there is a distinct recognition of a town as an entity without incorporation or municipal character. Again, in article 8, § 1, the Constitution of Montana provides that the judicial power of the state shall vest in certain enumerated tribunals and such inferior courts as may be established in any "incorporated city or town." This use of the term "incorporated," as applied to cities and towns, clearly connoting the opposite idea of unincorporated cities or towns, is repeated in sections 3212, 3214, and 3481 of the Revised Codes. It is quite true that in both the Constitution and the Codes the term "city or town" is used without any definitive prefix, but under circumstances which make it clear that only incorporated cities or towns is meant; and a further investigation also discloses the frequent legislative use of the term "city or town" without any definitive prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns is meant. Illustrations of this are: Constitution, art. 15, § 12; chapter 58, Acts of the Twelfth Legislative Assembly; Revised Codes, § 6339, subd. 10; sections 8483, 8535, 8547, 8548, 8582, 8765, 8771, 8834. It seems clear, therefore, that no consistency whatever has been observed in the legislative use of the term "town"; and it is not correct to say that, whenever an unincorporated town is meant, it has been explicitly so declared, or that the use of the term "town," without the definitive prefix, is in all cases intended to be an incorporated town, within the meaning of section 3202. On the contrary, the true inference is that the term "town," as used in the Code, is a term of varying significance and so uncertain that a construction resting wholly upon it would be highly unsatisfactory.

Accepting, however, as correct the canon of construction proposed by respondent that, where a term has both a technical and a common meaning, the technical meaning must be applied whenever reasonably possible, and assuming that section 3202 is a technical definition for all purposes when the contrary does not appear, we think it is not difficult to see that in the Leighton Act the term "town" is not to be taken in the sense in

which it is defined in section 3202. Counsel for respondent say "that the Legislature is presumed to know existing statutes and the state of the law." Very well, among the existing statutes, and included in the state of the law when the Leighton Act was passed, may be found the provisions of sections 2851 to 2856, Revised Codes. These provisions date back many years and to a time when incorporated towns in Montana were few and far between; to a time when county seats were notoriously situated at, or removed from, or moved to, unincorporated towns. These provisions in effect say that a county seat may be moved "from the place where it is fixed, by law or otherwise, to another place"; that, in voting at an election to move a county seat, the elector must vote "for the place" he prefers by marking opposite the name of "the place"; that, if two-thirds of the legal votes cast by those voting on the proposition are in favor of "any particular place," the board must give notice, in which "the place selected" must be declared the county seat. No mention whatever is made in these provisions of a city or town, and no reason whatever appears for holding that, in this proceeding for removing a permanent county seat, the place selected must be an incorporated city or town. So that, if under the Leighton Act only incorporated towns are contemplated as eligible for county seat, we are brought to one of two remarkable situations: Either (1) as to all counties created under that law, the county seat must be an incorporated town, while in all other counties it need not be; or (2) the temporary county seat must be incorporated, but the people of the county may promptly thereafter remove it to a town that is not incorporated. Such a conclusion has no reason apparent or suggested to support it.

Furthermore, three days after the passage of the Leighton Act, there was approved chapter 135 (Acts of Twelfth Legislative Assembly), which is "An act to provide for the designation of temporary county seats and for the location of permanent county seats in new counties or in counties in which the permanent county seat has not been located." In this act we look in vain for the term "city or town," or for any evidence of intention to require incorporation as a qualification for county seat. On the contrary, the language is that the board of county commissioners shall by resolution "designate some place" within the county as temporary county seat, and "the place so designated" shall be the temporary county seat; if the commissioners cannot agree, each shall write the name of the "place" he favors on a slip, and the slips shall be put in a receptacle and one of them drawn out, and the "place" named on the slip so drawn shall be the temporary county seat. At the succeeding general election, the matter must be submitted to the people, and

at such election the elector is required to write on his ballot the name of the "town or place" at which he desires the permanent county seat to be located, and a ballot so marked and cast is to be deemed a vote for the "town or place" so marked; and the "town or place" found to have received a majority of the votes cast shall be the county seat, etc. This act is so nearly contemporaneous with the Leighton Act that the incongruity between its manifest intent and the construction sought by the respondent to be given to the Leighton Act must have been obvious to the Legislature, if, as a matter of fact, any such construction of the Leighton Act had occurred to it as possible. If it cannot be supposed that the same session intended results so incongruous upon subjects so intimately related, then we must adopt the only harmonizing conclusion, viz., that neither act presupposes incorporation as a qualification to become a county seat.

The respondent has failed to suggest any hypothesis, and none has occurred to us, for supposing that to the legislative mind any special reason appealed for preferring an incorporated city or town to one not so endowed. But there is, we think, a consistent purpose to be seen in the Leighton Act to submit the entire matter to the vote of the people, and it is in line with that purpose that we hold the choice of fixing the county seat to be theirs, as among all feasible locations, whether in incorporated towns or not.

It is ordered that the relator have of the respondent his costs herein incurred, which are taxed at \$290.60.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

STATE ex rel. RYERSON v. DALE, County
Clerk.

(Supreme Court of Montana. April 7, 1913.)

Mandamus by the State on the relation of George L. Ryerson against J. W. Dale, County Clerk and Recorder of Valley County, Mont. Writ issued.

Norris, Hurd & Lewis, of Great Falls, for relator. D. M. Kelly, Atty. Gen., Louis P. Donovan, Asst. Atty. Gen. (Thomas Dignan, of Glasgow, and Walsh, Nolan & Scallion, of Helena, of counsel), for respondent.

SANNER, J. Mandamus to the county clerk of Valley county to compel that officer to place the name of Medicine Lake upon the ballot as a candidate for county seat at a special election looking to the creation of the county of Sheridan. The peremptory writ issued after the hearing; our reasons being the same as given in the case of State ex rel. Powers v. Dale, County Clerk, 131 Pac. 670.

Upon application of the relator, it is ordered that he have of the respondent his costs herein incurred, which are taxed at \$198.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

CURRY v. McCAFFERY.

(Supreme Court of Montana. April 1, 1913.)

1. ELECTIONS (§ 269*)—CONTESTS—NATURE AND FORM OF REMEDY.

Under Rev. Codes, §§ 7234-7249, inclusive, providing for the contest of an election, such contest, while partaking of the nature of a civil action, is not one, but a statutory special proceeding.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.*]

2. ELECTIONS (§ 305*)—CONTEST—RECORD ON APPEAL—STATUTORY PROVISIONS.

In view of the constitutional provision giving original jurisdiction to the district court and appellate jurisdiction to the Supreme Court in an election contest, and of Rev. Codes, § 7248, providing that either party aggrieved by the judgment of the court may appeal to the Supreme Court, as in other causes of appeal thereto from a district court, and, in the absence of any provision for a record presenting such appeal, recourse is to be had to section 6329, providing that when jurisdiction is by the Constitution or the Code conferred on a court all means necessary thereto are also given, and that, if the course of proceeding is not specific, any mode of proceeding may be adopted which is most conformable to the spirit of the Code, and thereunder a record on appeal in an election contest, such as would be appropriate in an ordinary civil action, is proper.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.*]

3. JUDGES (§ 15*)—DISQUALIFICATION—CALLING IN ANOTHER JUDGE.

A district judge disqualified to hear an election contest was authorized to call one trial judge after another until he finally secured the services of one who could preside at the trial of the cause.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 48-52; Dec. Dig. § 15.*]

4. ELECTIONS (§ 285*)—CONTEST—VERIFICATION OF STATEMENT.

A verification attached to the statement of an election contest which is to all intents the same as that required for a pleading in an ordinary civil action is sufficient.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.*]

5. JUDGES (§ 51*)—DISQUALIFICATION—AFFIDAVIT.

A district judge disqualified to hear an election contest is not compelled to call upon the other district judges, unless his disqualification is brought about as provided by Rev. Codes, § 6315, subd. 4, as amended by Laws 1909, c. 114, declaring a judge disqualified when either party files an affidavit that he has reason to believe that he cannot have a fair and impartial trial before such judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

6. JUDGES (§ 29*)—HOLDING COURT FOR ANOTHER JUDGE.

Under the express provision of Const. art. 8, § 12, any judge of the district court may hold court for any other district judge, and shall do so when required by law.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-142, 144-152; Dec. Dig. § 29.*]

7. COURTS (§ 30*)—JURISDICTION—ACQUIRING AND EXERCISING JURISDICTION.

Where the jurisdiction of a court is exclusive, and has once lawfully attached, it cannot be ousted by subsequent events or facts arising

in the cause, but the court may proceed to final judgment, unless some Constitution or statute divests it of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 119-128; Dec. Dig. § 30.*]

8. ELECTIONS (§ 276*)—CONTINUANCE—STATUTORY PROVISIONS.

Rev. Codes, § 7244, providing that, upon application of either party, the court may continue the trial of a contested election before its commencement for not more than 20 days, where the applicant presents a good cause by affidavit and pays the cost of the continuance, has no application to a case in which neither party asked for a continuance, but the continuance was had upon the court's own motion.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*]

9. ELECTIONS (§ 305*)—CONTESTS—APPEAL—HARMLESS ERROR—CONTINUANCE.

Ertoneous orders for continuance made in an election contest within the court's jurisdiction are to be treated as errors without prejudice, in the absence of any showing of injury arising therefrom.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.*]

10. COURTS (§ 68*)—TERMS—ACTS AFTER EXPIRATION OF TERM.

Where the duration of a special term or session is limited to a certain time, any act performed in the matter after the expiration of that time is coram non iudice and void.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 240-242; Dec. Dig. § 68.*]

11. ELECTIONS (§ 276*)—CONTEST—JURISDICTION—SPECIAL "TERM"—SPECIAL "SESSION."

Rev. Codes, § 7241, provides for a special session or term of the district or county court in an election contest on some date to be set by it not less than 10 nor more than 20 days from the date of such order. Section 7244 provides that the court shall have the powers necessary to the determination thereof and for adjourning, and may also continue the trial before its commencement for any time not exceeding 20 days after good cause shown by either party upon affidavit at the cost of the applicant. *Held*, that the terms "session" and "term" were used interchangeably, that the word "session" applied to a court in a judicial district comprising but a single county where there were no terms of court, and that the word "term" applied to a court within a district having terms of court, and that there was no constitutional or statutory limit to such special term or session.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6435-6437; vol. 8, pp. 6916, 6917, 7798.]

12. COURTS (§ 76*)—TERMS—ADJOURNMENT.

A court of record has authority over its own motion and in the absence of statute to adjourn the hearing of a matter pending before it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 250-254; Dec. Dig. § 76.*]

13. ELECTIONS (§ 276*)—CONTEST—POSTPONE-MENT OF TRIAL—STATUTE.

Under Rev. Codes, § 7244, providing that a court holding a special session or term for the trial of an election contest may adjourn from day to day may also continue the trial before its commencement for any time not exceeding 20 days for good cause shown by either party upon affidavit, the trial court had authority of its own motion to postpone the trial of an election con-

test before the actual commencement of the trial.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*]

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

Election contest by George Curry against Joseph J. McCaffery. Judgment for contestee, and contestant appeals. Reversed and remanded.

Alex. Mackel, Wm. F. Davis, H. A. Tyvand, and I. G. Denny, all of Butte, for appellant. John F. Davies, Kremer, Sanders & Kremer, J. E. Healy, John V. Dwyer, and William Meyer, all of Butte, for respondent.

HOLLOWAY, J. At the general election held in Silver Bow county on the 5th day of November, 1912, Joseph McCaffery, H. Lown-des Maury, and Louis A. Smith were contesting candidates for the office of county attorney. The county canvassing board declared McCaffery elected, and issued a certificate to him. Within the time allowed by law for filing contests George Curry, a resident of Silver Bow county and a qualified elector therein, filed in the district court of that county his statement contesting the right of McCaffery to the office of county attorney. The ground of the contest is malconduct on the part of the election officers, which, it is alleged, resulted in depriving the rightful claimant of the office. On December 2d, after this statement had been filed, the district court, presided over by Judge Lynch, made an order calling a special session of the court for December 16th to determine such contested election case, and directed the proper citation to issue to the contestee. Due service of the citation was made, and on the 16th day of December the contestee appeared by motion. Judge Lynch, deeming himself disqualified, called in Judge Poindexter, of the Fifth district, to hear the motion and to try the cause, and by agreement of the parties the further hearing was continued until December 19th. On December 19th, by agreement of the parties, Judge Pierson, of the Thirteenth judicial district, was called in to hear all pending matters and motions and to try the cause, and the further hearing was continued until January 3, 1913. Some time thereafter the clerk of the court received a letter from Judge Pierson, to the effect that it would be impossible for him to hear the motion or try the cause. On January 3, 1913, the matter was called before the district court while Judge Lynch was presiding. Counsel for the contestee objected to Judge Lynch making any order or assuming any jurisdiction over the proceedings; but these objections were overruled, and an order was made calling Judge Winston, of the Third judicial district, and the matter was set for hearing January 4th. Judge Winston was unable to try the matter or hear the motion, and on January 4th, in

open court while Judge Lynch was presiding, and over the objection of the contestee that he had no jurisdiction to make any order, Judge Clements, of the First judicial district, was called to try the cause, including the hearing of the pending motion, and the matters were set for January 6th. Judge Clements indicated that he could try the cause but that he could not be present until January 8th. On January 6th, in open court, Judge Lynch presiding, over the objection of the contestee that he had no jurisdiction to make any order and upon the further ground that no affidavit for a continuance had been filed, and that the cause could not be continued to a date more than twenty days from the 16th of December, 1912, the day upon which the cause was originally set for hearing, Judge Lynch set the matters over to January 8th. On January 8th Judge Clements appeared in court, and, the matter being called, counsel for the contestee objected to any further proceedings, upon the ground that the court had lost jurisdiction, for the reason that the hearing had been continued for more than 20 days from the day originally set for the hearing, and moved the court to dismiss the proceeding. The objection was sustained, the motion granted, and a judgment rendered and entered in favor of the contestee and against the contestant for costs. It is from that judgment that this appeal is prosecuted.

[1,2] 1. Objection is made to the record by which this appeal is sought to be presented. Under our Code the proceeding for contesting an election is classed as a special proceeding. While it partakes of the nature of a civil action, it is not in fact such an action. It is altogether statutory. The provisions of law governing are found in sections 7234-7249, inclusive, of the Revised Codes. The only provision with reference to an appeal is found in section 7248, as follows: "Either party, aggrieved by the judgment of the court may appeal therefrom to the Supreme Court, as in other causes of appeal thereto from the district court." Jurisdiction—original in the district court and appellate in the Supreme Court—of a proceeding of this character is conferred by the state Constitution. The right in a party to the proceeding to appeal is conferred by section 7248 above. There is not any provision made for a record by which the appeal can be presented. Under such circumstances we have recourse to section 6329, which provides: "When jurisdiction is, by the Constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." Appar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ently acting upon the analogy existing between the character of this proceeding and an ordinary civil action, counsel for appellant prepared such a record as would be appropriate in an ordinary civil action. The procedure thus adopted properly presents the matters for adjudication, appears suitable and in conformity with the spirit of our Code, and meets with our approval. The objection urged against the record is untenable. In *re Lister's Estate*, 19 Mont. 474, 48 Pac. 753; *State ex rel. Seres v. District Court*, 19 Mont. 501, 48 Pac. 1104; *State ex rel. Whiteside v. District Court*, 24 Mont. 539, 63 Pac. 395.

[3] 2. That Judge Lynch had authority to call one trial judge after another, until he finally secured the services of one who could preside at the trial of the cause, is not open to doubt or debate. *Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394; *State ex rel. Anaconda C. M. Co. v. Clancy*, 30 Mont. 529, 77 Pac. 312; 23 Cyc. 599.

[4] 3. Complaint is made of the form of verification attached to the statement of contest. While it is somewhat informal, it is to all intents and purposes the same as that required for a pleading in an ordinary civil action and is sufficient. *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Murphy v. Levengood*, 31 Mont. 34, 77 Pac. 311.

[5, 6] 4. The record fails to disclose the cause of Judge Lynch's disqualification. He was not compelled to call upon the other judges of the Second district, nor was he required to do so unless his disqualification was brought about by the filing of an affidavit under subdivision 4 of section 6315, as amended by the act of 1909 (*Laws 1909*, p. 161). There is not any question, however, of Judge Clements' authority to act for Judge Lynch. Section 12, art. 8, Montana Constitution.

5. The special session of court to hear this contest was ordered for December 16th. The postponement to the 19th and again to January 3, 1913, was taken by agreement of the parties, and no one complains. By filing the statement of contest in time, the district court of Silver Bow county acquired complete jurisdiction of the subject-matter involved herein, and by due service of the citation upon the contestee equally complete jurisdiction was acquired over the parties. The court having met at the time and place designated in the order convening the special session, there was then presented a question for adjudication, a court having exclusive jurisdiction, and a special term duly convened for the purpose of hearing and determining the question.

[7] It is conceded to be the general rule that "where the jurisdiction of a court is exclusive and has once lawfully attached it cannot be ousted by subsequent events or facts arising in the cause, but the court may proceed to final judgment unless some con-

stitution or statute operates to divest that particular court of its jurisdiction." 11 Cyc. 690. That there is not any provision of our Constitution by or through which the court lost jurisdiction of this matter must also be conceded.

[8] In their brief, counsel for contestee say: "The jurisdiction of the court in this case was determined and ousted by the provisions of section 7244, Revised Codes of Montana." As the trial of this cause was never begun, the provision of section 7244, above, for adjournment from day to day, was never invoked. The adjournments after January 3d were taken from time to time before the commencement of the trial, and over the objection of the contestee. Paraphrased, that portion of section 7244, above, invoked by the respondent, reads as follows: Upon the application of either party the court may continue the trial before its commencement for not more than twenty days, upon two conditions: (a) That the applicant present good cause by affidavit; and (b) that he pay the cost of the continuance. But in the instant case every continuance was had upon the court's own motion. Neither party asked for a continuance, and, so far as this record discloses, neither party desired one. There could not be any showing of cause, and there was not any one upon whom the cost of the continuance could be imposed. Therefore the provision of section 7244 for a continuance before trial has no application to the facts of this case. We are confronted with the fact that the trial court ordered these adjournments of its own motion. If Judge Clements had appeared and tried the cause on January 6th, no complaint could have been made. The periods covered by the several adjournments, including the adjournment to January 6th, equaled, but did not exceed, 20 days. The 20 days from December 16th would have expired on January 5th, but for the fact that January 5th was Sunday, and, under the rule of computation of time prescribed by the Code, that day is excluded. If, then, the court lost jurisdiction, it resulted from the postponement of the cause for trial from January 6th to January 8th; and that this is the theory of counsel for respondent is evidenced by the recital in their brief: "The hearing of the contest was not begun until more than twenty (20) days had elapsed, to wit: on January 8, 1913. The term of court could only continue for twenty (20) days; the twenty (20) days having elapsed on January 6, 1913, and no hearing having been had or commenced, the special session of court which had been called, ended, and the court lost jurisdiction."

[9-11] The orders postponing the trial from January 3d to January 4th, and from January 4th to January 6th, even if erroneous, were orders made within jurisdiction, and in the absence of any showing of injury or inconvenience to the contestee arising

therefrom they are to be treated as errors without prejudice; and the same rule would be invoked as to the postponement to January 8th if it was accomplished by an order which the court had authority to make. So that by this process of elimination we reach the only serious question presented, viz.: Did the postponement of the trial to a date more than 20 days from the day on which the special session was convened work a discontinuance of the proceeding? The answer to this involves a consideration of two other questions:

(1) Is the duration of the special session which is authorized by section 7241 to be held to determine an election contest limited to 20 days? This inquiry must be answered "Yes" or "No." If the term is so limited, the limitation is absolute; for there is not any provision for extending it. The words "session" and "term" are used here interchangeably. They are both employed in section 7241 to meet the condition arising from the different situations of different courts within this state. In a judicial district such as the second, comprising but a single county, there are no terms of court; while in a district comprising more than one county there are terms. The word "session" is employed for a court within a district of the first class, and the word "term" for a court within a district of the other class; but the two words as here used mean the same thing. If the duration of the special term or special session is fixed by hard and fast rule to 20 days, then any act performed in the matter after the expiration of that period would be *coram non jure* and void. 11 Cyc. 735. If this cause had been brought to trial on January 3d before Judge Pierson, there cannot be any question of the right of the court to proceed. However, if contestee's theory of this statute is correct, the court would then have had but three days within which to complete the trial, and, if at the expiration of January 6th the trial was not completed, the mere expiration of that day would *ipso facto* work a dissolution of the special session of court and a discontinuance of the proceedings, even though neither party nor the court was at fault. Such a result ought not to be reached unless the language of the statute leads inevitably to that end. While the manifest purpose of the statute is to secure a speedy hearing of election contests, it is certainly of more consequence that a contest instituted in good faith be determined upon its merits, and that the very right of the case be ascertained, than that the controversy be ended speedily without regard to right or wrong.

In support of their view counsel for contestee cite *English v. Dickey*, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40, but the decision was upon a statute which is quite different from ours, and one whose terms seem to lend support to the position taken. The statute

considered by the Indiana court authorizes the trial board to grant continuances "not exceeding twenty days altogether." Of this the court said: "In our opinion it was the intention of the Legislature that the entire time given to the consideration of a contested election case by the board of county commissioners should be 20 days altogether." There is not anything in our Code which limits the special term or special session to 20 days or at all. The language of section 7244, above, is that the court "may adjourn from day to day until such trial is ended." As indicated above, the limitation upon the power of the court to grant a continuance for not more than 20 days applies only when an application by one party has been made for cause. The provision is reasonable, and its purpose is to prevent either party from having recourse to delay merely for the sake of delay. Our conclusion is that the decision of the Indiana case above is not authority upon the question of the construction of our statute, and that there is not any limit fixed by the Constitution or laws of this state to the special term or special session of court called to determine an election contest.

[12, 13] (2) Has the trial court authority of its own motion to postpone the trial of an election contest before the actual commencement of the trial? The position of counsel for contestee is, in effect—though not in terms—that the court does not have such authority, and support for this view is found in the declarations of the Supreme Court of California in construing statutory provisions similar to our own. In *Dorsey v. Barry*, 24 Cal. 449, there was presented the single question: Has the trial court authority to grant a new trial in an election contest case? The Supreme Court very properly determined that such authority was not lodged in the court and annulled all proceedings subsequent to the judgment confirming Barry's election. With that decision itself there cannot be any fault found; but, notwithstanding there was not involved any question of the power of the trial court to grant a continuance, and no continuance had been had, the Supreme Court, by dictum pure and simple, undertook to construe the provisions of the California statute similar to those of our section 7244, and said: "In section 62 of the act, provision is made for the continuance of the special term, not exceeding 20 days, upon good cause shown before the commencement of the trial; and it further provides that after the commencement of the trial it may be continued from day to day until such trial is ended. The continuance in those two cases being provided for, all further power of continuance is excluded."

Counsel also cite *Norwood v. Kenfield*, 34 Cal. 329, but the only question involved there was the power of the judge at chambers to grant a continuance of the trial of an election contest after the special term had been

fixed and before the trial had actually commenced. The Supreme Court there very properly denied to the judge the power which he sought to exercise.

Counsel for contestee rely with great confidence upon the decision in *Keller v. Chapman*, 34 Cal. 635. In that case, after the trial of the contest had proceeded for two days, the trial court, on contestant's motion and over the objection of the contestee, granted a continuance for seven days. The Supreme Court refers to the dictum in *Dorsey v. Barry*, quoted above, and makes it the foundation for its further observations as follows: "The summary nature of the proceedings is inconsistent with the exercise of the general discretionary power of granting continuances possessed by courts in civil actions. The expression of the particular mode and time of continuance is exclusive of all nonenumerated modes and times. The continuance from the 6th of the month, when the cause was on trial, to the 13th of the same month, against the objections of the respondent and without an affidavit showing cause, was unauthorized, and operates as a discontinuance of the proceeding." We are unable to appreciate the force of that argument, and in our opinion the California court failed to grasp the meaning of the provisions of the statute involved. In *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947, the decision in *Keller v. Chapman* is overruled in fact, though not in terms. In *O'Dowd v. Superior Court*, 158 Cal. 537, 111 Pac. 751, it was held that the provisions of section 1119 of the California Code of Civil Procedure (section 7242, Montana Rev. Codes) are directory merely. In *Hagerty v. Conlon*, 15 Cal. App. 643, 115 Pac. 762, the same rule was applied to the provisions of section 1118 of the California Code of Civil Procedure (section 7241, Montana Rev. Codes). In *Busick v. Superior Court*, 16 Cal. App. 499, 118 Pac. 481, the same rule was again applied to the provisions of section 1121, California Code of Civil Procedure, which are the same as the provisions of our section 7244, above. And in *Moore v. Superior Court* (Cal. App.) 128 Pac. 946, the doctrine of the *Busick* Case was reaffirmed. We are not required to adopt either theory thus advanced by the California court.

In our opinion, the language of section 7244, above, is too plain to admit of the application of any rules of construction. All that this court is called upon to do is to declare that the Legislature meant just what it said. The section provides that, when the court has met at the time and place designated for the special term or session, it "shall have all powers necessary to the determination" of the contest. The only limitations upon that authority are found in the same section, viz.: (1) Before the trial commences, neither party may have a continuance, even for good cause shown, for more

than twenty days; and (2) after the trial commences the only adjournment to be had is from day to day. That a court of record has authority of its own motion, and in the absence of statute to adjourn the hearing of a matter pending before it, is the rule well-nigh universal (1 Ency. Pl. & Pr. 238); and that our own Codes recognize that rule as in effect in this state is manifested by the fact that in certain particular instances restrictions upon that power are imposed, as, for instance, in section 8005. Since, however, there is not any restriction upon the power of the court of its own motion to adjourn the hearing of an election contest before the trial actually commences, we hold that the district court of Silver Bow county had authority to adjourn the hearing of this matter to January 8th, and in the absence of any showing of an abuse of the court's discretion or of prejudice resulting to the contestee, its action is to be approved. In holding that jurisdiction of this proceeding was lost by reason of the adjournment to January 8th, the trial court erred.

The judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

CURRY v. DREW.

(Supreme Court of Montana. April 1, 1913.)

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

Election contest by George Curry against Dan D. Drew. Judgment for contestee, and contestant appeals. Reversed and remanded.

Alex Mackel, Wm. F. Davis, H. A. Tyvand, and I. G. Denny, all of Butte, for appellant. John F. Davies, Kremer, Sanders & Kremer, J. E. Healy, John V. Dwyer, and William Meyer, all of Butte, for respondent.

HOLLOWAY, J. The facts in this case are identical with those in *Curry v. McCaffery*, 131 Pac. 673, this day decided, and upon the authority of that case the judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

CURRY v. McGRADE.

(Supreme Court of Montana. April 1, 1913.)

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

Election contest by George Curry against Barney McGraide. Judgment for contestee, and contestant appeals. Reversed and remanded.

Alex Mackel, Wm. F. Davis, H. A. Tyvand, and I. G. Denny, all of Butte, for appellant. John F. Davies, Kremer, Sanders & Kremer, J. E. Healy, John V. Dwyer, and William Meyer, all of Butte, for respondent.

HOLLOWAY, J. The facts in this case are identical with those in *Curry v. McCaffery*, 131

Pac. 673, this day decided, and upon the authority of that case the judgment is reversed and the cause is remanded for further proceedings. Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

MIDLAND VALLEY R. CO. v. BRYANT.
(Supreme Court of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 411*) — FENCES — SUFFICIENCY.

Section 1389, Comp. Laws 1909, making it the duty of railroad companies to fence their roads, except at public highways and stations, with a good and lawful fence, contemplates the erection of wing fences and cattle guards at public highway crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.*]

2. RAILROADS (§ 411*)—FENCES—SUFFICIENCY—PURPOSE.

The purpose of the statute is to prevent the intrusion of domestic animals upon the right of way, and this can only be accomplished by wing fences and cattle guards on either side of the crossings, as well as by fencing the sides of the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.*]

3. RAILROADS (§§ 412, 441, 442*)—INJURY TO STOCK ON TRACK—CATTLE GUARDS—EVIDENCE.

The only evidence of the condition of certain cattle guards over which it was claimed plaintiff's mules had passed was that said guards were "steel cattle guards"; that they were the most improved and approved pattern in general use by railroads in this country, and were properly put in and in good condition. The evidence further showed that plaintiff's mules, in some way not disclosed, passed over said guards, and on other occasions, the dates of which do not appear, horses and mules had crossed over them (the condition of the guards at the times not being shown). *Held*, no evidence of negligence, and that the facts were not such as would authorize the jury to infer a neglect on the part of the railroad company to perform a duty imposed by statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1451-1458, 1575-1595, 1596-1607; Dec. Dig. §§ 412, 441, 442.*]

4. RAILROADS (§ 405*)—INJURY TO STOCK ON TRACK—DUTY OF TRAINMEN.

The duty owing by train operatives to animals trespassing upon a railroad track, fenced as required by statute, is to exercise ordinary care to avoid injury after their presence and peril are discovered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1393-1398; Dec. Dig. § 405.*]

Commissioners' Opinion, Division No. 1. Error from Osage County Court; C. T. Bennett, Judge.

Action by Charles Amos Bryant against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Edgar A. de Meules and Sol H. Kauffman, both of Muskogee, for plaintiff in error. Grinstead, Mason & Scott, of Pawhuska, for defendant in error.

SHARP, C. [1, 2] It is urged with great earnestness by counsel for plaintiff in error that the statute of this state, requiring railroads to fence their right of way, does not require the construction of cattle guards at public crossings. Section 1389, Comp. Laws 1909, makes it the duty of every person or corporation owning or operating any railroad in this state to fence its road, except at public highway crossings and station grounds, with a good and lawful fence. A fence is defined to be: "An inclosure about a field or other place, or about any object; especially, an inclosing structure of wood, iron or other material, intended to prevent intrusion from without or straying from within." Webster's International Dictionary. Public travel and convenience make necessary the exception that the sides of the right of way be not fenced at public highway crossings; but this does not relieve from the duty to inclose by wing fences and cattle guards, or in some other proper manner, the right of way on each side of such public highway crossing that the object of the statute may be accomplished. The statute is one not alone for the benefit of owners of domestic animals, whether confined in adjoining inclosures or at large, but is also intended to furnish a means of reducing to a minimum the danger to both passengers and employes from collisions with trespassing animals, and at the same time to better enable the railroad company to discharge its duty as a common carrier. *Walt v. Bennington & R. R. Co.*, 61 Vt. 268, 17 Atl. 284; *Yazoo & M. V. R. Co. v. Harrington*, 85 Miss. 366, 37 South. 1016, 3 Ann. Cas. 181. To require the fencing of the sides but not the ends of the right of way would but partially accomplish this purpose, and, where the entry was effected at such ends or crossings, would in many instances increase instead of lessen the dangers sought to be avoided.

As said in *Elliott on Railroads* (2d Ed.) § 1198: "The true test, it seems to us, for determining whether a cattle guard should be erected at any particular point is whether the company is bound to fence at that point." In *International & G. N. R. Co. v. Searight*, 8 Tex. Civ. App. 593, 28 S. W. 39, the court in passing upon this question said: "Without some contrivance to prevent cattle from passing from a crossing along the track or right of way, we think the road would not be 'fenced' within the meaning of the statute. The object of the fence is to keep cattle off the track. They must be fenced off. If they can pass onto it at will from the crossings or openings, it is not fenced." *Patrie v. Oregon Short-Line R. Co.*, 6 Idaho, 448, 56 Pac. 82; *Toledo, St. L. & K. C. R. Co. v. Franklin*, 53 Ill. App. 632; *Evansville & C. R. Co. v. Barbee*, 74 Ind. 169; *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523; *Wabash, St. L. & P. Ry. Co. v. Tretts*, 96 Ind. 450;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Elliott on Railroads (2d Ed.) § 1198. Again, in Elliott on Railroads, § 1199, the author notes: "The duty rests upon the company to protect its track for the full width of its right of way, and this duty must be discharged by the erection of proper cattle guards and wing fences."

While our statute requiring railroads to fence their right of ways differs slightly from that of many of the states to which our attention has been called, it cannot reasonably be said that there is any distinction in the object of the different statutes or the duty attempted to be imposed.

[3] It is next urged that there is no evidence of defective cattle guards. On the morning following the accident, the plaintiff discovered mule tracks just over the crossing or cattle guards, and testified that his mules entered defendant company's right of way over the cattle guards, although unseen by him. Plaintiff further testified that the guards were "steel cattle guards." He further testified that other horses and mules had crossed over said guards. The general superintendent of the defendant company testified that the cattle guards were the most improved and approved cattle guards in general use on railroads in this country, were properly installed and in good condition. This was all the testimony touching the character or repair of the cattle guards. The fact that plaintiff's mules entered the right of way through the cattle guards, or that plaintiff had known of mules or horses crossing said guards, even though the time the other mules and horses crossed said guards, and their condition at the time had been shown (which was not attempted), was not alone sufficient to entitle the plaintiff to recover. The statute requiring railroad companies to fence their roads does not exact that a railroad cattle guard, to be sufficient, must be so constructed and maintained as to interpose an absolutely unsurmountable and impassable barrier against the encroachment of stock, without exception and under all conditions. It cannot be said that a railroad company is an insurer of the efficacy of its cattle guards under every circumstance, such as against frightened or breachy animals. On the contrary, a railroad company has discharged its duty when it installs and keeps in good repair such guards as are of the most improved and approved kind in general use by railroads. *Smead v. Lake S. & M. S. Ry. Co.*, 58 Mich. 201, 24 N. W. 761; *Choctaw & M. R. Co. v. Goset*, 70 Ark. 431, 68 S. W. 879; *Choctaw & M. R. Co. v. Vossburg et al.*, 71 Ark. 232, 72 S. W. 574; *St. Louis, M. & S. E. R. Co. v. Busick*, 74 Ark. 589, 86 S. W. 676; *Chicago, B. & Q. R. Co. v. Farrelly*, 3 Ill. App. 60; *Barnhart v. Chicago, M. & St. P. Ry. Co.*, 97 Iowa, 654, 66 N. W. 902; *Cole v. Chicago, B. & Q. Ry. Co.*, 47 Mo. App. 624; *Jones v. Chicago, B. & K. C. Ry. Co.*, 59 Mo. App. 137; *Wait v. Bennington & R. R. Co.*, 61 Vt. 268, 17 Atl.

284; *Lewis' Sutherland Statutory Construction*, § 721. The jury, therefore, could not infer the insufficiency of the cattle guard from the fact that the mules had gone over it, and other mules and horses at other times had passed over it. Had there been other evidence tending to show the size, length, depth, and manner of construction of the guards, from which the jury could for themselves have determined their sufficiency, the testimony that stock had crossed over them would have been competent as tending to show their insufficiency. *Timins v. Chicago, R. I. & P. Ry. Co.*, 72 Iowa, 94, 83 N. W. 379. But, without some such testimony, the jury could not fairly conclude that the defendant company was negligent in the discharge of its statutory duty. There was wanting that testimony from which an inference of fact could properly be drawn. *St. Louis & S. F. Ry. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892; *T. S. Reed Grocery Co. v. Miller*, 128 Pac. 271. The burden of proof to establish the acts of negligence charged rested upon the plaintiff; the accident itself raising no presumption of negligence.

The testimony of the plaintiff showed that, on the evening in question, he had turned his mules out into a lane leading to an inclosed pasture on the opposite side of the railroad right of way; that the morning following he found one of the mules at his barn badly injured, and the other he afterwards found dead on the railroad right of way. The testimony of Engineer Patton, in charge of the train, is as follows: "Q. When did you first see the mules? A. As I came round the curve beyond the bridge. Q. Where were the mules when you first saw them? A. At the west end of the bridge. Q. West end? A. Yes, sir. Q. What position were they in? A. Facing the engine. Q. What did you do then? A. Whistled an alarm and stopped. Q. What did the mules do? A. Turned and ran onto the bridge. Q. Did you see the mules when they ran onto the bridge? A. Yes, sir. Q. What did you do then? A. Called the train crew to get them off the bridge. Q. Tell the jury what you did then. A. After four blasts of the whistle, the train crew came over and we proceeded to get the mule off the track, off the end of the bridge; we got him up four or five different times and he would fall back; then, after going a short distance, he finally made a lunge and jumped over the bridge and fell on the right-hand side. Q. You there all the time? A. Yes, sir. Q. I will ask you, Mr. Patton, if any of the men there assisted you in trying to get the mule off the bridge besides the crew? A. No, sir; they did not. Q. How many times did the men get him up? A. Four or five times. Q. What kind of a bridge was it? A. A wooden trestle. Q. How far apart were the ties? A. Something like eight inches, I judge. Q. How long did you and the train crew labor with the mule

to get him safely off the bridge? A. Thirty or forty minutes. Q. What did you do after he lunged off? A. Went on with our work."

Plaintiff's testimony concerning the operations of the train on the night of the accident was: "Q. You know whether or not on the evening of September 11, 1909, there were any trains coming east over the defendant company's line near your place? A. There was. Q. About what time, if you know? A. After 10 o'clock; I don't know exactly. Q. Was there anything that attracted your attention to the train? A. Yes, sir. Q. What was it? A. Whistling of the train. Q. Where was that train, if you know, with reference to the crossing mentioned when you noticed the whistle? A. Near the crossing. Q. You was in bed at that time? A. I was. Q. What did you do then? A. Jumped up and run out on the porch. Q. Did you see the train? A. I could see the light. Q. Any other whistles? A. There was a little one. Q. How long did the whistling continue? A. I don't know, probably a half a minute, something like that. Q. Was that train going slow or fast at the time you observed it? A. Going at a moderate rate of speed. Q. How many times did that engine whistle that night while in the vicinity of your house, if you know? A. Whistled twice, two different intervals, as if it struck something or that something was ahead; and then I think four long whistles. Q. Where was the train the time these four long whistles were given, if you know? A. South of my house and near this trestle. Q. What was the character of the whistles up near your house; what kind? A. Fast, as if whistling at stock."

[4] It is not claimed that the engine struck either of the mules. As we have already seen, the testimony failed to show negligence in either the construction or maintenance of the cattle guards, so that the mules were at the time trespassing upon the railroad company's right of way. In *Atchison, T. & S. F. Ry. Co. v. Davis & Young*, 26 Okl. 359, 109 Pac. 551, it was held that in such cases the only obligation resting upon the railroad company was to exercise ordinary care, in the management of its trains, to prevent injury to the animals, after their presence and peril were discovered. *Atchison, T. & S. F. Ry. Co. v. Ward*, 32 Okl. 187, 120 Pac. 982; *Missouri, K. & T. Ry. Co. v. Savage*, 32 Okl. 376, 122 Pac. 656; *St. Louis & S. F. Ry. Co. v. Brown*, 32 Okl. 483, 122 Pac. 136; *St. Louis & S. F. Ry. Co. v. Little*, 125 Pac. 459.

We are unable to see, from a careful examination of the evidence, wherein the defendant company was guilty of negligence in the operation of its train. The testimony of Engineer Patton stands unimpeached. In fact, it is in part corroborated by that of the plaintiff himself, and while it is true

the plaintiff testified that on the morning following the accident he found mule tracks leading down the right of way from the crossing to the trestle, and which appeared to have been made by running animals, this would not of itself be sufficient, for even though the mules did in fact run down the track ahead of the engine, still, being trespassers there and their presence unseen, their peril was not by the mere fact of their presence known to the operatives in charge of the train. It is not the danger or peril that the animals were in that constitutes the test of liability, but the knowledge of such danger, and the consequent failure to exercise ordinary care to prevent the injury. It was further shown by the testimony of the engineer that the entire train crew of five men attempted to get one of the mules off the wooden trestle on which it had run; that they labored with the animal in trying to get it safely off the bridge for 30 or 40 minutes; that the train crew were provided with lanterns, and were further aided by the light reflected by the electric headlight on the engine; that they got the mule up four or five times, when he would fall back (presumably between the ties), and then, after going a short distance, the animal finally made a lunge and jumped over the bridge and fell on the right-hand side. It appears that the train crew used all reasonable efforts to safely remove the mule from the track. This work was necessarily dangerous, and that they did not succeed in safely performing a difficult feat cannot be held to constitute negligence. There being no evidence of negligence, the court should have instructed the jury to return a verdict for the defendant, and it was error to refuse defendant's request for a peremptory instruction.

The judgment of the trial court should therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

YARBOROUGH v. RICHARDSON.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 485*)—APPEAL FROM JUSTICE OF THE PEACE—TRANSFER TO SUPERIOR COURT.

A case pending on appeal in the county court from a justice of the peace court may be transferred on motion of plaintiff to the superior court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1292-1298; Dec. Dig. § 485.*]

2. BROKERS (§§ 40, 51, 53, 55, 88*)—SALE OF LAND—RIGHT TO COMMISSION.

If, after the tract of land or realty is placed in the agent's hand for sale, a sale is brought about by his exertions, he will be entitled to his commission; or if the agent introduces or discloses the name of the purchaser to the vendor for such purpose, and through such introduction or disclosure negotiations for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sale of the property are begun and then effected by the vendor, the agent is entitled to his commission.

(a) To entitle the agent to commission there must be an employment, and his service must be the immediate and effective cause of the bargain.

(b) But if the services of the agent, whatever they be, fail to accomplish a sale, and several weeks have elapsed after the proposed purchaser has decided not to buy, he is induced by another party to reconsider the matter, and then makes the purchase as the consequence of such secondary or supervening influence, the agent has no right to a commission.

(c) *Held*, under the facts as disclosed by the record, the question as to "efficient cause" of the sale should have been submitted to the jury for their determination.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40, 69, 74, 82-84, 121, 123-130; Dec. Dig. §§ 40, 61, 53, 55, 88.*]

Error from Superior Court, Custer County; J. W. Lawter, Judge.

Action by C. E. Richardson against J. E. Yarbrough. Judgment for plaintiff, and defendant brings error. Reversed.

T. A. Edwards and Ara Russell Ash, both of Cordell, for plaintiff in error.

WILLIAMS, J. The defendant in error, as plaintiff, sued the plaintiff in error, as defendant, in a justice court in Custer county to recover \$136.12 as commission on a certain land sale. After a trial judgment was had for plaintiff in said sum. An appeal was prosecuted to the county court of Custer county where, on motion of plaintiff, the cause was transferred to the superior court of said county. A trial was there had and a verdict directed in favor of plaintiff. All preliminary matters having been observed, this proceeding was instituted to review the action of the lower court.

Questions are raised (1) as to the jurisdiction of the superior court; (2) as to the action of the court in excluding certain evidence offered by defendant for the purpose of showing who effected the sale; and (3) as to the directing of the verdict in favor of the plaintiff. Neither has any appearance been made by counsel nor any brief filed in this court on the part of the defendant in error.

[1] 1. In *Oklahoma Fire Insurance Co. v. Phillip*, 27 Okl. 234, 111 Pac. 334, it was held: "A case pending on appeal in a county court from a judgment of a justice of the peace may be transferred on motion of plaintiff to a superior court, and held, tried, and determined by it."

[2] 2. The defendant admitted that he agreed to pay the plaintiff a commission of 5 per cent. of the reasonable value of a certain farm belonging to him, provided the plaintiff was the cause of effecting a sale or exchange of the same, but denied that the plaintiff effected the same. He admitted that plaintiff sent one W. A. Prince to him as a purchaser of said farm, but alleged that he looked at the same, but was not then satis-

fied with the offer made thereon by plaintiff, and wholly abandoned making any trade therefor. He further alleged that said farm was at that time, and had been for some time prior thereto, listed with Frank Goodwin, of Dill, Okl., for sale; that, about a month after the said Prince inspected said farm, the said Frank Goodwin communicated with him and induced him to return to Dill, Okl., for the purpose of looking over some other farms listed by this defendant for sale with the said Frank Goodwin; that the said W. A. Prince did return to Dill, Okl., and, having investigated the other farms mentioned, did not consummate any trade for any of them with the said Frank Goodwin; that a trade was later made by Frank Goodwin with the said Prince for the farm, the purchasing of which he had abandoned, when dealing with the plaintiff. The defendant offered evidence to sustain this issue, a part of which was excluded.

We will consider the question of the competency of the evidence and the action of the court in directing a verdict against the defendant. In *Roberts v. Markham et al.*, 26 Okl. 387, 109 Pac. 127, paragraph 2 of the syllabus is as follows: "If, after the lot or realty is placed in the agent's hands for sale, it is brought about and procured by his advertisements or exertions, he will be entitled to his commission, or if the agent introduces or discloses the name of the purchaser to the vendor for such purpose, and through such introduction or disclosure negotiations for the sale of the property are begun, and then effected by the vendor, the agent is entitled to his commissions." The agent, under the finding of the court in this case, effected the sale. In the one at bar, though the introduction was brought about by the agent, yet it is denied by the principal that by the acts of the agent the sale was consummated or effected. None of the cases cited in *Roberts v. Markham et al.*, supra, hold, as to the fact of introduction of the vendee by the agent to the principal or vendor, where the sale is afterwards consummated, that that per se is conclusive that the sale was effected by such agent.

In *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718, it is said: "If a mere introduction of the property to the notice of the buyer effects the sale, the broker earns his commission. An advertisement or any other service is enough if it be the immediate and efficient cause of the bargain. But if the services of the broker, whatever they be, fail to accomplish a sale, and several months after the proposed purchaser has decided not to buy, he is induced by other persons to reconsider his resolution, and then makes the purchase as the consequence of such secondary or supervening influence, the broker has no right to a commission. In a certain sense it may be true that the purchase was in consequence of the broker's advertisement;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

but for that, the purchaser may never have looked at the property, nor entertained a thought of buying it, but the evidence in this case shows that it was at least due to another so distinct and separate a cause that it was a mistake to permit the broker to recover. The simple answer to his demand was that if the evidence was believed he did not cause the sale; that is, his agency was not the immediate and efficient cause of the sale, and law regards only proximate, and not remote, causes." See, to the same effect, *Studer et al. v. Byson*, 92 Minn. 388, 100 N. W. 90; *Quinby v. Tedford*, 4 Colo. App. 210, 35 Pac. 276; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *McCrory v. Kellogg*, 106 Mo. App. 597, 81 S. W. 485; 19 Cyc. 258.

The question as to whether the sale was effected by the plaintiff should have been left to the jury for determination under proper instructions.

The judgment of the lower court is reversed, with instructions to grant a new trial and proceed in accordance with this opinion. All the Justices concur.

KAHN v. McCONNELL et al.
(Supreme Court of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 410*)—FORECLOSURE—RIGHT OF JUNIOR MORTGAGEE.

The existence of a prior mortgage in excess of the value of the land does not disentitle a junior mortgagee to a decree of foreclosure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1178-1180; Dec. Dig. § 410.*]

2. SUBROGATION (§ 14*)—PAYMENT BY VENDEE—JUNIOR MORTGAGEES.

When the vendee, in payment of the purchase price of real estate, pays the indebtedness secured by a first mortgage, he is not subrogated to the lien of that mortgage as against a second mortgagee whose mortgage is duly recorded at the time of purchase.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 35-39; Dec. Dig. § 14.*]

Commissioners' Opinion, Division No. 1. Error from Pontotoc County Court; A. T. West, Judge.

Action by Leon Kahn against A. A. McConnell and others to foreclose a mortgage. Judgment for plaintiff for his debt and for defendants on the foreclosure issue, and plaintiff brings error. Reversed and remanded.

Bullock & Kerr, of Roff, for plaintiff in error. Crawford & Bolen, of Ada, for defendants in error.

AMES, C. A. A. McConnell and A. M. McConnell owned the land. There was a first mortgage on it to secure an indebtedness to the First National Bank of Roff. There was a second mortgage to secure the indebtedness of the plaintiff. The defendant Wright ap-

proached McConnell with reference to a purchase of the land. McConnell referred him to the First National Bank, stating that, if he could satisfy the bank concerning his indebtedness, he would convey the land. Wright ascertained from the bank the amount due, paid a part of it, and gave his note for the balance, which was later paid. He took McConnell's canceled notes to him, and thereupon McConnell executed a deed conveying the land to him. The plaintiff's mortgage during all these times was of record, although it may be that Wright had no actual knowledge of it.

[1, 2] In the suit by the plaintiff to foreclose and under these facts the court held that Wright was subrogated to the lien of the bank's first mortgage, found that the land was worth less than the amount of the first mortgage, and refused the plaintiff's prayer for a foreclosure. This was error. Under no circumstances should the plaintiff have been denied his right to foreclose. But under the facts of this case, Wright, the purchaser from McConnell, was not subrogated to the lien of the bank. The plaintiff's mortgage was of record. Wright had constructive notice of it, although it may not have been actual. It could have been ascertained by the exercise of reasonable diligence on his part in the examination of the records. He therefore bought the land charged with notice of the plaintiff's mortgage. The fact that he assumed the indebtedness to the bank and paid it did not give him the right of subrogation. In the matter of that payment he was a volunteer. He was under no duty to buy the land. He was under no duty to pay the first mortgage. He was negligent in doing so without examining the records, and cannot escape the consequence of his own negligence by an appeal to the equitable doctrine of subrogation. "Vigilantibus non dormientibus aequitas subvenit." In *Campbell v. Hamilton* (Tenn. Ch.) 39 S. W. 895, it is said in the syllabus: "The fact that a purchaser who paid a mortgage on the land as part of the consideration, and secured the release thereof, did so at the time of the purchase, made it none the less a case of assumption of the mortgage, disentitling him to subrogation." In *Stastny v. Pease*, 124 Iowa, 587, 100 N. W. 482, it is said in the syllabus: "The purchaser of real property has constructive notice of an existing judgment lien; and, where by agreement with his grantor he discharges prior liens in part payment of the purchase price, the judgment becomes a first lien upon the property, and neither the doctrine of equitable assignment nor subrogation applies."

The following cases support the same conclusion: *Goodyear v. Goodyear*, 72 Iowa, 329, 38 N. W. 142; *First National Bank v. Thompson*, 72 Iowa, 417, 34 N. W. 184; *Kellogg v. Colby*, 83 Iowa, 513, 49 N. W. 1001;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hubbard v. Le Barron, 110 Iowa, 443, 81 N. W. 681; McDowell v. Jones Lumber Co., 42 Tex. Civ. App. 280, 93 S. W. 476; Kuhn v. Nat. Bank of Holton, 74 Kan. 456, 87 Pac. 551, 118 Am. St. Rep. 332; Hargis v. Robinson, 63 Kan. 686, 66 Pac. 988; Hayden v. Huff, 60 Neb. 625, 83 N. W. 920; Gulling v. Washoe Co. Bank, 24 Neb. 477, 56 Pac. 580; Avon-by-the-Sea, etc., Co. v. McDowell, 71 N. J. Eq. 116, 62 Atl. 885; Demourelle v. Piazza, 77 Miss. 483, 27 South. 623; Browder v. Hill, 136 Fed. 821, 69 C. C. A. 499; Shirk v. Whitten, 131 Ind. 455, 31 N. E. 87; Menefee v. Marge (Va.) 4 S. E. 726.

The rule in Ohio seems to be otherwise (Joyce v. Dauntz, 55 Ohio St. 538, 45 N. E. 900), while Louisiana and Indiana seem to have decided this question both ways (Hobgood v. Schuler, 44 La. Ann. 587, 10 South. 812; Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 South. 457; Farmers' Bank of Mooresville v. Butterfield, 100 Ind. 229; Caley v. Morgan, 114 Ind. 350, 357, 16 N. E. 790).

On the case as presented by this record, the judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

STATE v. WEATHERFORD MILLING CO.
(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—DISMISSAL OF APPEAL—BRIEFS.

Where plaintiff in error fails to file briefs, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 2. Error from Custer County Court; A. H. Latimer, Judge.

Action by the State of Oklahoma, County of Custer, against the Weatherford Milling Company. Judgment for defendant, and plaintiff brings error. Appeal dismissed.

Fred A. Snodgrass, of Little Rock, Ark., and Thomas & Thomas, of Arapahoe, for the State. Shartel, Keaton & Wells, of Oklahoma City, for defendant in error.

BREWER, C. The petition in error and transcript of the record in this case was filed in this court April 27, 1911. The plaintiff in error has failed to file any brief in the cause, as required by rule 7 of this court (95 Pac. vi). The petition in error shall therefore be dismissed for want of prosecution. Haas et al. v. McCampbell, 27 Okl. 290, 111 Pac. 543; Maddin v. McCormick et al., 27 Okl. 779, 117 Pac. 200; Mc-

Clelland v. Witherall, 30 Okl. 287, 119 Pac. 205; Miller Lumber Co. v. Swink Merc. Co., 130 Pac. 574, not officially reported.

PER CURIAM. Adopted in whole.

HOWARD v. ROSE TP., PAYNE COUNTY,
et al.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. TOWNS (§ 45*)—NEGLIGENCE—LIABILITY OF TOWNSHIP.

A township in this state, in the absence of an express statute creating liability therefor, is not liable in a civil action for damages for the neglect of its officers in failing to perform, or in improperly and negligently performing, an official duty.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 79, 80; Dec. Dig. § 45.*]

2. HIGHWAYS (§ 187*)—INJURY FROM DEFECTIVE HIGHWAY—LIABILITY OF TOWNSHIP.

For the distinction between municipal corporations, such as cities and towns, and such as counties and townships, as regards liability for the negligent construction and maintenance of the public highways, etc., see opinion.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 326, 327, 478, 479, 480, 482, 500; Dec. Dig. § 187.*]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in a negligence case, the jury finds no breach of duty by defendant, an erroneous instruction on the measure of damages is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Payne County; A. H. Huston, Judge.

Action by Welcome Howard against Rose Township, Payne County, and others. Judgment for defendants and plaintiff brings error. Affirmed.

Freeman E. Miller, of Stillwater, for plaintiff in error. J. M. Grubbs, of Stillwater, for defendants in error.

BREWER, C. This suit was commenced on the 7th day of June, 1909, by Welcome Howard, as plaintiff, against Rose township, in Payne county, and G. Brewer, J. K. P. Schooler, and Peter Wills, the officers of said township, as defendants, to recover damages in the sum of \$1,250 to certain lands and crops growing thereon, because of an alleged breach of duty upon the part of said defendants.

The facts out of which this controversy arose appear to be, in brief, that some time in 1905 Rose township, for the purpose of deviating a public highway from the section line upon which Howard's land bordered, filed a proceeding in the district court to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

condemn a roadway for a few hundred yards across plaintiff's land, and that on April 25, 1905, an agreed judgment was entered in that cause, the substantial parts of which are: That the township was to pay Howard the sum of \$40 for taking the land, the damages accruing thereby, together with a certain portion of the costs of the proceeding, and was to build a temporary bridge across a ditch on the west side of Howard's premises, and as soon as same was built Howard was to move his fence. The township was also to grade a road and place a ditch on the west side to carry off the water, and thereupon was to take title to the land for highway purposes and to have possession thereof. The petition, after alleging the terms of this judgment, proceeds to charge that the township has failed, neglected, and refused to comply with the terms of said judgment in that it has refused and neglected to grade any road along the west side of defendant's land and to place a ditch there to carry off the water as stipulated in said judgment. The petition also alleges the negligent obstruction of the ditch on the west side of the road that had been constructed by plaintiff prior to the rendition of said judgment. Plaintiff further alleges that during the years 1905 and 1906 that said township and its then officers were requested to comply with the judgment, but failed and refused to do so, and that after November 16, 1907, the date of the election of the defendant officers for said township, the plaintiff made demand on them that they comply with and fully perform the terms of said judgment, and that they failed and refused to do so. It is then stated that, by reason of the failure, refusal, and negligence of the defendants so to do, water was caused to flow and be precipitated upon and across plaintiff's growing crops on a portion of his lands, resulting in damages to the crops of 1908 and 1909, also to the land itself, by washing the soil away and rendering it less fertile, and all to his damage in the sum of \$1,250. A demurrer interposed by the three township officers upon the ground that the petition failed to state a cause of action against them as individuals was sustained.

The defendant township filed an answer which, after a general denial, contained the following defense: "That after the rendition of said judgment, and in compliance therewith, the defendant made a ditch on the west side of the road to carry off the water and graded the road and constructed a temporary bridge across the ditch on the east side of the road; that said work was done by reason of said judgment and in compliance therewith, and after its completion the plaintiff examined the same and signified his approval thereof and acknowledged same to be in full compliance with such judgment and the agreement therein set forth."

Proof was introduced at the trial by both parties under the issues so framed, and the jury rendered a verdict in favor of the defendant township.

A number of assignments of error are discussed in the brief, but, under the view we take of the law of this case, it will not be either necessary or profitable to discuss them all. The gravamen of the case, as disclosed by the petition, is based on the assumption that the township is liable for negligence in constructing the public highway and in failing to perform the obligation it assumed in the judgment, in connection with the construction of the highway. No such liability existed. Under the holdings of this court, and of its predecessor, the territorial Supreme Court, a municipal corporation, such as cities and towns, is held liable for negligence in maintaining its streets, sidewalks, bridges, etc., in an improper and dangerous condition, where persons have been injured because thereof. *City of Stillwater v. Swisher*, 16 Okl. 585, 85 Pac. 1110; *City of Guthrie v. Swan*, 5 Okl. 779, 51 Pac. 562; *Guthrie v. Thistle*, 5 Okl. 517, 49 Pac. 1003; *Pitman v. El Reno*, 2 Okl. 414, 37 Pac. 851; *City of Oklahoma City v. Welsh*, 3 Okl. 288, 41 Pac. 598; *Marth v. City of Kingfisher*, 22 Okl. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238; *City of Pawhuska v. Rush*, 29 Okl. 759, 119 Pac. 239; *Derr Const. Co. v. Gelruth*, 29 Okl. 538, 120 Pac. 253; *Colbert v. City of Ardmore*, 31 Okl. 537, 122 Pac. 508. And this same rule has been adopted in many of the states. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Jansen v. Atchison*, 16 Kan. 358; *Oliver v. Kansas City*, 69 Mo. 79; *Hutson v. New York*, 9 N. Y. 163, 59 Am. Dec. 526; *Higert v. City of Greencastle*, 43 Ind. 574; *City of Wyandotte v. White*, 13 Kan. 191, and numerous cases cited.

[1, 2] But a distinction is made in this state, and many of the other states, between municipal corporations, such as cities and towns, and such quasi corporations, as townships, counties, etc. This distinction is clearly drawn in the case of *James v. Wellston Township*, 18 Okl. 56, 90 Pac. 100, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938. That case was an action for damages for the failure and neglect of the officers of the township to keep in repair its roads and bridges, because of which negligence the plaintiff suffered a personal injury. In affirming the action of the trial court in sustaining a demurrer to a petition fully stating such negligence and injury, the court in an elaborate opinion collates and discusses many authorities on this question and arrives at the following conclusion, as stated in headnotes by the court: "In the absence of express statute imposing a liability on townships for injuries sustained from defects in highways, such townships, in this territory, are not liable in a civil action for damages for neglect of

public duty in failing to keep the highways in a safe and proper condition." And relative to the distinction between the classes of municipal corporations and the reasons why such as counties and townships should not be liable for the failure of their officers to perform their public duties, the court say: "In some states it is held that municipal corporations proper are, without any express statutory provisions to that effect, liable for all injuries caused by defective highways, on the theory that being invested with the exclusive control over the highways within their limits, and having ample power to raise money for their construction and repair, it is their duty to keep the highways in a reasonable and safe condition, for failure to perform which they are subject to corresponding liability. But, on the other hand, it has been held that quasi municipal corporations are not liable for defects in the highways, unless they are expressly made so by statute; the theory on which they are distinguished from municipal corporations proper being generally stated to be that they are mere agencies of the state. We think the correct theory on which it is held that quasi corporations, such as counties and townships, are exempt from liability is that they are but auxiliary parts of the sovereignty. The sovereignty is vested in the state for the purpose of carrying out the political powers of the state, and for convenience the state is divided into counties, the counties are divided into townships, and the townships are divided into road districts. These subordinate divisions being merely component parts of the great body politic of the state, and as public policy would dictate that the state, for a failure to perform a public duty, would not be liable in civil damages to a citizen, the same rule would apply as to subordinate political subdivisions of the state." In discussing the rule laid down in that case the court say: "Perhaps there is no other question that has received more frequent consideration by the courts of this country than this one, and none where the decisions have been more in harmony and of one accord. It is true that there are three or four states holding adversely to this contention, notably, Iowa, Maryland, and Pennsylvania. But we think an examination of the authorities will convince that the great weight of authority is with the doctrine of the nonliability of townships under the conditions set forth in this petition." The court cites *Vall v. Amenla*, 4 N. D. 239, 59 N. W. 1092; *Eikenberry v. Bazzarr Township*, 22 Kan. 556, 31 Am. Rep. 198; *Marion County v. Riggs*, 24 Kan. 255; *Barnett v. County*, 67 Cal. 77, 7 Pac. 177; *El Paso County v. Bish*, 18 Colo. 474, 33 Pac. 184; *Helgel v. Wichita County*, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63; and many other cases. That case is authority controlling in the case at bar.

[3] The trial court held in this case, upon the authority of *James v. Wellston Township*, supra, that the township was not liable in damages for the negligence of its officers as charged in the petition, but submitted to the jury the issue as to whether the work agreed to be done in the judgment had been done in substantial compliance therewith, and that, if it had, there was no liability, and, if it had not, that plaintiff could recover a sum equal to the cost of the unperformed work; and, if partially performed only, then the recovery would be limited to the cost of the work necessary to finish it in conformity with the judgment. We see no material error in this charge, but, if there was, it would be immaterial, because on the main issue of performance or nonperformance of its full duty the jury found in favor of the township, which cannot mean anything else than that every duty owed by the township to plaintiff had been substantially performed, and that therefore no recovery could be had. Where there is no breach of duty, there can be no recovery, and even an erroneous instruction as to the measure of the recovery would not be prejudicial.

The objections to the refusal of evidence offered grew out of the ruling of the court against liability for negligence of defendant's officers in the discharge, or failure to discharge, their official duties, and need not be discussed. The contention that the court erred in sustaining the demurrer of the individual officers as to personal liability is urged in the brief, but no case is referred to to sustain the point. From a careful reading of the petition, we think the demurrer was properly sustained.

The contention that the court erred in admitting evidence that the ditch dug by the defendant was sufficient for the purpose and fulfilled the obligation of the judgment is not sound. Indeed, we fail to see the grounds upon which it is made. The alleged insufficiency of this ditch was the real basis of plaintiff's claim. The answer so treated it when it alleged that it and the other things required had been done in compliance with the judgment. The evidence was competent, relevant, and highly material.

The judgment of the court should be affirmed.

PER CURIAM. Adopted in whole.

STATE ex rel. EOTON, County Atty., v. HEATH.

(Supreme Court of Oklahoma. April 4, 1913.)
APPEAL AND ERROR (§ 773*)—ABANDONMENT OF APPEAL—BRIEFS.

Where, in an action by the state, on the relation of the county attorney, against a person for using and permitting his premises to be used for the purpose of unlawfully keeping and

dispensing intoxicating liquors, no briefs are filed by either party, the appeal will be deemed abandoned, and the cause will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Proceeding by the State, on the relation of Joe S. Eoton, County Attorney of Okmulgee County, against Robert Heath. A demurrer to relator's petition was sustained, and he brings error. Dismissed.

HARRISON, C. This action was begun by Joe S. Eoton, county attorney of Okmulgee county, in May, 1910, against Robert Heath, for using and permitting to be used, certain premises in the town of Morris, in Okmulgee county, for the purpose of keeping and dispensing intoxicating liquors in violation of law. Defendant demurred to the petition, on the ground that it failed to state a cause of action. The county attorney refused to plead further and appealed to this court.

The petition in error and case-made was filed here May 26, 1911. The cause was assigned for submission December 6, 1912. No briefs having been filed, the appeal is deemed to have been abandoned, and the cause is dismissed for failure to file briefs, as required by the rules of this court.

PER CURIAM. Adopted in whole.

ADKINS v. WRIGHT et al.
(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 195*)—COMPETENCY — HUSBAND AND WIFE.

A woman called as a witness to testify against a defendant, who was formerly her husband, cannot give evidence concerning any communications made by one to the other while the marriage relation existed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 743; Dec. Dig. § 195.*]

2. WITNESSES (§ 64*) — COMPETENCY — HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.

The statutes of this state (section 5842, Comp. Laws 1909), as well as the common law, prevent one spouse from giving testimony, falling under the head of privileged communications, against the other either during or after the marital relation has ceased; but neither the statute nor the common law prevents one spouse, after the marriage relation has been terminated, from testifying against the other, regarding independent facts within the knowledge of the witness, and not coming within the privilege.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 180, 181; Dec. Dig. § 64.*]

3. ADVERSE POSSESSION (§ 58*)—LOST INSTRUMENTS (§ 8*) — ESTABLISHMENT — EVIDENCE OF POSSESSION—PROBATE OF—EFFECT.

The mere possession of lands, without any adverse claim being made to them, for a period less than is provided by the statute of limita-

tions, does not prove title; but direct proof of a written conveyance which has been lost or destroyed may be aided by the presumption flowing from long peaceable possession and repeated or continuous acts of ownership.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 279-281; Dec. Dig. § 58;* Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.*]

4. EVIDENCE (§ 178*)—LOST INSTRUMENTS—ESTABLISHMENT.

Where the execution and delivery of a written conveyance in a chain of title has been proved, together with the fact of its loss or destruction, relevant secondary evidence may be used in proof of the fact of its existence and contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.*]

5. LOST INSTRUMENTS (§ 8*)—ESTABLISHMENT—EVIDENCE—ADMISSIBILITY.

Where there is a missing link in an otherwise perfect chain of title, and there is any competent proof of the execution, delivery, and subsequent loss of a deed which would supply the missing link, such evidence, together with any evidence of long peaceable possession without adverse claim, the payment of taxes, the failure of the other claimant to assert his rights with knowledge of such possession, etc., should be submitted to the jury on the question of whether such alleged lost deed had in fact ever existed.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Jackson County; J. T. Johnson, Judge.

Action by J. G. Adkins against W. B. Wright and another. The court sustained a demurrer to plaintiff's evidence, and he brings error. Reversed and remanded for new trial.

Tisdinger, Clay, Robinson & Hamilton, of Mangum, for plaintiff in error. A. R. Garrett, of Granite, for defendants in error.

BREWER, C. This suit was filed in the district court of Jackson county May 2, 1910, by J. D. Adkins, plaintiff in error, as plaintiff below, against the defendants in error, T. V. Turner and W. B. Wright. The suit was brought by plaintiff in possession to remove clouds and quiet his title in and to lots 10 and 11 of block 8 Wright's addition to the town of Altus, formerly Leger, Okl. Defendant W. B. Wright disclaimed any interest in the lots. Defendant Turner denied plaintiff's title, and asserted title in himself under a quitclaim deed from his co-defendant Wright. The cause was tried to a jury, and at the conclusion of the evidence the court sustained a demurrer to the same in favor of the defendant Turner. Two questions are presented: (1) The action of the court in sustaining the demurrer to the evidence. (2) Refusal to admit certain evidence.

These lots are part of a quarter section of land patented by the United States government to the defendant W. B. Wright, who afterwards platted the same as an addition to the present town of Altus. Both parties

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

here claim title under said patentee. Plaintiff shows a record title through a long line of conveyances, beginning with the deed from Emma W. Turner. The only fault in plaintiff's title as shown by the record is the absence of the deed from patentee Wright to Emma W. Turner. Plaintiff alleged in his petition that this deed had been executed and delivered, but that it had been lost. The court sustained the demurrer to the evidence, upon the theory that there was no proof that a deed had ever been executed by Wright to Mrs. Turner, and that same had been lost; and for that reason that plaintiff had failed to show title in himself to the lots. If there was no such proof, of course, the court should be sustained; if there was, however, any substantial proof of the execution and loss of this deed which constituted a missing link in an otherwise perfect title, which was strengthened by many years of peaceable possession, then in such event the action of the court cannot be sustained. We think there was sufficient proof on this point to have justified its submission to the jury.

Mrs. Turner was at the time of the transfer by her of the title to these lots the wife of the defendant Turner. They were divorced some years before the trial of this case. These lots were conveyed by warranty deed executed by Mrs. Turner May 25, 1901, to the Orient Land & Townsite Company, since which time this company and the various grantees in the line of title have been in peaceful and exclusive possession of the lots and have paid the taxes thereon. It does not appear that the defendant Turner claimed or attempted to assert any adverse interest in the same for eight or nine years, and not until he procured a quitclaim deed from the patentee Wright which forms the basis for his present claim of title. All of the proof relative to the deed from the patentee to Mrs. Turner prior to the execution by her of the deed of May 25, 1901, is presented in her deposition used at the trial. On this point we quote her testimony: "Q. I will ask you if you were ever the owner of lots 10 and 11 in block 8, Wright's addition to the town of Altus, formerly the town of Leger, Okl. A. Yes, sir. Q. From whom did you obtain title to these lots? A. Walter Wright. Mr. Turner bought them from Mr. Wright. Q. Is the Walter Wright that you have just mentioned and W. B. Wright the defendant in this action, the same person? A. Yes, sir. Q. Are you now the owner of said lots 10 and 11, block 8, Wright's addition? A. No, sir. Q. To whom did you deed these lots, if you remember, Mrs. Turner? A. They went to the Orient Railway, but I don't remember the man's name. I would know it if I was to hear it. Q. I will ask you to state, Mrs. Turner, if T. V. Turner was present at the time you deeded these lots? A. Yes. Q. In one of your former answers you spoke of 'the old deed.' What deed was

that, Mrs. Turner? A. The deed from Walter Wright to me. Q. Was he (T. V. Turner) or was he not present at the time you made the deed? A. He was standing right by my side."

[5] And further on she stated: "But anyhow we got the deed that we had and carried it up there to the old Hightower building, made the new one, and left the old one with McDaniel and Bob Brewer. They were the ones that were taking these deeds for the Orient Railroad. I never read the deed that I signed. * * * It was made to the company. * * *"

There was evidence of a search for the missing deed, and that it could not be found.

[2] This last clause of the evidence quoted above was in the deposition, but the court excluded it, on the objection urged that it was incompetent because of the marital relation previously existing. In this the court erred. Portions of the deposition may possibly have been open to this objection on the ground that they were privileged communications between the parties when they were husband and wife, but we fail to see wherein the statement quoted was other than a statement of fact relative to a title which this witness claimed to possess and which she had conveyed with warranties which under the law she was obligated to defend. The marital relation had long since terminated.

[1] The statutes (section 5842, Comp. Laws 1909) as well as the common law interposed its barrier to her giving testimony which would fall under the head of privileged communications between husband and wife, but neither the statute nor the common law prevents one spouse, after the marriage relation has been terminated, from being called as a witness in a case in which the other is a party to testify to independent facts within the knowledge of the witness, and not coming within the privilege. 3 Wigmore on Evidence, 2237, note, and cases cited; *Eastery v. Gater*, 17 Okl. 93, 87 Pac. 853, 10 Ann. Cas. 888; *Jones on Evidence* (2d Ed.) §§ 736, 773; 1 *Greenleaf on Ev.* (16th Ed.) 837.

[3] The mere possession of lands, without any adverse claim being made to them, for a period less than is provided by limitation statutes, does not prove title; but direct proof of the existence of a written conveyance, which has been lost, may be aided by the presumptions to be derived from possession and repeated or continuous acts of ownership in establishing the title to the land.

[4] Where the conveyance is in writing, it must be proved by the original writing or a properly certified copy, as provided by statute; but if the fact of the written conveyance is proved, together with the fact of its loss, its existence and contents may be proved by relevant secondary evidence. *Cahill v. Cahill*, 75 Conn. 522, 54 Atl. 201, 60 L. R. A. 706; 4 *Ency. Ev.* 214, and cases cited.

Scott v. Crouch et al., 24 Utah, 377, 67 Pac. 1068; Herndon v. Burnett et al., 21 Tex. Civ. App. 25, 50 S. W. 581; Melvin v. Proprietors, 17 Pick. (Mass.) 255; Johnson et al. v. Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57; Baylor v. Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

The important fact in this case was whether there had been a written conveyance from the patentee of these lots to Mrs. Turner, which had been lost. The evidence on this point, taken together with the circumstances of long possession, payment of taxes, and the actions of defendant, with full knowledge of the facts, in asserting no adverse claims to the lots for so many years, was sufficient to take this main question of fact to the jury for determination.

The cause should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

STATE v. HINES et al.

(Supreme Court of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. BAIL (§ 77*)—COUNTY COURTS—FORFEITURE OF BAIL BOND—JURISDICTION.

The county court is not limited by its jurisdiction in civil cases to declare a forfeiture upon a bail bond given in a criminal action of which it has original jurisdiction.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 335-349, 379, 403; Dec. Dig. § 77.*]

2. BAIL (§ 84*) — FORFEITURE — RIGHTS OF SURETIES.

Where an order of court, admitting a defendant to bail, authorized the making of a single bond to cover three separate cases, and the bond given pursuant thereto recited that the defendant stood charged by indictment in three cases, describing the offenses, such bond, being otherwise valid, is binding and obligatory on the sureties.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 379-381; Dec. Dig. § 84.*]

3. BAIL (§ 77*) — DEFAULT OF PRINCIPAL — FAILURE TO CALL SURETIES.

Where the principal fails to appear at court, as required by the terms of a bail bond, the failure to call the sureties will not defeat an action on the bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 335-349, 379, 403; Dec. Dig. § 77.*]

4. BAIL (§ 84*) — FORFEITURE — RIGHTS OF SURETIES.

In an action brought in the district court by the state against the principal and sureties on a bail bond theretofore duly declared forfeited by the county court having jurisdiction of the criminal action, sickness of the principal on the date of forfeiture is no defense against the sureties' liability. Comp. Laws 1909, § 7112.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 379-381; Dec. Dig. § 84.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action on a statutory bail bond by the State of Oklahoma against Frank Hines,

John McEachin, and Paul Winsett. Judgment for plaintiff against defendant Hines, and for defendants McEachin and Winsett, and the State brings error. Reversed and remanded.

Wm. L. Curtis, of Sallisaw, for the State. Robert E. Jackson, of Sallisaw, for defendants in error.

SHARP, C. On February 2, 1910, the defendant in error Frank Hines was in custody, charged with having violated the state prohibitory laws in three separate cases, numbered 432, 441, 462. On said day the county court of Sequoyah county made and caused to be entered an order fixing the bail of said defendant at the sum of \$1,500 for his appearance on the first Monday in April, 1910, the bond fixed in said sum to include all three of said cases. On the same day a bond, signed by said W. F. Hines, as principal, and John McEachin and Paul Winsett, as sureties, was tendered the county judge and by him approved. The case coming on for trial on April 12th, the defendant filed a motion for continuance, which was overruled, and being called three times and failing to answer his bond was ordered forfeited and an alias warrant issued. April 19th thereafter the defendant filed a motion to set aside the forfeiture theretofore taken, and to continue the case until the next term of court, assigning as grounds therefor that on the day of the forfeiture the defendant was ill and unable to be in attendance on the court. Accompanying this motion was a certificate, signed by two physicians, stating that on the date of the affidavit, April 15, 1910, the defendant was sick in bed and unable to be up or to attend to any business on account of his said illness. This motion coming on to be heard was by the court overruled, and the case reset for trial on June 15th. The present action to recover of the principal and sureties the amount of the forfeited bail bond was brought in the district court on August 31, 1910. The defendants defended on the ground that the principal was at the time of the forfeiture prevented from attending court on account of unavoidable sickness, rendering it impossible for him to leave his home in Ft. Smith to attend the trial.

The bond provided that said defendant should well and truly make his appearance before the court at its next term to be begun and holden at the courthouse of said county of Sequoyah, in the town of Sallisaw, on the 4th day of April, 1910, and there remain from day to day and term to term of said court until discharged by due course of law. The forfeiture, as we have seen, was not taken until April 12, 1910. It was not necessary that the forfeiture be taken on the day named in the bond, as was recently held by this court in Knight et al. v. State of Oklahoma ex rel. H. D. Henry, 130 Pac. 282, re-

cently decided and not yet officially reported, where it was held that a similar recognizance, executed in pursuance to the statute, was a continuing bond. See, also, *Shriver et al. v. State*, 32 Okl. 507, 122 Pac. 160.

It is urged here, in addition to the defenses made below: (1) That the bail bond, being a joint bond to answer for three cases, was therefore void; (2) that, no forfeiture having been taken against the sureties, no recovery could properly be had in a suit on the bond; (3) that the amount of the bond was beyond the jurisdiction of the county court.

[1] We do not understand that the amount of a bond fixed in a criminal case, in a court of limited jurisdiction, must be confined to the amount over which the court has jurisdiction in civil actions. The county court had exclusive original jurisdiction of the offenses laid against the defendant. Sections 12, 18, art. 7, *Williams' Ann. Const.* The county court not only had jurisdiction of the offense charged, but it was its duty to admit said defendant to bail. Section 7105, *Comp. Laws 1909*. This it did, and at the time made an order fixing his bail at \$1,500, which bond when made was to include all three of the cases pending. Having jurisdiction of the offense charged, the court would have, as a necessary incident to its jurisdiction, the right to adjudge a forfeiture of such bond. It is expressly provided by section 7112, *supra*, that if the defendant neglect to appear according to the terms or conditions of the recognizance, the court must direct the fact to be entered upon its minutes, and the recognizance, or money deposited instead of bail, as the case may be, is and shall thereupon be declared forfeited. If the contention of the defendants in error be correct, then examining magistrates, having jurisdiction in preliminary hearings in all manner of ballable felony cases, could not fix a bail bond that would exceed in amount the maximum sum over which they had civil jurisdiction; so that no bond taken by such an officer for the appearance of a defendant in such court could exceed, in a justice of the peace court, \$200, in the county court, \$1,000. Such is not the law. Entering an order of forfeiture against the principal is not the legal equivalent of the rendition of a judgment against the sureties, however important it may become in the subsequent proceedings in the district court in an action on the bond. It was the determination of a fact incidental to the jurisdiction in proceedings over which the county court had exclusive original jurisdiction, and which jurisdiction was possessed by no other court.

The question was before the Supreme Court of Texas, where, in *Garner v. Smith*, 40 Tex. 505, it was held that a justice of the peace had jurisdiction to declare a forfeiture of a bail bond in the sum of \$1,000, given for the appearance of a defendant before the justice, although by statute it was provided

that a justice of the peace should only have jurisdiction to try suits and actions in behalf of the state, or any county thereof, or any individual, to recover penalties, fines, and forfeitures, where such penalty, fine, or forfeiture did not exceed \$100. Other cases in point are *State v. Quattlebaum*, 67 S. C. 203, 45 S. E. 162; *State v. Wilder*, 13 S. C. 344; *State v. Williams*, 37 La. Ann. 200; *State v. Cornig et al.*, 42 La. Ann. 416, 7 South. 698; *People v. Devlin*, 7 Daly (N. Y.) 47. In the latter case, referring to the rule at common law, it was said: "As respects the forfeiting of the recognizance, that is a matter exclusively for the court where the recognizance was taken. This was the rule of the common law. It was held in *King v. Tombs*, 10 Mod. 278, that the judges of Oyer and Terminer are the proper judges to determine whether recognizances are to be estreated or spared; that it is for the advantage of public justice that it should be in the power of the justices of Oyer and Terminer to spare the recognizances, if upon the circumstances of the case they see fit, and there is nothing in the statutory provisions above referred to changing the rule of the common law." The test of the jurisdiction of the county court was not, therefore, the amount of the bond, but the fact that it had jurisdiction over the offense charged, and for which the defendant gave bond for his appearance.

The fact that but one bond to cover three separate cases was given does not thereby render the bond void. The bond was given in strict conformity to the order of the court fixing the bail, and therefore differs from the case of *United States v. Goldstein's Sureties*, 1 Dill. 413, Fed. Cas. No. 15,226, cited by counsel for defendants in error, in which case no order authorizing a single bond was made.

[3] It is next urged that no forfeiture was taken against the sureties; they not being included in the call and declaration of forfeiture. This question was passed squarely upon in *Ingram et al. v. State of Kansas*, 10 Kan. 630, in which the syllabus is as follows: "Where the principal fails to appear at court, as required by a criminal cognizance, the failure to call the sureties, or to enter the default of the principal on the records, will not defeat an action brought on the recognizance."

The bail bond was given for the appearance, not of the sureties, but of the principal. It was his absence that forfeited the bond. Having, without sufficient excuse, neglected to appear, the court, after having first called the defendant three times, declared a forfeiture on the bond, and caused the fact to be entered upon its minutes. This was all the statute providing for forfeiture of bail requires. *People v. Tidmarsh et al.*, 113 Ill. App. 153.

[2] Lastly, in a suit brought against the sureties upon a forfeited bail bond, is the ill-

ness of the principal at the time of the forfeiture a defense such as will discharge the sureties from liability? There are decisions so holding; but, so far as our examination has extended, none arise out of a statute containing provisions like or similar to those found in section 7112, *supra*. This section provides that if, without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond, or undertaking, either for hearing, arraignment, trial, or judgment, the trial court must direct the fact to be entered upon its minutes, and such recognizance, bond, or undertaking of bail, or the money deposited instead of bail, as the case may be, is and shall thereupon be declared forfeited. But if at any time before the final adjournment of court the defendant and his bail satisfactorily excuse his neglect, the court may direct the forfeiture to be discharged upon such terms as may be just. It is further provided that after the forfeiture the district (county) attorney must proceed with due diligence by action against the bail upon the instrument so forfeited. If money, instead of bail, be so forfeited, the clerk of the court or other officer with whom it is deposited must immediately, after the final adjournment of court, pay over the money deposited to the county treasurer without further proceedings at law.

On the day of the forfeiture the defendant had moved for a continuance of the cases pending against him, which motion was overruled. Observing the provision of the statute, he thereafter and on April 19th filed a motion to set aside the forfeiture theretofore taken, in which it was stated that at the time of forfeiture the defendant was ill and unable to attend court. This motion was supported by the affidavits of two physicians residing at Ft. Smith, Ark. This motion was overruled, and no further effort made in the county court to vacate and set aside the judgment of forfeiture. The question of the sufficiency of the defendant's excuse for failure to attend court according to the terms of his bond was therefore adjudicated and decided against him.

In *People v. Wolf et al.*, 16 Cal. 385, a similar question was presented. It was there insisted by the sureties in the action brought on the forfeited recognizance in the district court that the court of sessions had erred in declaring the bond forfeited. Answering this contention the court said: "It is sufficient that if the court of sessions erred in this respect the error cannot be corrected or be made available in the district court. The court of sessions decided that the defendant made no appearance, and forfeited his bond; and this judgment, if erroneous upon the facts, cannot be revised in the district court in the form of a plea or defense to the suit on the recognizance. This matter would be really a retrial of the subject pass-

ed upon by the court of sessions, or an indirect appeal from its decision."

Section 5362, Compiled Laws of Utah 1888, is very similar to our own statute; in fact, on the question of controlling importance the statutes are alike. It was held in *United States v. Eldredge*, 5 Utah, 161, 13 Pac. 673: "Our territorial statute, however, provides that, notwithstanding the forfeiture of the undertaking, if, at any time before the final adjournment of the court, the accused or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking to be discharged upon such terms as may be just. Laws Utah 1878, p. 148, § 409. The appellants have not, however, concluded to avail themselves of the privileges offered by the statute. We think they have waived all the irregularities of which they could have taken advantage under it. We know of no authority for the court to entertain such excuse after the adjournment of the term, which took place a few days after the forfeiture"—citing cases. Here the defendant did avail himself of the opportunity afforded by the statute, but having met with an adverse decision allowed the court's judgment to become final.

In *Friedline v. State*, 93 Ind. 366, it was held that where a justice of the peace adjudged a recognizance to appear before him to answer for a crime to be forfeited, and made the proper entry and certificate thereof, his judgment of forfeiture could not be questioned by plea or proof in a suit upon the recognizance. It was said by the court: "Even if the action of the justice in the particular complained of was irregular, it did not render the judgment of forfeiture void. It cannot, therefore, be collaterally questioned." *Hardesty v. State*, 5 Kan. App. 780, 48 Pac. 908; *State v. Stout*, 11 N. J. Law, 125; *State of Texas v. Ake*, 41 Tex. 166; *Foulke et al. v. Commonwealth*, 90 Pa. 257; *United States v. Reese*, 4 Sawyer, 635, Fed. Cas. No. 16,138; *Gregory et al. v. Levy et al.*, 12 Barb. (N. Y.) 610; *Pierson v. Commonwealth*, 3 Grant's Cas. (Pa.) 314.

[4] That the defendant was subsequently surrendered into the custody of the officer and tendered the payment of all costs that had accrued by reason of the forfeiture are not questions that can be raised in a suit on the forfeited recognizance in the district court. In other words, the defendant had presented his excuse to the county court, and it had there been adjudged insufficient. This was binding, not only on him, but, in so far as the forfeiture was declared, upon the sureties. In making this order overruling the defendant's motion, the county court may have erred or abused its discretion, as the case may be; but the judgment, having become final, is binding upon those affected by it. We have no hesitancy in saying that in the call of a criminal case, either for hearing, arraignment, trial, or judgment, or upon any

other occasion when his presence in court may be lawfully required, if a defendant, on account of illness, is unable to be present, and such fact is made to satisfactorily appear, it would be either error or an abuse of discretion to refuse either to pass the case or grant a continuance, or upon sufficient showing to vacate and set aside the order of forfeiture. If by illness or accident a defendant is prevented from attending court, his recognizors should be relieved from liability on account thereof. But this contemplates that the relief sought be prosecuted at the proper time and in the proper court; otherwise, as in all other cases, the judgment of forfeiture would become final. In such cases the sureties must take timely notice of the fact of the default of their principal. They have voluntarily become his jailers (Comp. Laws 1909, § 7111), and if by reason of illness or unavoidable casualty their principal has been prevented from being present at court, it is their duty to see to it that excuse be rendered at the same term of the court at which the forfeiture was taken.

For the reasons stated, the judgment of the trial court must be reversed, and the cause remanded for further proceedings consistent with this opinion.

PER CURIAM. Adopted in whole.

WESTERN NAT. LIFE INS. CO. v. WILLIAMSON-HALSELL-FRAZIER CO.

(Supreme Court of Oklahoma. April 5, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 335*)—IRON-SAFE AND INVENTORY CLAUSES—EFFECT OF BREACH.

The iron-safe and inventory clauses in fire insurance policies are promissory warranties, and an unjustifiable breach of them by the insured prevents recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.*]

2. INSURANCE (§ 335*)—IRON-SAFE AND INVENTORY CLAUSES—RECOVERY ON POLICY.

If inventories and books have been kept as required by the terms of the policy, the insured is entitled to recover, although the inventories and books have been lost, provided the loss has occurred without the fault, negligence, or design of the insured, and where the insured has used such care in the premises as a prudent man acting in good faith would exercise.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.*]

3. WITNESSES (§ 52*) — COMPETENCY — HUSBAND AND WIFE.

The wife is an incompetent witness in a case if her husband is interested in the result of the action and will share in any recovery that may be had, although the action is in the name of a third party.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 126-136, 165, 415-417, 419, 424; Dec. Dig. § 52.*]

4. WITNESSES (§ 56*) — COMPETENCY — HUSBAND AND WIFE—AGENCY.

When the wife is acting as agent of the husband in respect to the transaction about which she is called to testify, and her testimony is otherwise admissible, the fact that the transaction occurred in the presence of her husband does not prevent her from testifying.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 153-156; Dec. Dig. § 56.*]

5. WITNESSES (§ 78*) — COMPETENCY — HUSBAND AND WIFE—AGENCY—SUFFICIENCY OF EVIDENCE.

The facts examined, and held to constitute the wife the agent of the husband.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. § 78.*]

6. WITNESSES (§ 79*) — COMPETENCY — QUESTION FOR COURT.

It is the duty of the court to pass upon the competency of witnesses, and it is error to admit the testimony of a witness whose competency is challenged and then submit to the jury an instruction directing them to disregard the testimony providing they find that the witness is incompetent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201-204, 216; Dec. Dig. § 79.*]

7. EVIDENCE (§ 258*)—ACTION ON INSURANCE POLICY—ACTS OF AGENT—ADMISSIBILITY—PREDICATE.

Testimony was admitted tending to show that an officer of the defendant corporation made a corrupt offer. The testimony tended to show that this officer was the secretary of the company and in charge of the particular matter of business. Held, that it was unnecessary to show that the officer had authority to make the improper offer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

(Additional Syllabus by Editorial Staff.)

8. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—SUBMISSION OF ISSUES—COMPETENCY OF WITNESS.

Where, in an action on a fire insurance policy, the wife was clearly competent to testify as she did, her testimony being concerning a transaction wherein she acted as her husband's agent, error in submitting the question of her competency to the jury was not prejudicial to the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Pottawatomie County; Roy Hoffman, Judge.

Action by the Williamson-Halsell-Frazier Company against the Western National Life Insurance Company to recover on a fire insurance policy. Judgment for plaintiff, and defendant brings error. Affirmed.

Blakeney & Maxey, of Muskogee, for plaintiff in error. Lydick & Eggerman, of Shawnee, for defendant in error.

AMES, C. W. J. Grace was the insured. The plaintiff was one of his creditors. Grace's stock of merchandise was totally destroyed by fire. A day or two after the fire Grace assigned his claim against the insurance company to the plaintiff as collateral security. The plaintiff sued and recovered judgment.

The first error assigned is that the court erred in giving the following instruction: "The jury is instructed that the failure of the insured to produce the books and inventories as required by the policy of fire insurance means a failure to produce them if they are in existence when they are called for, or if they have not been lost or destroyed by the fault, negligence, or design of the insured. If the insured has made a reasonable effort to produce the required books and inventories, and has failed through no fault of his own, such substantial compliance will be sufficient, and if the jury believe that the books and inventories, if you find that such were kept, *have been lost without the culpable negligence or wrongful or fraudulent act or design of the insured or his assignee*, the jury is instructed that the loss and consequent failure to produce the same will not invalidate the policy, notwithstanding the provision that the failure to produce the same shall render the policy null and void, *where the insured and the assignee have used such care on the occasion as a prudent man acting in good faith would exercise.*"

[1, 2] One of the defenses was that the insured had not kept and produced his inventories and books as required by the terms of the policy; the iron-safe and inventory clauses being the customary ones in insurance policies. The plaintiff's excuse for failure to produce was that the books had been lost after the fire without fault or negligence on his part. The iron-safe and inventory clauses are promissory warranties, and an unjustifiable breach of them prevents a recovery. *Shawnee Fire Ins. Co. v. Thompson & Rowell*, 30 Okl. 466, 119 Pac. 985; *German American Ins. Co. v. Fuller*, 26 Okl. 722, 110 Pac. 763; *Gish v. Insurance Co. of North America*, 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826. On the other hand, "failure of an insured to produce the books and inventories, as required by a policy of fire insurance under the penalty of forfeiture, means failure to produce them if they are in existence if called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured." *German Alliance Ins. Co. v. Newbern*, 25 Okl. 489, 106 Pac. 826, 28 L. R. A. (N. S.) 337. And a substantial compliance with these provisions is sufficient. *Home Ins. Co. v. Ballard*, 32 Okl. 723, 124 Pac. 316. The evidence to which this instruction was addressed tended to show that an inventory was taken and kept at the residence of the insured and in compliance with the requirements of the policy; that a few days after the fire a representative of the plaintiff called upon the insured with reference to his indebtedness; that he was assisting the insured in the matter of making his proofs of loss and collecting his insurance; that the books were delivered to this agent of the plaintiff for use in settlement with the insurance company; that this agent received the books and took them away with

him; that he left the town of the fire upon a train, carrying the books; that he laid them upon a seat in the railroad car; that he changed his seat to engage in conversation with some one, or for some other purpose, leaving the books; that he went to sleep; that he was to get off at Holdenville; that when the train stopped he awoke; that he looked for the books where he had left them and in several adjoining seats; that he did not have time to make further search, but had to jump off the train; that he wired the railway company at McAlester to make further inquiries, but that the books were never found, and consequently were never produced by the insured as required by the terms of the policy. The italicized portions of the instruction give the material conditions justifying a loss; that is, that the books must be produced if in existence, and that their loss will not be an excuse, unless it has been without the fault, negligence, or design of the insured. The term "culpable negligence" may be too strong, and the instruction would be better if the word "culpable" was omitted; but an examination of the italicized portions shows that the substance of the instruction was to the effect that the loss would excuse the plaintiff, provided that he and the insured had used such care on the occasion as a prudent man acting in good faith would exercise, and that the loss had not occurred by reason of their fault, negligence, or design. We think, the instruction is a substantial compliance with the rule laid down in the *Newbern Case*, supra, and are not disposed to reverse the case on account of the improper use of the word "culpable."

[3-5] The next assignment of error relates to the admission of the testimony of Mrs. Grace, the wife of the insured, over the objection that she was an incompetent witness. The testimony was admitted upon the theory that in the matters about which she was testifying she was acting as agent of her husband, and therefore was within the terms of section 5842, Comp. Laws 1909, which provides that: "The following persons shall be incompetent to testify: * * *

(3) Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards. * * *

The substance of Mrs. Grace's testimony was that she assisted in taking the inventory; that her husband called off the articles, and price, and she took them down in a book; that she took care of the book, keeping it at her residence and having charge of it until after the fire; that this and the other books were kept by her on the dresser at night, and were there when the store was burned; that

after the fire she gave the books to Mr. Butts, the agent of the plaintiff; that at the time he was there her husband was in bed sick; that she delivered the books to Mr. Butts by Mr. Grace's direction, all three being present at the time. It is true that her husband is not the plaintiff in this case, but the testimony shows that the assignment is to the plaintiff as collateral security, and that the surplus after the payment of the plaintiff's debt is for the benefit of the husband. The verdict is for more than the plaintiff's debt, and therefore the husband is interested in the result of the action, and under these facts his wife cannot testify unless she could testify if he were the plaintiff himself. In *re Valentine*, 93 Wis. 45, 67 N. W. 12; *La Barre v. Wood*, 54 Vt. 452; *McEwen v. Shannon et al.*, 64 Vt. 583, 25 Atl. 661; *Swift v. Martin*, 19 Mo. App. 488; *Phillips v. Poulter*, 111 Ill. App. 330; *Bird v. Hueston*, 10 Ohio St. 418; *Johnson v. Bolce*, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528; *Lindsay v. McCormick*, 82 Va. 479, 5 S. E. 534. We have recently had occasion to examine this subject in the cases of *Fish v. Bloodworth*, 129 Pac. 32, and *Muskogee Electric Traction Co. v. McIntire*, 132 Pac. —, neither of which is yet officially reported, and, under the principles laid down in those two cases, we think that Mrs. Grace's testimony was admissible.

[6, 8] It is next urged that the court erred in giving an instruction advising the jury that husband and wife are incompetent to testify except under the circumstances stated in the statute, and that in this case, while Mrs. Grace's testimony had been admitted, the jury should exclude every part of it, if any, except in the cases where she was acting as the agent of her husband. This instruction shifted the court's responsibility to the jury and was improper. It is the duty of the court to pass upon the admissibility of evidence, and where the testimony of the wife is objected to on the ground of incompetency, and it is sought to introduce it because she comes within the exception, the court should determine this question. *Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 225; *Commonwealth v. Reagan*, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496; *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532; *Grand Lodge of Ill., etc., v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123. The trial court should not avoid the responsibilities which the law imposes upon him by shifting them to the jury. The judge is an important and indispensable element in the trial of a lawsuit, and should meet his duties without hesitation. His duties are just as important as those of the jury. He should guide the jury in its deliberations. He should inform them as to the law and exercise a superintending control of the administration of justice, and, if the testimony of Mrs. Grace had been im-

properly admitted, we would not hesitate to reverse this case on account of this instruction. But as her testimony was properly submitted to the jury concerning a transaction in which she acted as agent for her husband, the error of the court in giving this instruction could not have resulted prejudicially to the defendant, and therefore the case could not for that reason be reversed.

[7] The witness Butts, the agent of the plaintiff, testified that Mr. Archinault offered to give him \$500 not to make proof of loss, the effect of which would have been to pay the plaintiff but defeat a recovery on the policy for the benefit of Grace. This offer, if made, was equivalent to an offer of a bribe and manifestly would be of material weight with the jury. The testimony tended to disclose that Mr. Archinault was secretary of the company; in fact, his name appears as secretary upon the policy sued on. But it is argued that it must be shown that he was authorized by the defendant to make this proposition before the testimony was admissible. If he was the secretary of the company, and if he was in charge of the adjustment of the loss, and if he made a corrupt proposition, we do not think it was necessary for the plaintiff to prove that he was authorized by the defendant to make this corrupt proposition. It requires no argument to show that practically that would be an impossible thing to do.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

TIDWELL et al. v. DOBSON et al.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. INDIANS (§ 16*) — LEASE OF LANDS — INSTRUCTIONS.

By Act Cong. June 7, 1897, c. 3, 30 Stat. 72, the restrictions as to alienation of lands allotted members of the Quapaw Indian Tribe under Act March 2, 1895, c. 188, 28 Stat. 907, were so modified as to grant to allottees of such tribe the power to lease their allotted lands for a term not exceeding three years for farming or grazing purposes, and for a term not exceeding ten years for mining or business purposes, without the approval of the Secretary of the Interior, except in cases where the allottee by reason of age or other disability was incompetent to properly manage his allotment.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

2. INDIANS (§ 16*) — MINING LEASE — ASSIGNMENT OF ROYALTY — VALIDITY.

An assignment of royalty due under a mining lease given by a Quapaw Indian on his allotment is valid under Act March 2, 1895, c. 188, 28 Stat. 907, as modified by Act June 7, 1897, c. 3, 30 Stat. 72. *Following Wat-Tah-Noh-Zhe v. Moore*, 129 Pac. 877.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Commissioners' Opinion, Division No. 2. Error from District Court, Ottawa County; T. L. Brown, Judge.

Action by Moody R. Tidwell and another against W. W. Dobson and Mary Moore. Demurrer to answer of Mary Moore sustained, but overruled as to answer of defendant named, and from judgment rendered for such defendant plaintiffs bring error. Affirmed.

E. E. Sapp and A. Scott Thompson, both of Miami, for plaintiffs in error. S. C. Fullerton, of Miami, for defendant in error.

HARRISON, C. This was an action by Moody R. Tidwell and W. C. Lykins against W. W. Dobson and Mary Moore to clear title to a tract of allotted land in the Quapaw Indian reservation. One Ohs-ta-wat-tah, a citizen of the Quapaw Tribe of Indians, was the original allottee of the land in question. Plaintiff claimed title by virtue of a warranty deed from the heirs of Ohs-ta-wat-tah. Defendant Mary Moore claimed an interest in the land by virtue of a lease from Ohs-ta-wat-tah during her lifetime. Defendant Dobson claimed an interest by virtue of an assignment of royalty from the heirs. Upon Ohs-ta-wat-tah's death, her lands descended to her heirs. There seems to have been two families of heirs, and after her death one C. M. Harvey procured mining leases from each family to the land in question for a period of ten years, after which defendant Dobson procured from one family of heirs, to wit, George Red Eagle and wife, Minnie Red Eagle, and sister, Grace Red Eagle Sacto, an assignment of the royalties due them from the lease of C. M. Harvey. At the trial of the cause the demurrer to the answer of Mary Moore being sustained, she dropped out of the case, and judgment was rendered foreclosing her of all interest in the land. The issues between plaintiffs and defendant Dobson were whether the heirs of a Quapaw allottee could alienate the allotment by a mining lease, and whether, if so, the royalties due such heirs from such lease could be legally assigned. The court decided both issues in favor of defendant Dobson. Plaintiff excepted and appealed from the judgment.

[1, 2] It is true, as contended by plaintiff in error, that Congress by Act March 2, 1895, c. 188, 28 Statutes at Large, 907, designated as the Quapaw Allotment Act, restricted the members of the Quapaw Indian Tribe in the alienation of their lands for a period of 25 years. It is also true, and was so held by this court in *Eldred v. Okmulgee Loan & Trust Co.*, 22 Okl. 742, 98 Pac. 929, that the granting of oil, gas, or mining leases is an alienation within the meaning of the act of Congress. But it must be observed that by

act of Congress approved June 7, 1897 (chapter 3, 30 Statutes at Large, 72), the restrictions of members of the Quapaw Indian Tribe were modified so as to permit members of such tribe to lease their allotted lands for terms not exceeding three years for farming and grazing purposes, and not exceeding ten years for mining or business purposes. Said act reads as follows: "That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years for farming or grazing purposes, or ten years for mining or business purposes. And said allottees and their lessees and tenants shall have the right to employ such assistants, laborers, and help from time to time as they may deem necessary; provided, that whenever it shall be made to appear to the Secretary of the Interior, that, by reason of age or disability, any such allottee can not improve or manage his allotment properly and with benefit to himself, the same may be leased, in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him. All acts and parts of acts inconsistent with this are hereby repealed." This act clearly gives the right to such Indians to lease their allotted lands for farming or grazing purposes for periods not exceeding three years, and for mining or business purposes for periods not exceeding ten years, without the approval of the Secretary of the Interior, except in cases where the allottee by reason of age or other disability was incompetent to properly manage his allotment.

The question as to whether the royalties due an allottee under a mining lease can be legally assigned was decided by Judge Campbell of the Eastern District of Oklahoma, in *United States v. Abrams et al.* (C. C.) 181 Fed. 847, which opinion was affirmed by the United States Circuit Court of Appeals May 23, 1912 (*United States v. Noble*, 197 Fed. 292, 116 C. C. A. 654), in an opinion by Judge Smith of said court. The same question was decided by this court January 7, 1913, in *Wat-Tah-Noh-Zhe et al. v. Moore*, 129 Pac. 877, where, in an opinion by Judge Robertson, it was held that an assignment of royalty due under a mining lease given by a Quapaw Indian on his allotment is not an alienation of a part of the real estate in violation of Act March 2, 1895, c. 188, 28 Statutes at Large, 907, making such allotments inalienable for 25 years; following *United States v. Abrams* (C. C.) 181 Fed. 847.

We conclude, therefore, that these issues were correctly determined by the court below, and the judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

RHYNE et al. v. TURLEY.

(Supreme Court of Oklahoma. April 4, 1913.)

*(Syllabus by the Court.)***1. DAMAGES (§§ 87, 91*)—EXEMPLARY DAMAGES—THEORY—GROUNDS.**

Exemplary damages are imposed by the law on the theory of punishment to the offender, for the general benefit of society, and as a restraint to the transgressor, and are allowed only in cases where malice, fraud, oppression, or gross negligence enter into the cause of action.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 188-192, 193-201; Dec. Dig. §§ 87, 91.*]

2. APPEAL AND ERROR (§ 1140*)—DECISION—GROSSLY EXCESSIVE VERDICT.

Where, from the evidence and circumstances in a case, it is clear to the court that the verdict of a jury awarding exemplary damages is the result of passion and prejudice, and where the amount is so grossly excessive as to be shocking to the court's sense of justice, a remittitur should not be ordered, but, on application therefor, a new trial should be granted, for the reason that in such case the vice of prejudice and passion has probably prevented a fair and impartial consideration of the evidence and defenses offered, and has therefore permeated and destroyed the value of the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.*]

Commissioners' Opinion. Division No. 2. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by C. S. Turley against R. C. Rhyme and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Wrightsmen, Bush & Murry, of Tulsa, for plaintiffs in error. Biddison & Campbell, of Tulsa, for defendant in error.

BREWER, C. O. S. Turley, defendant in error, brought this action as plaintiff below to recover the value of a case of whisky alleged to have been converted by the plaintiffs in error, defendants below, to their own use, and for exemplary damages for the alleged trespass of defendants in seizing the whisky at plaintiff's residence, in the sum of \$2,000, which included the value of the case of whisky.

It appears that on December 15, 1908, a case of whisky arrived in the town of Broken Arrow, express prepaid, and consigned to one Fishbourn; that the city marshal, one of the defendants, learned or suspected that this whisky was to be delivered by a drayman to a person other than the consignee, and, when the drayman got the whisky to be carried away, the marshal, and perhaps a deputy, went with or followed the drayman and the whisky to ascertain the place of delivery with the idea that, if delivered to a person other than the consignee, it would be an illegal transportation of the whisky and therefore a violation of the law,

and would render same subject to confiscation. As the drayman proceeded through the village with the officer accompanying him, the incident seems to have attracted the attention of a number of citizens, the same being defendants in this case, and, when the drayman stopped and delivered the goods at the residence of plaintiff, these citizens went up to the place and stood about the gate, some inside the yard and others outside; the officers followed the whisky in onto the porch, and, after the box had been deposited inside the door of the front room, the officer picked up the same, took it out on the porch, raised the lid, ascertained that it was in fact whisky, nailed the lid back on, put the box on his shoulder and took the same down town, stating to the wife of defendant that he believed the whisky to be an unlawful shipment, and that he would have to carry it before a justice of the peace to be investigated. The officer had no warrant authorizing either a search or a seizure, but claimed to act on the assumption that he needed none, as the conveyance and delivery of the whisky was in his presence. The proof shows that plaintiff Turley was the owner of 7 quarts of the 12 in the case; the remaining five belonging to other parties not disclosed. There is no proof that Turley had ever violated the prohibition law, and he testified that the whisky was for his own use and that of his family. So far as the record shows, all the parties to this suit are reputable persons.

The defendants seem to have tried the case on the theory that the entry of the marshal and one or two others onto the porch and on the inside of the door to the house would have been a trespass, except for the fact, as they allege, that they were invited in by Mrs. Turley.

The case was tried to a jury; a three-fourths verdict being rendered in favor of the plaintiff for \$2,000 damages and for the return of the whisky. This was more than the plaintiff sued for, as the value of the whisky was included in the \$2,000 damages claimed. Upon hearing a motion for a new trial, in which it was alleged that the verdict was excessive and the result of prejudice and passion in the minds of the jury, the court informed plaintiff he would grant a new trial, unless he was willing to accept a verdict of \$500 and would remit the balance. The remittitur was promptly made, and the judgment for \$500 entered.

Outside of the \$7, the value of the seven quarts of whisky, there is no claim that the evidence shows any actual damages. The judgment outside the part requiring a return of the whisky was solely by way of punishment.

[1] Section 2887, Comp. L. 1909, authorizes punitive or exemplary damages, in addition to actual damage suffered, "where the defendant has been guilty of oppression, fraud or malice, actual or presumed," etc. This

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

statute is substantially the common law. They have no relation to the question of compensation for loss sustained, but are permitted on the theory of punishment to the offender, for the benefit of the community, as a restraint to the transgressor. Such damages are allowed only in cases where malice, fraud, oppression, or gross negligence enter into the cause of action. *W. U. T. Co. v. Reeves*, 126 Pac. 218, and cases cited; *Franc Cady v. Case*, 45 Kan. 733, 26 Pac. 448; *Burns v. Campbell*, 71 Ala. 271; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Barlow v. Lowder*, 35 Ark. 492; *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *C. K. & W. Ry. Co. v. O'Connell*, 46 Kan. 581, 26 Pac. 947; *Sheik v. Hobson*, 64 Iowa, 146, 19 N. W. 875; *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353.

[2] A reading of the evidence in this case would convince any fair-minded man that the verdict resulted from prejudice and passion. The trial court must have thought so. The plaintiff probably had misgivings along this line, when he so readily surrendered the bulk of his judgment. There was no fraud, oppression or malice, or any of the elements of ill will, dislike, wantonness, or rudeness shown in the conduct of defendants. The officers erred in their judgment of the law, but appear to have acted in good faith. The citizens who came upon the scene merely stood by and saw the whisky box opened; they were neither rude, boisterous nor insulting. Those of them who went inside the yard were probably trespassers technically, unless they were invited, but this is about as serious a view of their conduct as could be reasonably urged.

In our judgment, the jury found contrary to the great weight of the evidence on the question of whether Mrs. Turley invited the parties onto her premises. This question was presented as a defense against the charge of trespass. If the majority of the jury was prejudiced against these parties, who seem to have been vigilantly, and perhaps overzealously trying to enforce the prohibition law, this same state of mind that resulted in such a verdict probably prevented a fair consideration of the evidence and defenses offered by defendants. In other words, the prejudice and passion which the record to our minds so clearly shows must have permeated the whole case, rendering it impossible to give to the evidence that fair and impartial consideration contemplated in a jury trial. Under such a situation, the court should have set this verdict aside and granted a new trial. The defendants were entitled to the verdict of a fair-minded unprejudiced jury; this we think they have not had. To compel them to accept in lieu of such verdict the judgment of the court, where the

damages are unliquidated, and awarded solely as punishment, and there are no means of measuring the same, is to deny them the right of a trial by jury as contemplated by the law. *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 560; *Pertello v. Mo. Pac. Ry.*, 217 Mo. 645, 117 S. W. 1138; *Chlanda v. St. L. Transit Co.*, 213 Mo. 244, 112 S. W. 249; *Chitty v. St. L., I. M. & S. Ry. Co.*, 148 Mo. 64, 49 S. W. 868; *Chicago & N. W. Ry. Co. v. Cummings*, 20 Ill. App. 333; *Gurley v. Mo. Pac. Ry. Co.*, 104 Mo. 211, 16 S. W. 11.

We do not mean to intimate that the court, in proper cases, does not have the right to order a remittitur. It has such right. But this case should be reversed because the vice of prejudice and passion has entered into and destroyed the verdict.

The cause should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

WEGNER v. MINCHEW.

Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE—MALICIOUS PROSECUTION.

Evidence examined, and held that, as the same reasonably tends to support the verdict, the judgment of the trial court will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error from Superior Court, Logan County; J. M. Sandlin, Judge.

Action by Henry Minchew against Herman Wegner. Judgment for plaintiff, and defendant brings error. Affirmed.

Hepburn & Granttham, of Guthrie, for plaintiff in error. McGuire & Smith, of Guthrie, for defendant in error.

TURNER, J. On November 6, 1909, in the superior court of Logan county, Henry Minchew, defendant in error, sued Herman Wegner, plaintiff in error, in damages for malicious prosecution. The petition substantially states that on September 3, 1909, within that county, the defendant maliciously, unlawfully, and without probable cause caused the arrest of plaintiff by filing before the county judge of that county an affidavit and information duly sworn to by him charging defendant with having within the county carried on or about his person a certain weapon called a revolver; that upon said charge so made, which was false, defendant unlawfully and maliciously caused a warrant to issue by said county judge for the arrest of plaintiff, which was done without probable cause, and he forcibly imprisoned and kept in the county jail of Logan county four days; that he was tried for said crime at the end of which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the court, on request of the county attorney, directed the jury to return a verdict of not guilty, which was done. By reason of all of which he says he was damaged in a sum certain for which he prayed judgment.

For answer defendant pleaded a general denial, and specifically denied any malice towards plaintiff. For a second defense he pleaded that he had made a fair statement of the facts constituting the alleged offense to the county attorney of Logan county, and that the information and warrant resulting in the arrest complained of were issued upon that statement, that the same was made without malice, that the charge was true, and that defendant drew or attempted to draw said revolver on him. After reply denying that defendant sought the advice and counsel of the county attorney in good faith, or that he laid the facts before the county attorney, and charging that the statements to him were untrue and maliciously made, and that it was the false and malicious statements to the county attorney, which induced him to issue the information, there was trial to a jury and verdict for plaintiff for \$250, and defendant brings the case here.

The evidence reasonably tends to support the verdict. Plaintiff testified that he was living with his mother on his farm in that county, when about the latter part of August, 1909, defendant came on the place where plaintiff was working and had a conversation with him concerning the selling of some oats upon which it appears defendant had or claimed to have a mortgage; that he took possession of a scoop which plaintiff desired to use, and in the controversy used vulgar and indecent language in the presence of plaintiff's mother; that upon being commanded to desist and leave the place plaintiff took the scoop and departed. He further testified that he did not have a revolver on that occasion, and did not own one, and made no demonstration toward putting his hand in his hip pocket. His mother testified that she was present on that occasion, and that plaintiff had lived with her all of his life, and did not have a revolver and never owned one; that she saw defendant drive up to the granary on that occasion to load oats, when her son told him not to do so, whereupon defendant used the vulgar language attributed to him by the son; that thereupon he was ordered off the place, as stated, and departed, after she had separated the men, with the scoop on his shoulder, averring that he would return and shoot plaintiff's heart out, and that during the altercation her son had no revolver. The brother-in-law of plaintiff also testified that he never saw him with a revolver, and to the best of his knowledge did not own one. Three other witnesses testified that plaintiff's reputation as a peaceable, law-abiding

citizen was good. After defendant had testified, two of his neighbors testified that his reputation for truth and veracity in that vicinity was bad.

Upon this evidence, the jury found, in effect, that the charge was false, malicious, made without probable cause, and that defendant did not seek the advice and counsel of the county attorney in good faith, but that his statements to him were untrue and maliciously made.

There being evidence reasonably tending to support the verdict, the judgment will be sustained.

Affirmed. All the Justices concur.

ANDERSON et al. v. CANADAY.

(Supreme Court of Oklahoma. April 4, 1913.)

(Syllabus by the Court.)

1. EXEMPTIONS (§ 139*)—EVASION OF RIGHT—ACTION FOR DAMAGES—PETITION.

A petition, which alleges that plaintiff and defendants are residents of Oklahoma, that plaintiff, by contract of employment made in this state, is working in this state for a railroad company, that plaintiff was indebted to one of the defendants, and that the other defendant was an attorney, and that the defendants conspired, combined, and confederated together for the purpose of defeating plaintiff's right to exemptions under the laws of Oklahoma, and for that purpose brought suit in another state into which the lines of the railroad company for which he works extends, and by garnishment proceedings collected wages earned within 60 days before the action was begun, states a cause of action for damages against both defendants.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 166; Dec. Dig. § 139.*]

2. MALICIOUS PROSECUTIONS (§ 3*)—LIABILITY OF ATTORNEY.

Where an attorney is himself actuated by malicious motives in bringing an action or proceeding for his client, he is liable for damages for bringing such action or proceeding equally with his client.

[Ed. Note.—For other cases, see Malicious Prosecutions, Cent. Dig. § 8; Dec. Dig. § 3.*]

3. JUDGMENT (§ 818*)—FOREIGN JUDGMENT—CONCLUSIVENESS—PROCESS.

Full faith and credit is not denied to the judgment of another state upon garnishment proceedings, requiring the garnishee to pay the wages of the debtor to his creditor by allowing the defendant, where no personal service was obtained on him, to recover damages from his creditor for seizing his exempt wages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458-1481; Dec. Dig. § 818.*]

(Additional Syllabus by Editorial Staff.)

4. EXEMPTIONS (§ 4*)—NATURE OF RIGHT.

The exemption laws are intended for the protection of families, to preserve them from want and make them independent.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. § 4.*]

5. EXEMPTIONS (§ 139*)—PROTECTION—DAMAGES—RIGHT OF ACTION.

A resident debtor may recover damages against a person who has brought suit in a foreign jurisdiction to evade the exemption laws of Oklahoma, and who, in violation of such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

laws, has collected from the debtor a judgment obtained in such jurisdiction.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 166; Dec. Dig. § 139.*]

6. EXEMPTIONS (§ 139*) — WRONGFUL GARNISHMENT—ACTION—ESTOPPEL.

Where a resident creditor, in order to evade the exemption laws of Oklahoma, brings an action in another state against a resident debtor, and through garnishment proceedings collects the judgment there obtained, the fact that the debtor fails to appear in the foreign jurisdiction and defend the suit will not estop him from recovering his damages for the violation of his exemption right.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 166; Dec. Dig. § 139.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Woodward County; R. F. Loofbourrow, Judge.

Action by Roy O. Canaday against A. W. Anderson and another. From judgment for plaintiff, the defendant named brings error. Affirmed.

Chas. R. Alexander, of Woodward, for plaintiff in error. A. M. Appelget, of Woodward, for defendant in error.

ROSSER, C. [1] The only question involved in this case is the sufficiency of the petition. The petition alleges that the plaintiff is a married man, residing with his family in Woodward county, state of Oklahoma; that the defendants, J. W. Holmes and A. W. Anderson, also reside in that county; that during the months of January and February, 1908, plaintiff was employed by the Atchison, Topeka & Santa Fé Railway Company; that a line of that company's road extends into the state of Missouri; that it maintains offices in both Oklahoma and Missouri, and has officials in each state upon whom service of summons may lawfully be made; that plaintiff was a resident of the state of Oklahoma at the time he was employed by the railroad company, and that his contract of employment was made in said state; that all the labor he has performed by reason of such employment has been within the said state; that prior to the month of January, 1908, plaintiff was indebted to the defendant J. W. Holmes in the sum of \$50, which indebtedness was incurred in the state of Oklahoma; that the defendant A. W. Anderson is an attorney, admitted and practicing in said state, and that the said defendants, J. W. Holmes and A. W. Anderson, combined and confederated together to defeat and defraud the rights of the plaintiff under the exemption laws of the state of Oklahoma by bringing an action in the state of Missouri upon the said indebtedness so owing by plaintiff to the defendant Holmes, and that they seized the wages due the plaintiff from said railroad company for the months of January and February, 1908, by garnishment proceedings; that the time said action was brought is not definitely known by the plaintiff, but it was about the

1st of March, 1908, and that the wages so taken by garnishment proceedings were earned by the plaintiff in his capacity as fireman for said railroad company within 60 days prior to the commencement of said action; that no service of summons was made personally upon the plaintiff, and if any service was made it was made by publication. This count of the petition prayed for a restraining order prohibiting the defendants from maintaining said action in the state of Missouri, or taking the wages due the plaintiff by garnishment process in the courts in the state of Missouri or the courts of any foreign jurisdiction. The second count of the petition adopts all the allegations of the first count, and alleges that the plaintiff has been damaged by reason of the garnishment, and prays judgment for damages. The trial court overruled the demurrer to the petition and rendered judgment against Anderson for the amount of plaintiff's wages. There was no service on Holmes. The evidence is not brought up, so it will be presumed that it sustains the allegations of the petition.

It is well settled that the courts of a state may enjoin one of its citizens from bringing a suit in a foreign jurisdiction against another of its citizens, for the purpose of preventing that other citizen from claiming exemptions to which he would be entitled under the law of the state of his residence. *Snooks v. Snetzer*, 25 Ohio St. 516; *Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 53, 15 L. R. A. (N. S.) 1008, 122 Am. St. Rep. 446; *Greer v. Strozler*, 90 Ark. 158, 118 S. W. 400; *Greer v. Cook*, 88 Ark. 93, 113 S. W. 1009, 16 Ann. Cas. 671; *Griffith v. Langsdale*, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182. It is difficult to understand upon what theory an injunction can be granted, unless it is because the act enjoined will result in wrong, and if it does result in wrong the law should give redress. It seems illogical to say to a citizen against whom an injunction is asked, "It is wrong for you to seize by garnishment process the wages of another citizen in a foreign state, and therefore you are enjoined from so doing," but if he does get the money by garnishment process to say to such person whose wages were taken, "If you had applied in time, an injunction would have been issued to prevent your creditor from getting your wages, but as he has collected them he may keep them."

[4, 5] The exemption laws are intended for the protection of the family, and embody the public policy of the state on the question. It seems clear that as between her citizens the state has the right to make her exemption laws effective, and ought not to deny to one of her citizens a remedy against another of her citizens, who has brought suit in a foreign jurisdiction for the purpose of evading her exemption laws, and of depriving the party sued of the protection which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the law of the state of his residence gave him. Section 3346, Comp. L. 1909, provides that: "The following property shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided. * * * Sixteenth, all current wages and earnings for personal or professional services earned within the last ninety days." No other item in the list of exemptions is as important as the item of wages. The purpose of the exemption laws is to preserve families from want and to make them independent. When the wage-earner cannot collect his wages, he immediately becomes dependent on the kindness of others. He must immediately "go borrowing," and therefore "go sorrowing." Without means to provide for the daily wants of his family, he is forced to ask for additional credit at the very time when his credit is most impaired, or else to see his family suffer for lack of necessities. The statute was intended to prevent this.

[8] The question involved has been before the courts, and there is diversity of opinion among them. In the case of *Harwell v. Sharp*, 85 Ga. 124, 11 S. E. 561, 8 L. R. A. 514, 21 Am. St. Rep. 149, Judge Bleckly decided that the debtor had no cause of action against his creditor under such circumstances. He conceded, however, that the debtor might have had an injunction to restrain his creditor from proceeding in the foreign court. But, as already stated, it is difficult to give a reason why the action to recover the money should not lie, if an injunction could have been issued before it was collected. That opinion also seems to invoke the doctrine of waiver against the debtor. Judge Bleckly said the debtor "could not allow the law of Tennessee to be applied to the case and afterwards, by such an action as this, have the law of Georgia applied to it." It is not believed, though, that the courts of the state of both parties' residence should apply the doctrine of estoppel against one of its citizens, because he did not appear in a foreign jurisdiction to defend a suit brought for the very purpose of evading the law of the state of his residence.

The contrary rule has been laid down in Nebraska. It was held in *Albrecht v. Trieschke*, 17 Neb. 205, 22 N. W. 418, that where a creditor seized and collected exempt wages by garnishment proceedings the debtor could recover from the creditor, unless he had waived his right. In that case the garnishment proceeding was in a domestic court, but knowledge thereof was fraudulently kept from the debtor. In *O'Connor v. Walter*, 37 Neb. 267, 55 N. W. 867, 23 L. R. A. 650, 40 Am. St. Rep. 486, it was held that where the creditor, by means of an assignment of his claim to a resident of another state, procured the collection of the wages of the debtor by means of a garnishment in the

other state, he was liable to the debtor for the amount so collected. The same rule was laid down in *Bishop v. Middleton*, 43 Neb. 10, 61 N. W. 129, 26 L. R. A. 445. It is true these decisions were based on a statute which, in effect, gave a right of action against the creditor under such circumstances, but the statute was only declaratory of the policy of the state on the subject. It is believed that the policy of this state favors the fullest protection for exemptions. *Kestler v. Kern*, 2 Ind. App. 488, 28 N. E. 728, also holds that the debtor has a cause of action against the creditor under the same circumstances as exist in the present case. In that state the statute made it a misdemeanor for a creditor to send a claim against a resident of the state out of the state for collection against the creditor. In that case it was said: "It would be a lasting reproach to our jurisprudence, armed as it is in its admirable combination, with all the powers and attributes of both law and equity, to hold that while a creditor may be enjoined from sending a claim into another jurisdiction for the purpose of evading our exemption laws, yet if he should do so successfully, without the knowledge of the debtor, or if the debtor, on account of his poverty, be unable to furnish the necessary undertaking for the restraining order, the law will afford him no redress. In many instances creditors could assign or transfer claims against our citizens to citizens of other states for the purpose of facilitating their collection before a restraining order could be obtained, and no order of injunction, after such assignment or transfer, could interfere with the nonresident assignee and prevent him from prosecuting proceedings in the tribunals of his own state. The 'strong arm of chancery' would afford very inadequate protection under such circumstances."

In the case of *Stark v. Bare*, 39 Kan. 100, 17 Pac. 826, 7 Am. St. Rep. 537, the court held that a creditor, who sent a claim out of the state in order to prevent the debtor from availing himself of the exemptions of the state of their residence, was liable to the debtor for whatever damages he might sustain. And the same rule was followed in *Stewart v. Thomson*, 97 Ky. 575, 31 S. W. 133, 36 L. R. A. 582, 53 Am. St. Rep. 431. The authorities are collected in a note to this case in 36 L. R. A., and the annotator approves the doctrine in vigorous language. Both abstract justice and sound legal principles give a cause of action under such circumstances. Ill. Cent. R. Co. v. Smith, 70 Miss. 344, 12 South. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651; *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382.

[2] It is contended, however, that though the creditor might be liable his attorney is not. An attorney is not ordinarily liable for the acts of his client. The fact that through ignorance he gives his client bad advice, on

which he acts to the hurt of another, will not make the attorney liable to that other. But where the attorney is actuated by malicious motives or shares the illegal motives of his client he becomes responsible. In the case of *Burnap v. Marsh*, 13 Ill. 535, Mr. Justice Caton said: "It is not denied that, in order to render the attorneys liable for suing out a writ and causing the plaintiff to be arrested thereon, something more must be shown than would be required, were the action brought against the party in whose behalf the writ was sued out. The rule by which attorneys may be held liable for malicious prosecutions is clearly laid down by *Tindal, C. J.*, in *Stockley v. Harnidge*, 34 Eng. C. L. R. 276. It was there held that if the attorneys who commenced the suit alleged to be malicious knew that there was no cause of action, and knowing this 'dishonestly and with some sinister view, for some purpose of their own, or for some other ill purpose which the law calls malicious, caused the plaintiff to be arrested and imprisoned,' they were liable. To protect attorneys beyond this would be authorizing those who are the most capable of mischief to commit the grossest wrong and oppression. It is true that when the attorney acts in good faith in prosecuting a claim which his client believes to be just, and is actuated only by motives of fidelity to his trust, he ought not to be held liable, although he may have entertained a different opinion as to the justice of legality of the claims. When the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him, so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to justify his malice. But when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. If he will knowingly sell himself to work out the malicious purposes of another, he is a partaker of that malice as much as if it originated in his own bosom." In *Bicknell v. Dorion*, 16 Pick. (Mass.) 478, Justice Shaw said: "Upon the other ground I am not prepared to say that if a person applies to an attorney and wishes to have a groundless suit commenced for the purpose of detaining the property or person of another under the form of legal process, and the attorney yields to such a request, that they would not render themselves liable to an action at the suit of the party thus injured. It would be very different from the case where the client requested an action to be brought on his re-

sponsibility, however groundless the attorney himself may think it to be, and though he explicitly declared to the client that he cannot maintain the action." See, also, *Hoosac Tunnel D. & E. Co. v. O'Brien*, 137 Mass. 424, 50 Am. Rep. 323. In other words, the liability of the attorney depends on his state of mind. If he is actuated only by his duty as attorney, he is not liable; but if he shares the illegal purpose and intent of the client he is liable.

In the case of *Bishop v. Middleton*, 43 Neb. 10, 61 N. W. 129, 26 L. R. A. 445, Middleton was indebted to Latta. Latta placed the account in the hands of Bishop, an attorney at law, for collection. After the Nebraska act was passed which made the creditors liable for the collection of their debts out of exempted property through garnishment process in another state, Latta assigned the account to Bishop, and Bishop assigned it to an attorney in Iowa. The Iowa attorney assigned it to another person, who brought suit in the name of that other person in the courts of Iowa and garnished Middleton's wages. The court held that Bishop was liable to Middleton for damages for wrongful seizure of his exempted wages.

The petition in this case alleges that Holmes and Anderson combined and confederated together, in order to defeat and defraud the rights of the plaintiff under the exemption laws of the state of Oklahoma, by bringing an action in the state of Missouri. It stated a cause of action.

[3] It is urged that to allow the plaintiff in this case to recover would be to refuse full faith and credit to the judgment rendered in the state of Missouri. This contention cannot be maintained. No personal judgment was obtained against the plaintiff in Missouri. He was never served with process. He did not appear there. The judgment there would not be the basis for a cause of action in the state of Oklahoma.

No attack is made on the judgment in Missouri, so far as it purported to be valid; but there was no judgment against the plaintiff, because he was not served with process and was not before the court. There was no adjudication in that court binding upon him under any construction of the Constitution, except to the extent that his money was taken. The very purpose of bringing the suit was to prevent the defendant from claiming his rights. His rights were not adjudicated. *O'Connor v. Walter*, 37 Neb. 267, 55 N. W. 867, 23 L. R. A. 650, 40 Am. St. Rep. 486. There is no question of constitutional law in this case.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

DYER v. CHISSOE.

Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

COURTS (§ 486*)—TRANSFER OF APPEALS—COUNTY COURTS.

Where on appeal from a justice of the peace in Coweta division, Wagoner county, to the county court of Wagoner county, Coweta division, defendant moved to transfer the cause to the Wagoner division of the county court on the ground that Wagoner was nearest his residence, and where plaintiff appeared, and waived notice of service of the application to transfer, *held*, construing Act March 12, 1909 Sess. Laws 1909 p. 199) art. 13, §§ 2, 5, that "shall be transferred to, * * * the county court held in said county nearest defendant's residence," is mandatory, and that the court erred in overruling the motion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1299-1306; Dec. Dig. § 486.*]

Error from Wagoner County Court; W. T. Drake, Judge.

Action by Dora Chissoe, etc., against James Dyer. Judgment for plaintiff, and defendant brings error. Reversed.

Watts & Watts, of Wagoner, for plaintiff in error.

TURNER, J. On November 22, 1909, the defendant in error, Dora Chissoe, by her guardian, recovered judgment for \$50 against James Dyer, plaintiff in error, before a justice of the peace of Coweta division, Wagoner county. On December 31, 1909, defendant perfected his appeal to the county court of Wagoner county, Coweta division, and on one of the days of the regular May term of that court at that place filed a motion to transfer the case to the Wagoner division of the county court on the ground "that he resided within one mile of the city of Wagoner, and that Wagoner is the nearest and most convenient to the defendant." On the same day the plaintiff appeared and waived notice of the application to transfer, but objected thereto on the ground that defendant had waived his right so to do because he did not appeal direct from the justice to the county court at Wagoner, and thereupon the court overruled the motion on that ground. There was trial and judgment for plaintiff, and after motion for a new trial filed and overruled defendant brings the case here, assigning for error the overruling of his motion. It was the duty of the court to make the transfer. Act March 12, 1909 (Sess. Laws 1909, p. 199, art. 13), provides:

"Sec. 2. The said court held at Coweta, Wagoner county, Oklahoma, shall have original jurisdiction as a county court over the entire county: Provided, that upon application presented after reasonable notice any action or matter pending in either court shall be transferred to or remain in the county court held in said county nearest the residence of the defendant, or one of the defendants, in such action. * * *

"Sec. 5. In all cases of appeals from justices of the peace, the appellant may appeal to either county court held in the county, and the same may be transferred as herein provided."

When section 5 provided that, "in all cases of appeals from justices of the peace, the appellant may appeal to either county court held in the county," it meant just what it said; and, when it further provided "and the same may be transferred as herein provided," it meant that any cause appealed to either county court may be transferred as provided by section 2. And when said section provides, as it does, that the procedure shall be upon application presented after reasonable notice and commands that any action or matter pending in either court shall be transferred to the court nearest the residence of the defendant, or if already there by appeal shall remain there, it means what it said and that the language, "shall be transferred to * * * the county court held in said county nearest defendant's residence," should be regarded and the same is mandatory.

Reversed. All the Justices concur.

CORNELISON v. BLACKWELDER.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1010*)—FINDING OF FACT—RESIDENCE.

The intention of a person as to the place of his residence is a question of fact, to be determined by the verdict of the jury or the findings of the court; and such determination is conclusive upon appeal if there was any evidence reasonably tending to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

(Additional Syllabus by Editorial Staff.)

2. DOMICILE (§ 4*)—RESIDENCE—DETERMINATION.

It is exclusively within the province of every citizen to determine where his residence shall be, and such determination is binding upon all parties.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-23; Dec. Dig. § 4.*]

Error from District Court, Tillman County; Frank Mathews, Judge.

Action by Browne Cornelison against J. W. Blackwelder. Judgment for defendant, and plaintiff brings error. Affirmed.

W. F. Wilson and John Tomerlin, both of Oklahoma City, for plaintiff in error. Mounts & Davis, of Frederick, for defendant in error.

KANE, J. This controversy grows out of an action for damages for breach of contract commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, wherein upon the com-

mencement of the action an attachment was issued against the property of the defendant upon the ground that he was a nonresident of this state. Upon a motion to dissolve the attachment being filed, the court below, after a hearing, sustained the same, finding from the evidence that the defendant was a resident of the state of Oklahoma at the time the attachment was issued. To reverse the action of the court below this proceeding in error was commenced.

[1, 2] In our judgment the evidence reasonably tends to support the finding of the court below on the question of the residence of the defendant. It is well settled that it is exclusively within the province of every citizen to determine where his residence shall be, and that such determination is binding upon all parties. *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530; *Bradley v. Lowry*, Speers' Equity (S. C.) 1, 39 Am. Dec. 142; *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896. The evidence of the defendant was to the effect that he resided in North Carolina prior to coming to Oklahoma, leaving his family at his former home; that he came to Oklahoma in April, 1910, for the purpose of building a knitting mill which it was his intention to have his son manage and operate; that on account of sickness in the family of his son this plan was abandoned, and the defendant decided to manage the business, and make Oklahoma his home. The following are some of the questions and answers on cross-examination: "Q. When you went home with your son's wife, I will ask you to state if you had then already decided to come back to Oklahoma and make this your home? A. Yes, sir. Q. Was it not the first arrangement for your son to run the mill? A. Yes, sir. Q. But after his wife got sick, was it not your intention to come back, and let him go to North Carolina, and you were going to run the mill? (Objected to by counsel and by the court sustained.) Q. I will ask you how long before you went was it that you determined you were to live in Oklahoma and make it your permanent home? A. I think about the 15th day of January, 1911. Q. How long had you been living in Oklahoma at that time? A. Nine or ten months. Q. Your son and you had been living here together? A. Yes, sir. Q. I believe you stated your son boarded here? A. Yes, sir. Q. They live here? A. Yes, sir. Q. I will ask you if, during this time, you made this your home? A. Yes, sir. Q. I will ask you, upon January 15, 1911, if you made Oklahoma your home? A. Yes, sir. Q. I believe you stated that your object in going home was in settling up some unfinished business? A. Yes, sir. Q. Outside of the question that you had to take your son's wife back, would you have gone, anyway? A. If it had not been for some unfinished business, and taking my

son's wife back, I would not have gone. My son and I concluded that he should go back to North Carolina, I stay here and run the mill."

The intention of a person as to the place of his residence is a question of fact, to be determined by the verdict of the jury or the findings of the court, and such determination is conclusive upon appeal if there was any evidence reasonably tending to support it. *Cochrane v. City of Boston*, 4 Allen (Mass.) 177; *Colleston v. Halley*, 6 Gray (Mass.) 517. In *Lyman v. Fiske*, supra, Mr. Chief Justice Shaw, speaking of the elements of residence, says: "It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case, the mere declarations of a party, made in good faith of his election to make the one place rather than the other his home would be sufficient to turn the scale."

Finding no error in the record, the judgment of the court below is affirmed. All the Justices concur.

MUSKOGEE ELECTRIC TRACTION CO. v. PATTERSON.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

The evidence on the issues as joined being in conflict and the cause having been submitted to the jury under proper instructions, and it not appearing that the verdict is excessive, the same will not be disturbed on review in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Nellie Patterson against the Muskogee Electric Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

N. A. Gibson, H. C. Thurman, and T. L. Gibson, all of Muskogee, for plaintiff in error. Brown & Stewart and J. H. Lilley, all of Muskogee, for defendant in error.

WILLIAMS, J. The defendant in error, as plaintiff, sued the plaintiff in error, as defendant, for damages, alleging that the "plaintiff was a passenger on one of defendant's cars operated * * * on Broadway, city of Muskogee, Okl.; that, near the intersection of Second street and the said Broadway, plaintiff signaled to the conductor in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

charge of said car to stop the same for the purpose of allowing plaintiff to alight therefrom; that said car was thereupon stopped and said plaintiff attempted to alight, but that through the negligence and carelessness of the motorman or the conductor, or both of them, said conductor and motorman being then and there the agents and employes of the defendant, said car was started while the plaintiff was in the act of alighting therefrom, and plaintiff was thrown violently to the pavement by reason of the starting of said car as aforesaid; that plaintiff was seriously injured by being thrown as aforesaid to the pavement; that her right ankle was badly sprained and that she suffered great bodily pain thereby." Defendant answered by general denial. After trial a verdict was returned in favor of the plaintiff in the sum of \$700.

By proceeding in error, the action of the lower court is now properly here for review. The questions raised are: (1) The refusal of the court to direct a verdict in favor of the company; and (2) as to whether the verdict is excessive on account of prejudice and passion.

The plaintiff testified that she boarded the car and "gave them the signal to have them stop the car at Second street, and the car ran to the east side of the street and stopped and I attempted to alight. I got on the running board and they started up and threw me down on the street with my right foot doubled under me; by that time they had run the length of the car, possibly a little more." She further testified that she was ill about 40 days and that the injury was painful; that she could not put her foot to the floor for 30 days, but at the end of that time she was able to put the same on the floor, but could not stand her weight on it; that, at the time of the trial, she could not walk very much, and if the weather was cloudy it got stiff, and if she went more than six blocks it gave out and she had to sit down and rest; that she wore a supporter that the doctor had had made especially for her foot; that before she was injured she did all of her housework, including cooking, ironing, and sweeping, but now she had to hire somebody to do it. She testified as to the expenditure of \$136 for doctor's bill, medicine, and other things she had to have, which was claimed by proper pleading as an element of damage, and that she suffered a nervous shock and a good deal with her back and stomach, and that this continued some time.

Geo. Kirk, another witness on behalf of plaintiff, testified that he was standing at the corner of Broadway and Second street, at which time he was running a cab line; that the street car stopped and the plaintiff started to get off; as she started to get off, the car started again. There is considerable

evidence contradicting this on the part of the plaintiff as to how the accident happened.

It is a settled rule of appellate procedure in this state that, where there is any evidence reasonably tending to support the verdict of the jury, the same will not be disturbed on review in this court. The trial court refused to set aside this verdict and overruled a motion for a new trial. There is no complaint that the issues were not submitted under proper instructions. On the plaintiff's theory of the case and her supporting evidence, which was evidently believed by the jury, the verdict for \$700 was not excessive.

The judgment of the trial court must be affirmed. All the Justices concur.

STATE BAR COMMISSION *ex rel.* WILLIAMS v. SULLIVAN.

(Supreme Court of Oklahoma. July 23, 1912.
On Application for Rehearing,
Nov. 22, 1912.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 52*)—DISBARMENT—VERIFICATION OF CHARGES.

In disbarment proceedings instituted by the state bar commission by the order and direction of the Supreme Court, no verification of the specification of charges is necessary, under section 261, Comp. Laws 1909 of Oklahoma.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.*]

2. ATTORNEY AND CLIENT (§ 52*)—DISBARMENT—VERIFICATION OF CHARGES—DETERMINATION OF SUFFICIENCY.

The sufficiency of the verification must be determined by an inspection of it, and the evidence of affiant cannot be taken for the purpose of showing that he had no personal knowledge as to the charges.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.*]

3. CONSTITUTIONAL LAW (§ 101*)—JURY (§ 19*)—RIGHT TO PRACTICE LAW—VESTED RIGHT—JURY TRIAL.

The right to practice law is not a vested right, but a mere privilege, and an action to disbar an attorney under section 267, Comp. Laws 1909 of Oklahoma, is a civil proceeding, and the accused is not entitled to a trial by a jury as a matter of right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 209-211; Dec. Dig. § 101.* Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

4. ATTORNEY AND CLIENT (§ 43*)—DISBARMENT—GROUNDS—ATTACK ON COURT.

The obligation which attorneys assume when they are admitted to the bar is not simply to be obedient to the Constitution and laws, but to maintain at all times the respect due the courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining, out of court, from insulting language and offensive conduct toward the judges personally for their judicial acts. An attorney may criticize the courts so long as his criticisms are made in good faith and in respectful language, but the printing and pub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lication of a pamphlet falsely, purposely, and maliciously attacking the integrity of the courts and the judges thereof, designed to willfully, purposely and maliciously misrepresent the courts and the judges thereof and bring them into disrepute and lessen the respect due them, violates his duties and obligations as an attorney and counselor at law, for which he may be disbarred.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.*]

5. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—GROUNDS—PLEADING AS EVIDENCE.

Under section 266, Comp. Laws 1909, an attorney cannot be suspended or disbarred for the filing of any pleading or exhibit in the courts of this state, but a petition, with a pamphlet attached thereto as an exhibit, falsely and maliciously attacking the courts of this state and the judge thereof, may be considered as evidence upon the question of the attorney's moral and mental fitness to practice law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

6. ATTORNEY AND CLIENT (§ 36*)—DISBARMENT—JURISDICTION.

The Supreme Court, having exclusive jurisdiction to admit attorneys to practice law, has, independent of statutory authority, the inherent power to disbar attorneys for misconduct.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 49; Dec. Dig. § 36.*]

On Application for Rehearing.

(Additional Syllabus by Editorial Staff.)

7. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—QUANTUM OF PROOF.

In disbarment proceedings, the guilt of the accused should be proved by a clear preponderance of the evidence, but not necessarily beyond a reasonable doubt.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

8. ATTORNEY AND CLIENT (§ 46*)—DISBARMENT—DEFENSES—STATUTE OF LIMITATIONS.

In a proceeding for disbarment upon charges of the publication of a pamphlet disrespectful to the court, the statute of limitations is not available as a defense, especially where the pamphlet remains in circulation until a time within what would be the limitation period if the statute of limitations be construed to apply.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 71; Dec. Dig. § 46.*]

9. ATTORNEY AND CLIENT (§ 37*)—DISBARMENT—INHERENT POWERS OF COURT.

The Supreme Court is not limited in its disciplinary power over attorneys to the grounds and remedies indicated by statute, but the statutory provisions are merely cumulative, and do not impair the court's inherent constitutional power to deal with such contempts in a proper, though nonstatutory, manner.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 50-63; Dec. Dig. § 37.*]

Burford and Hubbell, Special Judges, dissenting.

Original proceeding by the Bar Commission of the State of Oklahoma, on the relation of Ben F. Williams, for the disbarment of P. M. Sullivan. Defendant disbarred, and application for rehearing overruled.

C. W. Stringer, of Oklahoma City, for plaintiff. James Twyford, of Oklahoma City, for defendant.

DUDLEY, Special Judge. This is an original proceeding in this court by the state bar commission, on the relation of Ben F. Williams, against P. M. Sullivan, a member of the bar of this court and the inferior courts of the state, residing at Oklahoma City. The regular judges of the Supreme Court were disqualified, and this fact was certified by them to the Governor of the state, who thereupon appointed five special justices of the Supreme Court to hear and determine this cause, who thereafter assembled at Oklahoma City and qualified as such, and heard the testimony in this case. Before proceeding to a discussion of the merits of the case, it becomes necessary to determine some preliminary questions raised and urged by counsel for defendant.

[1, 2] The specification of charges was filed January 13, 1912. The defendant was duly notified of the filing of the charges and furnished with a copy thereof, and in due course of time filed an answer to and an explanation of the charges and specification filed against him, to which the plaintiff filed a reply, by way of general denial. Upon the hearing of the cause, the defendant objected to the introduction of any evidence upon the part of the plaintiff in support of the specification of charges, for the reason that the petition or specification of charges was not verified, as required by law, in that it was verified upon information and belief and not positively, and thereupon C. W. Stringer, the attorney for the plaintiff and the person who verified the specification of charges upon information and belief, asked leave of court to amend the verification of charges by making the verification positive. Leave was granted to do so and the amendment was made, and after the conclusion of the taking of testimony upon the part of the plaintiff the defendant again challenged the sufficiency of the verification of the specification of charges, for the reason that the testimony clearly showed that Mr. Stringer had no personal knowledge of the allegations contained in the specification of charges, and that by reason thereof the court did not have jurisdiction. The position of counsel for defendant is not well taken for two reasons: (1) This proceeding was commenced by the bar commission of the state of Oklahoma, by the order and direction of this court, and therefore, under section 287, p. 229, of Snyder's 1909 Compiled Laws of Oklahoma, it was not necessary for the specification of charges to be verified at all; and (2), even though it were necessary for the specification of charges to be verified, after the amendment was made as to the verification, it was then a positive verification and its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sufficiency must be determined by an inspection of the verification itself; and, even though it developed upon the hearing of the case (a point which we do not concede) that the person who made the verification did not have actual knowledge of the statements contained therein, this fact cannot be taken for the purpose of showing that he had no personal knowledge. In re Collins, 147 Cal. 8, 81 Pac. 221.

[3] It was also contended by the defendant that his right to practice law in the courts of this state was a vested right, and that therefore as a matter of right he was entitled to a trial by a jury in this court, upon the charges preferred against him, under chapter 56, p. 97, of the Session Laws of 1910, providing for trial by jury in this court. To this contention of the defendant we cannot agree. The right to practice law is not a vested right, but a mere privilege. 4 Cyc. p. 898, and cases cited; State ex rel. Mackintosh, Pros. Atty., v. Rossman, 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821, 17 Ann. Cas. 625. Section 268, p. 229, Snyder's 1909 Compiled Laws of Oklahoma, on the subject of "Trial in Disbarment Proceedings," specifically provides that the issues joined shall in all cases be tried by the court. This is a specific statute covering this class of proceedings, and should govern over the general statute. Section 1, c. 56, p. 97, of the Session Laws of 1910, provides: "That in any cause now pending or hereafter brought in the Supreme Court wherein said court is exercising its original jurisdiction in which an issue of fact is presented properly triable by a jury, and either party to said cause demands a jury trial, said court shall not dismiss such cause for the reason that a jury is required but shall proceed in the manner hereinafter prescribed." The issue of fact presented here is not properly triable by a jury for the reason that the special statute governing the trial of proceedings of this kind specifically provides that all questions of fact shall be tried by the court. The provision of the Constitution as to the right of a trial by a jury means the right of trial by jury as it existed at the time of the adoption of the Constitution. Williams' Annotated Constitution of Oklahoma, § 27, p. 15; State v. Cobb, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639; Baker v. Newton, 27 Okl. 438, 113 Pac. 1034. A disbarment proceeding, under our statute, is a civil proceeding (In re Biggers, 24 Okl. 842, 104 Pac. 1083), and the right to a trial by a jury in a disbarment proceeding did not exist at the time of the adoption of the Constitution (Dean v. Stone, 2 Okl. 13, 35 Pac. 578). We therefore are clearly of the opinion that the defendant was not as a matter of law entitled to a trial by a jury, and his application was denied. This disposes of all preliminary questions raised and

urged by the defendant, and we now proceed to a discussion of the merits of the case.

[4] It is alleged in substance in paragraph 2 of the specification of charges that the defendant is not a fit and proper person to engage in the practice of law in this state and should be disbarred, for the reason that he has been guilty of gross misconduct and has violated his oath and duty as an attorney and counselor at law. This paragraph is subdivided into five specific charges. However, we only deem it necessary to consider two of them, namely, the second and fifth, and we will therefore discuss them in their order. In the second subdivision of this general charge it is alleged that the defendant has been guilty of gross misconduct and violated his duty and obligations as an attorney and counselor at law, in that he, within a year prior to the filing of the specification of charges in this court, falsely, maliciously, and without reasonable justification or excuse caused to be printed and published a certain book or pamphlet entitled "A Criminal Combine," consisting of the Governor, the Attorney General, the Supreme Court, district courts, district clerks, district attorneys, referees, perjurers, murder plotters, and crooks galore in the state of Oklahoma; that said book or pamphlet was printed and published by the defendant for the purpose of giving vent and expression to his own personal spleen and malice, and to excite and create an ill will and prejudice against the courts of this state and the judges thereof, and the other officers and attorneys mentioned in said publication. The defendant in his answer admitted the printing and publication of the pamphlet, but claims that the publication was in good faith and without malicious motives, and that the statements and allegations therein contained are true; he denies, however, that the pamphlet was printed and published at any time within one year prior to the filing of the specification of charges herein, and claims that, if he did violate any of his duties and obligations as an attorney and counselor at law, he cannot be disbarred on account thereof, for the reason that the same is barred by the statute of limitations. In the fifth subdivision of the specification of charges it is alleged that the defendant has been guilty of misconduct and violated his duties and obligations as an attorney and counselor at law by preparing and filing in the district court of Oklahoma county, Okl., a certain document styled a "Petition," in case No. 11,054, wherein he is a plaintiff and the Watch Tower Bible Tract Society and others, including the district, superior, and county judges of Oklahoma county, the district judge of Cleveland county, the judges of the Supreme Court, C. N. Haskell, Governor, and Chas. J. West, Attorney General, are defendants, in which he charges these defendants and others mentioned therein with a conspiracy to judicially rob him of certain

real estate in Oklahoma City, and in connection with this general charge of conspiracy he charges them with robbery, bribery, perjury, and numerous other offenses; that the preparation and filing of said pleading was not actuated by an honest purpose to present and state in said petition any issuable or triable matters of fact or law, but was prepared and filed maliciously and for the purpose upon his part to slander and libel said defendants and bring the courts of this state, and the judges thereof, and the other officers mentioned therein, into contempt, ridicule, hatred, and malice, and to injure the defendants in their reputations as citizens and public officials. Defendant in his answer admits that he prepared and filed said petition, but claims that the statements and allegations therein contained are true; that he filed the action for the purpose of recovering the lands which he had lost by reason of the acts and conduct of the defendants, as therein stated; and that the filing of said petition was no misconduct upon his part, nor a violation of any of his duties and obligations as an attorney and counselor at law, and, even if it were, he cannot be suspended or disbarred on account thereof under the statutes of this state.

We think the statements and allegations of the second and fifth subdivisions of paragraph 2 of the specification of charges are sustained by the testimony, and it therefore becomes pertinent to determine whether or not the conduct upon the part of the defendant, as set out in these two subdivisions, justifies his suspension or disbarment under the statutes of this state. Section 266, p. 228, Snyder's 1909 Compiled Laws of Oklahoma, enumerates three causes for which an attorney may be suspended or disbarred. The one applicable, if at all, to the facts in this case, is subdivision 3, which is, "For the willful violation of any of the duties of an attorney or counselor." Section 257, p. 227, Snyder's 1909 Compiled Laws of Oklahoma, defines the duties of attorneys. The part of the statute applicable to the case at bar is: "Not to encourage either the commencement or continuance of an action or proceeding upon any motive of passion or interest." Section 255, p. 226, of Snyder's 1909 Compiled Laws of Oklahoma, prescribes the oath that attorneys and counselors at law of this state shall take in open court. The part of the oath applicable to this case is: "You shall not wittingly, willingly or knowingly promote, sue or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client." These are all of the sections of our statute that in any way apply to the facts and circumstances of this case; and, if the conduct of the defendant does not

come within these provisions, then there is no statutory authority for his suspension or disbarment upon the charges brought against him.

The pamphlet or book referred to is a 36-page document, with defendant's picture on the front page. A mere casual reading of this pamphlet by one familiar with the judicial history of this state will convince him that it is a false, malicious, and unwarranted attack upon the courts and the judges thereof mentioned and referred to in the publication. It bristles with malice and hatred from start to finish, and was published for the purpose of creating an ill will and prejudice against the Supreme Court, the inferior courts, and the judges thereof mentioned therein. The pamphlet gives a detailed history of the proceedings instituted by defendant in the district court of Oklahoma county to recover a certain piece of valuable real estate located in Oklahoma City. The case, or some phase of it, has been before three or four district judges and as many special judges and referees, the superior and county judges of Oklahoma county, and the regular district judge and special judge, W. J. Jackson, of the District court of Cleveland county, and finally reached the Supreme Court, where the judgment of the district court of Cleveland county, was reversed and a new trial granted. The publication charges every judge, special or regular, and the referees to whom said cause, or some phase thereof, has been referred, with a conspiracy to judicially rob the defendant of the piece of land in Oklahoma City, and in furtherance of this general conspiracy he charges them with bribery, perjury, and other crimes and misdemeanors too numerous to mention. Finally, after the case got into the Supreme Court, even though he secured a reversal, he takes exception to the action of the Supreme Court because they did not render a judgment in his favor on the merits of the case, and then proceeds to accuse them with bribery, forgery, perjury, and other serious charges. The publication, upon its face, is conclusive of the falseness and maliciousness of the statements therein contained. It would take too much space to refer to the various charges contained in this pamphlet, but the following paragraph from what is styled the "Introductory" in the publication is a fair index to the contents thereof: "And I know from a bitter, boycotted, persecuted experience that not only the Supreme Court, but the Governor (C. N. Haskell), the Attorney General, four district judges, two district clerks, three county attorneys, and other county and state officials of Oklahoma, are impure and guilty of many high crimes and misdemeanors in office for which they can and should be driven from power to prison." Upon the trial of the case the defendant offered no apology for the publication of the document, but asserted that the statements

therein contained were true. This assertion, however, was made in his pleadings, and not under oath in open court, because he did not see proper to testify in his own behalf upon the hearing. An attorney has a right to criticize the courts of this state, so long as his criticisms are made in good faith and in respectful language and with no design to willfully or maliciously misrepresent the position of the courts, or tend to bring them into disrepute or lessen the respect due them. Is this publication a criticism? Certainly not. It is a willful, malicious, outrageous, and unwarranted attack upon the integrity of the courts of this state and the judges thereof, with the sole and only purpose of creating a feeling of ill will and prejudice against the courts of this state and lessening the respect due them. Freedom of speech is one of our boasted guaranties of liberty; but even this right should be curbed when the integrity of the courts are willfully and maliciously assailed. The court has the inherent right to protect itself from such malicious attacks, and we think the publication of this pamphlet by the defendant a willful violation of his duties as an attorney and counselor at law, in that it violates that part of his oath as an attorney which provides that he shall act in the office of an attorney according to his best learning and discretion, with all good fidelity as well to the court as to his client.

Our statute undertakes to limit the grounds upon which an attorney may be suspended or disbarred, and one of these grounds is the willful violation of any of the duties of an attorney or counselor. The statute also in a general way defines the duties of an attorney, but it in no sense attempts to define and set out all of the duties of an attorney. An attorney is an officer of the court, and as such it is his duty not merely to observe the rule of courteous demeanor in open court, but also to abstain, out of court, from all insulting language and offensive conduct toward the judges personally for their judicial acts. 4 Cyc. 908. The oath which an attorney is required to take before being permitted to practice law in the courts of this state is not simply to be obedient to the Constitution and laws of the state, but to maintain at all times the respect due the courts of justice and judicial officers (Bradley v. Fisher, 80 U. S. [13 Wall.] 335, 20 L. Ed. 646; In re Breen, 30 Nev. 164, 93 Pac. 997), and for a violation of these duties an attorney may be suspended or disbarred. The defendant in this cause has not shown the proper respect due the courts of this state and the judges thereof.

[5] In the petition above referred to, which the defendant prepared and filed in the District Court of Oklahoma County, he reiterates, to a very large extent, the contents of the pamphlet or book, and in fact attaches

the pamphlet to the petition as an exhibit and makes it a part thereof, and asks judgment against the defendants, including the district, superior, and county judges of Oklahoma county, and the district judge of Cleveland county, and the members of the Supreme Court and others, for \$250,000. It is insisted by counsel for defendant that he cannot be suspended or disbarred for filing a pleading in court under our statutes. This contention, we think, is correct, but we think the petition and the exhibit are competent evidence to be considered along with other evidence in the case, as affecting the defendant's mental and moral fitness to continue to practice law before the courts of this state. He certainly did not expect to recover a judgment against the judges of the Supreme Court and the inferior courts of the state. He evidently sought this means to harass and attack the courts of this state and the judges thereof with the hope that he might create a feeling of ill will and prejudice against them, and we think the pleading, with the exhibit attached thereto, are competent evidence upon the general charge of misconduct and moral fitness in the specification of charges.

[6] The Supreme Court of this state has exclusive power to admit attorneys to practice law before it and in the inferior courts of the state; and, this being true, it has, independent and aside from the statutory grounds of disbarment, the inherent power to suspend or disbar attorneys. In re Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646; 4 Cyc. 905; In re Newby, 76 Neb. 482, 107 N. W. 850; In re Robinson, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415; In re Wilson, 79 Kan. 450, 100 Pac. 75; In re Durant, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539; In re Breen, 30 Nev. 164, 93 Pac. 997; In re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592; In re Thatcher, 80 Ohio St. 492, 89 N. E. 39; In re Egan, 22 S. D. 355, 117 N. W. 874; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; Underwood v. Commonwealth (Ky.) 105 S. W. 151; In re Simpson, 9 N. D. 379, 83 N. W. 541; State ex rel. Atty. Gen. v. Burr, 19 Neb. 593, 23 N. W. 261; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

After a thorough consideration of all the testimony in this case, we are of the opinion that his conduct is such that he is not a fit and proper person to practice law in the courts of this state, and that his license should be revoked.

It is therefore ordered, adjudged, and decreed by the court that the license of the defendant to practice law before this court and the inferior courts of this state be and the same hereby is revoked, and that the

costs in this case be taxed against the plaintiff.

JOHNSON and ZEVELY, Special Judges, concur. BURFORD and HUBBELL, Special Judges, dissent.

BURFORD, Special Judge (dissenting). I regret that I am unable to concur in the judgment pronounced by the majority of the court. In my judgment the defendant Sullivan is not a fit or proper person to engage in the practice of law in the state of Oklahoma, but I cannot come to the conclusion that under the laws in force in this state there is authority for disbarment.

The charges against defendant, when reduced to their ultimate conclusion, charge him with being mentally and morally unfit to engage in the practice of law. This charge is based upon the publication of two certain pamphlets reflecting in the most bitter and malicious way upon the various courts of this state. Sufficient substance of these pamphlets is set out in the majority opinion of the court. Assuming with the court that the publication of these pamphlets within the period of limitation and their falsity have been properly established, I yet cannot conclude that they constitute proper grounds for disbarment. Section 286 of Snyder's Statutes provides in part: "The following are sufficient causes for suspension or revocation: First, when he has been convicted of a felony under the laws of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence. Second, when he is guilty of a willful disobedience or violation of any order of the court requiring him to do or forbear any act connected with or in the line of his profession. Third, for the willful violation of any of the duties of an attorney or counselor: Provided, that whenever any act is done by the attorney for an honest purpose or with the intent to discover the truth in some matter heretofore being litigated and pending in any tribunal at the time the acts were done, or to prevent litigation, then they shall not be grounds for revocation or suspension of the attorney's license. The filing of any pleading or exhibit in court shall not be cause for suspension or revocation of the attorney's license, but may be punished as a contempt and according to the laws governing proceedings in contempt cases. *An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act.*" It is not charged that the defendant has been convicted of a felony or a misdemeanor involving moral turpitude. It is not charged that he has been guilty of any willful disobedience or violation of any order of court. The charges, therefore, cannot be

brought under the first or second subdivision of the statute. Has he been guilty under the third subdivision, to wit, of any willful violation of the duties of an attorney or counselor? These duties are specifically set out in section 257 of Snyder's Statutes, as follows: "(1) It is the duty of an attorney and counselor *while in the presence of the courts of justice* or in the presence of judicial officers engaged in the discharge of judicial duties, to maintain the respect due to the said courts and judicial officers, and at all times to obey all lawful orders and writs of the court. (2) To counsel and maintain no actions, proceedings or defenses, except those which appear to him legal and just, except the defense of a person charged with a public offense. (3) To employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth and never to seek to mislead the judges by any artifice or false statements of facts or law. (4) To maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client. (5) To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged. (6) Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest. (7) Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed." I cannot conceive that the publication of a pamphlet outside of court which makes unwarranted reflections upon the courts and the officers thereof can be construed to come under any of the seven subdivisions of the duties of an attorney as specified in the statute. The defendant has perhaps failed to maintain the respect due to courts and judicial officers, but this failure was not charged or proven to be in the presence of any court, and the statute specifically limits the application of such language to conduct in the presence of judicial officers. The majority of the court seem to place the alleged misconduct of the defendant under the subdivision "not to encourage either the commencement or continuance of an action or proceeding upon any motive of passion or interest." I cannot agree that the publication and circulation of this pamphlet encouraged the commencement or continuance of any action or proceeding. It is charged that such pamphlet was filed in the district court of Oklahoma county, attached as an exhibit to a pleading. Section 286 expressly provides that the filing of a pleading or exhibit shall not be cause for suspension or revocation of an attorney's license, and I cannot conclude that the publication and circulation of this pamphlet outside of court would in any way have affected the com-

mencement or continuance of any action or proceeding whatsoever.

I am forced to the conclusion, therefore, that the defendant's conduct does not constitute a violation of any of the duties of an attorney as prescribed by our statutes, and that, therefore, neither of the three statutory causes of disbarment have been proven against him. Nor can I agree with the court that the inherent power exists in the Supreme Court to disbar an attorney for other than the grounds laid down in the statute. Undoubtedly, at common law, inherent power existed in courts of record to suspend or disbar the attorneys practicing before such court when the power of admission was vested in the court exercising the power of disbarment. Undoubtedly, at common law, the publication of a false and malicious pamphlet reflecting upon the courts, as does the one in the case at bar, would constitute proper grounds for disbarment. Perhaps the weight of authority is to the effect that, where statutes have been passed merely declaring what shall be grounds for disbarment without any prohibition therein contained, the courts may continue to exercise the inherent power of disbarment for causes other than those named in the statute upon the principle and assumption that the grounds named by the statute are not intended to be exclusive. But our statute specifically provides that: "An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act." I have been unable to find a single adjudicated case that goes so far as to hold that such a statute may be swept aside and declared invalid and the court proceed to exercise the power of disbarment which formerly inhered in it. A few cases touching upon this subject will be noted.

In the case of *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071, cited in the case of *In re Robinson*, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415, the court, speaking of the power of disbarment, says: "But power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. *Statutes and rules may regulate the power, but they do not create it.*" If the statute may regulate the power of this court, then it is apparent that the Legislature has in as strong language as could be used limited the power to disbar to the causes named in the statute.

In *Re Peyton*, 12 Kan. 404, Judge Valentine says that the power to disbar "is a necessary incident to the proper administration of justice; that it may be exercised without any special statutory authority, and in all proper cases, *unless positively prohibited by statute.*" Here the judge, even while asserting the inherent power of the

court, recognizes the power of the Legislature to prohibit the exercise of it.

In *Re Smith*, 73 Kan. 743, 85 Pac. 584, the Supreme Court of Kansas, in declaring that a court may punish for causes other than those enumerated in the statute, shows the reason of the rule: "As will be observed, the statute does not provide *that the only causes* for which the license of an attorney may be revoked or suspended are those specified in the statute, nor does it undertake to limit the common-law power of the courts to protect itself and the public by excluding those who are unfit to assist in the administration of the law. It merely provides that certain causes shall be deemed sufficient for the revocation or suspension of an attorney's license." In this state the Legislature has prescribed the *only causes* for which a license may be revoked or suspended.

In *Re Mills*, 1 Mich. 392, where it is held that the statutory grounds are not exclusive, the court in discussing the statute says: "That the Legislature never intended to withhold from our courts the exercise of a power so necessary to preserve the administration of justice from pollution, and the public from imposition." In this state, on the contrary, the Legislature has expressly said that it intended to withhold this power.

In *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555, the court says that the act of the Legislature was not intended to be exclusive.

In *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407, the court holds that the statute there in force is applicable only to a proceeding for disbarment, whereas the proceeding being considered was one for suspension.

In *Bar Association v. Greenhood*, 168 Mass. 169, 46 N. E. 568, the court holds that, there being no prohibition in the statute, the grounds therein set up will not be held to be exclusive.

Similar adjudications may be found in *Sanborn v. Kimball*, 64 Me. 140; *Serfass' Case*, 116 Pa. 455, 9 Atl. 674; *State v. Gebhardt*, 87 Mo. App. 542, and others.

In no case which I have been able to examine has the court held, in the face of a prohibition such as is contained in our statute, that the inherent power of the court to disbar continued. On the other hand, in *Ex parte Yale*, 24 Cal. 243, 85 Am. Dec. 62, the court, speaking of attorneys and their duties, said: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute."

In *Re Collins*, 147 Cal. 13, 81 Pac. 222, the court said: "Whatever the rule may be in the absence of statutory regulations as to the power of courts to deprive attorneys

of their license for causes which, in the judgment of the court, may warrant that action, we are satisfied that, when the Legislature has specified the acts for which an attorney may be disbarred or suspended, the court is not authorized to act for other causes, or warranted in invoking an asserted implied power to amove for causes not specified in the statute; that the Legislature has the power to regulate the causes for which a disbarment or suspension of an attorney may be had; and that the courts are bound by this regulation and the limitation it imposes."

In *Re Eaton*, 4 N. D. 514, 62 N. W. 597, the court said: "Where the statute enumerates grounds for disbarment of an attorney, no other ground can be considered by the court."

To the same effect is *Ex parte Schenck*, 65 N. C. 353; *State v. Byrckett*, 4 Ohio Dec. 89; *Ex parte Smith*, 28 Ind. 47; *Kane v. Haywood*, 66 N. C. 1; *Ex parte Trippe*, 66 Ind. 531.

Both under principle and authority I am unwilling to concede the power of this court to sweep aside the specific language of the Legislature acting upon a matter which I believe to be within its power. It is to be regretted that such a law is upon our statute books; but, finding it there, in my judgment the courts must leave the remedy to the people and the Legislature rather than to their own power. Even under the statute as it exists, the facts alleged in the petition for disbarment constitute a crime of which the defendant might regularly have been indicted and convicted, and such conviction would have operated as a conclusive ground for disbarment in this court.

I am therefore forced to dissent from the judgment of the court that the defendant be disbarred.

On Application for Rehearing.

ZEVELY, Special Chief Justice. The respondent was tried before this court composed of five special justices upon the charge of uttering a document defamatory of and grossly disrespectful to the five regular justices of this court. He was adjudged guilty and disbarred from practice, and he now files an application for rehearing based on 13 several grounds, which will be discussed seriatim.

1 and 9. It is contended by respondent that his right to practice his profession as an attorney is property, and that under the due process of law provision of the Constitution he could not be deprived of such property without a jury trial. Conceding for the sake of argument, without deciding, that this professional capacity is property, a jury is not indispensable in a trial for disbarment. That he is not entitled to a jury has been expressly decided by the highest authority, which we are content to follow. *Ex parte*

Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, 562; *Davis v. State*, 92 Tenn. 643, 23 S. W. 62; *In re Goodrich*, 79 Ill. 148; *In re Shepard*, 109 Mich. 633, 67 N. W. 972. Nor are we aware of any authority in conflict with this view.

2 and 3. If the bar commission is not a legal entity, its relator Ben Williams must be deemed sole complainant. As he is a natural person capable of making the complaint, it is immaterial whether he or the bar commission is to be deemed the complainant. But this is not technically a suit by the complainant; the only purpose of requiring a complainant at all is to have a moral sponsor for the charges who shall be responsible for costs if cast therefor. Nor is it material whether the committee presenting the charges had authority to present them from any other person or body. *Fairfield v. Taylor*, 60 Conn. 14, 22 Atl. 442, 13 L. R. A. 769. In that case the court, by *Andrews, C. J.*, said: "It was the duty of the attorneys, if they knew of unprofessional conduct by the appellant or any other attorney, to bring it to the attention of the court. An appointment by the bar to do that which it was their duty to do without any appointment could give them no added authority. Nor was any such appointment necessary to give the court jurisdiction. The court might summon the appellant to a hearing upon any information it had that it deemed worthy of credit, whether it came from lawyers or laymen. The manner in which the proceeding should be conducted, so that it be without oppression or injustice, was for the court itself." *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

4. It is complained that the Supreme Court does not appear to have ordered the filing of the charges. There is no merit in this contention especially at this late day. The court has taken jurisdiction of the charges and had a trial, which is a sufficient authorization for all practical purposes. The lack of a prior formal authorization works no prejudice to defendant, even if one was necessary, which we do not decide. If this objection is worthy of consideration at all, it should have been interposed in limine.

5 and 6. These grounds complain that the complaint is brought by Ben Williams on behalf of the bar commission, and that the charges are sworn to by one Stringer. It is not essential to jurisdiction to hear this case that the original petition should be sworn to. Even if necessary to be sworn to, the oath of Stringer was enough, though upon information and belief. *In re Shepard*, 109 Mich. 633, 67 N. W. 972. Nor was the objection asserted in limine, as it should have been to be available.

[7] 7. The contention that the guilt of the respondent should be proven beyond a reasonable doubt, as in criminal cases, is not sound. "In the case of *Ex parte Wall*, 107

U. S. 265 [2 Sup. Ct. 569, 27 L. Ed. 552], the Supreme Court in speaking of this question said: "The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them." In the case of *People ex rel. Shufeldt v. Barker*, 56 Ill. 299, the Supreme Court of that state, with reference to such a proceeding, said: "The respondent, in express terms, denies the charge exhibited against him, and to overcome this express denial there ought to be required more than a mere preponderance of evidence. A charge so grave in its character, and so fatal in its consequences, ought certainly to be proved by what the law denominates a clear preponderance of the evidence." These courts recognize in this rule, as we believe, that the proceeding is a civil one, and not a criminal one." In *re Brown*, 2 Okl. 590, 39 Pac. 469.

[8] 8 and 12. Nor is the offense with which respondent was charged barred by limitations. While there may be some classes of offenses which may be barred by limitations, this is not one of them. In speaking of a similar charge against an attorney for disrespectful conduct towards the court, the Supreme Court of California said: "As to the objection made that the offenses charged are barred by the statute of limitations, it appears that the acts complained of were committed some three years since. We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be, under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such; and while this court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation, we are not prepared to say as a matter of law upon this demurrer that the accusation is barred either by the express terms of the statute of limitations or by analogy." In *re Lowenthal*, 78 Cal. 427, 21 Pac. 7. This court in the case of *In re Mosher*, 24 Okl. 61, 102 Pac. 705, 24 L. R. A. (N. S.) 530, 20 Ann. Cas. 209, quoted the language of the California court with approval when discussing the identical statute of limitations now invoked by respondent.

There has not been cited to us, and we doubt that there can be found, any authority sustaining a plea of statute of limitations to a proceeding for disbarment upon charges of conduct disrespectful to the court. The authorities rather sustain the contention that the courts have inherent power to protect their own dignity and enforce respect

and punish disrespect from the attorneys practicing therein. *Re Brown*, 2 Okl. 590, 39 Pac. 469; In *re Goodrich*, 79 Ill. 148; *Beene v. State*, 22 Ark. 157. "It is a general rule that the Legislature is powerless to interfere with the jurisdiction, functions, or judicial powers conferred by the Constitution upon a court, nor can it diminish, enlarge, transfer, or otherwise infringe upon the same." 11 Cyc. 706. "While the statutes of many of the states authorize the suspension or removal of attorneys upon specified grounds, it has generally been held that such statutes do not restrict the general powers of the court over attorneys, who are its officers, and that they may be removed for other than statutory grounds."

Our own Constitution emphasizes the independence of the three great departments of government, each from the other, by section 1 of article 4, reading as follows: "Section 1. The powers of the government of the state of Oklahoma shall be divided into three separate departments: The legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others." It may be difficult to lay down any general rule, applicable to all cases, defining the exact boundaries between the power of the courts established by the Constitution and the power of the Legislature with reference to the admission to practice and disbarment of attorneys, who are officers of the courts. There may be a broad field of operation for proper legislative enactment upon this subject without encroaching upon the inherent powers of the court to protect its own dignity from contemptuous assault. The Legislature, in creating statutory offenses meriting disbarment, may conceivably prescribe proper rules of limitation, especially in courts of statutory creation. Without attempting to decide anything but the pending case, we lay down the principle that the Legislature has no power to fix a limitation, either as to time or upon the power of this court, that could be set up in bar of this prosecution. It would be intolerable if the attorneys, who are officers of the court, could treat the court with pronounced disrespect and be immune from disbarment by reason of the lapse of short time or other technicality. This court is one established by the Constitution, and it is not competent for the Legislature to abolish it directly or indirectly, nor can it take away from this court those powers which inhere in similar courts at common law and which vested in it by virtue of its very establishment by the Constitution. If it were competent for the Legislature to enact that such offenses could not be punished by disbarment after one year, they could put a limitation of one day as well, and thus practically abolish the inherent power of the court to

protect itself from further assaults by disrespectful practitioners. We cannot admit that the Legislature has power to encroach upon the inherent constitutional powers of this court, and are persuaded that by the enactment of the act of limitation invoked in this case the Legislature had no intention of giving the statute such an application as would so encroach.

Even if the Legislature had the power and intended the act of limitation to apply to charges of disbarment for conduct disrespectful to the courts, it may well be doubted whether it would apply in the present case. The act complained of was a case of the publication of a document in its nature grossly libelous of the regular members of this court. So long as the document remained in circulation, it was a continuous offense against the dignity of this court, and the offense cannot be said to be ended within the meaning of an act of limitation so long as it is outstanding, unsuppressed, and unatoned for. The first utterance of the offensive matter may constitute offense sufficient to merit punishment, but its continuous remaining in the state of offense is none the less an affront to the dignity of the court. It would be possible, if defendant's contention is correct, to give wide circulation in remote localities to a libelous document grossly disrespectful to the court which might impair the usefulness of the court, and yet not be punishable because not brought to the court's attention within the short period of limitation. The affront to the court's dignity and the tendency to impair its usefulness and to weaken the confidence of the people in it by means of the libel takes place whether the court knew of it or not, and the power of the court to protect itself from such indignities should not be made to depend upon the fact or quickness of discovery of it. The court should not tolerate at its bar anybody who is now disrespectful or has at any time in the past been guilty of disrespectful conduct not fully excused or punished.

[9] For the reasons just stated, we must also overrule the contention that the court is limited in its disciplinary power to the grounds and remedies indicated by statute. The statutory provisions are wise, but are merely cumulative, and do not impair the inherent constitutional power of the court to deal with such contempts in a proper, though nonstatutory, way. In Wyoming an attorney was charged with applying vile epithets to the court out of its hearing and the defendant was disbarred. The court, per Lacey, C. J., said: "Our statute provides that this court 'may revoke or suspend the license of any attorney or counselor at law to practice therein, * * * fifth, for the willful violation of any of the duties of attorney or counselor.' The statute does not define the duties of an attorney or counselor. We have also a general statute adopting the

'common law of England, as modified by judicial decision,' and expressly providing that that common law 'shall be considered as of full force until repealed by legislative authority.' Comp. Laws, p. 193, § 1. The duties of an attorney in this territory are therefore the same as under the common law, his first duty being to the court of which he is an officer. 'The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts.' *Bradley v. Fisher*, 13 Wall. 335, at page 355 (20 L. Ed. 646). The fountain of the power of the courts to remove attorneys as exercised at common law, is St. 4 Henry IV, c. 18, which is as follows: 'And if any such attorney be hereafter found notoriously in any default of record or otherwise he shall forswear the court and never after be received to make any suit in any court of the king. They that be good and virtuous and of good fame shall be received and sworn at the discretion of the justices, and, if they are notoriously in default, at discretion may be removed upon evidence either of record or not of record.' It seems to us that the power to remove under our statute and the causes sufficient for removal, are as broad and comprehensive as at common law. Further, so far as questions now arising in this case are concerned, there is nothing in our statute, either expressly or by implication, repealing the common law." In *re Brown*, 3 Wyo. 121, 4 Pac. 1085, 1087, 1088.

10. In this tenth ground for the motion for rehearing defendant says: "That the record and undisputed evidence in this case shows that defendant was arrested for libeling the courts and judges here complained of and in the book here complained of, and his case was set for trial before a jury on October 11, 1910, in the county court of Oklahoma county, and these courts and judges by their attorney came into court on the day of trial and against the protest of the defendant dismissed the cases, * * * and we submit that these courts and judges having elected their remedy and voluntarily abandoned it, this proceeding should be dismissed." It must be manifest that no other courts or attorneys could make an "election" that would deprive this court of its inherent disciplinary power to purge its rolls of attorneys of unworthy members, nor can it be seriously contended that this court made or estopped itself by an appearance (if such can be imagined) in the nisi prius court referred to. It appears that the charge in the court

referred to was a simple charge of criminal libel upon which defendant could have been punished on proof of guilt, without impairing the power of this court to disbar him. In the dismissal of the criminal charge in the nisi prius court defendant was more fortunate than deserving.

11. The defendant's eleventh contention is highly technical and without merit. Though the court sustained a motion to make allegations more definite and certain, the allegations which were the subject-matter of the motion were not abandoned or thereby put out of court. Defendant's failure to insist upon compliance therewith operated as a waiver thereof. It is evident that the defendant was not misled or prejudiced by any obscurity, indefiniteness, or uncertainty therein, and he points out none such in the motion for rehearing.

13. Respondent objects that he was not present when the decision of this court was rendered. He was within the jurisdiction of the court, and it was his duty to attend upon it. There is no law requiring special notice to him that the court will render a judgment in his case. He has every right he would have had were he present, and is not injured even by his own neglect to be present. He also complains that only two of the five special justices were "present and concurring when said decision was handed down." The fact is, and the record shows, that a quorum of the court was present and concurring in the decision at its rendition. Neither law nor custom requires a majority of the court to announce a decision in chorus. This objection is obviously without merit.

The application for rehearing is overruled.

RUPERT v. STATE (two cases).
(Criminal Court of Appeals of Oklahoma.
April 19, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 162*)—FORMER JEOPARDY.

The constitutional provision (section 21, Bill of Rights), "nor shall any person be twice put in jeopardy of life or liberty for the same offense," and the common-law principal therein declared are broad enough to mean that no one can be twice lawfully punished for the same offense. Hence, when a court has rendered judgment and imposed sentence upon a plea of guilty for the offense charged, and such judgment and sentence has been executed and satisfied, that ends the prosecution, and the power of the court as to that offense is at an end; and the court is without jurisdiction to render a second judgment and sentence upon the same charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. § 162.*]

2. CRIMINAL LAW (§ 163*)—"JEOPARDY."

Jeopardy, in its constitutional and common-law sense, has a strict application to criminal prosecutions only; and the word "jeopardy," as used in the Constitution, signifies

the danger of conviction and punishment which the defendant in a criminal prosecution incurs when put upon trial before a court of competent jurisdiction under an indictment or information sufficient in form and substance to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 288; Dec. Dig. § 163.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3803-3811; vol. 8, p. 7694.]

3. CRIMINAL LAW (§ 179*)—FORMER JEOPARDY—VALIDITY OF JUDGMENT.

The defendant, upon his plea of guilty, was sentenced to pay a fine of \$100—a punishment that is authorized by the statute for the offense charged. On the same day he paid the fine and satisfied the judgment. A month later he was brought into court, the original sentence was set aside, and he was sentenced to pay a fine of \$100 and to be confined in the county jail for 15 days. Held, that the second judgment and sentence is, under such circumstances, null and void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 325; Dec. Dig. § 179.*]

Appeal from Blaine County Court; George W. Ferguson, Judge.

Paris Rupert was convicted in two cases of the violation of the game laws, and he appeals. Reversed.

These cases arising upon like facts and involving the same principles of law will be considered together.

From the records in the respective cases, the following facts appear:

February 23, 1911, there were filed two informations in the county court of Blaine county; each charging plaintiff in error, Paris Rupert, with a violation of the game laws. On these informations the said Paris Rupert was arraigned on February 24, 1911, and entered pleas of not guilty thereto. On April 3, 1911, both cases were assigned for trial April 19th. On April 13th it appears that he withdrew his plea of not guilty and entered his plea of guilty in each case, and on the same day he was sentenced to pay a fine of \$100 and costs in each case. On the same day he paid the fine in each case and received a receipt therefor, as follows:

"In case 1758 and 1759 April 13, 1911, received from Paris Rupert two hundred dollars in payment of fines, State v. Paris Rupert, \$200.00.

"[Signed] George W. Ferguson,
"County Judge."

And thereupon he was released. Thereafter, on April 18, 1911, he paid the costs in each case and received a receipt therefor, as follows:

"April 18, 1911.

Received of Paris Rupert as costs in
case No. 1758 \$17 80
Received of Paris Rupert as costs in
case No. 1759 12 15

\$29 95

"[Signed] W. C. Burt,
"Clerk of the Court."

The record shows that as a part of the costs so paid items were charged for journal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

entries and recording judgments. The record further shows that on April 14th the court turned over to the deputy game warden the sum of \$100; the same being one-half of the fine in each case. On May 9th the plaintiff in error was rearrested on what is termed an alias warrant, and on the same day he was brought before the court and again sentenced. The judgment of the court in each case is as follows: "It is therefore ordered and adjudged that the judgment and sentence of this court shall be that the defendant pay a fine of \$100.00 and serve in the county jail at hard labor for a period of 15 days, and that the defendant pay the costs of this action, including the county attorney's fee. It is further ordered that in case of default of the payment of the said fine that the said defendant be confined in the county jail at the rate of \$2.00 for each day of the said fine costs and fees." The plaintiff in error was on said day ordered committed to jail in execution of the first sentence. Thereupon he applied to this court for a writ of habeas corpus, which was denied. See *Ex parte Rupert*, 6 Okl. Cr. 90, 116 Pac. 350. He then filed motions for new trials in the lower court, which were overruled. He gave notice of appeal, and the court fixed bail in the sum of \$500 in each case. From the judgments, appeals were perfected. The question presented in each case is the same.

Wm. O. Woolman, of Watonga, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. [3] The single question presented for our decision is, Could the county court legally impose the judgments and sentences appealed from? Otherwise stated, has a court the power to revise and increase a judgment and sentence at the same term after it has been executed and satisfied?

The general power of a court to reconsider its judgment and sentence and reverse, vacate, or modify it at any time during the term in which it was rendered, or to increase or diminish the sentence which it has imposed, where the original sentence has not been executed or put into operation, is undeniable. *Bish. New Crim. Proc.* § 1288, and cases cited. This power is inherent in all courts of record. However, it would seem there must, in the nature of the power thus exercised by the court, be in criminal cases some limit to it. It is clear that a court cannot pass two sentences for the same offense, to be enforced at the same time. And the validity of a second judgment and sentence must be because the first judgment and sentence is legally annulled or revoked and made void.

[1] That no person shall be twice put in jeopardy for the same offense is a universally accepted principle of the common law, and this principle has been embodied in

the federal Constitution and in all state Constitutions, and it is incorporated in the Constitution of the state of Oklahoma by express provision, as follows: "Nor shall any person be twice put in jeopardy of life or liberty for the same offense." Section 21, Bill of Rights.

[2] Jeopardy, in its constitutional or common-law sense, has a strict application to criminal prosecutions only. The word "jeopardy," as used in the Constitution, signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when put upon trial before a court of competent jurisdiction under a valid indictment, information, or complaint, and in this use it is applied only to strictly criminal prosecutions. *Stout v. State*, 34 Okl. —, 130 Pac. 553. "A person is not in legal jeopardy until put upon trial before a court of competent jurisdiction under an information or indictment sufficient in form and substance to sustain a conviction." *Cooley, Const. Lim.* (7th Ed.) 467, and cases cited.

We think this provision of the Bill of Rights, and the principle therein declared, is broad enough to mean that no person can be twice lawfully punished for the same offense. The one follows from the other, and this constitutional provision is designed and intended to protect the accused from a double punishment as much as to protect him from two trials. For this reason we think that where a judgment and sentence has been executed and satisfied that ends the prosecution, exhausts the power of the court, and terminates its jurisdiction, and the court is without power or jurisdiction to render another judgment and sentence in the case.

The leading case upon this question is *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872. In that case the defendant was convicted of appropriating mail bags, of the value of less than \$25, the punishment for which offense, as provided by statute, was imprisonment for not more than one year or a fine of not less than \$10 or more than \$200. The sentence was one year's imprisonment and \$200 fine. The defendant was committed in pursuance of the sentence and paid the fine the day after his commitment. On the second day after his commitment he was brought by habeas corpus before the same judge who sentenced him, who vacated the former judgment and sentenced the defendant anew to one year's imprisonment. The case came before the Supreme Court of the United States on habeas corpus, and the defendant was discharged, on the ground that, where a statute imposes as a punishment a fine or imprisonment, and the court has both fined and imprisoned the defendant, who thereupon pays the fine, the court has no power, even during the same term, to modify the judgment by imposing imprisonment instead of the former sentence. One of the alternative requirements of the statute having been satisfied, the power of the court as to the offense was

at an end. Mr. Justice Miller, delivering the opinion of the court, said:

"The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal, is manifest.

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

"The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. '*Nemo debet bis vexari pro una et eadem causa.*' It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action. In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, '*Nemo bis puniatur pro eodem delicto.*' or, as Coke has it, '*Nemo debet bis puniri pro uno delicto.*' 'No one can be twice punished for the same crime or misdemeanor,' is the translation of the maxim by Sergeant Hawkins. Blackstone, in his Commentaries, cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. Of course, if there had been no punishment, the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle that no person shall be twice punished for the same offense that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or

danger of a second punishment on a second trial.

"The common law not only prohibited a second punishment for the same offense, but it went further and forbade a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted. Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense. * * * If we reflect that at the time this maxim came into existence almost every offense was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted? The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

"But there is a class of cases in which a second trial is had without violating this principle, as when the jury fail to agree, and no verdict has been rendered, or the verdict set aside on motion of the accused, or on writ of error prosecuted by him, or the indictment was found to describe no offense known to the law. * * *

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alterna-

tive punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield and forbade that he should be punished again for that offense. The record of the court's proceedings at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist. * * *

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the circuit court, under which the petitioner is held a prisoner, was pronounced without authority, and he should therefore be discharged."

In these cases the informations were verified by a deputy state game and fish warden.

The statute prescribes the punishment for violation of the game law, as follows (section 3563, Snyder's Sts.): "It shall be a misdemeanor to violate any section of this act, if not otherwise provided in this act, and upon conviction shall be punished by a fine of not less than ten dollars (\$10) or more than one hundred dollars (\$100), or by imprisonment in the county jail not less than ten days or more than thirty days, or both such fine and imprisonment."

Thus it will be seen that the court pronounced judgment and sentence in both cases, as authorized by statute, for the offense of which the defendant pleaded guilty, and that in accordance with section 3557, which provides that when a deputy game and fish warden makes the complaint he shall receive one-half of all fines collected upon his complaint, the court, when said fines were paid, paid the complaining wit-

ness his proportionate share of the fines paid by the defendant.

The object and purpose of rendering the second judgments is not apparent. However, it is immaterial, as the county court had no jurisdiction to render the judgments and sentences appealed from.

Said judgments are therefore reversed.

ARMSTRONG, P. J., and FURMAN, J., concur.

MARSTON v. STATE.

(Criminal Court of Appeals of Oklahoma. April 26, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159*)—APPEAL—INSUFFICIENCY OF EVIDENCE.

Where, in a criminal case, the evidence is insufficient to sustain the conviction, in that the evidence is insufficient to show the commission of the offense charged, the judgment of conviction will be reversed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error from Atoka County Court; Baxter Taylor, Judge.

Leola Marston was convicted of violating the prohibition law, and brings error. Reversed and remanded.

J. G. Ralls, of Atoka, for plaintiff in error, Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error was convicted in the county court of Atoka county on an information which charged "that the said Leola Marston did then and there unlawfully manufacture intoxicating liquor, to wit, Choctaw beer, contrary to," etc., and was sentenced to be imprisoned in the county jail for a term of 30 days, and that she pay a fine of \$50. From the judgment, an appeal by case-made was perfected.

Numerous errors are assigned, but we deem it unnecessary to consider any of them, save and except the one which is to the effect that the verdict of the jury is contrary to law and to the evidence.

Two witnesses testified on the part of the prosecution, J. W. Phillips, sheriff of Atoka county, and Tom Miller, constable of Atoka.

Phillips testified that on the day in question he and Tom Miller were driving past Bulah Marston's and saw some one in the kitchen stirring something on the stove; that he jumped out of the buggy and ran in and found the defendant stirring something on the stove that would be Choctaw beer when they got through making it; "that Choctaw beer was made by putting different things in it, among which were hops, malt, apples, and potatoes; that after the various things are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

boiled and cooked the combination is then set off, and it is let cool, and then sugar is added to it, and after that it is let stand and ferment; that Bulah Marston is the defendant's father-in-law;" that a negro, Ed. Farmer, was in the kitchen when witness went in, and Mrs. Bulah Marston was also in there and seemed to be the boss, and she said something about her kidneys, and that she had to have it; that the liquid that he found there was not done, and had not yet been made into Choctaw beer; and that they had no search warrant.

Tom Miller's testimony was substantially the same as Phillips'.

The defendant testified, on her own behalf, that she was visiting at her father-in-law's house, and knew nothing about the contents of the tub, and had nothing to do with the putting in of the water and any of the ingredients in it; that she had gone into the kitchen, where there was a fire, with her baby; and that Ed. Farmer was at the tub at the time.

Ed. Farmer's name was indorsed on the information, and he was present in court, but was not used by the prosecution.

In every criminal prosecution it devolves upon the state to prove the corpus delicti—that is, the fact that the crime charged has been actually perpetrated—and we think it was not proven in this case.

It is our opinion that the verdict is unwarranted by the evidence, and that the judgment of conviction, as a matter of law, is without support in the evidence.

The judgment of the county court of Atoka county is therefore reversed and the cause remanded.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

MILLER v. STATE

(Criminal Court of Appeals of Oklahoma.
April 26, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 471, 476, 478, 481, 741*)
—WITNESSES—EXPERT EVIDENCE—ADMISSIBILITY—"EXPERTS"—"ART OR TRADE"—QUESTIONS OF LAW AND FACT.

(a) As a general rule, expert or opinion evidence is not admissible as to matters which are within the common knowledge and understanding of mankind generally, and which the jury are as competent to understand and determine as the witnesses could be.

(b) Experts are persons who are professionally acquainted with some science or are skilled in some art or trade, or who have experience or knowledge in relation to matters which are not generally known to the people.

(c) Every business or employment which requires peculiar knowledge or experience and which has a class of persons devoted to its pursuit is included in the term "art or trade," and any person who, by study or experience, has acquired this peculiar knowledge or practical skill may be allowed to give in evidence his

opinions upon matters of technical knowledge and skill.

(d) In prosecutions for murder, medical experts may be allowed to testify to their opinions as to the cause and manner of the death of the deceased.

(e) The admissibility of the testimony of expert witnesses is a question of law for the determination of the court. The weight and credibility to be given to such opinions is a question for the jury alone to determine.

(f) As a general rule expert evidence is not admissible for the purpose of proving that a wound was or was not self-inflicted; but, where a wound is of an extraordinary nature and is upon a portion of the body of which men have little or no knowledge, then expert evidence is admissible for the purpose of showing that such wound was or was not self-inflicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1059, 1062, 1065, 1066, 1070, 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. §§ 471, 476, 478, 481, 741.*

For other definitions, see Words and Phrases, vol. 1, pp. 510, 511; vol. 3, pp. 2594-2596.]

2. HOMICIDE (§ 166*)—CRIMINAL LAW (§ 369*) — EVIDENCE — ADMISSIBILITY — OTHER OFFENSES.

(a) Where a defendant is upon trial charged with the murder of a girl, for the purpose of proving motive it is competent for the state to show all of the relations existing between the deceased and the defendant, and that the defendant had entertained illicit sexual relations with the deceased by which the deceased had become pregnant, and that the defendant attempted to have an abortion performed upon the deceased, and that the defendant, being a married man, had become estranged from his wife.

(b) Any evidence is admissible upon a trial in a criminal case which tends to prove the defendant guilty of the crime with which he is charged, although it may also prove, or tend to prove, another separate and distinct crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166;* Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§§ 763, 764, 807*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—TESTIMONY OF EXPERTS.

(a) Where expert evidence is introduced in the trial of a cause, it is improper for the court to give argumentative instructions thereon or to attempt to instruct the jury as to what weight and credibility should be given to the testimony of experts.

(b) For an approved instruction with reference to the testimony of experts, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764, 807.*]

4. HOMICIDE (§ 234*)—EVIDENCE—SUFFICIENCY.

See opinion for evidence held to establish the guilt of a defendant of murder upon circumstantial evidence.

[Ed. Note.—For other cases see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. § 234.*]

5. CRIMINAL LAW (§§ 1128, 1163*)—APPEAL—PRESENTATION FOR REVIEW—REMARKS OF COUNSEL—GROUNDS FOR REVERSAL.

(a) Improper remarks made by a prosecuting attorney in his argument to the jury must be incorporated in the case-made and certified to by the trial judge before they can be considered upon appeal. Such remarks cannot be presented by affidavit or in any other manner, unless it appears from the record that counsel for the defendant requested the trial judge to have such remarks taken down by the stenographer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in order that they might be incorporated in the record and that the court refused to have this done.

(b) When counsel for a defendant request the trial court to have a stenographer take down in shorthand any statement made by a prosecuting attorney during his argument, to be made a part of the record upon appeal, and the court refuses to comply with such request, then the fact of such request and refusal may be shown by affidavits or any other competent evidence, and such refusal upon the part of the court constitutes ground for reversal without regard to the merits of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2951-2953, 3090-3099; Dec. Dig. §§ 1128, 1163.*]

6. HOMICIDE (§ 354*)—PUNISHMENT—SEDUCTION.

The protection of female purity requires that men who seduce young and inexperienced girls and then murder them to cover up their own infamy should receive the most severe possible punishment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. § 354.*]

Appeal from District Court, Woodward County; James B. Cullison, Judge.

N. L. Miller was convicted of murder, and he appeals. Affirmed.

L. T. Willson, of Alva, and Charles Swindall, of Woodward, for appellant. Smith C. Matson and Joseph L. Hull, Asst. Attys. Gen., and Moman Prulett, of Oklahoma City, for the State.

FURMAN, J. For the purpose of logical arrangement, we will consider the questions presented in the order in which they arose at the trial rather than in the order in which they are presented in the brief of counsel for appellant.

[1] First. Dr. M. Bilby, having first qualified as an expert, testified that on the 9th day of November, 1910, he was called to the old opera house in Alva to examine the body of the deceased; her face was very dark, in fact, almost black; her eyes were slightly protruding; her lips were partly opened; the white part of her eyes was bloodshot; both of the eyes were very red and the lids of the eyes were protruding; her tongue was slightly protruding between her teeth; her body was lying in a lay-out position; her feet were both together and her hands were folded across her breast; there was a scarf very tightly drawn around her neck running back and resting under her head; there had been an evacuation of her kidneys and bladder and apparently the body had been pulled down four or five inches after the evacuation was over; her clothes were wet, and the carpet on which she was lying was wet up to the small of her back; there had also been a slight evacuation of the bowels. The following question was then asked this witness: "Now, Doctor, from the condition of that body and its condition in all respects, what, in your opinion and judgment, would you say caused the death of that girl?" To

which counsel for appellant objected upon the ground that such evidence was irrelevant, incompetent, and immaterial and would invade the province of the jury, which objection was by the court overruled, to which counsel for appellant excepted. The witness then replied: "I would say that, from the condition and facts, she was strangled; that she met her death by strangulation." The witness was then asked the further question: "If the condition of this scarf that was wound around her neck was as tight as it was when you found her, would that produce death? Answer: Yes, sir." To which counsel for appellant objected upon the ground that the question was argumentative and had already been asked and answered. The following question was then asked the witness: "I will ask you this question, Doctor: In your judgment, if it had been possible for Mable Oakes to strangle herself and produce strangulation to the extent to produce her death and then placed her hands upon her breast?" To which counsel for appellant objected upon the ground that it was incompetent, irrelevant, and immaterial and invaded the province of the jury and required the witness to pass upon the weight and sufficiency of the evidence, which objection was by the court overruled, to which question the witness replied: "It would have been impossible for her to have strangled herself and placed her hands on her breast, and also the ends of the scarf back under her head; that would have been impossible."

Dr. O. E. Temple was then placed upon the stand by the state and qualified as an expert. He testified that he too was called to examine the body of the deceased. His testimony in the main fully corroborates the testimony of Dr. Bilby. He mentioned, however, some additional facts. He stated that the clothing of the deceased was smooth and straightened out nicely, and that between her hands was the wrapper off of a piece of Yucatan chewing gum. He describes the scarf around the neck of the deceased as follows: "There was a silk scarf around her neck the same as if you would take the scarf in your hands in this way and put the middle of the scarf here and laid it back and cross it behind and bring the ends around and cross it in front. The ends were then drawn tightly and tucked under the back of the neck. It was drawn very tightly and was imbedded in the skin and flesh of the neck so that when it was removed it left the print of the scarf on her neck." Rigor mortis had not set in when the witness examined the body of the deceased. The body was not yet stiff. The following question was then asked the witness: "Taking your experience as a physician, your knowledge of strangulation and knowledge of the condition of that body, the ecchymotic condition, in fact, the entire condition of the body,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taking everything into consideration, are you able to state what produced the death of the deceased?" To this question counsel for appellant objected upon the ground that it was incompetent, irrelevant, and immaterial and related to a subject which did not call for expert testimony and that it invaded the province of the jury. This objection was by the court overruled, to which ruling of the court counsel for appellant excepted. The witness was then asked: "Are you in a position to state what caused death?" Answer: "Yes, sir." The witness was then asked: "Taking your experience as a physician and your knowledge of strangulation and the condition of the body here and the condition of the hands, the attitude of the body and all, are you able to state whether or not Mable Oakes could have strangled herself to death?" To this question counsel for appellant objected upon the ground that it was irrelevant and incompetent and not upon a subject requiring expert testimony and invaded the province of the jury. Which objection was by the court overruled, to which counsel for appellant excepted. The witness replied, "No, she could not."

Dr. E. Granthum was placed upon the stand by the state and qualified as an expert. The testimony of this witness fully corroborated all of the statements made by the preceding witnesses with a few additions. The clothing of the deceased was drawn up behind as though the body had been pulled down and the clothes dragged up when it was pulled down. This witness also testified to a post mortem examination of deceased and that the heart of the deceased was perfectly normal; the lungs were not in a normal condition but were very dark; and that the deceased was pregnant, the foetus being probably about $4\frac{1}{2}$ months old. The following question was then asked the witness: "Now, Doctor, taking your experience as a physician and knowledge of works on strangulation, your knowledge of the condition of the body when you found it, and its location at the time, location of the scarf and condition and location of the hands and of all and of every condition and all that surrounded the body, can you say or are you able to say what produced her death?" To which counsel for appellant objected upon the ground that it was incompetent, irrelevant, and immaterial and called for a conclusion of the witness and invaded the province of the jury, which objection was by the court overruled, to which counsel for appellant excepted. The witness replied: "Yes, sir; I am able to state. Q. What, then, in your judgment produced the death of the deceased?" The witness replied that her death was due to strangulation. The following question was then asked the witness: "From your experience as a physician and the conditions you found there and the condition of the body, can you say whether or not Mable Oakes

strangled herself to death?" To which counsel for appellant objected upon the ground that it was incompetent, irrelevant, and immaterial, called for a conclusion of the witness upon testimony upon which expert evidence was not required. Which objection was by the court overruled, to which ruling of the court counsel for appellant excepted. The witness then testified: "I say she could not have strangled herself to death."

Dr. Edwin De Barr testified that he occupied the chair of chemistry in the State University; that he was a graduate of the Michigan State Agricultural College and also the Michigan State University, and had also studied at the Chicago University. He also testified that he had made a study of the subject of strangulation and had had experience in a number of cases in which death had resulted from strangulation. He further testified that he had received from Dr. Bilby a stomach purporting to be the stomach of the deceased for the purpose of making an analysis of its contents. He detected the odor of whisky in the stomach; he also found one-fourth of a grain of strychnine and three-fourths of a grain of morphine in the stomach; that the morphine and strychnine found in the stomach was not sufficient to produce death; he found the inner coating of the stomach congested with little spots where the blood had collected. He was then asked the following question: "Taking the body of a girl 23 years of age, robust, having a sound heart, the right heart being filled with blood of a dark color, the girl being found lying in a room with her hands across her chest, her face very dark, her eyes slightly protruding, lips almost closed, the clear white part of the eyes bloodshot in both eyes, the lips protruding, tongue slightly protruding between the teeth, body found lying on her back straightened out with her feet together, with a scarf drawn twice around her neck very tight and the ends turned back and resting under the head, the scarf being pressed deep into the skin, the skin bulging out over the scarf, face contorted, discoloration both above and below the scarf, there had been an evacuation of the kidneys and a slight evacuation of the bowels, lungs congested, the stomach containing an ecchymotic condition, a little bloody froth coming out of the mouth and nose, the hands folded upon the chest, from your experience as an expert and as a physician are you able to state what produced her death?" To which counsel for appellant objected that this was not a proper hypothetical question as it contained statements which were not proven to exist and also being irrelevant, incompetent, and immaterial, and because the witness had not proven himself to be a doctor or physician and as invading the province of the jury. Which objection was by the court overruled, to which counsel for appellant excepted. The witness replied, "I am not a practicing physician, but I am able to state

that she died from strangulation." The witness was then asked, "Taking the condition of the body as described in the hypothetical question, are you able to say as to whether or not the deceased could have strangled herself to death?" To which counsel for appellant objected upon the ground that it was incompetent, irrelevant, and immaterial and invaded the province of the jury. This objection was by the court overruled, to which ruling counsel for appellant excepted. The witness then said, "I will say she came to her death by strangulation by a person other than herself." The objections to all of these questions and the answers thereto relate to the same subject and involve the same principles of law, and therefore will all be discussed together.

As we gather from the brief of counsel for appellant and the oral argument made when the case was submitted, the contention is that the expert testimony should not have gone further than to state that the death of the deceased might have been caused by strangulation and that the court erred in permitting the witnesses to state that in their opinion the deceased did die from strangulation which was not self-inflicted.

In their brief counsel for appellant state their position as follows: "We have given the testimony of three physicians and a chemist, Edwin De Barr, the testimony upon which the state relies to prove the corpus delicti. It will be observed that, over the protests and objections of the defendant, these witnesses were permitted to testify that death was caused by strangulation, not that death might have been caused by strangulation. Instead of being tried by a jury of 12 men, the defendant was in fact tried and convicted by three doctors and a chemist." We cannot agree with this contention. It clearly appears from the testimony of all of the witnesses that they were only expressing their opinions as experts as to the cause of the death of the deceased. Counsel for appellant had the right, on cross-examination, to question these witnesses fully and show, if they could, any other facts and circumstances than those relied upon by the state which might have resulted in the death of the deceased and which would in any manner weaken the opinions expressed by the witnesses as to the cause of the death of the deceased.

As a rule, expert or opinion evidence is not admissible as to any matters which are within the knowledge or understanding of mankind generally and is confined to questions requiring special skill or scientific knowledge. See *Byers v. State*, 1 Okl. Cr. 877, 100 Pac. 261, 103 Pac. 532, and *Price v. United States*, 2 Okl. Cr. 449, 101 Pac. 1036, 139 Am. St. Rep. 930. It would be difficult, if not impossible, to lay down a general rule which is applicable to all cases as to what is, and what is not, expert evidence. Experts are persons who are professionally ac-

quainted with some science, or are skilled in some art or trade, or who have experience and knowledge in relation to matters which are not generally known to the people. Every business or employment which requires peculiar knowledge or experience, and which has a class of persons devoted to its pursuit, is included in the terms art or trade, and any person who, by study or experience, has acquired this particular knowledge or practical skill may be allowed to give in evidence his opinions upon matters of technical knowledge and skill. The cases in which opinion evidence is admissible are of endless variety and may be divided into two classes: First. Where experts in a particular science or calling are permitted to state the opinions formed by them from hypothetical statements of facts propounded to them, or to state their opinions from facts within their personal knowledge. Second. Where persons not experts are permitted to testify as to opinions formed by them in regard to the common transactions of life at the time of their occurrence and concerning things which cannot be reproduced before the jury. See *Dillard v. State*, 58 Miss. 368. Under the first head would come the familiar cases of opinions of men of science, testifying as to the peculiar learning connected therewith, or of the practical man who details the result of long observation in the particular calling to which he has devoted himself. Under the second would fall those instances in which the common observer is permitted to testify as to the direction from which a particular sound seemed to come, or as to the apparent size or weight of a stationary object or the speed of a moving one, as to whether a person appeared to be sick or well, or drunk or sober, or sane or insane, as well as countless other instances, more easily imagined than enumerated.

In *Kocelis v. State*, 56 N. J. Law, 44, 27 Atl. 800, Garrison, J., said: "The expert witness is one whose possession of special knowledge renders his opinion admissible upon a state of facts within his specialty, without regard to the manner in which the facts are established, and without requiring that they should have come, in whole or in part, under the personal observation of the witness; whereas the sole ground upon which a witness may give an opinion as to matters of ordinary knowledge is that they not only came within his personal observation, but that they come into proof so blended with the opinion to which they give rise that it is receivable in proof as a substitute for a specification of the host of circumstances that called it forth." See, further, *Yates Bros. v. Garrett*, 19 Okl. 449, 92 Pac. 142; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Thompson v. Pennsylvania R. Co.*, 51 N. J. Law, 42, 15 Atl. 833; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *McKelvey v. Chesapeake & O. R. Co.*, 35 W. Va. 500, 14

S. E. 261. In the last case it was said: "The nonexpert testifies as to conclusions which may be verified by the court or jury; the expert to conclusions which cannot be. The nonexpert gives results of a process of reasoning familiar to everyday life; the expert gives the results of a process of reasoning which can be mastered only by special scientists." Experts are persons selected by the court or parties to a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinion. *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126 (citing *Bouv. Law Dict.*); *Heacock v. State*, 13 Tex. App. 97, 131; *Le Mere v. McHale*, 30 Minn. 410, 15 N. W. 682; *Travis v. Brown*, 43 Pa. (7 Wright) 9, 12, 82 Am. Dec. 540. Mr. Lawson lays down the rule that one may be qualified as an expert witness by studying without practice or practice without study. *Lawson, Exp. Ev. p. 210*. He justly adds that mere observation, without either study or practice, will not be sufficient. *Wheeler & Wilson Mfg. Co. v. Buckhout*, 60 N. J. Law, 102, 36 Atl. 772, 773.

Expert testimony is admitted because the witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts and basing opinions upon them than jurors generally are presumed to be. In prosecutions for murder, the testimony of medical experts, as to the cause and manner of the death of the deceased, may be indispensable. The case at bar is an illustration of this. Very few persons have any knowledge or experience with reference to death caused by strangulation. Without the testimony of medical experts, the jury would have been entirely in the dark on this subject. The admissibility of this evidence was a question for the determination of the court. The weight and credibility of the opinions of experts was a question for the jury to determine, and, if such opinions were not well founded, this could have been shown upon cross-examination. The most serious objection to the introduction of the evidence complained of was as to whether or not deceased died from self-inflicted strangulation or whether she died from strangulation produced and caused by some other person. The general rule is that expert evidence is not admissible for the purpose of proving that a wound was or was not self-inflicted. See *Ætna Life Ins. Co. v. Kaizer*, 115 Ky. 539, 74 S. W. 203. But there are exceptions to this rule as there are to all other rules. In cases where a wound is of an extraordinary nature and is upon a portion of the body of which men have little or no knowledge, then expert evidence is admissible for the purpose of showing that it was or was not self-inflicted.

The case of *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202, presents an instructive discussion of this question. Lee was indicted for murder and was acquitted. The state appealed upon a question of law, complaining that the trial court had excluded expert testimony showing the wound from which deceased died was not self-inflicted. Discussing this question the court said: "The fifth assignment of error is as follows: 'The court erred in excluding the following question asked by Mr. Doolittle of the same witness (Moses C. White): "You examined the uterus in this case, under the conditions you testified to. You made the post mortem and examined the uterus in this case, and have described its conditions. Now, I wish to ask you whether, from your examination of the body of the uterus, in your opinion, the wounds which you have described, upon the wall of the uterus, were self-inflicted."' The finding details in full the facts in the case claimed to have been proved by the state and by the defense. The victim of the crime charged was a woman whose death was caused by a lacerated wound in the uterus, made by some instrument used in the production of an abortion shortly prior to her death. The defendant was a practicing physician, whom the deceased consulted for the first time after she decided on suffering an abortion. The testimony introduced in chief by the state was sufficient to justify the jury, if they believed the witnesses, in drawing an inference of the defendant's guilt. The testimony introduced by the defendant consisted mainly in contradictions of the state's witnesses; the most important contradiction being that of the accused himself, who denied having performed any operation upon the deceased, and stated that in attending the deceased during her last illness, caused by the abortion, and superintending her delivery of a dead foetus and afterbirth, he acted only as an honest medical practitioner would act when called to attend a woman suffering from such injuries. He said the injuries were inflicted by the deceased herself, and offered testimony claimed as tending to show that she was familiar with the mode of producing abortion by mechanical means, and also testimony that the deceased stated she had inflicted the injury upon herself, and had made this statement subsequent to her dying declaration testified to by the state's witnesses, in which she charged the defendant with having produced the abortion. Upon rebuttal the state called the witness Moses C. White, a practicing physician and medical examiner for the county, who had, as such public officer, performed an autopsy on the body of the deceased. Dr. White had been previously examined by the state and cross-examined by the defense as a medical expert. It is patent that, under these

circumstances, the opinion of Dr. White, as a medical and surgical expert, upon the question whether the wound he had examined and described to the jury was so situated and of such a nature as to render its self-infliction impracticable, was admissible evidence. It is true that a wound may be so situated that the practicability of self-infliction is an inference which all men are competent to draw, requiring no peculiar knowledge or experience, and therefore not a proper subject of expert testimony. But to draw such an inference from this particular wound on the interior surface of the womb of the deceased plainly required peculiar knowledge and experience, not common to the world; and therefore the opinion of an expert, founded on such knowledge and experience, is admissible. *Taylor v. Monroe*, 43 Conn. 44; *Whart. Crim. Ev.* p. 403. The importance of the excluded testimony is not less clear. The testimony in the case, as appears from the record, was of such a nature that the question of the defendant's guilt might have wholly turned on the disputed fact of self-infliction, of the wound. The defendant himself relied on the possibility of that fact existing as a principal hypothesis consistent with the evidence and his own innocence. The evidence excluded was relevant to that fact. Justice required the admission of the evidence. What weight might have been given to it cannot be known, but it well may be that the opinion of Dr. White would have convinced the jury that the wound was not self-inflicted, and that there remained no reasonable hypothesis consistent with the evidence and the innocence of the prisoner."

The case of *Beckett v. Northwestern Masonic Aid Association*, 67 Minn. 298, 69 N. W. 923, is also in point. In that case expert evidence was held to be competent showing that it is very rarely that a suicide inflicts a wound on himself on the back of his person. In *State v. Knight*, 43 Me. 11, it was held that it was proper to allow a medical expert to testify that in his opinion the wound described in the neck of the deceased could not have been inflicted by his own hand.

We are therefore of the opinion that the evidence objected to was competent and proper, and that the court did not err in admitting the same.

[2] Second. N. J. Lewellen testified for the state that, about six months before the death of the deceased, witness had a conversation with appellant with reference to the deceased in which appellant stated that there was not a better girl living than Mable Oakes; he thought her a perfect lady in every respect; he thought the world of her as a clerk and as a woman. In a later conversation appellant said: "I am not getting along just right at home. If anything ever comes up that I can do it I am going to marry

that lady." He said he wanted to get her to love him. In a subsequent conversation appellant stated to witness that he was loving deceased fit to kill and she was loving him. In a later conversation appellant told witness that he (appellant) and Mable Oakes had been out buggy riding and that he and Mable Oakes had had sexual intercourse and that Mable cried all of the next day. Appellant subsequently told witness that one night the folks of the deceased were away from home; that they were gone out in the country; and that he went to her home and stayed with her all night. Appellant told witness that it took him an hour and a half to accomplish his purpose the first time he had sexual intercourse with the deceased. Appellant also told witness that he could not live at home; it was too hot for him; that he did not have any pleasure at home; sometimes he went there for his meals and sometimes he did not; that he and his wife did not sleep together; she slept upstairs with the girls and he had a separate room to himself; that he was not living with his wife now and did not think he ever would; and that if his wife did not make up with him he had everything arranged to get a divorce. About four weeks before the death of Mable Oakes appellant told witness that he had made up with his wife. Shortly before the death of the deceased, appellant told witness that the deceased had gone to Dr. Safford to be examined to find out whether or not she was pregnant. Appellant also told witness that the deceased had sinking spells or spells of the heart, and that he had to have a little whisky in the office for her when she had a bad spell. To all of this evidence appellant strongly objected upon the ground that it tended to prove a separate, independent, and distinct offense than that of which appellant was upon trial, and thereby prejudiced his case in the minds of the jurors. The court overruled this objection, to which appellant excepted.

Dr. W. B. Safford testified for the state that, about three weeks before the death of Mable Oakes, appellant requested witness to examine her to ascertain whether or not she was pregnant, and that witness made an appointment with appellant for the deceased to visit his office for this purpose; that soon after this deceased came to the office of witness and submitted to a physical examination when witness discovered that she was pregnant; that, within an hour after the examination was made, appellant came to the office of witness to ascertain the result of the examination. Witness informed appellant that deceased was pregnant and that appellant then requested witness to perform an abortion on deceased, which witness refused to do; that appellant insisted upon witness performing an abortion and helping him (appellant) out of his trouble, and, upon witness' continued refusal, appellant said he would perform the job himself if he had the

tools. To all of this testimony counsel for appellant objected upon the ground that it was irrelevant, incompetent, and immaterial, and was calculated to prejudice the jury against appellant. The court overruled this objection and admitted the testimony, to which ruling counsel for appellant objected.

W. N. Bickel, being upon the stand as a witness for the state, was asked the following question: "I will ask you to state to the jury whether or not, prior to the 9th of November, 1910, you had a conversation with the defendant and in which conversation he spoke to you something about his having studied medicine? Mr. Swindall: Objected to as incompetent, irrelevant, and immaterial; he is not on trial for studying medicine. By the Court: Overruled. (The defendant excepting.) Q. You may state, what, if anything, he said to you at that time? A. He told me that, when he was a young man, he had studied medicine sufficient to have been admitted to practice had he pursued that line." In their brief and in the oral argument made when the cause was submitted, counsel for appellant bitterly objected to the reception of this testimony, claiming that it related to a separate, independent, and distinct offense from that for which appellant was upon trial, and was highly calculated to inflame the minds of the jury and prejudice them against appellant.

In the case of *Vickers v. United States*, 1 Okl. Cr. 452, 98 Pac. 435, in a well-considered opinion by Judge Doyle, this court held that evidence is admissible which tends to prove the defendant guilty of the crime for which he is upon trial, and even though it may also prove, or tend to prove, another distinct felony and thus prejudice the accused. We think that this is unquestionably correct. Upon a trial for murder, the motive, or want of motive, upon the part of the defendant for the commission of the crime is always a material question to be considered by the jury. An examination of the reported cases will show that illicit relations between the sexes has always been a most prolific source of murder. For a full presentation and discussion of our views upon this subject, see *Burns v. State*, 8 Okl. Cr. 554, 129 Pac. 657; *Ex parte Harkins*, 7 Okl. Cr. 464, 124 Pac. 931; *Ex parte Jefferies*, 7 Okl. Cr. 544, 124 Pac. 924, 41 L. R. A. (N. S.) 749. Illicit love will sink its victims to a greater degradation and prompt the commission of more desperate deeds and unjustifiable crimes than any other passion to which poor erring mortality is the slave.

We think that the state could not have proven a more powerful motive upon the part of appellant to kill the deceased than by proving that illicit relations had existed between them during the time when appellant was estranged from his wife, and that, after appellant had become reconciled to his wife, he discovered that the deceased was pregnant as a result of their illicit relations,

and after he had failed to induce a physician to produce an abortion upon the deceased, and he knew that unless the deceased was disposed of, their secret and shame would soon become public. We therefore think that all of the evidence on this subject, while it did prove a separate offense upon the part of appellant, yet it was pertinent to the charge for which he was upon trial and was therefore properly admitted by the court. The testimony that appellant was familiar with medical science also tended to explain the unusual manner in which the death of the deceased was effected. The court, therefore, did not err in admitting this evidence.

[3] Third. Appellant complains at the action of the trial court in refusing to give a number of special instructions requested. With one exception, all of the propositions presented by counsel for appellant, with reference to the instructions, have been previously passed upon by this court adversely to the contentions made. It is therefore not necessary to discuss them again. The instruction referred to as constituting the exception is as to the effect and weight that should be given to the testimony of experts. The instruction requested is argumentative and highly calculated to confuse the minds of the jurors who are not supposed to be learned in the law. The court, therefore, did not err in refusing to give the instruction requested by appellant upon this subject.

The court did, however, instruct the jury upon this question as follows: "Gentlemen of the jury, the court has permitted expert testimony to be given in the trial of this case and in this connection the court instructs you that the opinions of expert witnesses are to be considered by you in connection with all other evidence in the case. You are not to act upon such opinion to the exclusion of other testimony. In determining the weight of the testimony of expert witnesses, you are to apply the same general rules that we applied to the testimony of other witnesses. Taking into consideration the opinions of the expert witnesses, together with all other evidence, you are to determine for yourselves, from the whole evidence, whether it establishes the guilt of the defendant beyond a reasonable doubt, as charged in the information." We think the instruction given by the court is correct.

[4] Fourth. It was proven that the body of the deceased was found in a back room adjoining defendant's office about 2 or 3 o'clock in the afternoon. It was also proven that the deceased was a robust, healthy girl about 23 years of age, and that she left her father's house that morning to go to the office of appellant, at which she was employed, and that she did not go home for dinner. Appellant was proven to have been at his office about 12 and also at about 1 o'clock on the day of the homicide. About 2 or 3 o'clock the father of the deceased, passing

near the office of appellant, was called by appellant. Upon entering the office, appellant informed the father of the deceased that he believed that his daughter was dead. He then carried the father of the deceased to the room in which the body was lying and stated that this was the position in which he had found her. The father of the deceased examined the corpse and found that there was yet some warmth about the heart and that the body was in the condition described by the attending physicians. The father of the deceased also testified that during the month of September he had stated to appellant that he wanted his girl to quit working for appellant, but that appellant replied he did not want her to quit at all; that he and the deceased intended to get married. Appellant stated that he and his wife had separated and that he was going to get a divorce. The record covers nearly 800 pages and contains many other facts showing the relations existing between appellant and the deceased of a similar nature to those hereinbefore stated in this opinion.

[5] Fifth. Appellant's counsel complain of certain alleged improper remarks claimed to have been made in the closing argument of counsel for the prosecution. Upon an examination of the record, we find that the only reference to this matter is contained in some remarks made by one of the counsel for appellant after the argument was over and before the jury had retired to consider their verdict. The record does not contain a certificate of the trial court that the prosecuting attorney used the language which he was charged with having used by counsel for appellant. We have time and again decided that improper remarks made by a prosecuting attorney in his argument to the jury must be incorporated in the case-made and certified to by the trial judge before they can be considered upon appeal. Such remarks cannot be presented by affidavits or in any other manner than under the certificate of the trial judge, unless it appears from the record that counsel for the defendant requested the trial judge to have such remarks taken down by the stenographer, in order that he might incorporate such remarks and his objections thereto in the record; and the court had refused to have this done. In that event only can such remarks be presented to this court upon appeal by affidavit. If it had been made to appear by the record that counsel for appellant had requested the trial court to have the stenographer take down in shorthand any statement made by the prosecuting attorney during his closing argument to be made a part of the case-made upon appeal, and that the court had refused to comply with such demand, then this fact might have been shown by affidavits or any other competent evidence, and such refusal upon the part of the court would have been ground for reversal, without regard to the merits of the case.

But it is not claimed that any such request was made by counsel for appellant or refused by the trial court, and, as the court has not certified to the statements contained in the record made by counsel for appellant, we cannot consider such statements as a part of the record. See *Lamm et al. v. State*, 4 Okl. Cr. 641, 111 Pac. 1002.

[6] Sixth. If we were to state all of the evidence in this case, it would fill a volume of our reports. It is not necessary that the evidence should be stated in full. We think from the statement of facts contained in this opinion, in connection with the other evidence in the case which appears in the record, that an honest and intelligent jury could not be impaneled who, with a due regard for the evidence and their oaths, could do otherwise than convict appellant of murder. In fact, his acquittal would have been a great miscarriage of justice. We regard this as the most cold-blooded, cowardly, and infamous murder committed in Oklahoma to which our attention has been called. To gratify his animal passions and under promises of getting a divorce from his wife and marrying deceased, appellant, in the sacred name of love, laid siege to the citadel of the heart of a young and inexperienced girl and accomplished her ruin. His own statements conclusively show that he alone is responsible for her seduction, and, when he learned that, as a result of her defilement, she was about to become a mother, and being unable to induce a doctor to perform an abortion and cover up his treachery and infamy, he in a cowardly manner deliberately strangled her to death.

Appellant had stated that he kept whisky in his office to give to the deceased when she had sinking spells. He doubtless gave her whisky on the day of the homicide containing enough morphine to stupify and not to kill her, the better to enable him to strangle her to death without causing her to call for assistance. The presence of strychnine in the stomach would give color to appellant's claim that deceased had sinking spells and suggest the idea that this came from medicine which she had taken to strengthen her heart. This makes the testimony that appellant had read medicine clearly admissible. It strengthens the presumption that appellant was preparing to cover up his tracks and manufacture a defense.

We believe that the gallows was cheated of its due when the jury failed to inflict the death penalty upon appellant. The protection of female purity requires that such conduct as appellant has been guilty of should receive the most severe possible punishment.

We find no material error in the record. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

WELLS v. STATE.

(Criminal Court of Appeals of Oklahoma.
May 8, 1913.)

CONTEMPT (§ 86*)—APPEAL—JURISDICTION.

The Criminal Court of Appeals has no jurisdiction to review civil contempt proceedings wherein defendant is adjudged guilty of contempt for failure to pay attorney fees and alimony.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

Appeal from District Court, Hughes County; John Caruthers, Judge.

Carl R. Wells was adjudged guilty of contempt, and appeals. Appeal dismissed.

Crump & Skinner and Mann, Rogers & Harris, all of Holdenville, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was on April 11, 1912, ordered to be committed to the custody of the sheriff and confined to the county jail of Hughes county until such time as he complied with the order of said court as theretofore made, directing him to pay \$400 alimony and \$100 attorney fee, awarded in a divorce wherein Phœbie A. Wells was plaintiff and plaintiff in error was defendant. From this judgment an appeal was attempted to be taken by filing in this court June 8, 1912, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal as follows: "Because the record discloses and the petition in error recites that this is an appeal from a 'judgment and sentence rendered in a certain cause pending in the district court of Hughes county, Okl., wherein Phœbie A. Wells was plaintiff and Carl Wells was defendant, and wherein this defendant was adjudged to be guilty of the crime of contempt of court in not paying certain attorney's fees and alimony awarded against him upon a former hearing in said cause,' etc., it clearly appearing from the fact of the petition in error that this is an appeal from a judgment rendered in a civil and not a criminal action."

The question presented is the same as the one decided in *Flathers v. State*, 7 Okl. Cr. 668, 125 Pac. 902, and, for the reasons given in the opinion in that case, the motion to dismiss for want of jurisdiction is sustained and the purported appeal herein dismissed.

STEWART v. STATE.

(Criminal Court of Appeals of Oklahoma.
May 3, 1913.)

(*Syllabus by the Court.*)

1. HOMICIDE (§ 342*)—APPEAL—ERROR FAVORABLE TO DEFENDANT.

When the court submits the issue, and the jury finds the defendant guilty of man-

slaughter in the second degree, in a case where the law and the facts makes the crime murder or manslaughter in the first degree, it is an error in favor of the defendant, of which the law will not take cognizance, and of which the defendant cannot complain.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 842.*]

2. CRIMINAL LAW (§ 1048*)—APPEAL AND ERROR—PRESENTATION BELOW—NECESSITY.

Errors can be made available on appeal only by exceptions duly taken on the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. § 1048.*]

Appeal from District Court, Pontotoc County; Tom D. McKeown, Judge.

G. A. Stewart was convicted of manslaughter in the second degree, and he appeals. Affirmed.

W. T. Anglin, of Calvin, and Crawford & Bolen, of Ada, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Spec. Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error, hereinafter called the defendant, was convicted of manslaughter in the second degree in the district court of Pontotoc county on an information filed in said court February 3, 1910, charging him with the murder of one D. T. Gray in said county on or about the 24th day of December, 1909, and in accordance with the verdict of the jury he was sentenced to imprisonment in the penitentiary for a term of three years. The judgment and sentence was entered March 14, 1911. An appeal was perfected by filing in this court September 13, 1911, a petition in error with case-made.

The facts of this case so far as deemed material to a proper understanding of the questions presented are as follows: It appears from the record that the defendant was a physician with an office in the town of Allen. The killing occurred in the defendant's office on Christmas Eve; the defendant was shot with a 45-caliber pistol, the bullet entered 2½ inches below and back of the left nipple, and came out 3 inches below the right shoulder blade.

Three persons besides the defendant and the deceased were in the room at the time; of these two testified for the state and one for the defendant.

Jim Story testified: That he went with the deceased to Dr. Jones' office, and there found Dr. Jones, Julian Donaghey, and the defendant. That there was a double-barrel shotgun on a table in the room, and the defendant was sitting behind the table. The deceased remarked, "Seems like you are having a jubilee up here." The defendant said, "I have a right to protect my house;" and the deceased answered, "I do not blame you; I would too." The defendant then jumped up, and came out with a six-shooter, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

deceased said, "Don't shoot me, Doc," and walked towards him. The defendant struck the deceased with the six-shooter, and deceased picked up the shotgun, and witness knocked it out of his hands on the floor. Donaghey said, "Jim, you are going to get shot;" and witness got from between them. The defendant and the deceased were then scuffling over the six-shooter; the deceased, holding the muzzle, shoved the defendant down, and the gun went off. The deceased let go of the pistol and grabbed the shotgun, holding the muzzle towards the defendant. The defendant then fired again, and the deceased said, "You have killed me," and laid down and died in a few minutes. The deceased was unarmed. He further testified that the deceased had not made any move to do the defendant any harm at any time before the defendant drew the pistol.

Julian Donaghey testified that he was sitting in the office when Jim Story and the deceased came in, and his testimony was in substance the same as that of witness Jim Story.

Nute Smith, Ebb Ashford, and Ira Singleton testified that they were in the defendant's office a short time before the killing, and Ashford picked the shotgun from the table, and the defendant said "not to be monkeying with it," and took the gun from him, and broke it, and a shell fell out on the floor. The defendant picked the shell up, and put it in his pocket, and breeched the gun; that they were drinking whisky, and the defendant ordered them out of his office, and pushed Nute Smith down the stairs; that they went into a pool hall, and told the deceased about the trouble, and he said, "Take a fool's advice, and stay away from up there."

J. B. Robinson testified that he was in Dr. Means' drug store right under the defendant's office, and heard the shots, and walked out and started up the stairs, and was about two-thirds of the way up when the defendant said, "'Hold on there; don't come up here.' I said, 'This is Banks Robinson;' and he said, 'All right, Banks.' He was standing in the door with the shotgun and a pistol in his hands. I looked around and saw Mr. Gray laying there, and I said, 'Doctor, how come this?' and he said, 'I cannot tell you; it was done so quick that I do not know how it was done; I never was so sorry over anything in my life as this.' I said, 'Doctor, did you kill him with bird shot?' and he said, 'No, Banks, I killed him with buckshot.' As I said this, he unbreeched the shotgun and put in a couple of shells. He asked me to look over the room, and see if I could find any shells. I looked, and found one, a No. 10, loaded with buckshot."

On behalf of the defendant, Sam Weems and Jim Crawford testified that they heard the deceased remark to some one, "I will go up and see if he will kick me out that

way," and a few minutes afterwards they heard the shooting.

Dr. John B. Jones testified: That he officed with Dr. Steward, the defendant; that the deceased, with Jim Story, walked in and said, "You all seem to be having a jubilee up here," and Julian Donaghey said, "No, we are not having a jubilee; but I think a fellow fell down the stairs and cut his hands on a whisky bottle;" and the deceased said, "You need not tell me that is all there was to it, because I know there was something else to it;" and the defendant said, "I do not know that it makes any difference to any one whether there is anything to it; we have to protect our office against any such crowd as that; we are not going to have any drunken crowd around here." That the deceased then advanced forward, and remarked, "'You old son of bitch, what is the matter?' and everything started quicker than you could hardly say." The deceased grabbed the shotgun, and Jim Story grabbed him by the arm, and the gun fell on the floor. Witness grabbed the defendant, and fell on the floor, and the defendant fell over him. That he heard two shots, and as he looked the deceased was holding the shotgun in the defendant's face. The deceased dropped the gun, and grabbed his stomach, and said, "He has killed me."

Tom Smith testified that the defendant had a commission under him as a deputy sheriff.

The defendant did not testify.

On rebuttal several witnesses testified that the deceased had a good reputation as being a peaceable, law-abiding citizen. It was the theory of the state that the homicide was deliberate and malicious. The defense was justifiable homicide in self-defense. The view we are constrained to take of this case renders it unnecessary to pass upon the questions raised by the assignment of errors, except the one that the verdict is contrary to the evidence. Under the evidence in this case as to whether or not the killing was in necessary self-defense was a question of fact for the jury. The right of the defendant to use sufficient force to eject the deceased from his office did not in itself justify his assault by a deadly weapon. If after remonstrance an invasion of the premises of another presumably for the purpose of assault cannot otherwise be prevented, it may be justifiable homicide to kill the person so forcibly invading. Our Code provides (section 2290), in so far as applicable, as follows: "When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is; or, when committed in the lawful defense of such person, * * * when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger

of such design being accomplished." If a man, though in no apparent danger, kills another through fear, undue alarm, or cowardice, under the belief honestly entertained that great personal injury is about to be inflicted upon him, it cannot be claimed that under such circumstances he would be justified in so doing, because the belief would be an unreasonable one, and not justified by the circumstances in which he was placed. The right of self-defense is founded on the law of necessity, and can only be exercised when the slayer is acting under a reasonable belief arising from the circumstances of the case, as they appear to him, that his life is in imminent danger, or that he is in danger of great personal injury, from some overt act of his assailant, and that the danger was so urgent and imminent at the time of the killing that it was necessary for him to take life to protect his own. The reasonableness of the defendant's belief must be determined from his standpoint, but it is a question for the jury as to whether he had sufficient grounds upon which to base such belief. And if there is a conflict in the evidence, or different inferences may be drawn therefrom, it is the province of the jury to weigh the evidence and determine the facts. It is no more the province of the appellate court than of the trial court to determine controverted questions of fact arising upon conflicting evidence.

The instructions of the court fully and fairly covered the law of justifiable homicide in self-defense. The court, however, for some reason not apparent from the record submitted to the jury the issue of manslaughter in the second degree. It must be admitted that the evidence in the case does not show, or tend to show, any of the elements or ingredients of manslaughter in the second degree, even assuming the facts to be as claimed by the defendant, and as shown by the evidence offered on his behalf. Obviously, when the homicide is admitted, and justification in self-defense is relied upon as a defense, there can be no element of manslaughter in the second degree, even where the defendant does not testify as in this case. Our procedure criminal provides that the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information, and "when it appears that a defendant has committed a public offense, and there is reasonable ground or doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degree only." Section 6829 and section 6875. The law makes it, however, the duty of the court in charging the jury, where there is no evidence tending to prove the commission of an offense which is necessarily included in the offense charged, to refuse to instruct on

such included offense or lower degree of the offense charged in the indictment or information, and it is the settled rule of decision in this state that it is the duty of the trial court to say in a homicide case, as a matter of law, whether there is any evidence that would tend to reduce the degree of the offense to manslaughter in the second degree. *Cannon v. Territory*, 1 Okl. Cr. 600, 99 Pac. 622. Says Mr. Wharton: "The province of the court on an issue as to the degree of a homicide is to guide and direct the jury, and keep them within proper bounds. It is its duty to determine whether competent evidence has been introduced, which, if believed by the jury, would furnish the elements or ingredients of any particular grade of homicide." Wharton on Homicide (3d Ed.) p. 241.

There seems to be a growing laxity in the observance of the rule which requires trial courts to confine the instructions to the included offenses or lesser degrees which the evidence tends to prove. While this court has not been called upon to construe our singular constitutional provision (article 2, § 21), "nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted," trial courts should not be unmindful of the fact that it is a matter of grave doubt whether a defendant after having been acquitted of the higher offense and convicted of an included lower or inferior one may again after having secured a new trial be placed upon trial for the higher offense charged in the indictment or information.

[2] In this case the instructions submitting the issue of manslaughter in the second degree were not excepted to by the defendant, and errors can be made available on appeal only by exceptions duly taken on the trial.

[1] If the jury in mercy or sympathy for the defendant or by a mistaken view of the law or the facts finds the defendant guilty of manslaughter in the second degree, in a case where the law and the facts make the crime murder or manslaughter in the first degree, it is an error in favor of the defendant of which the law will not take cognizance and of which the defendant cannot complain. Where the issue has been submitted, the jury have the undoubted power to fix the crime in the lowest degree when it ought under the law and the evidence to be fixed in a higher degree. We have given a careful consideration to this case, and we do not find that any injustice has been done the defendant.

The judgment of the district court of Pontotoc county is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

BROOKS v. STATE.

(Criminal Court of Appeals of Oklahoma.
May 3, 1913.)

(Syllabus by the Court.)

RAPE (§ 52*)—SUFFICIENCY OF EVIDENCE.

In a prosecution for statutory rape, the evidence is held to support the verdict and that no reversible error was committed on the trial. [Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

Appeal from District Court, Le Flore County; W. H. Brown, Judge.

Everett Brooks was convicted of statutory rape, and he appeals. Affirmed.

Tom W. Neal, of Poteau, for plaintiff in error. The Attorney General, for the State.

DOYLE, J. Plaintiff in error, Everett Brooks, was convicted of the crime of statutory rape committed on Maud Alton, an unmarried female over the age of 16 years and under the age of 18 and of previous chaste and virtuous character, on or about June 15, 1910, and in accordance with the verdict of the jury was sentenced to serve a term of five years' imprisonment in the penitentiary. The judgment and sentence was entered November 18, 1911. To reverse the judgment, an appeal by case-made was perfected.

Briefly stated, the salient facts are as follows: Maud Alton's testimony is in part in the words as follows: "He began going with me in the spring after my mother died in the winter. He always seemed to be a very nice young man until along about December, 1909, and then he began to make indecent proposals to me, and I refused him and asked him if I got in a bad condition what would he do. He said he would go to Poteau and get the license and come back and have the ceremony. I never did give up and he always had such talks until in April, 1910, and then he began trying to have intercourse with me and never did succeed until along in June, and then he did have intercourse with me off and on until along in November, and I had never had anything to do with any other young man that way, and in November I got in a bad condition and I told him and he proposed for me to go to my uncle's in Tennessee and get shut of it, and no one here would know anything about it, and I refused to go."

Joe Brooks testified that the defendant said to him: "That Maud Alton was in a bad fix and that she was going to Tennessee, and that she would get shut of the trouble there and that he would bear her expenses; that she says it is mine but 'I'll be damned if I will ever own it,' but that he had had intercourse with her."

Mrs. Tina Brooks testified that she heard the defendant say that he had had inter-

course with Maud Alton and he believed that she was going to lay it on him, and he intended going to the doctors and get something to make her miscarry.

Will Haggard testified that the defendant told him of having had intercourse with Maud Alton.

Lige Alton testified that Maud Alton is his daughter; that she was 17 years of age March 24, 1910; that his wife died in 1905 and his daughter Maud kept house on his farm for his family consisting of her and a younger sister and brother; that the defendant for several years had been calling on his daughter, and they had been going to church, prayer meetings, and entertainments together.

Six or seven witnesses testified to the previous chaste and virtuous character of the prosecutrix.

On behalf of the defense some testimony was offered tending to show that prosecutrix was not of previous chaste and virtuous character. The defendant did not testify on his own behalf.

The petition in error contains many assignments. The principal grounds relied upon for a reversal are based upon the rulings of the court on the admission of testimony and requested instructions refused to be given by the court.

We have carefully examined the record and the rulings complained of and can find no injustice done the defendant upon the trial by the rulings upon the admission of evidence or the instructions of the court. The alleged errors do not seem to us to merit special consideration. The trial was in every respect a fair one, and, considering that want of previous chaste and virtuous character, the only defense relied upon, was but feebly supported by the evidence, we think the only mistake apparent from the record was made by the jury in assessing the minimum punishment prescribed by the law. A case seldom appears in criminal annals showing more depravity in the defendant or a greater outrage to common decency and public morals.

A miscreant who would entice an unsophisticated motherless girl to submit to his lust by pretense of love and promise of marriage, and after his victim's hope, happiness, and life have been essentially destroyed finally adds infamy to his iniquity by attempting to destroy any vestige of character his victim may possess by denouncing her before the world as a wanton, is deserving full measure the punishment prescribed. It is apparent from the record that justice, though somewhat lame, has been long due, but the day of the defendant's atonement is at hand.

The judgment is affirmed. Mandate forthwith.

ARMSTRONG, P. J., and FURMAN, J., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

RHEA v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 19, 1913.)

(Syllabus by the Court.)

1. LARCENY (§ 27*)—PERSONS LIABLE—PRINCIPAL AND ACCESSORY.

The law of Oklahoma (Comp. Laws 1909, § 2045, Penal Code, and section 6715, Procedure Criminal) abolishes the distinction between accessories before the fact and principals, and provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals, and must be charged, tried, and punished as such. And also that no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against a principal.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 55-57; Dec. Dig. § 27.*]

2. CRIMINAL LAW (§ 1159*)—TESTIMONY OF ACCOMPLICE—PROBATIVE EFFECT.

When a defendant is convicted on accomplice testimony, and the evidence is clear and direct, this court will not reverse the judgment of the lower court, unless it is able to say that the record does not contain any evidence, independent of the testimony of the accomplice, which tends to connect the defendant with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. LARCENY (§ 55*) — SUFFICIENCY OF EVIDENCE.

In a prosecution for larceny of live stock, the evidence is *held* to support the verdict, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 187-189; Dec. Dig. § 55.*]

Appeal from District Court, Okfuskee County; John Caruthers, Judge.

Walter Rhea was convicted of cattle stealing, and he appeals. Affirmed.

O. T. Huddleston, of Okemah, and Stewart, Cruce & Gilbert, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and H. A. King, Spec. Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, Walter Rhea, was convicted of the crime of larceny of live stock, and was in accordance with the verdict of the jury sentenced to a term of five years in the penitentiary. The information charged the stealing of three steers from the owner, J. S. Hazelwood. The judgment and sentence was entered May 13, 1911. From the judgment an appeal by case-made was perfected.

The petition sets forth various assignments of error; the only one presented in the brief is that "the verdict of the jury is not supported by sufficient evidence, and the accomplice, Bob Mitchell, is not corroborated by any sufficient evidence to sustain a conviction."

[3] The evidence discloses the facts in the

case to be substantially as follows: The defendant had hired Bob Mitchell and Robey Lovell to steal cattle; they would butcher them on his place and sell the beef through the country, and the proceeds were to be divided equally, one-third each. On the morning of October 18, 1910, the defendant, before leaving home to go to a circus at Weleetka, said to his employes that "he was about out of beef stuff and wanted some brought back." Bob Mitchell went to Weleetka with the defendant that day, and about three miles before they got to Weleetka the defendant showed Mitchell some cattle, and told him to get those on the way back. Late in the afternoon in Weleetka on the same day the defendant told Robey Lovell and Mitchell to get the cattle on their way home that night, after the circus, and told them to meet his brother Rex Rhea on Sand Mountain. About midnight that night these three met on Sand Mountain and went west about half a mile to get the cattle the defendant pointed out to Mitchell. They drove four head out, and after going about a half a mile three head got away. Then Rex Rhea went into J. S. Hazelwood's pasture and drove out three steers, and they together drove them to the defendant's place, and put them in his pasture, where he had told them that afternoon to put them. The defendant returned the next morning and asked Bob Mitchell if he got any cattle, and was told he had, and he asked, "What ones?" and was told, and he said, "That is all right." The next day the defendant had Mitchell and Lovell kill one that was branded. The next night they killed another of Hazelwood's steers, and took the hide together with the first hide, and carried them to the hog pen, and the defendant poured coal oil on them and they burned them. On the Sunday following the defendant heard Hazelwood was hunting his cattle, and he sent Mitchell and Rex Rhea to tie the remaining steer in the timber in the river bottom, and that night the defendant had his employes take the steer to his east pasture. A few days afterwards Hazelwood was at the defendant's place. The defendant denied to Hazelwood of knowing anything about his cattle, and said the beef that Lovell was selling was sold by him to Lovell, and that he did not know what had become of the hides. The defendant then paid Bob Mitchell \$31 and told him to leave the country. Hazelwood found the steer that had not been killed in the defendant's east pasture.

Several witnesses testified to seeing three men driving four head of cattle along the road from Hazelwood's pasture towards the defendant's house that night, and that Robey Lovell was peddling beef through the country about that time. The heads of the two steers that had been butchered were found on the defendant's place.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The learned counsel for the defendant contend that the testimony shows beyond question that the larceny of the cattle that the defendant had advised was complete before it ever entered the minds of any of the thieves to steal Hazelwood's cattle, and that the defendant had no knowledge of the fact that Mitchell, Lovell, and Rex Rhea intended to steal Hazelwood's cattle, and that the testimony only tends to show that the defendant was guilty of receiving stolen property knowing the same to have been stolen. We do not think this contention is well founded.

[1] At common law an accessory before the fact is one who being present at the time of the commission of the crime doth yet procure, counsel, or command another to commit a crime. "It is likewise the rule that he who in any wise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other." Blackstone, 35, 1 Hale P. C. 617. It is the law of this state that: "All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals." Penal Code, § 2045. And section 6715, Procedure Criminal, provides: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals and no additional facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." We think that the evidence on behalf of the prosecution not only shows that the defendant and his employes conspired to steal cattle, and that the taking of the cattle in question was in pursuance of this common design, and that the act of the defendant in pointing out the cattle first stolen on the night in question was merely incidental to the common design, but that he assisted in concealing and disposing of the property stolen, while the original asportation was in progress. Larceny has been held to be a continuing offense, and when there is one continuing transaction, though there may be several distinct asportations in law, yet all who concur are guilty, though they were not privy to the first or intermediate act. *Brown v. State*, 7 Okl. Cr. 678, 126 Pac. 263. In *Pearce v. Territory*, 11 Okl. 438, 68 Pac. 504, it is held: "That the defendant was a principal in the commission of the larceny, although the agreement or arrangement was entered into in another county and the defendant was not present at the time the stolen property was taken

from the owner thereof; and further held that the district court of the county in which the property was stolen had jurisdiction to indict and try the defendant as principal in the commission of said offense." The opinion of Mr. Justice Hainer in that case presents an elaborate discussion of the question under consideration, and the doctrine therein announced on an appeal to the United States Circuit Court of Appeals was approved. *Pearce v. Territory of Oklahoma*, 118 Fed. 425, 55 C. C. A. 550. McClain in his work on Criminal Law, § 196, says: "Every one connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination perpetrated in the prosecution of the common design. But it is not necessary that the crime committed shall have been originally intended. Each is accountable for all the acts of the others done in carrying out the common purpose, whether such acts were originally contemplated or not, if they were the natural and proximate result of carrying out such purpose; and the question whether or not the result is the natural and probable effect of the wrongful act intended is for the jury." And in section 573 says: "To be a principal one must have taken the property or assisted in the taking, and all persons who counsel, aid and abet, or advise, are equally guilty as accessories before the fact with those who actually commit the offense. One who forms or combines in the general plan and assists in receiving and disposing of the property is a principal, though not present at the taking."

[2] The credibility of witnesses and the weight and value to be given their testimony was a question solely for the jury's determination, and it is the settled rule of decision of this state that, if there is evidence which corroborates the testimony of an accomplice and conduces to connect the defendant with the commission of the crime, its sufficiency is for the jury to determine. *McGill v. State*, 6 Okl. Cr. 512, 120 Pac. 297; *Alderman v. Territory*, 1 Okl. Cr. 562, 98 Pac. 1028.

The defendant took the stand in his own behalf, and denied any knowledge of or participation in the theft of Hazelwood's cattle, but no explanation was offered of the incriminating circumstances surrounding the larceny, nor his possession of the stolen cattle. We think the evidence discloses a well-planned conspiracy to steal cattle, and that the cattle in question were stolen in pursuance of this conspiracy, and that the evidence independent of the accomplice's testimony is sufficient to sustain the verdict of the jury.

There being no error in the record, the judgment of the district court of Okfuskee county is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

MORRIS v. STATE.

(Criminal Court of Appeals of Oklahoma.
April 26, 1913.)

(Syllabus by the Court.)

1. RAPE (§ 13*)—"RAPE IN SECOND DEGREE"
—ELEMENTS OF OFFENSE.

An act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under the age of 16 years is rape in the second degree, whether such act is accomplished by means of force or with consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 12; Dec. Dig. § 13.*]

2. CRIMINAL LAW (§ 369*) — EVIDENCE OF
OTHER OFFENSES.

The general rule that proof of other offenses is inadmissible unless a part of the res gestæ does not apply to offenses involving sexual intercourse; and evidence of other acts is admissible to show the relation and familiarity of the parties, and as tending to corroborate the testimony of the prosecutrix as to the particular act relied on for conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 369*) — EVIDENCE OF
OTHER OFFENSES.

In a prosecution for statutory rape evidence is admissible of sexual acts between the prosecutrix and the defendant prior to and subsequent to the one charged and relied upon for a conviction, as indicating continuousness of the illicit relation. In so far as the case of Cecil v. Territory, 16 Okl. 197, 82 Pac. 654, 8 Ann. Cas. 457, conflicts herewith, it is overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

4. CRIMINAL LAW (§§ 406, 413*)—SELF-SERV-
ING ACTS—ADMISSION OF EVIDENCE.

A defendant cannot introduce evidence of his own self-serving acts and declarations not constituting a part of the res gestæ, and he is not bound to make an effort to show that some other person is guilty of the crime for which he stands charged, at the peril of furnishing by his failure to act or by his silence, evidence against himself when on trial upon the charge, and the admission of such evidence over his objection, constitutes reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927, 928-935; Dec. Dig. §§ 406, 413.*]

5. CRIMINAL LAW (§ 1171*)—ARGUMENT OF
COUNSEL.

The state, in a criminal prosecution, does not seek a conviction unless the evidence shows guilt beyond a reasonable doubt. Nor will it permit its prosecuting officer to use any unfair means in the trial, or illegal argument in his address to the jury, to the prejudice of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

6. RAPE (§ 54*)—EVIDENCE OF PROSECUTRIX
—CORROBORATION—NECESSITY.

While it is the law that a conviction for rape may be sustained upon the uncorroborated evidence of the prosecutrix, it is nevertheless equally well settled that, when such evidence is inherently improbable and almost incredible, there must be corroboration by other evidence as to the principal facts to sustain a conviction.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

Error from District Court, Greer County; G. A. Brown, Judge.

R. E. L. Morris was convicted of statutory rape, and brings error. Reversed.

A. R. Garrett, of Granite, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, hereinafter referred to as the defendant, was, in the district court of Greer county, convicted under an information filed in said court May 9, 1910, the charging part of which is as follows: "On or about the 6th day of June, 1909, in the county of Greer, state of Oklahoma, one R. E. L. Morris, a male person, did then and there unlawfully and feloniously have, commit, and accomplish an act of sexual intercourse with Lola Morris, a female person, and did then and there carnally know and ravish the said Lola Morris; she (the said Lola Morris) being then and there under the age of 16 years and not the wife of the said R. E. L. Morris." The judgment and sentence of the court entered July 18, 1911, was that he serve a term of 50 years' imprisonment. To reverse the judgment, an appeal by case-made was perfected.

The facts and circumstances surrounding this case, as disclosed by the evidence, are as follows: The defendant, when 20 years of age, married a widow 31 years of age; she having four children at the time. They lived together in Mississippi, where they were married, for about eight years, and then separated. Three children were born of this marriage. About one year after the separation, the wife moved to Texas with the children. Between three and four years later, after some correspondence between the defendant and his wife regarding their children, he went to Texas and with their mother's consent took his two oldest daughters to Oklahoma and went to farming; his mother keeping house for him.

The conviction was had upon the uncorroborated testimony of the defendant's oldest daughter, Lola Morris, who testified, in substance, that she and her next younger sister went to live with her father and his mother in March, 1905, near Granite, Okl. That in June, 1905, they moved to Caddo county and lived with one of her father's brothers, and while there she and her sister used to sleep on a pallet on the floor in a room with their grandmother, and there her father had sexual intercourse with her the first time by coming to her pallet. That at that time she was 12 years of age. That he repeated the act three or four times a week while they were at his brothers'. That in a short time they moved to another place in Caddo county and lived there in a house of one room for about a year, and the defendant continued to have intercourse with her every night or two while they lived there. That they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then moved back to Greer county, and in 1909 they lived near Reed. That the defendant continued to have intercourse with her off and on all the time while he was at home. That here they lived in a two-room house; the defendant and his mother had beds in one room, and she and her sister had a bed on the floor in the other room, where it was his habit to come and have intercourse with her. That on Sunday night, June 6, 1909, the time alleged in the information, he had intercourse with her, and as the result she became pregnant and gave birth to a child March 2, 1910. She was then asked whether or not the defendant continued to have sexual intercourse with her after the act on the first Sunday in June, 1909, and over the objection of the defendant answered: "A. Well, he continued on; he was not at home all the time, but once in a while he would be and when he was there it was every night or two. He was gone two weeks at a time, but never gone over two weeks at a time, and when he was there it was every night that he had intercourse with me up until the last part of August or the first of September." That her grandmother and sister had no knowledge of the defendant's improper relations with her. She further testified that along in October or November he tried in various ways to cause her to miscarry and gave her medicine to cause a miscarriage, and that he said "he didn't want any one to know that it was him;" and "he told me to tell that it was some one else; that I didn't know;" and "he told me to tell that I was out walking one evening, somewhere about dusk, and that a man passed by and stopped and had intercourse with me;" and "that this man came two or three nights after that to my bed in my room." That she told this story first to Mrs. Meade when she was confined, and afterwards to Mr. Henry, the county attorney, and to Sheriff Tittle. And also told the same story to the defendant's attorneys, and that Lawyer Morris said that, if her father was guilty, he would not defend him, and she told him her father was not guilty. That after her mother had been with her a month she first told the truth by making a statement at her uncle's, her mother's brother, in accordance with her testimony. She also stated that her father took her and her sister to Sunday school whenever he was at home. She further stated that she played dominoes with a boy about her own age while she was herding cows, and that there was a water hole near the house and the neighbors' boys would come up there to water their horses, and sometimes they would come to the well and to the house for a drink when her father was away from home. That there was one boy that wanted to take her buggy riding, but her father told her she could not go and he would not allow her to keep company with the boys or go

driving with them, and she said, "I guess I can go with them when I am 16;" and he said, "I will see about it;" that she "thought a right smart of a boy down there, but he was not exactly a lover;" his name was Will Alexander. That she went back to Texas with her mother and there married D. W. Baldock.

Ethel Tolliver, a half-sister, testified that Lola Morris would be 18 years of age August 1, 1911.

Pauline Morris testified that she was 14 years old January 21, 1909, and had lived with her sister, father, and grandmother for several years. She was then asked and permitted to answer over the defendant's objection: "Did your father ever make any effort to find out who was the father of that child, as far as you know? A. No, sir."

On behalf of the defendant, Sheriff Tittle testified that he heard Mr. Morris, an attorney, ask Lola Morris if her father was the father of the child and she answered that he was not. That, when the defendant's attorneys insisted that she tell the truth of the matter, "she said she first met a man out from the house and afterwards he had been at the house." That at the time of this trial the defendant had been in his custody in the jail for ten months.

J. W. Morris, a brother of the defendant, testified that after her confinement he heard her tell the defendant's mother that there were three persons she had improper relations with; two of their names she did not know, and the other was a young man named "Knight," and he had left the country, but she did not know who was the father of her child.

The testimony of Mrs. J. W. Morris was substantially to the same effect.

Mrs. Meade testified that she was with Lola Morris during her confinement and questioned her about who was the father of the child and she answered that she did not know.

W. E. Meade testified that in 1909 he lived one-half mile from the defendant; that there was a locust grove of about two acres near the defendant's house; that Mr. Pressley farmed the land around the house and he had two sons, one grown, the other about 16 years old; that he frequently saw young men go to the defendant's house or about the house.

Several character witnesses testified that they knew the reputation of R. E. L. Morris in the Reed community as to being a moral man and that his reputation was good.

The defendant, as a witness on his own behalf, testified that during the year 1909 he traveled selling medicine, making regular trips of from one to two weeks; that his mother kept house and cared for his two daughters, Lola and Pauline; that his mother was aged and her health was poor, and that she had died shortly after his arrest; that his brother Rev. A. M. Morris lived a

near neighbor. He denied having had improper relations of any kind at any time or at any place with his daughter Lola, and testified directly contrary to her on all material points. He stated that she told him Mack Alexander's boy, about 19 years of age, often came there and talked to her; that Mr. Pressley cultivated the place he lived on and he had two boys nearly grown; that Mr. Richardson had 50 head of hogs in a pasture there that summer and his two sons were there every day he was at home, drawing water from the well for the hogs; that Mr. Rogers, a neighbor, had two unmarried boys at home that were often about his place; and that Mr. Depew had sons that were about grown, and that Mr. Higgins had a hired man working on the crop there. That the first he knew of the trouble his mother told him that Lola's monthly periods failed and he would have to get some medicine for her, so he obtained some Wine of Cardui from a merchant at Reed, and his mother informed him every time he came home that it did not have the proper effect. That after using three bottles his mother said to him, "I am afraid that your daughter is ruined." When he found out the condition that she was in he asked her about it. She claimed that she did not know anything for some time; finally she claimed "that she had met a party up the road, and later on some one had come to her bed when she was sleeping in the doorway." He denied advising her to procure a miscarriage; also that he advised her to make any statement about how she got that way. And the reason that he never inquired of his daughter Pauline about the matter was, "I considered it too delicate a matter to talk to a child of her age upon any such subject." That Mr. Pressley and Mr. Depew were the originators of the rumors against him and went about trying to get some one to make an affidavit against him. That, "after they failed on that, then they put up a correspondence between the mother and got her to come up here and make the affidavit and I was arrested on her information," and that "Mr. Pressley and Mr. Depew had disagreed with him on religious points and they disliked him very much."

[1] The first assignment of error is that the court erred in overruling the defendant's demurrer to the information. We think the demurrer was properly overruled.

In the case of *Myers v. State*, 6 Okl. Cr. 389, 119 Pac. 136, it is said: "The allegation, 'rape, ravish, and carnally know,' would be fully sustained by proof of carnal intercourse with a female under the age of 16 years. Whether the act is accomplished by means of force or with consent is immaterial. Therefore this clause did not extend, limit, or modify the crime charged, and might have been omitted. However, it is not inconsistent, and, at most, it may be treated as mere redundancy." The information was sufficient.

[2, 3] Certain assignments of error are based upon the rulings of the court on the admission of testimony. Now, as to these alleged errors, complaint is made to the ruling of the court admitting evidence of acts of sexual intercourse subsequent to the one charged in the information. In support of this contention counsel cites the case of *Cecil v. Territory*, 16 Okl. 197, 82 Pac. 654, 8 Ann. Cas. 457, and quotes from the opinion the following language: "While, as above stated, former acts of sexual intercourse may be considered by the jury as corroborating evidence, it is just as well settled that such acts, occurring subsequent to the one charged and relied on for conviction, cannot be considered by the jury as corroborating evidence or for any other purpose, for they have no such tendency. Such evidence would amount simply to proving separate and distinct offenses for the purpose of rendering it more probable in the minds of the jury that the defendant committed the crime charged in the indictment."

The question is one upon which the decisions are in conflict, but by the later and better authorities the question is well settled in favor of the rule that in this class of cases evidence of acts occurring subsequent to the act for which the defendant is being tried are admissible, although such subsequent act is in and of itself a crime.

In *State v. Stone*, 74 Kan. 189, 85 Pac. 808, a prosecution for carnally knowing a female under the age of 18 years, it was held that the admission of evidence of subsequent acts of intercourse, which occurred as late as 15 months after the acts charged in the information, was not error. The rule announced in this case was approved by the same court in the case of *State v. Brown*, 85 Kan. 418, 116 Pac. 508. Johnston, C. J., in delivering the opinion, said: "While in that case the subsequent acts were somewhat remote, there were circumstances tending to show continuousness of illicit relations. In the opinion it was said: 'Subsequent intimacy does illustrate the prior dispositions of individuals of opposite sex toward each other, and the question is how far derivable inferences may be carried backward. Manifestly this is, in the main, a question of weight and not of relevancy.' There was an effort made to have the court modify the doctrine of *State v. Stone* in *State v. Hibbard*, 76 Kan. 376, 92 Pac. 304, but after a reconsideration of the question and the authorities the rule admitting evidence of acts of sexual intercourse occurring after the one upon which a conviction is sought was reaffirmed, and it was held that the doctrine was sustained 'not only by the better reason but by the greater weight of authority.'"

In the case of *Woodruff v. State*, 72 Neb. 815, 101 N. W. 114, it is said: "The fact, if it be one, that the evidence tends to prove another and independent crime does not necessarily determine its admissibility as evi-

dence of the crime charged in the case at bar. The determinative question is, Is it relevant and pertinent in establishing the offense charged, and does it throw some light on that controversy and assist in the ascertainment of the truth in respect of such charge? We feel confident in the correctness of our position in saying that it does; and, if believed, the evidence is corroborative of the ultimate fact sought to be proven; that is, the act of sexual intercourse as charged in the information." The rule announced in this case was approved by the same court in the case of *Leedom v. State*, 81 Neb. 585, 116 N. W. 496. Barnes, C. J., delivering the opinion of the court, said: "That this evidence was introduced solely for the purpose of corroborating the prosecutrix as to the principal fact of her having had sexual intercourse with the defendant on the 20th day of July, 1906, was well understood; and it, as well as other acts of the same kind, which were related in time, and took place subsequently to the one specifically charged in the information, was admissible for that purpose. *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *State v. Robertson*, 121 N. C. 551, 28 S. E. 59; *Smith v. Commonwealth*, 109 Ky. 685, 60 S. W. 531; *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972; *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108."

The question here involved is discussed in all its phases by Prof. Wigmore in his work on Evidence (volume 1, para. 216, 398, and 399), wherein his conclusion is stated as follows: "That this desire at a prior or subsequent time is relevant to show the probable existence of the same desire at the time in issue is equally clear. The limits of time over which the evidence may range must depend largely on the circumstances of each case, and should be left to the discretion of the trial court. A subsequent existence of the desire is equally relevant with a prior one. It is true that the contingencies of error are different (i. e., in the former case the desire may have been first induced by intervening circumstances, in the latter it may have been ended by them); but the strength of these contingencies is no greater in one instance than in the other. If for example, the parties have been intimate during the entire year 1890, and an act of adultery is charged on July 1st, an adulterous desire on December 31st carries no less persuasive weight than an adulterous desire on January 1st. That there is any distinction is generally repudiated. The conduct receivable to prove this desire at such prior or subsequent time is whatever would naturally be interpretable as the expression of sexual desire. Sexual intercourse is the typical sort of such conduct, but indecent or otherwise improper familiarities are equally significant. That the intercourse is also itself criminal is no objection."

On reason and by the great weight of au-

thority, we think the correct rule is that, in a prosecution for "statutory" rape, evidence of other acts of sexual intercourse between the same parties is admissible, including evidence of acts committed subsequent to the particular act relied upon for conviction, even though it proves other and distinctive offenses as relevant to show the true relation of the parties to each other, and to characterize and explain the act for which the defendant is on trial. It is the general desire to satisfy lust that is involved in this class of cases, and this character of evidence tends to show lustful desire and disposition by showing continuousness of the illicit relation. However, the limits of time over which evidence of this kind may range is largely within the legal discretion of the trial court. In so far as the case of *Ocdl v. Territory of Oklahoma*, supra, conflicts with this opinion, it is overruled.

[4] The state, over the defendant's objections, was permitted to show by the testimony of several witnesses that, so far as they knew, the defendant made no effort to find out who caused his daughter to become pregnant. As an instance, F. M. Pickard testified that he was a deputy sheriff. The transcript then shows the following questions and answers given over the defendant's objections: "Q. Did he solicit your aid to find out who was the father of the child? A. No, sir. He never did. Q. When you went out to arrest him, did you discuss this subject; the subject of his being the father of the child? A. He didn't have very much to say about it at that time. Q. Up to the present time, has he ever solicited your aid to get the young man whom he claimed was the father of the child? A. Mr. Morris never talked to me or asked my assistance to get any one or help him in any way that I remember. Q. Did he make any efforts to find out who was the father of the child as far as you know? A. Mr. Morris has never made any pretense toward asking me to help him find out who was the father of that child. Q. Did he ever make any pretenses towards asking anybody else or making any effort to find out, as far as you know? A. No, sir; he never did." This testimony and other testimony of like character was clearly inadmissible. A defendant cannot introduce evidence of his own self-serving acts and declarations not constituting a part of the *res gestæ*, and surely it cannot be that there is any such anomaly in the criminal law or rules of evidence as is involved in the proposition that a defendant charged by indictment or information is bound to make an effort to show that some other person is guilty of the crime for which he stands charged, at the peril of furnishing, by his failure to act or by his silence, evidence against himself when on trial upon the charge. Manifestly the object of this method of proof was to impress the jury with the idea that, if the defendant was not guilty, it was his duty to show who

was the guilty party. We think the testimony elicited by the questions asked was prejudicial to the substantial rights of the defendant.

[5] Another error assigned is based upon the record as follows: "Bill of Exceptions No. 2: Be it remembered, that upon the trial of the above-entitled and numbered cause, the following proceedings were had, to wit: H. D. Henry, the county attorney, was addressing the jury in the opening argument for the state, and was referring to the evidence of S. H. Tittle wherein Tittle had testified that he was present in the spring of 1910 in Mangum when the prosecuting witness, Lola Morris, was present and A. R. Garrett, A. J. Morris, attorneys for the defendant, and said Morris and Garrett had a conversation with her and in which conversation the said Morris asked Lola Morris who was the father of her child, and urged her to tell who the father was, and in which conversation the witness Lola Morris denied that her father was the father of her child, and the attorney Morris told the said Lola Morris it was her duty to tell it if her father was guilty, and that he (Morris) would not appear and defend her father if he was guilty, and if she said he was guilty he would not represent her father, and in this connection the county attorney, H. D. Henry, said 'I don't know why Morris is not here,' to which statement the defendant's attorney excepted, and the court not having heard the statement, being some distance from the county attorney at the time it was made, permitted the argument to continue, and the county attorney again repeated, 'That he did not know why Morris [meaning the attorney for the defendant] was not here,' and again the defendant excepted. Whereupon the court, addressing Mr. Henry, said, 'Why do you repeat this and refer to this matter,' and Mr. Henry replied, 'It is a part of the record, and I have a right to refer to it; it was unexplained why Morris was not here.' Again the defendant excepted to the remarks of the county attorney, and the court then and there reprimanded the county attorney and instructed the jury that they should not consider said remark, and should not consider why the said Morris was not present; that his absence had nothing to do with the case, and that the defendant must be tried upon the evidence alone, and told the county attorney he must not refer to this matter again. Which bill of exceptions is here allowed as being true and correct with the following qualifications, viz.: At the time of defendant's exception, the counsel, assisting in the prosecution, stated in the presence and hearing of the jury that the state did not claim the attorney A. J. Morris had quit the defense because the prosecuting witness had said defendant was the father of her child or was guilty of the charge against him. G. A. Brown, Judge."

While prosecuting attorneys are not ex-

pected to maintain a judicial impartiality, yet it is their duty to present a case fairly and justly. Obviously these remarks were highly improper as a comment upon facts not in evidence before the jury and not legally competent and admissible in evidence. The fact that the court rebuked the county attorney and withdrew his remarks from the consideration of the jury may have cured the vice, yet we are unable to disabuse our minds of the conviction that, all the circumstances being considered, the defendant may have been seriously prejudiced.

[6] Finally it is contended that the evidence is insufficient to justify or sustain the verdict in that there is no corroborating evidence nor a single corroborating circumstance tending to connect the defendant with the commission of the crime. This court does not hold with some that, as a matter of law, rape cannot be established by the uncorroborated testimony of the prosecutrix, but in common with all courts recognizes that, without such corroboration, her testimony must be clear and convincing. And, where the testimony of the prosecutrix bears upon its face inherent evidence of improbability, there should be corroboration by other evidence, connecting the defendant with the commission of the crime. The law is that the life or liberty of a citizen shall be taken only in case the right to do so is established beyond all reasonable doubt; and while there is no rule of law which forbids a jury to convict of rape on the uncorroborated testimony of the prosecutrix, provided they are satisfied beyond a reasonable doubt of the truth of her testimony, yet the courts have always recognized the danger of conviction on her uncorroborated testimony, and the testimony of the prosecutrix, if inherently improbable and uncorroborated, will not justify or support a conviction; as the only reasonable conclusion in such cases is that such verdicts are the result of passion or prejudice, and therefore contrary to law. The testimony of the prosecutrix that the incestuous relations continued for nearly five years without being detected or discovered by her grandmother or her sister, one or both being present in the room at all times, is incredible. The evidence shows an intense enmity existing for many years between her father and her mother, and it is significant that she had been with her mother more than a month before she changed her former statements by making this unsupported charge against her father. And there is no claim of threats or fear in explanation of her delay in making this statement. The opportunity was ample, and it seems far more probable that some of the young men that the evidence shows frequented her home was the father of her child; and when we consider the testimony of the prosecutrix as a whole with its contradictions and inconsistencies, and that the facts and circumstances in evidence all tend to discredit her,

and consider that the evidence of the defendant's character for virtue and morality, and that he constantly during these years attended church and Sunday school with his two daughters, is uncontradicted, we cannot help but think that the testimony of the prosecutrix was maliciously inspired and that the verdict was more the result of prejudice or public sentiment than the calm and dispassionate conclusion of the jury upon the facts in evidence.

In the case of *State v. Gooddale*, 210 Mo. 275, 109 S. W. 9, the Supreme Court of Missouri says in discussing a case of this character: "The all-important question on this appeal is whether the testimony in this case is sufficient to sustain the conviction of the defendant. The admonition of Lord Hale that 'it must be remembered that this is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent,' must be heeded. While it is the law of this state, as in most others, where not modified by statute, that a conviction for rape may be sustained upon the uncorroborated evidence of the outraged female, it is nevertheless equally well settled that the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and, if it appears incredible and too unsubstantial to make it the basis of a judgment, will reverse the judgment. While, on the one hand, it will not do to hold that, because the evidence indicates a depravity not ordinarily witnessed among men, it must be rejected, because the annals of crime are replete with examples wherein the most sacred relations have been disregarded and the testimony left no room for a reasonable doubt of the guilt of the accused, yet, on the other, many well-authenticated decisions attest that this charge has often been the result of malice and hidden motives, and the courts have refused to permit convictions to stand because of the utter improbability of the testimony, in the light of the conceded circumstances. Instinctively the character of the accused and of his accuser is a prime consideration." In that case the court reversed the judgment on account of the unreasonableness of the evidence of the prosecuting witness, although it was a case in which an uncle was charged with rape upon his niece. The evidence in this case is far more unreasonable than the evidence in that case; and in this case, as in that, the record would give to defendant an unimpeachable character." See, also, *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *Mares v. Territory*, 10 N. M. 770, 65 Pac. 165; *Monroe v. State*, 71 Miss. 196, 13 South. 884; *Logan v. State*, 148 S. W. 713. The instructions correctly and fairly state the law, and the single objection thereto made is without merit.

It appears from the record that this con-

viction was upon a second trial, and that the defendant, being unable to give bail in the amount fixed, has now been confined almost three years. It is our opinion that the errors considered, other than the sufficiency of the evidence, require a reversal of the judgment, because the defendant was thereby denied that fair and impartial trial which the law prescribes for a person charged with crime. It is our opinion, also, that no person should be convicted of crime on such improbable, discredited, and unreasonable evidence as that given by the prosecutrix in this case.

The judgment of the district court of Greer county is therefore reversed, and the defendant discharged.

ARMSTRONG, P. J., and FURMAN, J., concur.

FOSTER v. UNIVERSITY LUMBER & SHINGLE CO.

(Supreme Court of Oregon. April 22, 1913.)

1. APPEAL AND ERROR (§ 987*)—QUESTIONS OF FACT—CONCLUSIVENESS OF VERDICT.

Under Const. art. 7, § 3, as amended November 8, 1910 (see Laws 1911, p. 7), declaring that no fact tried by a jury shall be otherwise re-examined, unless the court can affirmatively say there is no evidence to support the verdict, evidence held sufficient to go to the jury on the issue whether plaintiff's release of his claim for damages from an accident while in defendant's employ was signed while he was in no condition, by reason of sickness and pain, to read or understand the contents of the paper signed by him, that he did not intend to release his claim against the employer, and, that the release so procured was unfair and fraudulent so that the jury's finding on such issues could not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.*]

2. CONTRACTS (§ 93*)—RELEASE (§ 16*)—VALIDITY—ESTOPPEL.

Under ordinary circumstances, one is not excused from the consequences of signing a paper, as a release, which he has negligently failed to read.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93; Release, Cent. Dig. § 31; Dec. Dig. § 16.*]

3. APPEAL AND ERROR (§ 994*)—QUESTIONS OF FACT—VERDICT.

A party's statement of fact accepted by the jury must be taken as true on appeal by the other party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

4. NEGLIGENCE (§ 131*)—ACTION FOR INJURIES—ADMISSIBILITY OF EVIDENCE—SUBSEQUENT REPAIRS—CONDITION AT AND AFTER INJURY.

While evidence of subsequent repairs and improvements is inadmissible to show previous negligence, yet, where the jury has been permitted to view the machinery, evidence that it has been repaired or altered subsequent to the accident is admissible to show its condition at the time of the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 255, 256; Dec. Dig. § 131.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. APPEAL AND ERROR (§§ 206, 281*)—ADMISSIBILITY OF EVIDENCE—NECESSITY OF SPECIFIC OBJECTION.

A defendant who objected generally to the admissibility of evidence competent for certain purposes but not for others, and who requested no limitation as to its effect, cannot on appeal complain of its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1283-1289, 1299, 1302½, 1352; Dec. Dig. §§ 206, 281.*]

6. PLEADING (§ 436*)—CURE BY VERDICT—REPLY.

A replication in a servant's action for injuries, denying the execution of the release set up by the answer, and alleging that fellow workmen subscribed money for him after his injury, and that defendant's manager agreed to assist them to the same extent, and that, while he was suffering from his injury, he was directed to see the manager and receive the money so subscribed, and that the manager requested him to sign a paper and falsely and fraudulently represented that it was a receipt for the money so subscribed by the employes and by himself, and would not release the company from damages, was sufficient, after verdict, to justify reception of evidence as to fraud in procuring the release.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1482, 1483; Dec. Dig. § 436.*]

7. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An instruction that a master's duty as to a reasonably safe place and appliances for work is greater than that required of the servant, and he may be chargeable in certain circumstances with negligence in this respect in failing to ascertain a danger where a servant would not, while not to be commended if standing alone, yet is not objectionable when taken in connection with the entire charge fully and fairly presenting the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

8. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS GIVEN.

In a servant's action for injuries, the refusal to instruct for defendant that one cannot be heard to say that he did not know the contents of a release signed by him and which he had an opportunity to read was not error, where the court gave a general instruction that the release was regular upon its face and was presumed to have been executed in good faith, and that the burden of proving fraud was upon the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

9. APPEAL AND ERROR (§ 930*)—REVIEW—PRESUMPTIONS—RECEIVING VERDICT IN ABSENCE OF COURT.

Where it was agreed that a jury might return their sealed verdict to the bailiff and disperse, and no objection was made at the time such agreement was stated by the court or when the bailiff delivered the verdict to the court, nor until a motion for new trial was filed, it will be assumed that counsel consented to the separation of the jury and to the reception of the verdict in their absence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

Burnett, J., dissenting.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Charles L. Foster against the

University Lumber & Shingle Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for personal injuries sustained by plaintiff. The complaint alleges, in substance: That plaintiff was employed by defendant as a sawyer in its shingle mill. That defendant had placed in its mill a jointer saw, and had constructed and placed over and above the saw a guard for the purpose of preventing injury to the employes in and about the mill, and to prevent injury to the person by reason of coming in contact with the saw. That on November 12, 1910, while plaintiff was working at said machine, by reason of the crowded condition of the place where he was so working, he stumbled and reached for and placed his hand upon said guard to prevent himself from falling. That said guard was loose and moved and sprung over so that plaintiff's left hand went down upon the jointer saw, which was revolving at a rapid rate of speed, and thereby all the fingers and part of the thumb of his left hand were cut and severed from his hand, inflicting permanent injury. That the defendant carelessly and negligently failed and neglected to furnish a safe place and machinery for the plaintiff to work in and with upon the occasion referred to in this: That the defendant carelessly and negligently failed to have the said guard properly fastened and secure at the time the said accident occurred, and carelessly and negligently suffered and allowed said guard to become loose and insecure and unsafe, and permitted the same to remain unsafe and insecure. That the defendant at and before the time of the said accident, by the exercise of reasonable diligence, ought to have known of the dangerous condition of the said saw and guard, and of the looseness of the said guard, and of its insecurity and unsafeness, and that the defendant did have notice and knowledge of the same, and that defendant carelessly and negligently failed and neglected to notify or warn or instruct or inform this plaintiff of the dangerous condition of the said saw and guard or of any condition of the said guard or saw. That the plaintiff had no notice or knowledge of the existence of the dangerous condition of the said guard or that the same was loose or insecure, but believed that the same was safe, permanent, and strong, and properly fastened. Defendant answered, denying negligence on its part and pleading contributory negligence and assumption of risk by plaintiff, and also pleaded a written release by plaintiff of all damages by reason of the accident. By way of reply plaintiff denied the execution of the release and further alleged as follows: "The plaintiff, further replying to the said second and separate defense herein, alleges that on or about the 19th day of November, 1910, the employes in and about the mill of the said defendant,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—47

by and on account of the injury to the plaintiff, subscribed a sum of money for the plaintiff and placed the same in the hands of J. Kroenert, who is and was at said time the president and general manager of the defendant. That the said Kroenert promised and agreed that he would assist this plaintiff personally to the same extent as did the employees, and that while this plaintiff was suffering from the injuries to his left hand as set out in the complaint herein, and while he was suffering from the effects of the anæsthetic administered to him at the time of the amputation of the fingers from his left hand, this plaintiff was ordered and directed to go to the said J. Kroenert to receive the money so subscribed. That plaintiff went to the office of said Kroenert. That thereupon the said Kroenert requested him to sign a paper, and falsely and fraudulently and unlawfully, and with intent to deceive and defraud this plaintiff, represented that the said paper was a receipt for the money so subscribed by the employees and by himself, and that the same was not intended and would not release the company from the damages sustained by this plaintiff, and that the defendant would continually employ the plaintiff in and about the mill and premises and pay to him the sum of \$75 each and every month as long as the mill continued to stand. That relying upon the representation so made, and being sick and ill as aforesaid, this plaintiff signed the pretended release."

After the evidence had been introduced defendant asked the following instructions, which were refused: "I instruct you that it is a general rule that the plaintiff cannot be heard to say that he did not know the contents of the release or the paper signed by him when he had an opportunity to read it. * * * I instruct you to bring in your verdict in favor of the defendant." In instructing the jury, the court used the following language, which was excepted to by defendant: "The degree of care which the law requires of a master with reference to a reasonably safe place and to reasonably safe machinery and appliances is greater comparatively than that required of the servant, and the master may be chargeable in certain circumstances with negligence in this respect in failing to ascertain the danger where a servant would not." The court also gave the following direction to the jury: "It is agreed that, in case you return a verdict after I have left the courthouse, you may return a sealed verdict, and in that case all members of the jury agreeing must sign the verdict, and then you will hand it to the bailiff and then be discharged, and you may disperse to your homes, and, this being the last jury upon which you will sit, you will not be obliged to return." No objection was made to this direction. The jury found a majority verdict against defendant for \$8,000, which they sealed and delivered to the bailiff, as directed, and dispersed. The verdict so sealed

was handed to the court the next morning, and, though opened and read in the presence of counsel for both parties, no objection was made to the absence of the jury nor to any irregularity in the reception of the verdict. Counsel for defendant asked and were granted 40 days in which to move for a new trial, and in said motion for the first time raised the objection, among others, that the verdict was not delivered in open court in the presence of the jury. The court rendered judgment upon the verdict in favor of plaintiff, and defendant appeals.

S. C. Spencer, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. John Ditchburn and F. S. Wilhelm, both of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] The first question arises upon the validity of the release executed by plaintiff. By the provisions of section 8, art. 7, of the Constitution, as amended November 8, 1910 (see Laws 1911, p. 7), if there is any evidence to support the verdict, we are bound by the finding of the jury, and therefore we are to a great extent bound by the testimony of plaintiff upon this point.

This testimony is substantially that one Porteous, the night foreman of the mill, visited him shortly after the accident, identified himself as a brother in the same secret order, and advised him not to sue the company, telling him that he had not a witness in the world, and intimating that the company would do well by him. To this he made no reply. Upon the day the release was signed, Porteous came again, and the witness gives the following account of what occurred: "A. He came down to my house and wanted to know how I was, and I told him. He says, 'The old man wants to know why you don't come down to the office.' I told him I had no business down to the office that I knew of. He says, 'Well, the boys made up quite a purse for you.' I says, 'Is that so?' He says, 'Yes, they made up \$192. I have got it here in my pocket, but I have it with some other papers so I won't give it to you; I will wait and you will have to come down to the office this afternoon, because the old man wants to see you anyway.' I went down to the office that afternoon. Q. Now, state to the jury what occurred there at that time? A. I went into the office and bid Mr. Kroenert the time of day. He wanted to know how I was feeling. I told him. Q. What did you tell him? A. I told him I was sick and suffering more pain than I really ought to under the conditions. Q. Were you under the care of a doctor at that time? A. Yes, sir; Dr. Moore had dressed it. I think it was the day before this that he dressed my hand. Q. In what shape were you in regard to the effects of the anæsthetic? A. I was sick like an anæsthetic makes any one; sick at my stomach

and vomited considerable. Q. Were you sick up to the time of this date that you went there? A. For a month after. I went to see Dr. Moore something like a month after. Q. When you went in there this afternoon what occurred; what did Mr. Kroenert say to you? A. He bid me the time of day; wanted to know how I was feeling, and I told him; I told him I was sick and I was suffering more pain than I really ought to. He says, 'I have a check here that the boys made up for you for \$192.' He says, 'Now, I am going to give you an allowance myself on that;' and he says, 'It will make you a nice little purse.' He says, 'That will carry you through until you are well;' and he wanted to know how I was hurt, and I told him. Q. What did you tell him? A. I told him I tripped up and put my hand on this guard, and apparently the guard was loose for it bent over when I put my hand on it and let me come down on the saw and cut my hand off. And he asked me if I would stay there for two or three minutes until he went out. I says, 'Yes.' He went out, and I did not have the time; I did not look at the time when he went out or when he came in, but it was not very long, and he came in with a tall dark-complexioned man I have never seen before, never seen since, and don't know who he was. And he sat down at his table. 'Now,' he says, 'look over that and sign it, and I will have Mrs. Somebody [I don't recollect her other name] write you out a check for \$200;' and he says, 'I will give you a job as long as that mill runs, and I will see that you and your family will never want for nothing; if you are ever in want, I want you to come and tell me.' So I looked at the paper; I did not read much of it; I started in, and I turned around to him and I says, 'Is that in this paper?' He says, 'No, but you can take it for granted from me that it will be just as I am telling you that it will; you sign that and I will give you \$200 more and you will never want for nothing.' I signed the paper and he had that man sign it, and he had the woman sign it; the woman stenographer, at his place sign it; and that was all, and I took the money and left. Q. In what shape was that, the money he gave you and the check? A. There was a check from the men for \$192, stating from the men, and there was a check stating from the company so much. Q. When did you cash those checks? A. I cashed those checks the next day. Q. (by juror). How much did you say was the check from the company? A. \$200. Q. How much did they make the total amount? A. \$192 in the check and the day I received it my wife had received \$2 in cash from Mr. Porteous. Q. No, you don't understand. You got a check for \$200 from the company? A. Yes. Q. And what did you get from the men added to that made how much? A.

That was \$392. Q. They were in two separate amounts? A. Yes. Q. And you got \$2 in cash? A. \$2 in cash from Mr. Porteous that he left with my wife. Q. That was a part of the subscription from the men? A. Yes. Q. Now, was anything mentioned in any shape or form or manner at the time you say you signed this paper about it being a release? A. No, sir; not anything. Q. When did you again see Mr. Kroenert? A. I don't recollect exactly, but it was some days after that. Q. Under what circumstances? A. He told me if my hand kept on paining, or if my hand was not proceeding as I thought it was, to come and tell him. Q. Did you go and see him? A. I went and seen him and told him I was suffering more pain at that time than I ought to. Q. What was done? A. I don't know; he said no more."

On cross-examination the witness testified as follows: "Q. And did not Mr. Kroenert hand you at this time this paper, which I now present to you, and which I will ask to have marked defendant's Exhibit C? A. That is my signature. Q. And this defendant's Exhibit C is the paper, is it not, that you signed at that time? A. That is my signature on it. Q. Well, that is the paper signed by you at that time? A. Must be. Q. Now, as a matter of fact, you took that and read it, did you not? A. I did not. Q. At that time? A. I took it, but I did not read it. Q. You say, then, you did not read it? A. No, sir; I tried to read it; I glanced it over; and he says, 'You go ahead and sign that, and I will have Mrs. Crary [or whatever her name is] make out a check for \$200.' Q. You had it in your hands? A. I had it in my hands. Q. And glanced over it? A. I glanced at it; I am not much of a reader; and it would take me some time to read it; and I am suffering pain, I was sick at the time; I could not content myself to stay there so long. Q. You say you did not glance over it? A. I just glanced at it, yes; and I asked him if the job was on that; that he said that I and my family would never want for nothing; I asked him if that was on it, and he says, 'No, but I will guarantee it is all right; you go ahead and sign it.' Q. You had some conversation in the presence of these witnesses, didn't you? A. That was it exactly. Q. Didn't you have some conversation to this effect that Mr. Kroenert at the time asked you if it was perfectly satisfactory to you in the settlement of any matter you might have, and you stated to him, 'Yes, it was.' A. The only time any settlement was made, when I seen this in this paper, was when Mr. Ditchburn read it to me. They called it a release to release the company. Q. (Last question read). In the presence of these witnesses who were there at that time? A. He asked me— Q. No, answer the question first. A. He handed me the checks,

and after he handed me the checks he asked me if I was satisfied; I told him I was, to that extent. That was on this subscription they made up for me. Q. Did he not at that time, in speaking of the settlement of any possible claim you might have against them, ask you if you were entirely satisfied, and tell you, if it was all right, to sign it, and, if you were not satisfied, not to sign it? A. He did not; he did not. Q. You received at that time, did you not, this instrument here, which I will ask to have identified as defendant's Exhibit D? A. Yes, sir. Q. And that is your signature on the back of it? A. Yes, sir. Q. You signed this instrument which is marked defendant's Exhibit C on the 19th, did you not? A. If that was the first day I went down to see Mr. Kroenert, it was. Q. As I understand you, you told the jury that you deposited this check the next day. A. Yes. Q. At what bank? A. Bates' Bank on the east side. Q. As a matter of fact, this settlement was made on Saturday afternoon, and there were no banks open, and you did not deposit it the next day, the next day being Sunday, isn't that true? A. Yes, that is true. I deposited it on Monday morning; I kept it in my house over Sunday. Q. So that you took this check home with you, did you not, Saturday afternoon? A. Yes, sir. Q. And you had it in your house with you on Sunday? A. On Sunday, and I deposited it Monday morning in Bates' Bank, Monday forenoon. Q. So that your memory was faulty when you said it was the next day? A. I got that check after 3 o'clock. Mr. Kroenert himself told me I had to keep it until Monday. Q. What did you mean when you said you deposited it the next day? A. Well, I supposed it was, because the first time the bank was opened I went and cashed it, and I supposed it was the next day. I have not got the dates of these things so I don't know. Q. And during that afternoon and all the next day, which was Sunday, you had this check in your possession, which stated upon it, 'For an accident while at work during the evening of the 11th of November, 1910'? A. I gave it to my wife as soon as I came home. Q. But you had this check subject to your inspection so you and your wife could read it before it was cashed? A. I had it there, but I was not reading checks then; I was caring for my hand. Q. Mr. Kroenert was not there to prevent you from reading it? A. He did not, but he had my hand in such a shape it prevented me; he set the trap. Q. You had an anæsthetic at the time your fingers were dressed and taken care of by Dr. Christmas? A. I had an injection and then an anæsthetic. Q. Injected morphine into your arm? A. Something, I don't know what it was. Q. And then gave you an anæsthetic at that time? A. Yes, sir. Q. What time in the morning was that anæsthetic administered

to you; you were hurt about 3 o'clock? A. Well, it was about half or three-quarters; between a half an hour and an hour after I was cut. I sat in the office quite a long time before they got their instruments ready. Q. So you took your anæsthetic on or before 4 o'clock on the morning of the 12th? A. I could not tell you just exactly what time; it was something after 3 o'clock. Q. About 4 o'clock, because you were hurt about 3? A. Yes. Q. You say you were taken to St. Vincent's Hospital? A. I was taken to St. Vincent's Hospital. Q. Do you say that you were still under the influence of your anæsthetic at the time you were in Mr. Kroenert's office on the 19th day of November, seven days after that? A. Well, yes, pretty near a year after, and I am still; I have got it in my system yet. Q. You have got that anæsthetic in your system yet? A. Yes, sir; I have. Q. So that you are still not quite in your right senses? A. I am in my right senses now at the present time, but my stomach is not through with it. Q. Were you out of your senses on the 19th of November at the time that receipt was signed? A. Almost from pain and sickness. Q. From the anæsthetic? A. Yes, sir; and the pain in my hand. There was affection in my hand, which the doctor admitted which caused me to suffer the pain. Q. You were suffering from the pain and not the anæsthetic then? A. Both pain and anæsthetic together. Q. You were? A. Yes. Q. Seven days after this accident? A. Yes, sir. Q. This other check which has been presented, and which counsel has called for, is that your signature? A. Yes. Q. Is that the other check that was handed to you? A. From the men for \$192, yes. Q. From the men? A. I don't know whether it is from the men or not. The benefit from the day crew and the night crew, yes. Mr. Wilbur: I will offer this in evidence as defendant's Exhibit E. Received without objection and marked defendant's Exhibit E. Questions by the jurors: Q. Did you ever read these checks after you received them? A. No, I did not. I just looked at the amount on them and wrapped them up and went home and gave them to my wife and she opened them and looked at the amount and put them in our trunk. Q. Did she read them? A. No, she did not to my recollection. Q. Any discussion about them? A. No. Q. (by Mr. Wilbur resuming). Now, as to this defendant's Exhibit E, which is the check from the day crew and the night crew for \$192, their benefit, as a matter of fact, was that check not given to you by Mr. Kroenert in his office on Friday, the day before you got this check and signed this paper? A. I got the two checks on the same day. This one and that one I got at the same time. I went home with them both the same time and cashed them both at the same time. Q. And you say you did not get this one on Friday?

A. I got them both the same day. Q. Didn't you go down on Friday to have your hand dressed and at that time go and see Mr. Kroenert and get that one and then he said he would give you the \$200 if you would sign the release and you said you would? A. He did not say nothing to me about a release. Q. And you came back the next day and he gave you that? A. No, sir; he did not. Q. And both of these checks were in your possession? A. At the same time. Q. Over Sunday from Saturday afternoon? A. Yes. Q. With those statements on them of what they were for? A. I did not read them; I just looked at the amount. Q. You say he told you the question of this job was not in the paper? A. Yes, he told me that was not in the paper. I asked him if it was in the paper, and he said, 'No.' Q. He told you it was not? A. Yes, I asked him, 'Is that down in the paper?' And he said, 'No.' Q. Did Mr. Kroenert read that release to you? A. No, sir; he did not. Q. Do you claim now that Mr. Kroenert misstated to you the contents of what that release was? A. He did not state what it was. He says, 'Sign this and I will have Mrs. Crary write you out a check for \$200, and that will make you a nice little bunch of money.' That is what he said. Q. Then, as I understand, he did not tell you what was in that paper? A. No, sir; he did not; never mentioned what was in it whatever. Q. That was the only talk you had with him about that paper, which you signed, was whether or not the kind of job was in that and he told you it was not? A. That was the only question that came up. Q. So that, as a matter of fact, Mr. Kroenert did not deceive you when you signed that paper, did he? A. He did not. Q. He did not say anything to you what was in it, did he? A. He did not say what was in it, no. Q. So that, as I understand you to say, he did not represent to you what that paper was at all? A. He did not."

On redirect examination plaintiff testified as follows: "Q. Counsel asked you if Mr. Kroenert deceived you when you signed this paper? A. Yes, he did. Q. What had been your conversation prior to signing the paper? A. He asked me how I felt; asked me how I was cut, and had me explain it; and he told me that the boys made up a check for me, a purse for me for \$192, and he says, 'Now, I am going to go with them too, and that will make you a nice little bunch of money, and as soon as you are able to go to work you can come back and go to work.' And he says, 'Now, I know you understand shingles thoroughly; you can take that inspection job; and, furthermore, I will see that you and your family will never want for nothing.'"

The check for \$200 mentioned in the testimony was upon a printed form, except that the name of the payee, the amount, and the words, "For accident while at work during

evening of 11th of November, 1910" were typewritten thereon as follows:

No. 18713. Portland, Oregon, Nov. 19, 1910.
To Merchants' National Bank, Portland, Oregon:
Pay to the order of C. Foster \$200.00 Two Hundred & No/100 dollars.

[Not over Two Hundred \$200\$]

University Lumber & Shingle Co.,
Per A. J. Kroenert, Manager.

Settlement of account
below.

For accident while
at work during even-
ing of the 11th of Nov.
1910.

Endorsement of this
voucher check consti-
tutes acknowledgment
by payee of full pay-
ment of account speci-
fied hereon. Void if
altered or erased in
any way. Return to
payor if not correct.

We think this furnishes sufficient evidence to go to the jury to sustain the contention that Porteous, acting for the company and under the direction of its manager, led plaintiff to believe that the company intended to give him a donation of \$200, and that the manager allowed him to remain under that impression and hurried him into signing the release without explaining to him the contents.

[2] It is true that under ordinary circumstances a man is not excused from the consequences of signing a paper which he has negligently failed to read; but this is not always the case. In the present instance the manager was his employer and apparently his sympathizing friend, and Porteous was his friend and a brother in the same secret order. He would naturally rely on their statements and would not be likely to suspect any attempt to overreach him. In addition it appears that he was sick and in great pain from his wounded hand and in no condition to transact important business. While it is very unlikely that his mental and physical condition was the result of the anæsthetic administered several days before, the fact that he was actually in the condition he described from some cause seems very probable. He is not to be branded as an intentional falsifier because he made a wrong diagnosis of the cause of his condition, a thing which persons skilled in the treatment of disease do every day.

[3] Taking his statement as true, as we must, because the jury so accepted it, we conclude that he was in no condition to read and understand the contents of the paper signed by him; that he did not intend to release his claim against the company; and that the release procured under the circumstances was unfair and fraudulent. What our conclusion would be, sitting as triers of fact and considering and weighing all the testimony, need not here be considered. The question before us is not as to the weight of the testimony but as to whether there is any testimony to support plaintiff's contention. Releases obtained under circumstances similar to those detailed in plaintiff's testimony have frequently been disregarded or set aside

by the courts. 0 Thompson Neg. §§ 7376, 7377, and cases there cited; *Olston v. O. W. P. & Ry. Co.*, 52 Or. 343, 98 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915; *Christianson v. Chicago, St. P., etc., Ry. Co.*, 67 Minn. 94, 69 N. W. 640. Nor can we agree with counsel that the transaction itself is devoid of any indication of overreaching and unfairness on the part of defendant. It is plainly the law that plaintiff had a right to compromise his claim for \$200 or for \$1 if he saw fit; but, whatever the circumstances bearing upon the probability that he would deliberately have done so, the practical loss of his hand was a fact then and always apparent to him. He knew that he was greatly and permanently injured. Anybody in his right mind would have known that, if entitled to any remuneration whatever, the sum of \$200 would be ridiculous as a recompense. As a gratuity it might be thankfully accepted, as any sum so given, no doubt, would have been under these circumstances, but its gross inadequacy as compensation at once suggests the idea that it was received as charity. While this inadequacy may be but a slight circumstance tending to show that plaintiff did not know or realize that he was releasing a valuable claim for substantial damages, it is one entitled to consideration. The whole matter as the testimony leaves it was a question of fact for the jury, and not of law for the court.

[4] The admission of the testimony of A. L. Bullis tending to show that a few hours after the accident Olafson, defendant's foreman, was seen to tighten up the bolts on the sawguard and put in a new bolt is alleged as error. The authorities almost universally agree that evidence of subsequent repairs and improvements cannot be admitted to show previous negligence. *Skottowe v. O. S. L., etc., Ry. Co.*, 22 Or. 438, 30 Pac. 224, 16 L. R. A. 596; *Love v. Chambers Lumber Co.*, 129 Pac. 492; *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405. But it does not follow that, because such evidence is inadmissible for the purpose of showing negligence, it is always inadmissible for any purpose. Thus, as pointed out in *Love v. Chambers Lumber Company*, supra, where it is claimed by the defendant that certain safeguards alleged by plaintiff to have been necessary could not be used without impairing the efficiency of the machinery, evidence that subsequent to the injury such safeguards were provided and actually used without any detriment to the operation of the machinery was admissible. Another ground, well established by reason and authority, is, in those cases where the jury has been permitted to view the machine, evidence is admissible to show that such machine has been repaired or altered subsequent to the accident. *Marien v. M. J. Walsh & Co.*, 131 Pac. 505. The evidence here objected to would seem to come fairly within this exception. Another equally

well-established ground upon which such testimony may be admitted arises in those cases where the actual condition of the machinery, or other appliance, causing the accident is a question in dispute. In these cases such evidence is admitted not to show knowledge of the defect on the part of the defendant or to show negligence in failure to repair or guard the machinery, but to show the actual condition at the time the accident happened. *Brennan v. Lachat*, 5 N. Y. St. Rep. 882; *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 South. 33, cited in 42 L. R. A. 762, note; *Texas & N. O. R. Co. v. Anderson et al.* (Tex. Civ. App.) 61 S. W. 424; *Kuhn v. Illinois Central R. R. Co.*, 111 Ill. App. 323; *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *Harter v. Atchison*, 55 Kan. 250, 38 Pac. 778. In *Brennan v. Lachat*, supra, the court says: "The evidence was clearly competent as tending to show that defendant had removed the cause of the accident. The cases cited by appellant are all cases where it was attempted to be shown that after an accident a different or perhaps safer mode of structure, or preventive, or a different mode of conveyance or rate of speed was adopted after an accident, except in the case in 31 Hun, where it was attempted to be shown that, some months after an accident happened in the hallway of a tenement house by reason of a defective oil cloth covering, the landlord put down a new one, there can be no question but that such evidence is incompetent as tending to prove negligence. If an accident happened upon a railroad by reason of a broken rail, it would be quite competent to show that after the accident the broken rail was removed and replaced by a sound one as a mere matter of fact, but it would be incompetent to show that after the accident a different make and style of rail was used as tending to show negligence in using the style of rail upon which the accident took place."

[5] It would have been proper for the court, by ruling or instruction, to have confined the evidence admitted to the purposes herein indicated, but the objection was general and no such limitation was requested. Under such circumstances, defendant cannot now complain of its admission. *Woods v. Missouri, K. & T. R. Co.*, 51 Mo. App. 500.

[6] It is objected that the allegations of fraud in the procurement of the release are not sufficient to justify the admission of plaintiff's testimony in regard to it. The allegations are somewhat general; but, no objection having been made by demurrer or by motion to make more definite, we think them sufficient after verdict, especially since the attention of the court was not specifically called to the alleged defect during the trial.

[7] The instruction given by the court in reference to the degree of care required of a master and servant correctly stated the law. *Doyle v. Missouri, K. & T. Trust Co.*, 140 Mo. 1, 41 S. W. 255; *Choctaw, Okla-*

homa, etc., *R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96. Standing alone, the instruction is not to be commended, but taken in connection with the whole charge, which was able and fully and fairly stated the issues, the defendant has no reason to complain.

[8] The requests of defendant for instructions were, we think, sufficiently covered by the general instructions of the court. The instruction given is as follows: "This paper, purporting to be a release, is regular upon its face, and the presumption of law to begin with is that it was executed in good faith. Fraud is never presumed but must be established under our laws by reasonably clear and satisfactory evidence. The burden of proof upon this question is upon the plaintiff to establish that this paper, purporting to be a release, was signed and executed through fraudulent misrepresentations upon the part of the defendant." The language of defendant's request was as follows: "I instruct you that if it is a general rule that the plaintiff cannot be heard to say that he did not know the contents of the release or the paper signed by him when he had an opportunity to read it." It may be conceded that this request states a rule to a certain extent general, but the exceptions to it are so numerous that, stated baldly and without the qualifications which the law has attached to it, the probable result would be to mislead the jury, who would be likely to accept the statement that such was the "general rule" to mean that it was the universal rule.

[9] The objection that the sealed verdict was received and opened after the jury had separated cannot avail the defendant. It appears from the direction of the court to the jury that it was agreed that they might disperse upon delivering to the bailiff their sealed verdict. No objection to this statement was made by counsel for defendant at the time; neither was any objection made at the time the bailiff delivered the verdict to the court, nor at any time, until a motion for a new trial was filed. In the condition of the record, we must assume that consent was given by counsel to the separation of the jury and to the reception of the verdict in their absence.

The judgment is affirmed.

BURNETT, J. (dissenting). The plaintiff instituted this action to recover damages from the defendant for injuries suffered by him in its mill on account of the alleged negligence of the defendant in not providing for him a safe place in which to work. Admitting that the plaintiff was injured, the defendant denied all liability therefor and affirmatively pleaded, with other defenses, that the plaintiff, in consideration of the payment to him of \$200, released the defendant from all liability on account of the accident described in the complaint. The release was in writing, and the plaintiff ad-

mitted in his testimony that he executed the same, which is as follows:

"Portland, Oregon, November 19, 1910. In consideration of two hundred (\$200.00) dollars, the receipt of which is hereby acknowledged, paid to me by the University Lumber & Shingle Company, I do hereby release the said University Lumber & Shingle Co. from and on account of all or any claim for damages that I may have against it for any reason whatsoever, and particularly on account of an accident which happened to me on the eleventh day of November, 1910, at the shingle mill of the said company near University Part, Portland, Oregon, at which time I lost all of the fingers and a portion of my thumb on my left hand, and in consideration of said sum I do hereby release said company from any claim for damages as is hereinabove set forth.

"[Signed] Chas. L. Foster [Seal.]

"Witnesses: [Signed] Irene Crary. C. E. Morton."

Concerning this writing, the reply alleges as follows: "The plaintiff, further replying to the said second and separate defense herein, alleges that on or about the 19th day of November, 1910, the employes in and about the mill of the said defendant, by and on account of the injury to the plaintiff, subscribed a sum of money for the plaintiff and placed the same in the hands of J. Kroenert, who is and was at said time the president and general manager of the defendant. That the said Kroenert promised and agreed that he would assist this plaintiff personally to the same extent as did the employes, and that while this plaintiff was suffering from the injuries to his left hand as set out in the complaint herein, and while he was suffering from the effects of the anæsthetic administered to him at the time of the amputation of the fingers from his left hand, this plaintiff was ordered and directed to go to the said J. Kroenert to receive the money so subscribed. That plaintiff went to the office of said Kroenert. That thereupon the said Kroenert requested him to sign a paper, and falsely and fraudulently and unlawfully, and with intent to deceive and defraud this plaintiff, represented that the said paper was a receipt for the money so subscribed by the employes and by himself, and that the same was not intended and would not release the company from the damages sustained by this plaintiff, and that the defendant would continually employ the plaintiff in and about the mill and premises and pay to him the sum of seventy-five (\$75.00) dollars each and every month as long as the mill continued to stand. That relying upon the representation so made, and being sick and ill as aforesaid, this plaintiff signed the pretended release."

In respect to this pleading, it will be noticed that, although the plaintiff claims that he was sick and suffering from the effect of the anæsthetic nine days after the happening of the accident, he does not intimate

that his mental faculties were in any way impaired or suspended. For aught that appears in the reply, the plaintiff had full control of his mind and memory, and, if he would defeat the release for want of understanding, he must plead either that he was non compos mentis or laboring under such mental distress at the time that he could not and did not comprehend the nature and consequences of the act he was performing in the execution of the release. *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414, was a case somewhat like this in that the writing sought to be impeached by the makers thereof was said to have been procured by fraud, and this court there held that: "It is absolutely essential in pleading that a signer of a paper was fraudulently misled as to what was being signed, to show that the signer was free from negligence in the matter." No such allegation appears in the reply here. That pleading also does not state facts sufficient to constitute a rescission of the contract of release in that it is not averred that the plaintiff has restored to the defendant the money paid as a consideration for the release. In *Scott v. Walton*, 32 Or. 460, 464, 52 Pac. 180, 181, Mr. Justice Bean lays down the rule in this language: "A party who has been induced to enter into a contract by fraud has upon its discovery an election of remedies. He may either affirm the contract and sue for damages or disaffirm it and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly and return, or offer to return, what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it is more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in possession of the property received by him under the contract and dealing with it as his own, will be evidence of his intention to abide by the contract." In our own state, authorities to the same effect are these: *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 859; *State v. Blize*, 37 Or. 404, 61 Pac. 735; *Dundee Mortgage Co. v. Goodman*, 36 Or. 453, 60 Pac. 3; *Van de Wiele v. Garbade Co.*, 60 Or. 585, 120 Pac. 752. The following authorities and many more which might be cited teach the same doctrine: *Rabitt v. Ala. Great So. Ry. Co.*, 158 Ala. 431, 47 South. 573; *Norwich Union F. Ins. v. Girtton*, 124 Ind. 217, 24 N. E. 984; *Valley v. Boston R. Co.*, 103 Me. 106, 68 Atl. 635; *Drohan v. Lake Shore Ry.*, 162 Mass. 435, 38 N. E. 1116; *Pangborn v. Continental Ins. Co.*, 67 Mich. 683, 35 N. W. 814; *Crippen v. Hope*, 38 Mich. 344; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628; *Lane v. Dayton Coal Co.*, 101 Tenn. 581, 48 S. W. 1094; *Brainard v. Van Dyke*, 71 Vt. 359, 45

Atl. 758; *Town's Adm'r v. Waldo*, 62 Vt. 118, 20 Atl. 325; *Louisville, etc., Ry. v. McElroy*, 100 Ky. 153, 37 S. W. 844; *East Tenn. Ry. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350; *Vandervelden v. Chicago, etc., Ry. Co. (C. C.)* 61 Fed. 54; *Barker v. N. P. Ry. Co. (C. C.)* 65 Fed. 460.

An apparent exception to this rule requiring the return of what has been received of benefit from a contract before rescission is allowed is found in cases where the amount due on the contract to the person executing the release has been fixed and determined so that the sum paid is really a part of a greater indebtedness. In such a case part payment of an acknowledged larger sum constitutes no consideration for a release of the entire indebtedness, and hence the plaintiff in such case is entitled to prosecute such an action, and that, too, without returning the amount paid, because that was rightfully his own in the first instance. It is analogous to bringing an action for a balance of account giving credit for a payment already made. Where, however, the amount is unliquidated, as in the case of a claim for damages, the rule is uniform that, before a release alleged to have been obtained by fraud can be disregarded or rescinded, the party alleging the fraud must return the amount paid for the release.

The case in hand is distinguishable in that respect from *Olston v. Oregon Water Power Co.*, 52 Or. 343, 96 Pac. 1095, 20 L. R. A. (N. S.) 915. This was an action to recover damages for death of the plaintiff's intestate caused by the negligence of the defendant. A release under seal was pleaded as a defense, but the plaintiff alleged not only false and fraudulent misrepresentations made by the defendant with intent to defraud and deceive the plaintiff, but also that he had returned all the money and other things received as a condition for the release, thus bringing himself within the doctrine of the precedents of this state already quoted. Opposed to this rule requiring the return of the consideration in order to overturn the release of an unliquidated claim is the case of *Girard v. St. Louis Car Wheel Co.*, 46 Mo. App. 79. That case, however, stands practically alone on the question directly involved, and it bases its reasoning on cases where the claim was fully liquidated and the amount actually determined before the release was signed.

Passing the insufficiency of the reply in the respects mentioned, it is proper to examine the testimony in connection with the fraud charged. There are three elements of deception imputed to the president and manager of the defendant, who induced the plaintiff to sign the release in question: (1) That he "represented that said paper was a receipt for the money so subscribed by the employés and himself." (2) "That the same was not intended to and would not release the company from the damages sustained by

the plaintiff." (3) That the defendant would continually employ the plaintiff in and about the mill and premises and pay to him the sum of \$75 each and every month as long as the mill continued to stand." The first two of these specifications are representations of the legal effect of the paper in question, and the third is a promise of what the defendant would do in the future. The plaintiff is the only witness who testified in his behalf respecting the execution of the contract of release. He narrates in his direct examination that he went to the office of the company for the purpose of getting a check for the amount subscribed for his benefit by his fellow employes. After some conversation with the manager as to how the accident occurred, the witness proceeds thus: "And he asked me if I would stay there for two or three minutes until he went out. I says, 'Yes.' He went out and I did not have the time; I did not look at the time when he went out or when he came in, but it was not very long, and he came in with a tall dark-complexioned man; I have never seen before, never seen since, and don't know who he was. And he sat down at this table. 'Now,' he says, 'look over that and sign it, and I will have Mrs. Somebody [I don't recollect her name] write you out a check for \$200'; and he says, 'I will give you a job as long as that mill runs, and I will see that you and your family will never want for nothing; if you are ever in want, I want you to come and tell me.' So I looked at the paper; I did not read much of it; I started in; and I turned round to him and I says, 'Is that in the paper?' He says, 'No, but you can take it for granted from me that it will be just as I am telling you that it will; you sign that and I will give you \$200 more, and you will never want for nothing.' I signed the paper and he had that man sign it, and he had the woman sign it; the woman stenographer at his place sign it; and that was all and I took the money and left."

On cross-examination he testified as follows: "Q. And did not Mr. Kroenert hand you at this time this paper, which I now present to you, and which I will ask to have marked defendant's Exhibit C? A. That is my signature. Q. And this defendant's Exhibit C is the paper, is it not, that you signed at that time? A. That is my signature on it. Q. Well, that is the paper you signed at that time? A. Must be. Q. Now, as a matter of fact, you took that and read it, did you not? A. I did not. Q. At that time? A. I took it, but I did not read it. Q. You say, then, you did not read it? A. No, sir; I tried to read it; I glanced it over; and he says, 'You go ahead and sign that, and I will have Mrs. Crary [or whatever her name is] make out a check for \$200.' Q. You had it in your hands? A. I had it in my hands. Q. And glanced it over? A. I glanced at it; I am not much of a reader; and it would take me

some time to read it; and I am suffering pain, I was sick at the time; I could not content myself to stay there so long. Q. You say you did not glance over it? A. I just glanced at it, yes, and I asked him if the job was on that; that he said that I and my family would never want for nothing; I asked him if that was on it, and he says, 'No, but I will guarantee it is all right; you go ahead and sign it.' Q. You say he told you the question of this job was not in the paper? A. Yes, he told me that was not in the paper. I asked him if it was in the paper, and he said, 'No.' Q. He told you it was not? A. Yes, I asked him, 'Is that down in the paper?' and he said, 'No.' Q. Did Mr. Kroenert read that release to you? A. No, sir; he did not. Q. Do you claim now that Mr. Kroenert misstated to you the contents of what that release was? A. He did not state what it was. He says, 'Sign this and I will have Mrs. Crary write you out a check for \$200, and that will make you a nice little bunch of money.' That is what he said. Q. Then, as I understand, he did not tell you what was in that paper? A. No, sir; he did not; never mentioned what was in it whatever. Q. That was the only talk you had with him about the paper, which you signed, was whether or not the kind of job was in that and he told you it was not? A. That was the only question that came up. Q. So that, as a matter of fact, Mr. Kroenert did not deceive you when you signed that paper, did he? A. He did not. Q. He did not say anything to you what was in it, did he? A. He did not say what was in it, no. Q. So that, as I understand you to say, he did not represent to you what that paper was at all? A. He did not."

The plaintiff evidently understood that he was about to execute some obligatory writing; for when, as he says, the manager promised verbally to give him a job as long as the mill run, etc., he demanded to know if that was in the paper, but the manager says, "No, but you may take it for granted from me that it will be just as I am telling you that it will." Out of his own mouth he says that he had the paper in his hand with the opportunity of reading it and was told by the manager to look it over and sign it. Although he had the opportunity to and was urged to read the paper, he repeatedly says the manager did not read it to him; that the latter did not state what it was; and that "he never mentioned what was in it whatever," etc. Instead of proving the allegation that the manager represented that the paper "was a receipt for the money subscribed, and that the same was not intended and would not release the company from the damages sustained by the plaintiff," the testimony of the plaintiff himself directly contradicts and disproves the allegations of his reply.

To make statements fraudulent, they must

be representations of past or present material facts. Fraud cannot be predicated upon a statement or mere opinion or bare promises of something to be performed in the future. If the promise is a part of the contract, the person complaining must rest his action upon a breach of that promise. Moreover, neither the defendant nor its manager is being sued for a breach of a contract to furnish employment to the plaintiff for an indefinite period. Disproving as he does, by his own testimony, the allegations of fraud contained in the reply, the plaintiff presents a case where, having every opportunity to inform himself of the nature of the instrument he was signing, he acted upon his own judgment and signed the release. In the well-considered case of *Wimer v. Smith*, 22 Or. 469, 486, 30 Pac. 416, 421, Mr. Justice Lord lays down the rule thus: "Even where misrepresentations are made, if a person relies upon his own judgment when he has full means of knowledge, he cannot complain of such misrepresentations. On a charge of fraud, the burden of proof is on the party alleging it. The defendants must clearly and distinctly prove the fraud or false representations they allege. The law in no case presumes fraud. The presumption is always in favor of innocence and not guilt. Fraud must be proved, but it may be proved by circumstances from which no other inference but that of fraud can be drawn. The rule is that, when proven by circumstances, they must afford a strong presumption. Circumstances of mere suspicion will not warrant the conclusion of fraud. 'The evidence of it,' Chancellor Kent said, 'must be clear, strong, and satisfactory.' And so likewise said the learned and eminent Dillon. In no doubtful matter does the court lean to the conclusion of fraud; it is not to be assumed on doubtful evidence. If the fraud is not clearly and strictly proved as alleged, relief cannot be had, although the party against whom the relief is sought may not have been perfectly fair in his dealings. The facts constituting fraud must be clearly and conclusively established by the court in finding it; but it may be proved by a preponderance of the testimony." Here is a skilled mechanic, able to read, with the opportunity of reading and the reading urged upon him, whose perfect command of the English language, as disclosed by the testimony, shows him to be a man of more than ordinary intelligence. Under such circumstances, the releasor, having the opportunity to read, is bound by the terms of the instrument if he does not read it. *Spitze v. B. & O. R. R. Co.*, 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; *Hoeger v. Citizens' St. Ry. Co.*, 36 Ind. App. 662, 76 N. E. 328; *Atchison, Topeka & Santa Fé v. Vanordstrand*, 67 Kan. 386, 73 Pac. 113; *McNamara*

v. Boston Elev. Ry. Co., 197 Mass. 383, 83 N. E. 878; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Mateer v. Mo. Pac. Ry. Co.*, 105 Mo. 320; *Williams v. Wilson*, 18 Misc. Rep. 42, 40 N. Y. Supp. 1132; *Missouri, K. & T. Ry. v. Craig*, 44 Tex. Civ. App. 583, 98 S. W. 907; *Watson v. Planters' Bank*, 22 La. Ann. 14; *Eldridge v. Dexter, etc., R. Co.*, 88 Me. 191, 33 Atl. 974; *Leslie v. Merrick*, 99 Ind. 180; *Hawkins v. Hawkins*, 50 Cal. 558; *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Gibson v. Brown (Tex. Civ. App.)* 24 S. W. 574; *Powers v. Powers*, 46 Or. 479, 80 Pac. 1058.

It would have been an act of benevolent paternalism for the manager to have more thoroughly explained the nature of the writing which he presented for the plaintiff's signature, to have called in the plaintiff's friends and held a prolonged discussion concerning the advisability of making such a contract, but the defendant was under no obligations to do any of those things. The parties were adversary to each other. Having every opportunity to consider the matter, plaintiff was bound to take care of his own concerns and the manager could not assume to act as his guardian. Here was at least a debatable claim against the company in respect to which the defendant had a right to buy its peace. The law encourages settlement of disputes. Controversies once adjusted ought not to be reopened, except for very cogent reasons; and where, out of the mouth of the plaintiff himself, the alleged fraud is completely disproven, the court ought not to overturn the agreement which the parties themselves made. The reply is defective in that it does not show that the plaintiff was free from negligence in the execution of the release within the meaning of *Brown v. Feldwert*, *supra*; also in not alleging that he had returned the money received as a consideration for executing the contract of release. On the merits, the plaintiff should fail as against the contract because out of his own mouth he shows that the allegations of his reply are completely disproven. It is not a case of their being some evidence to take the case to the jury. It is a total failure of proof. The release may have been improvidently made, if we consider only the misfortune of the plaintiff's injury without reference to whether he himself might have avoided it; but courts cannot make contracts for parties and ought not to overturn their agreements, except upon proper pleadings and sufficient testimony. To allow the defeat of the release on the allegations of the reply and the evidence of the plaintiff in support thereof would destroy the value of written contracts and invite perjury in litigation to avoid them.

The judgment should be reversed and nonsuit directed.

THEISEN v. MATTHAI et al. (Sac. 2,036.)
(Supreme Court of California. April 4, 1913.
Rehearing Denied May 2, 1913.)

1. APPEAL AND ERROR (§ 373*)—DISMISSAL—COMPLIANCE WITH NEEDLESS REQUIREMENT—APPEAL UNDERTAKING.

An appeal complying with the requirements of Code Civ. Proc. §§ 941a, 941b, 941c, providing a new and alternative method of appeal which do not call for an appeal undertaking, will not be dismissed, even though appellant may have supposed that he was proceeding under the old method of appeal, and may have made an ineffectual attempt to take some of the steps necessary before the enactment of the new provisions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001-2004; Dec. Dig. § 373.*]

2. APPEAL AND ERROR (§§ 428, 430*)—PERFECTION OF APPEAL—NOTICE.

An appellant who has given his notice of appeal after the 60 days from service of notice of entry of judgment prescribed by Code Civ. Proc. § 941b, providing an alternative method of appeal without the necessity of an appeal undertaking, cannot take advantage of the new provisions; and if the notice is within the time prescribed by section 939, he must comply with section 940, requiring the serving and filing of his notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2166, 2167, 2173, 2174, 3126; Dec. Dig. §§ 428, 430.*]

3. APPEAL AND ERROR (§ 373*)—PERFECTION OF APPEAL—APPEAL UNDERTAKING.

Such appellant must comply with Code Civ. Proc. § 940, requiring the giving of an appeal undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001-2004; Dec. Dig. § 373.*]

4. APPEAL AND ERROR (§ 419*)—PERFECTION OF APPEAL—NOTICE.

Under Code Civ. Proc. § 941b, which provides that an appeal must be taken within 60 days after notice of the entry of judgment or order sought to be reviewed has been served, such notice need not contain the date of the entry of judgment, since the time for appeal runs from the service of the notice, and not from the date when judgment was entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2145, 2146; Dec. Dig. § 419.*]

5. APPEAL AND ERROR (§ 394*)—PERFECTING APPEAL—BOND—APPEAL FROM TWO OR MORE DECISIONS.

Under the code provisions regulating the old method of appeal prior to Code Civ. Proc. §§ 941a, 941b, 941c, a \$300 undertaking must be given in connection with every appeal from an order or judgment, and a civil undertaking reciting two appeals and denying that appellants will pay all damages awarded against them "on the appeal" will not support either of the appeals; but, where an appeal is taken from the judgment and from an order denying a new trial, the two appeals are regarded as so far identical as to authorize a single undertaking for both, but an appeal from an order dismissing a motion to vacate a judgment is a separate appeal from the judgment itself, so that both are not covered by a single undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2087, 2088; Dec. Dig. § 394.*]

6. APPEAL AND ERROR (§ 391*)—PERFECTING APPEAL—INSUFFICIENT BOND—NEW UNDERTAKING.

An appeal undertaking insufficient because not covering each of two separate appeals is invalid for any purpose, and the objection thereto cannot be obviated by the filing of a new undertaking under Code Civ. Proc. § 954, providing for the ordering of a new appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077-2084, 2087, 2088; Dec. Dig. § 391.*]

7. APPEAL AND ERROR (§ 795*)—DISMISSAL—NOTICE OF MOTION TO DISMISS—REQUISITES.

In view of the fact that a defect in an appeal bond was incurable, and went to the jurisdiction of the Supreme Court to entertain the appeal, a notice of motion to dismiss was sufficient without specifying the precise point in which the undertaking was bad.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3142, 3143, 3145; Dec. Dig. § 795.*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison and J. E. Prewett, Judges.

Action by S. Joseph Theisen against Rose Matthai and Louise Matthai. From a judgment for plaintiff and from an order dismissing the motion of Rose Matthai for a new trial and the motion of Louise Matthai to vacate the judgment, defendants appeal. Appeal from the judgment dismissed, and plaintiff's motion to dismiss the appeals from the order denied.

Rose Matthai and Louise Matthai, in pro. per. McCoy & Gans, of Red Bluff, for respondent.

PER CURIAM. Motion to dismiss appeals.

The action is one to quiet title to a parcel of land situate in the county of Tehama. Judgment in favor of the plaintiff was entered on the 5th day of July, 1911. On August 7, 1911, the defendant Rose Matthai filed her notice of intention to move for a new trial. The defendant Louise Matthai had theretofore, to wit, on July 18, 1911, filed a notice of intention to move to vacate and set aside the judgment. The plaintiff in October, 1911, served and filed a notice that he would move the court for an order striking out the proposed statement of the defendant Rose Matthai and the affidavits on motion for a new trial, and dismissing the motion of Rose Matthai for a new trial and the motion of Louise Matthai for an order vacating and setting aside the judgment. On November 15, 1911, the court made its order granting the plaintiff's motion as just set forth. On January 2, 1912, the defendants filed a notice of appeal, whereby they stated that they appealed from the judgment, and also from the order of November 15, 1911, striking out the defendant Rose Matthai's proposed statement and the affidavits on motion for new trial, and dismissing the motion of Rose Matthai for a new trial and the motion of Louise Matthai for an order vacating

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and setting aside the judgment. The plaintiff has moved to dismiss the appeal from the judgment and also the appeal (or appeals) from the orders of November 15, 1911.

Among the grounds urged for the dismissal of the appeal from the judgment are: "That the said appeal was not taken within the time required by law therefor; * * * (2) that no valid or sufficient undertaking on appeal has been given or filed by said defendants or either of them on said appeal or on any of the appeals herein."

[1] Of course, if the appeal may be regarded as taken under the "new and alternative method" provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, any defects in the undertaking must be disregarded for the reason that under those sections no undertaking is required. And it is thoroughly settled in this court that an appeal will not be dismissed where the appellant has complied with all of the requirements of the new method, even though he may have supposed he was proceeding under the old method and may have made an ineffectual attempt to take some of the steps necessary before the enactment of the new provisions. *Estate of McPhee*, 154 Cal. 385, 97 Pac. 878; *Mitchell v. Cal., etc., S. S. Co.*, 154 Cal. 731, 99 Pac. 202; *Union Coll. Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435.

[2, 3] But an appellant cannot take advantage of the more liberal procedure of the new sections unless he has taken his appeal within the time limited by those sections. If he has given his notice after the time allowed by the alternative method, but within that specified by section 939 of the Code, he must comply with the provisions of section 940 requiring the serving (as well as filing) of his notice of appeal, and the giving of an undertaking. *Sulsun L. Co. v. Fairfield L. Co. (App.)* 127 Pac. 349. This conclusion is sufficiently obvious upon a mere reading of the code sections, and it has been applied by this court in at least two cases, in which appeals have been dismissed from the bench by orders made without the accompaniment of a written opinion.

[4] Under section 941b, an appeal must be taken within sixty days after notice of the entry of the judgment or order sought to be reviewed has been served, and, in the absence of such notice, within six months after entry. In the present case written notice of decision and entry of judgment in plaintiff's favor was served on defendants in July, 1911, more than five months prior to the filing of the notice of appeal. Objection is made that the notice so served on the defendants failed to give the date of the entry of the judgment. But this was not required. Where notice of judgment is given, the time for taking the appeal begins to run, under section 941b, from the service of the notice, not from the date when judgment was entered. The recital of a date which does not affect this time would be useless.

Viewing the appeal as one taken under the new method, it is open to attack on the first ground of the motion, viz., that it was not taken within time.

[5] The appellants are, therefore, driven to the necessity of attempting to sustain their appeal as one taken under the old method, and in this aspect the necessity for a sufficient undertaking arises. The undertaking here given is a single one in the sum of \$300. It recites the appeal from the judgment and from the order of November 15, 1911, and by it the sureties undertake that the appellants will pay "all charges and costs which may be awarded against them on the appeal." The bond purports accordingly to cover, not only the appeal from the judgment and that from the order dismissing the motion of Rose Matthai for a new trial, but also the appeal from the order dismissing Louise Matthai's motion to vacate the judgment. It is thoroughly settled that, under the code provisions regulating the old method of appeal, a \$300 undertaking must be given in connection with every appeal from an order or judgment (*Estate of Kasson*, 135 Cal. 1, 66 Pac. 871), and that a single undertaking reciting two appeals, and conditioned that the appellants will pay all damages awarded against them "on the appeal" will not support either of the appeals. *Estate of Kasson*, supra; *Carter v. Butte Creek M. & P. Co.*, 131 Cal. 350, 63 Pac. 667, and cases cited; *Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418. An exception to this rule is made where an appeal is taken from the judgment and from an order denying a new trial. In such case the two appeals are regarded as so far identical as to authorize the giving of a single undertaking to cover both. It is conceded that in this case the appeal from the order dismissing Rose Matthai's motion for a new trial comes within this exception. But there still remains the appeal from the order dismissing Louise Matthai's motion to vacate the judgment. This is clearly a separate appeal, which could not be covered, jointly with the appeal from the judgment, by a single undertaking. *Carter v. Butte P. Co.*, 131 Cal. 350, 63 Pac. 667.

[6] The authorities are conclusive to the effect that an undertaking like the one under discussion is not merely insufficient, but is invalid for any purpose, and that the objection cannot be obviated by the filing of a new undertaking under section 954. *Home, etc., Associates v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *Centerville, etc., Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813; *Estate of Heydenfeldt*, 119 Cal. 348, 51 Pac. 543; *Wadleigh v. Phelps*, supra. We need not, therefore, stop to consider whether the undertakings presented by appellants after the oral presentation of the motion to dismiss, but before the filing of the briefs which were authorized, were filed in time to come within the terms of section 954. Besides, the new undertakings were no different from the origi-

nal one in the particular under discussion.

[7] The appellants contend that the notice of motion to dismiss should have specified the precise point in which the undertaking was bad. But we think, as was held in *Wadleigh v. Phelps*, supra, that the specification of grounds should be held to be sufficient, especially in view of the fact that the defect was incurable, and was one that went to the jurisdiction of this court to entertain the appeal.

We see no escape from the conclusion that the appellants failed to take the steps requisite to give this court jurisdiction of the appeal from the judgment. The motion to dismiss the other appeals is not pressed, and has apparently no merit. These appeals were taken in time to enable appellants to rely on the new method, and consequently no question of service or of an undertaking is involved.

The appeal from the judgment is dismissed. The motion to dismiss the appeal from the orders of November 15, 1911, is denied.

BEATTY, C. J., does not participate in the foregoing decision.

In re LEE. (S. F. 6,161.)

(Supreme Court of California. April 5, 1913.)

PARENT AND CHILD (§ 2*)—CUSTODY OF CHILD—DISCRETION OF COURT—STATUTE.

Under Civ. Code, § 246, declaring that the court's discretion in appointing a guardian for a minor shall be exercised in favor of what appears to be the best interests of the child in respect to its temporal, mental, and moral welfare, the court has no power to take a minor of 18 months from the safe protection of an aunt, and awarding his temporary custody to the dissolute and neglectful mother, for the experiment of seeing whether its presence might not work the mother's reformation.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the guardianship of Raymond Monroe Lee, a minor. From a decree appointing Eva Eugenia Lee, mother of the minor, his guardian pro tempore, with the provision that in the event of her unfitness his custody and control should be awarded to Lillian F. Christal, and continuing the proceedings, Lillian F. Christal appeals. Reversed.

Henry H. Davis, of San Francisco, for appellant. Crist & Johnson, Ferno J. Schuhl, and Louis V. Crowley, all of San Francisco, for respondent.

HENSHAW, J. The petition of Lillian F. Christal for letters of guardianship of the person of Raymond Monroe Lee, a minor, was opposed by Eva Eugenia Lee, the mother of the minor. The facts disclosed are that

Lillian F. Christal is married and living with her husband. They are childless. Lillian F. Christal is the paternal aunt of the infant, who, at the time of the institution of these proceedings was about eight months of age. The father joins in or assents to the application of his married sister. The child when an infant of a few weeks of age was delivered by its mother into the care of Lillian F. Christal, and by that mother was practically abandoned. At that time the child was sick well nigh unto death, and through the care of Lillian F. Christal under medical advice the health of the infant was restored. It was dying of malnutrition through the ignorance and heedlessness of its mother during the brief time she had charge of it. Lillian F. Christal is in all respects a fit and competent person to be appointed guardian. Upon the other hand, Eva Eugenia Lee is a young woman of dissolute habits and immoral life. Her indifference to and neglect of her offspring may be excused only to the extent that she knew that it was in tender and loving hands. All these matters plainly appear from the evidence and from the declarations of the judge. Yet, expressing the view that perhaps an award of the temporary custody of the child to the mother might work that mother's reformation, the court entered a decree awarding to Eva Eugenia Lee "the temporary custody of said minor by way of probation" and "that said Eva Eugenia Lee have, and she is hereby awarded, the custody and control of said minor while and as long as she prove herself worthy and discharge faithfully her duties as guardian and mother of said minor," and "that, in the event that said Eva Eugenia Lee does not prove herself worthy to have the custody and control of said minor, said minor shall be taken from said Eva Eugenia Lee and its custody and control awarded to said petitioner Lillian Christal," "that said Eva Eugenia Lee be, and she is hereby appointed guardian pro tempore of said minor," and, finally, "that the proceedings herein be continued for one month, and that the proceedings be further continued from time to time pending the probation of said Eva Eugenia Lee."

This judgment, however in consonance with the code of ethics, is not a judgment countenanced by the Code of this state. Section 246 of the Civil Code limits the discretion of the court, and declares that that discretion shall be exercised in favor of "what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare." Here the judge seeks to use the infant child of a mother whom he finds to be dissolute and immoral for the purpose of reforming that mother. In other words, the court takes this infant away from a safe and loving shelter in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

care of its aunt who is devoted to it to subject it to the doubtful experiment of seeing whether its presence may work the mother's reformation. (While the experiment is at least doubtful, it is not doubtful that the law does not countenance such an award, and that in the event of failure the experiment cannot be other than disastrous to the child whose welfare, and not that of the mother, is to control the award. No serious fault could be found if the award had been to Mrs. Christal with the right of the mother to recover her infant when and after she had proved herself by her own reformation to be a fit and proper person to resume her control over it.)

It should be added that, notwithstanding the judgment of the court, by this appeal the custody of the child has been continued in Mrs. Christal, and the child is now about two years old. The reversal of the judgment which for the reasons given becomes necessary once more sets the inquiry at large, and the court will be justified in taking additional evidence bearing upon the life of the mother and her fitness for the custody and guardianship of her child during the period that has elapsed since this appeal was taken, and the nature of this evidence should largely influence the conclusion which the court shall finally reach.

The judgment appealed from is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

BRADLEY CO. v. BRADLEY. (S. F. 6,030.)
(Supreme Court of California. April 3, 1913.
Rehearing Denied May 2, 1913.)

1. TRUSTS (§ 96*)—PAROL TRUSTS—REAL ESTATE—ENFORCEMENT.

A voluntary conveyance by a grantor to a grantee between whom relations of confidence existed made in reliance on such relations, and subject to a parol promise by the grantee to hold the real estate in trust for the grantor, is subject to a trust enforceable by the courts, and the grantee will not be permitted to repudiate the trust, and thereby obtain an unconscionable advantage.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. § 96.*]

2. JUDGMENT (§ 743*)—RES JUDICATA—JUDGMENT ESTABLISHING TITLE.

A judgment establishing title under the McEnerney act in a grantee holding real estate under an enforceable parol trust does not bar the right of the grantor to enforce the trust, though he failed to protect his interest in the proceedings to establish title of which he had notice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275-1277, 1284; Dec. Dig. § 743.*]

3. EQUITY (§ 65*)—CLEAN HANDS—MISCONDUCT DEFEATING ENFORCEMENT OF TRUST.

The act of a grantor conveying real estate subject to an enforceable parol trust in procuring the grantee to make the statutory affidavit under the McEnerney act in which his interest

in the property is not disclosed, and thereby permitting the grantee to obtain a judgment establishing title in him, is not such fraud as will bar his right to enforce the trust, under the rule that the misconduct which will prevent one from relief in equity must be so intimately connected to the injury of another with the matter for which he seeks relief as to make it inequitable to accord him such relief; the act of the grantor not being designed to injure anybody, and no one being in fact injured.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Bradley Company against Emma R. Bradley. From a judgment for defendant, rendered on the sustaining of a demurrer to the complaint, plaintiff appeals. Reversed, with directions.

Stoney, Rouleau & Stoney and Orville C. Pratt, Jr., all of San Francisco, for appellant. Costello & Costello, Charles Baer, and Charles L. Brown, all of San Francisco, for respondent.

HENSHAW, J. Plaintiff, as the successor of Richard Bradley, sued to enforce a parol trust in real property. A general demurrer was sustained to plaintiff's complaint, and, plaintiff declining to amend, suffered judgment. From this judgment it appeals.

The complaint charges that in 1906 Richard Bradley was the owner in fee of the real estate described; that he desired to borrow money secured by a mortgage upon the real property to erect improvements thereon; that he was the cashier and manager of the Pioneer Bank at Porterville, Cal., and for reasons connected with his position did not wish to be known as the borrower of money; that at that time there existed between himself and Emma R. Buxton, whom subsequently he married, relations of great confidence; that relying on those relations and without any consideration, valuable or otherwise, moving from Emma Buxton to him, he made a deed of grant, bargain, and sale purporting on the face of it to convey to her the fee-simple title absolute. This conveyance, however, was made and was accepted upon a parol trust, Emma Buxton promising and agreeing that she would take and hold the property in trust for Richard Bradley and to his use, would borrow the money on the property by way of mortgage for the purpose of improving it, would apply the money so borrowed for the indicated purpose, and would account to Richard Bradley for all rents and profits which she might collect, and would on demand of Richard Bradley reconvey the property to him. Pursuant to the deed and to this trust defendant Emma Buxton, now by marriage with Richard Bradley, Emma Bradley, defendant herein, entered into the possession of the property, mortgaged it to the Hibernia Savings &

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Loan Society for the sum of \$5,500, employed this sum in the improvement of the real property by the erection of flats thereon, collected the rents from these flats, and at all times down to February 28, 1910, accounted for such rents to Richard Bradley and to his successor in interest, plaintiff herein, as the respective owners of the property. Before making the loan of \$5,500, the Hibernia Savings & Loan Society required that the defendant should prosecute an action to establish and quiet her title under the provisions of the McEnerney act. This the defendant did, obtaining a decree establishing and quieting her title under the provisions of this act. In her affidavit filed in this action she did not name Richard Bradley as having an interest in the real property adverse to herself, "but her omission so to do was with the consent of said Richard Bradley, and was not fraudulent or with a view of repudiating the trust in his favor upon which she held the legal title to said real property, as above set forth; that, on the contrary, such omission was innocently made, and was made without any actual knowledge on defendant's part of its possible legal effect, and was made in furtherance of the purposes of said trust, in this, that, had said defendant named said Richard Bradley in said affidavit as the true equitable owner of said property, said the Hibernia Savings & Loan Society would have required said Richard Bradley to have joined in said mortgage, and his connection with said loan would have been thereby disclosed, and the very object with which said trust was created, as hereinabove set forth, would have been wholly nullified and defeated; that neither said defendant nor said Richard Bradley knew or understood at the time said action was commenced, or at the time said decree was obtained, or for more than one year continuously thereafter, what the possible legal effect of said action and decree might be with respect to the equitable rights of said Richard Bradley in and to said real property; that, on the contrary, both said defendant and said Richard Bradley were at all the times just referred to laboring under a mutual mistake of law with regard to the possible effect of said action and of said decree; that subsequent to the obtaining of said decree defendant repeatedly acknowledged to said Richard Bradley, both verbally and in writing, the existence and continuance of the trust hereinabove set forth, and accounted to said Richard Bradley, and to his successor in interest hereinafter named, for the rents and profits of said real property, and received from said Richard Bradley the sum of \$1,000, which she, said defendant, applied in partial discharge and satisfaction of said \$5,500 mortgage to said the Hibernia Savings & Loan Society hereinabove referred to; that at all the times herein mentioned down to and including the month of April,

1910, Richard Bradley and his successor in interest, the plaintiff corporation, have with the knowledge and consent of the defendant paid all the taxes upon the real property, and have borne all the costs of repairs and improvements upon the real property. On the 28th day of February, 1910, Richard Bradley demanded of defendant that she convey the real property to the plaintiff corporation, he having theretofore made his deed to that corporation, but defendant then and there fraudulently refused so to do and repudiated her trust.

[1] It is a matter of indifference under this pleading whether it be said that plaintiff is seeking to enforce a voluntary trust which has been repudiated by the trustee, or whether it is seeking to enforce an involuntary trust arising in law from that repudiation. In its creation the trust was voluntary, and, however at variance it may be thought to be with the mandate of the statute as to the creation of trusts in land, it is of such character that equity will not permit the trustee to take advantage of the confidential relations existing in which the trust itself originated and by repudiating the trust obtain an unconscionable advantage over the confiding trustor and beneficiary. So numerous are cases upon this subject that it must suffice to refer to *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506; *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

[2] The foregoing proposition does not seem to be questioned, but seemingly the demurrer was sustained upon the theory that the proceeding under the McEnerney act, well known to Richard Bradley, gave him an opportunity to appear and protect his interest, and, having failed to do so, the judgment bars his right and claim to the real estate. In this respondent relies upon the familiar principle and the numerous cases to the effect that when all parties are in court, or have had their opportunity and day in court, no one of them can be heard thus to question a judgment given against him. *Freeman on Judgments*, § 486; 3 *Story's Equity Jur.* 1575; *Boston v. Haynes*, 33 Cal. 31; *Amador, etc., Co. v. Mitchell*, 59 Cal. 174; *Zellerbach v. Allenberg*, 67 Cal. 298, 7 Pac. 908. But it should not be necessary to call to mind the fact that we are in this consideration governed by the declarations of the complaint, and under those declarations this judgment was but in furtherance and part execution of the very trust by which the defendant took the land. The principle enunciated is perfectly sound in every case where the parties are dealing with each other at arm's length, and where the proceeding is in fact an adversary one. It has no application under the facts here presented. We think this so plain as to require no greater amplification, but still further it may be said that,

if it can be believed that such untoward consequences attach to a judgment obtained under these circumstances, the pleading makes complete answer by its allegation of a mutual mistake in law entertained by both parties by virtue of which mistake the judgment was permitted to be given. *Remington v. Higgins*, 54 Cal. 621; *Benson v. Bunting*, 127 Cal. 537, 59 Pac. 991, 78 Am. St. Rep. 81; *Bacon v. Bacon*, 150 Cal. 486, 89 Pac. 317. And finally upon this subject it may be added in conclusion that relief is not here sought against a judgment fraudulently obtained. The relief is sought against the fraudulent use of a judgment obtained under a thorough understanding between the parties and in furtherance of a trust relationship which existed between them. That such relief may be secured against the fraudulent use of a judgment not fraudulently obtained is well recognized in equity. *Thompson v. Laughlin*, 91 Cal. 813, 27 Pac. 752.

The theory of the respondent, that the McEnerney decree destroyed the trust and that a trust once destroyed cannot be revived, mistakes the meaning and scope of the complaint. An innocent purchaser from Emma Buxton or Mrs. Bradley would unquestionably be protected by such a decree. So, indeed, would such a purchaser have been protected against the undisclosed parol trust, but there is no doubt that as between the parties to that trust the decree had no effect whatsoever to destroy it. Such is the pleading to the effect that the decree was obtained in furtherance of the trust; such is the pleading to the further effect that the trust was continuously recognized and fulfilled after the decree.

[3] Finally, respondent invokes the maxim that he who comes into equity must come with clean hands, and justifies the order sustaining the demurrer upon the ground that Richard Bradley in procuring Emma Buxton to make the statutory affidavit under the McEnerney act in which his interest in the property was not disclosed was guilty of such a fraud as to bar his right to relief. But, whatever judgment may be placed upon Richard Bradley's conduct in the forum of good morals, it was not a fraud of which law or equity takes cognizance. It was not designed to injure anybody. In fact, it injured nobody, least of all respondent, who seems to see in it rather an opportunity to make use of it to her advantage. It is not every wrongful act nor even every fraud, which prevents a sutor in equity from obtaining relief. His misconduct must be so intimately connected to the injury of another with the matter for which he seeks relief, as to make it inequitable to accord him such relief. It must have been conduct which, if permitted, inequitably affects the relationship between the plaintiff and the defendant, nothing of which is here shown. Suffice it for this to

make reference to 1 Pomeroy's *Equity Jurisprudence*, § 399.

It follows herefrom that plaintiff's complaint is not without equity, that the demurrer was improperly sustained, and the judgment is therefore reversed with directions to the trial court to permit defendant to plead to the merits of the action.

We concur: LORIGAN, J.; MELVIN, J.

IN re LATHROP'S ESTATE

Appeal of HANSON.

(S. F. 6,299.)

(Supreme Court of California. April 4, 1913.)

1. DESCENT AND DISTRIBUTION (§ 5*)—PERSONAL PROPERTY—WHAT LAW GOVERNS.

The common-law rule that the distribution of personal property of a decedent is governed by the law of decedent's domicile is subject to the limitation imposed by Civ. Code, § 946, declaring that such shall be the rule if there is no law to the contrary in the place where the property is located.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 19-22; Dec. Dig. § 5.*]

2. WILLS (§ 2*)—WHAT LAW GOVERNS—FOREIGN WILLS—CHARITABLE BEQUEST—STATUTES.

Civ. Code, § 1285, provides that a foreign will, executed in compliance with the California law, shall be valid to pass personal property located there, subject to section 1313, providing that no charitable bequest exceeding one-third of a testator's estate shall be valid where the testator left legal heirs. Held that, under such sections, foreign wills making charitable bequests will be construed, in so far as property located in California is concerned, by the same rules as control like bequests in domestic wills; and that a foreign will, making a charitable bequest in excess of one-third of the estate of the testator leaving heirs, was valid in the state of his domicile did not render it valid so far as it purported to pass property in California.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. EXECUTORS AND ADMINISTRATORS (§ 523*)—FOREIGN EXECUTORS—RIGHT TO PROPERTY.

Code Civ. Proc. § 1667, providing that, where necessary, in order that the estate of a decedent or any part thereof may be distributed according to a will, that the estate be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery, is not mandatory, but vests a discretion in the court, to be exercised in accordance with the public policy of the statutes of California, so that no such delivery would be made where it appears that to do so would result in a distribution of the property contrary to California laws.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. § 523.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Ariel Lathrop, deceased. Application by Russell M. Johnston and another, domiciliary executors, for distribution to them of all the personal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property of the testator within the state for distribution under the will, to which Aimee Lathrop Hanson appeals. Reversed, with directions.

Page, McCutchen, Knight & Onley and Samuel Knight, all of San Francisco (Bradner W. Lee, of Los Angeles, of counsel), for appellant. Wilson & Wilson, of San Francisco, for respondents.

HENSHAW, J. Ariel Lathrop died in 1908 in the county of Rensselaer, state of New York, of which county and state he was a resident at the time of his death. With other heirs at law he left Aimee Lathrop Hanson, appellant herein, the daughter of a deceased brother. His last will and testament was probated in the state of New York. This will admittedly made a valid disposition of the property belonging to his estate under the laws of the state of New York, and was executed in accordance with those laws, as well as in accordance with the laws of this state. Under the probate proceedings in New York state, the respondents, Russell M. Johnston, and Donald McCredle, were appointed executors. Under his will all the property of his estate, with the exception of \$28,500, was devised and bequeathed to charity. The value of his estate was between \$200,000 and \$250,000. Under the laws of the state of New York, this disposition was valid. After the original probate of the will, proceedings were duly taken to have the will admitted to probate in this state, pursuant to sections 1322 et seq. of the Code of Civil Procedure. Application for letters testamentary was made, and in March, 1909, such letters were issued to the domiciliary executors who came to this state and submitted themselves to the jurisdiction of its court. On March 1, 1910, the executors petitioned for final distribution of the estate situated in this state to themselves as such domiciliary executors. Appellant filed written objections, setting forth that she is one of the heirs at law of the deceased; that, under the deceased's will, the devises and bequests to charity collectively exceed one-third of the estate, contrary to the law of this state. She prayed that to her be distributed her proportionate part of two-thirds of the estate situated in this state, to wit, one-sixth. The property situated in California and affected by the decree of distribution is wholly personal property, consisting of cash and certain shares of the capital stock of the Bank of Tehama county; its value altogether amounting to the sum of \$13,536. The court in probate overruled appellant's objections and distributed the whole estate to the domiciliary executors. Appellant contends that by force and virtue of the express laws of this state, which laws must control in the construction of the testator's bequests and in the distribution of his property under his will, the will itself does violence to the rule governing

charitable devises or bequests, with the necessary result that, as to two-thirds of the estate of the deceased situated in this state, the testator died intestate, and that this two-thirds therefore descends and must be distributed to his heirs at law.

Bearing upon this consideration are the following provisions of our Codes:

"The validity and interpretation of wills, wherever made, are governed, when relating to property within this state, by the law of this state, except as provided in section twelve hundred and eighty-five," Civ. Code, § 1376.

"If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile." Civ. Code, § 946.

"No will made out of this state is valid as a will in this state, unless executed according to the provisions of this chapter, except that a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of such state or country, is valid in this state so far as the same relates to personal property, subject, however, to the provisions of section thirteen hundred and thirteen." Civ. Code, § 1285.

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death such devise or legacy and each of them shall be valid: Provided that no such devises or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law." Civ. Code, § 1313.

"Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with

the will annexed, in this state, the relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court." Code Civ. Proc. § 1667.

Having relation to these provisions of the law are section 1323 of the Code of Civil Procedure which, dealing with foreign wills, makes provision for the giving of a notice of the hearing of the probate of such a will precisely as in the case of a domestic will, and section 1304, which specifies that to the heirs and named executors are to be mailed a copy of the notice of the time appointed for the probate.

The above quotations make manifest the cause of the controversy between the parties. Appellant contends that the very reading of section 1285 in connection with section 1313 of the Civil Code discloses the limitation which the Legislature has put upon the power to dispose of personal property situated within the jurisdiction of the state. Respondents contend that such a construction does such violence to the *jus gentium*, is so subversive of the universal rule which obtains in all civilized nations in regard to an owner or testator's rights over his personal property, that, even if the power of the Legislature to do this thing be conceded, the court should adopt any possible construction to acquit it of so flagrant an act. *Cullerton v. Mead*, 22 Cal. 96; *Estate of Garcelon*, 104 Cal. 584, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

[1] The law governing the disposition and control of personal property, the law whose application to this decree respondent asks to be considered controlling, is itself unquestioned. That law is a part of the *jus gentium* and announces the clearly established general rule arising out of considerations of justice and the principle of comity that the distribution of personal property is governed by the law of the domicile of the owner. It is recognized by our own decisions, as in *Estate of Apple*, 66 Cal. 434, 6 Pac. 7, and *Whitney v. Dodge*, 105 Cal. 197, 38 Pac. 636. It is also declared by section 946 of our Civil Code, above quoted. But the declaration is accompanied by the all-important limitation that the law of the domicile controls "if there is no law to the contrary in the place where the personal property is situated." This limitation not only finds expression in the Code, but equally in the leading cases above cited. Thus, in *Estate of Apple*, it is declared that, "in the absence of positive law to the contrary, disposition of the decedent's personal estate will be governed by the law of his actual domicile." In *Whitney v. Dodge* it is said: "But the rule is part of the general law of every state in which it has not been abrogated either by express

legislative language or the enactments of statutes which work such abrogation by necessary implication." It is not only when the disposition made of the property does violence to the statute law of the country where it is situated that a limitation upon the otherwise universal rule is worked. It is equally true where the disposition made is conceived to be contrary to the welfare of that country or to its public policy, a proposition well illustrated in *Mahorner v. Hooe et al.*, 9 Smedes & M. (Miss.) 247, 48 Am. Dec. 706. The true rule is thus succinctly stated by Story (*Conflict of Laws*, § 38): "In the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests." And the same principle, with more elaboration, is declared by Cyc. as follows: "There is no doubt that every state has power to establish and regulate the rights of property in things within its jurisdiction, whether the property be real or personal, movable or immovable. Accordingly the law of the place under which an ancillary administration is taken must govern the distribution of the assets in the payment of debts there. Some states have exercised this power for the purpose of regulating the descent and distribution of personal property within their limits, as well as of real estate, notwithstanding the laws of the domicile of the owner." 22 Cyc. p. 22.

[2] The amendment to section 1285, above quoted, was adopted in 1905, subsequent, of course, to the decisions in *Estate of Apple* and *Whitney v. Dodge*. Up to that date the state had refrained from interfering in the case of a foreign will with the distribution of the personal estate here situated in so far as the charitable devises and bequests in such will were concerned. The Legislature in 1905, with deliberation, added the proviso to section 1285 limiting the validity of such charitable devises and bequests in foreign wills by the provisions of section 1313. This legislative declaration is without ambiguity and is perfectly understandable. To deny it its manifest meaning is to strike it from the statute. That meaning is and can be nothing other than that charitable bequest in foreign wills shall be governed by the same rules controlling like bequests in domestic wills. In the one case in which this court has been called upon to consider the law as amended, such was the construction given to it. *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242. There is nothing in the language of section 1285 to justify the argument that its application must be limited to cases of a will of a nonresident decedent which has not been probated in the court of domicile of the decedent. The very language of section 1285 forbids it. "No will," declares that section, "is valid," excepting as therein provided.

[3] Nor yet can we agree with the respondents' further contention that section 1667 of the Code of Civil Procedure is all-controlling and that under its provisions the distribution here made is warranted. The language of this section that, "where it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such a delivery to be made" is not a mandate upon the court but vests in it merely a discretion so to do. In *re Hughes*, 95 N. Y. 55. That discretion will be exercised in consonance with the dictates of public policy and of our own statutes, and where it shall be found, as here, that to distribute the estate or deliver the estate to the domiciliary executors would do violence to plain provisions of our laws, such a distribution should not be made and cannot be upheld if made.

The decree appealed from is therefore reversed, with directions to the trial court to enter its decree in accordance with the opinion and judgment herein rendered.

We concur: MELVIN, J.; LORIGAN, J.

NATIONAL UNION FIRE INS. CO. v. NASON. (Civ. 1,184.)

(District Court of Appeal, First District, California. Feb. 24, 1913.)

1. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

In an action by an insurance company against its agent to recover commissions retained by the agent on policies that were afterwards canceled, in which the cancellations were conceded, and the only dispute was as to the time thereof, which element the defendant deemed immaterial, rulings on the introduction of evidence as to the fact of cancellation, if erroneous, were harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

2. APPEAL AND ERROR (§ 171*)—GROUNDS OF REVIEW—THEORY OF CASE.

Where an issue is tacitly accepted by all parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

3. INSURANCE (§ 84*) — CONSTRUCTION OF AGENT'S CONTRACT — COMPENSATION — COMMISSIONS RETAINED ON CANCELED POLICIES.

An insurance agent working under a contract providing for return of commissions retained by him from premiums on policies afterwards canceled was liable for such commissions, irrespective of whether the policies were canceled before or after the termination of his agency.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 111-114; Dec. Dig. § 84.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the National Union Fire Insurance Company against Arthur G. Nason, doing business under the name and style of Arthur G. Nason & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

James W. Cochrane, of San Francisco, for appellant. Coogan & O'Connor, of San Francisco, for respondent.

MURPHEY, Judge pro tem. Appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

Defendant was for a term of years the general agent for the plaintiff in the state of California. At the time of the trial the parties exchanged accounts, from which it appeared that the only difference between the parties was as to two items; the respondent claiming a credit of \$925.23 for return of commissions retained by appellant from premiums on policies that were afterwards canceled, and the appellant claiming a credit of \$317.33 for commissions earned by him, but rebated to insured policy holders by respondent through adjustments made necessary by reason of the fire in San Francisco of 1906.

If respondent's claim for return of commissions was sustained without allowance to appellant for earned premiums, there would be a balance of \$678.77 due respondent. The court found in favor of respondent on the single issue of the return of commissions on canceled insurance, and in favor of appellant for the amount of \$317.33, earned commissions on adjusted insurance, and gave judgment for the respondent for the balance claimed after deducting this amount.

The record fairly discloses the fact that the appellant at the time of the trial conceded that there were flat cancellations of insurance upon which the aggregate commission retained by him would amount to the sum claimed by the plaintiff; but contended that the cancellations were effected after he severed his connection with the plaintiff corporation, and it was upon this theory that the cause was tried. As we understand the record it was upon this understanding that the plaintiff rested its case:

"The position that Mr. Nason takes in this matter is this that, these policies having been canceled after the termination of his agency, he is not responsible nor liable for any return premiums on those policies or any premiums at all, for this reason: That Mr. Nason operated an office here; that all of this business was brought and placed upon the books of the company by and through the efforts of Mr. Nason and through money expended by him; and, the policies being canceled after the termination of his agency,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he cannot be held responsible for any of these return premiums.

"Mr. O'Connor: Now is there any question of the cancellation of the policies?"

"Mr. Cochrane: Yes.

"Mr. O'Connor: I don't mean the date of them. I mean the cancellation of them.

"Mr. Cochrane: No. We take the position that the policies were canceled subsequent to the termination of the agency. But I would like to have the policies."

[1] In his brief appellant calls attention to several rulings of the court on the introduction of testimony relative to cancellation of those policies, which he claims to be error. We have examined the rulings carefully, and are satisfied that the conclusions of the trial court were correct; but in view of the situation above developed wherein the cancellations were conceded, and the only disputed matter being as to time, which element the appellant deemed immaterial, the rulings if erroneous were harmless. In his closing brief appellant contends that the case was not tried solely upon the theory that he should not be charged with premiums upon policies canceled subsequently to the termination of his agency, and in support of his contention cites the testimony of appellant as follows: "Question. An account of yours with the National Union Fire Insurance Company has been offered in evidence, showing there is a balance due you from the National Union Fire Insurance Co. of \$564.49? Answer. Yes, sir." This conclusion of the witness does not in any way militate against respondent's position, nor does it support appellant's theory. The statement of the position is an admission of the fact of the cancellations; and the balance claimed results only by reason of the fact that appellant refuses to credit respondent with the commissions retained on this identical item of canceled insurance.

[2] Even if this were not true, the appellant could not be heard at this time to impeach a record upon which the respondent submitted its case; the general rule being that: "Where an issue is tacitly accepted by all the parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory. * * * When a case is tried upon the theory that certain facts exist, even though they are put in issue by the pleadings, their existence will be assumed on appeal." 21 Ency. of Plead. & Prac. 667; 2 Cyc. 670; *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459; *Milwaukee Mechanics' Ins. Co. v. Warren*, 150 Cal. 346, 89 Pac. 93.

[3] The sole question left for determination, therefore, is as to whether the conclusion of the trial court that the respondent was entitled to a return of these commissions irrespective of the time of cancellation, whether before or after the termination

of appellant's agency, is supported by authority.

This identical question here raised was passed upon by the Supreme Court in the case of *Milwaukee Mechanics' Ins. Co. v. Warren*, supra. In that case, as in the case at bar, the contract of agency provided that the agent should retain as his compensation 35 per cent. of gross premiums, after deducting all return premiums, rebates, and reinsurance; and in that respect the court said: "It appears from the record that in a number of instances where policies have been written by Warren & Langtree return premiums were paid by the company after the termination of Warren & Langtree's agency. In making up his statement of account the referee charged Warren & Langtree 35 per cent. of these return premiums, and there was a good deal of discussion in the lower court as to the propriety of this charge. Under the contract itself it is clear that Warren & Langtree were chargeable with these payments. The agreement on which they were appointed agents provided that as compensation for their services they were to receive 35 per cent. of the gross premiums by the company in their territory, 'after deducting all return premiums, rebates and reinsurance.'"

The question at issue here is directly in point with the above citation; and appellant has called our attention to no authority in opposition to the views therein expressed.

Judgment affirmed.

We concur: LENNON, P. J.; HALL, J.

SOUTHERN CONST. CO. v. HOWELLS et al. (Civ. 1,272.)

(District Court of Appeal, Second District, California. Feb. 26, 1913.)

MUNICIPAL CORPORATIONS (§§ 488, 489*)—PUBLIC IMPROVEMENTS—ENFORCEMENT OF ASSESSMENTS—STATUTES.

Vrooman Act (St. 1885, p. 156) § 11, as amended, makes a determination by the city council upon appeal by any of the property owners affected by an assessment, and notice of hearing published for five days, binding upon all property owners so affected whether they join in the appeal or not, and section 12 provides that at any time after five days from the decision of the appeal the contractor may sue for unpaid assessments. In a contractor's action to recover unpaid assessments, the trial court found that notice of the hearing of the appeal by defendant and others to the city council had not been published as required by the statute, or at all. *Held*, that the publication of notice was imperative and jurisdictional and that any action on the appeal before such publication was invalid, so that defendant by appearing before the council and urging his appeal without objection to its failure to publish notice thereof did not waive such requirement, and estop himself from alleging the failure of notice as a defense to the contractor's action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Cases & Rep'r Indexes

Appeal from Superior Court,* San Diego County; T. L. Lewis, Judge.

Action by the Southern Construction Company against Jessie S. Howells and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Sam Ferry Smith, of San Diego, for appellant. Crouch & Crouch, of Los Angeles, for respondents.

JAMES, J. The city council of San Diego in the year 1907 initiated proceedings under the Vrooman Act (St. 1885, p. 147) to have performed the work of grading certain portions of Tide street. The work was completed, but within the time allowed by statute certain property owners made appeal to the city council, objecting to the assessment levied as being excessive, and also upon the ground that the work had not been performed according to the specifications of the contract. The property owners so objecting did not constitute all of the property owners who were affected by the assessment. Thereafter the city clerk mailed a notice to the agent who represented the objecting property owners, which notice set forth the day when hearing would be had upon the appeal so taken. The hearing came on before the city council, when the appealing property owners were heard through their agent and attorney, and the council made an order in the form of a resolution denying the appeal and affirming the assessment. Thereafter this action was commenced by the contractor to recover the amount assessed against defendants' property on account of the street improvement work performed by it. The defendant Howells was one of the property owners who joined in the appeal made to the city council, and she was represented at the hearing thereof by the same agent and attorney who represented the other contestants. The city council caused no notice by publication to be given of the hearing to be had on the appeal of the property owners, and the trial court sustained the contention of defendant that, until publication of such notice had been had in accordance with the requirements of the statute, any purported hearing of the appeal was null and void, and that in consequence this action was prematurely brought. By section 11 of the street law under which the improvement of Tide street was had (Stats. 1885, p. 147, and as subsequently amended), it is provided that, after an appeal has been filed with the clerk of the council, "notice of the time and place of the hearing * * * shall be published for five days." Section 12 of the same act contains a provision that, at any time after five days have elapsed from the decision of the council made after hearing of the appeal of property owners, the contractor, or his assignee, may sue the owner of the land or lots assessed, and recover the amount of the unpaid assessment. The trial judge failed to make findings of fact as to material is-

ssues presented by the pleadings, and made only a single finding determining that notice of the hearing of the appeal to the city council had not been published as required by law or at all. Of course, if the evidence sustains this finding, then the plaintiff, which appealed from the order denying a motion for a new trial, cannot be said to have been prejudiced by the omission of the court; for the reason that, if it was an essential prerequisite that notice of the hearing referred to should have been published before the council was authorized to determine the merits of the objections, then the plaintiff was not in a position entitling it to bring this action at the time it filed its complaint. As there was no dispute as to the fact found by the court as to the nonpublication of the notice, the single question of law is presented as to whether the defendant by appearing and urging her appeal without objecting to the failure of the council to publish notice of the hearing, waived the benefit of such notice and thus estopped herself from urging that defense in this action.

Under the street improvement act here considered, a determination made in regular form by a city council upon a notice of appeal taken by any of the property owners affected by an assessment becomes binding upon all property owners so affected, whether they join in the appeal or not; and it seems that the notice by publication is designed for the purpose of charging all such property owners and of giving them an opportunity, if they so desire, to appear and be heard at the time set. The filing of an appeal by a property owner has the effect of initiating a proceeding which must be carried through in the manner prescribed by the statute. No hearing can be had before a published notice is given which will bind any of the parties assessed. The law provides for but one trial or hearing upon such an appeal, and after this hearing is had property owners who do not join in the notice of appeal cannot appear and raise any further question, but they are all equally bound by the conclusion of the city council. The hearing cannot be so had as to be valid as to some of the assessed property owners and invalid as to others. It may be that, where all of the owners liable for the assessment appear and waive notice of the hearing, a valid order might be made determining the merits of the appeal without notice having been published, but such was not the fact in this case. In the case of *Girvin v. Simon*, 127 Cal. 491, 59 Pac. 945, which we regard as being in point upon the facts presented here, it was said: "It is clear that the appeal, when filed, though by one only, suspends all proceedings to collect any of the assessments until that appeal has been heard, after the statutory notice has been given, and it is only such hearing upon notice that binds any of the parties assessed. * * * The statutory direction to the city

council was imperative, and the appellant, and all other parties assessed, might safely rest until due notice was given." We are not unmindful of the fact that in the case cited the council refused to hear the protest or appeal on the ground that it was not sufficient in form, but the language in the decision which we have quoted is directly to the point that the proceedings of the city council taken after an appeal is made from an assessment can only result in a valid order where notice of the hearing is given in the precise mode prescribed by the statute. We cite also *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679. Stated in another way, we conclude that the city council, when it proceeds to give a hearing on an appeal against a street assessment under this act, cannot assume jurisdiction to make any order of determination therein until all property owners affected by the assessment, whether parties to the appeal or not, have been given notice of the hearing; there is but one way provided by the statute for the giving of this notice, and that is that it shall be published for five days.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

MEAD et al. v. BROADS et ux. (Civ. 1,011.)

(District Court of Appeal, Second District, California. Feb. 26, 1913.)

1. CONTINUANCE (§ 19*)—GROUNDS—ABSENCE OR DISABILITY OF PARTY.

On a motion for a continuance on the ground of the absence of a party defendant, there were affidavits that he was the only person who knew of the whereabouts of necessary witnesses, and that defendants could not safely proceed to trial in his absence; but there was no showing as to when he could probably appear, or that it was expected that he would be able to within a reasonable time. The opposing affidavit showed that the action had been pending for more than a year, and that various continuances had been had, and that the wife of the absent defendant was the owner and manager of their business, and that during most of the time when the alleged damages occurred he had not been in the city. *Held*, that the denial of a continuance was not an abuse of discretion, since the mere absence of a party furnishes no ground for a continuance, unless it is shown that such absence is unavoidable, and that the party will suffer damage to his interests if he is unable personally to attend the trial.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 41, 43-48; Dec. Dig. § 19.*]

2. APPEAL AND ERROR (§ 966*)—DISCRETION OF TRIAL COURT—CONTINUANCE.

Where it is shown, on motion for continuance for the absence of a party defendant, that his interests will suffer if he is unable to attend the trial, which the affidavits of the other side tend to disprove, it is for the trial judge to determine the facts; and no abuse of discretion can be predicated on his ruling.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3837; Dec. Dig. § 966.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by George R. Mead and Walter J. Cook, copartners doing business under the firm name of Mead & Cook, against B. Broads and Laura Broads, his wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. C. Millsap, of Los Angeles, for appellants. Ray Howard, of Los Angeles, for respondents.

JAMES, J. By this appeal, taken from a judgment entered in favor of the plaintiffs, but one question is presented for review, and that is whether the trial court erred in denying a motion made for a continuance of the trial on the ground of the absence of defendant Bernard Broads. This action was brought to recover damages alleged to have been suffered by the plaintiffs through the acts of defendants in allowing and permitting water and other liquids to flow through the ceiling of plaintiffs' storeroom. An injunction was also asked to restrain the continuance of the acts complained of. Answer was filed, and the cause came on regularly for trial, when the attorney for defendants presented an affidavit showing that defendant Bernard Broads, the husband of defendant Laura Broads, was sick and unable to attend the trial; that said Bernard Broads was the only person who knew of the whereabouts of witnesses necessary to be called on behalf of defendants; and that defendants could not safely proceed to trial without the presence of said Broads. It was not shown by the affidavit as to when the absent defendant would probably be able to appear, or that it was expected that he would so be able within a reasonable or any time. In opposing the motion for a continuance counsel for plaintiffs made a statement which it was stipulated might be treated as though it was presented in the form of an affidavit, and it was so considered by the court. By this statement it was shown that the action had been pending for more than a year, and that various continuances had been had, and that defendants had testified in other matters between the same parties that the defendant Laura Broads was the owner and principal manager of the business of defendants; that Broads had formerly testified that during most of the time when the alleged nuisance was being maintained he was not present in the city; that defendants Broads had made their residence upstairs over the restaurant of defendants; and that these were the premises where the damages were alleged to have been suffered. Upon this showing the court made an order denying the motion for a continuance, and plaintiffs introduced their testimony. No evidence was offered on behalf of defendants, and the judgment followed.

[1, 2] Upon the evidence as presented to the trial court, consisting of the affidavit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the statement made counter thereto, we are of the opinion that the making of the order denying the motion for postponement of the trial was not an abuse of discretion. The mere absence of a party furnishes no ground for a continuance, unless it is made to appear that such absence is unavoidable, and that the party will suffer damage in his interests if he is unable personally to attend the trial; and even where a *prima facie* showing of these essentials is made, if there is presented a countershowning, then it becomes the duty of the trial court to resolve the facts, and no claim of abuse of discretion can be predicated upon its action. Such is the state of the case presented upon this appeal.

Suggestion has been made as to the death of some of the parties to this action, but upon the state of the record as it is presented we do not deem it necessary that substitution be made of their personal representatives.

The judgment appealed from is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

HONAKER v. HEATLY. (Civ. 1,267.)
(District Court of Appeal, Second District,
California. Feb. 26, 1913.)

BOUNDARIES (§ 47*)—ESTOPPEL.

Where adjoining owners were not privy to the making of a private survey between their lands, and there was no dispute between the parties as to the true boundary line and no express agreement as to its location, any conduct by the parties from which an agreement as to the boundary might be presumed being under mutual mistake of fact, neither of them was estopped from claiming according to the true boundary when discovered.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 227-231; Dec. Dig. § 47.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Silas W. Honaker against James Heatly. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Conkling & Brown, of El Centro, for appellant. Shaw, Ross & Dyke, of El Centro, for respondent.

SHAW, J. Action of ejectment. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

The only point urged by appellant is that the court failed to make findings upon material issues tendered by the pleadings. In addition to the denials contained in the answer, defendant, by an amendment thereto, pleaded affirmatively certain facts which he claims constituted an equitable defense to the cause of action. The court found in favor of plaintiff as to the issues tendered by the complaint; but, notwithstanding evi-

dence offered in support thereof, refused to make any finding as to the matter set forth in the amendment to the answer, the substance of which is that in 1903 plaintiff and defendant, under the homestead act, settled on adjoining quarter sections of government land which in 1856 had been surveyed by the government, but the monuments established to designate the sectional and subdivision lines and corners had long since disappeared. In the actual entry upon the land so claimed by the parties, they both assumed that certain stakes set by the Imperial Land Company, in making a private survey which purported to re-establish and retrace the lines of the government survey, correctly marked and delineated the same upon the ground. By reason of this fact both parties were thus led to believe that the strip of land which forms the subject of the controversy was included in and a part of the homestead entry made by defendant. Thereafter defendant, with plaintiff's acquiescence and co-operation, constructed over and upon said strip of land an irrigating ditch, and made other improvements thereon. Thereafter it developed that the survey so made by the Imperial Land Company was erroneous and incorrect, and that the strip of land over which defendant had constructed the irrigating ditch was a part of plaintiff's homestead, title to which was acquired by him from the government. Prior to ascertaining the correct corners and lines in accordance with the government survey, plaintiff erected posts in accordance with the erroneous survey made by the Imperial Land Company, and pointed them out to defendant as designating the corners of his land.

In our opinion the facts so pleaded were clearly insufficient to constitute an equitable defense. Had the court found the issues thus tendered in favor of defendant, the judgment must, nevertheless, have been in favor of plaintiff; hence defendant was not prejudiced by reason of the failure of the court to find thereon. No question of adverse possession is presented. *McCreery v. Sawyer*, 52 Cal. 257; *Montgomery v. Locke*, 72 Cal. 76, 13 Pac. 401. There existed between the parties no dispute as to the location of the true boundary line. Neither party was privy to the making of the private survey. No agreement in words as to the location of the line was made, and it is clear that any acts or conduct of the parties from which an agreement might be inferred were due to a mutual mistake of fact. Under such circumstances, plaintiff was not precluded or estopped from claiming his estate in accordance with the true line when the same was ascertained. In the case of *Schraeder Mining & Mfg. Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. 385, 32 L. Ed. 760, the court says: "The decisions in the other states generally support the rule that owners of adjacent

tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered." And in *Perkins v. Gay*, 3 Serg. & R. (Pa.) 327, 8 Am. Dec. 653, it is said: "If the parties from misapprehension adjust their fences and exercise acts of ownership in conformity with a line which turns out not to be the true boundary, or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement or be binding as an assent of the parties. * * * The reason is that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event." To the same effect is *Cheaney v. Stone Co.* (C. C.) 41 Fed. 740; *Winnipisiogee Paper Co. v. New Hampshire Land Co.* (C. C.) 59 Fed. 542. Says Mr. Bigelow in his work on Estoppel (5th Ed.) at page 619: "The principle upon which these cases proceed is that there must have been, when the incorrect line was acted upon, knowledge of the true boundary by the one party and ignorance of it by the other, in order to estop the party from asserting it within the period of limitation; and this though it may have been intended that the incorrect line should be fixed upon as the true one and acted on accordingly." Moreover, the pleading is insufficient in that it fails to state other facts constituting essential elements of estoppel, as announced in *Maye v. Yappen*, 23 Cal. 306, quoted with approval in *Cottrell v. Pickering*, 32 Utah, 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404.

Since the matters alleged were insufficient to constitute an equitable defense, the failure of the court to find thereon was not prejudicial to defendant.

The judgment and order are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

GRIFFIN v. LONG et al. (Civ. 1,190.)
(District Court of Appeal, Second District,
California. Feb. 25, 1913.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding by the trial court on substantially conflicting evidence is conclusive on appeal. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. CONTRACTS (§ 153*)—CONSTRUCTION.

In construing a contract every part thereof should be given effect, if reasonably practicable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by F. H. Griffin against W. A. Long and others. From a judgment for defendants and an order denying a motion for new trial, plaintiff appeals. Affirmed.

H. Scott Jacobs and H. P. Brown, both of Hanford, for appellant. E. T. Cosper, of Hanford, for respondents.

SHAW, J. This action was brought to recover money alleged to be due upon a contract, as follows:

"Hanford, Cal., May 11th, 1907.

"This agreement made and entered into this 11th day of May, 1907, between F. H. Griffin, party of the first part, and W. A. Long, W. R. Newport and Robt. McCourt, parties of the second part, agree to payment of \$1,500 dollars in thirty days from date to be paid to the party of the first part; otherwise one-quarter interest in the Hattie B. Mica and Felspar Mine, situated in Los Angeles county, to revert back to F. H. Griffin party of the first part.

"[Signed] F. H. Griffin.

"[Signed] W. R. Newport.

"R. L. McCourt.

"W. A. Long."

In answering the complaint defendants alleged that the contract was intended by the parties to constitute a 30-day option to purchase a one-quarter interest in certain mining property owned by plaintiff, and given by him to defendants. The court so found and gave judgment accordingly, from which and an order denying his motion for a new trial plaintiff appeals.

Where a contract is reduced to writing, the intention of the parties should be ascertained from the instrument alone, if possible. Civ. Code, § 1639. If its meaning, however, be doubtful, the court, for the purpose of ascertaining the intention of the parties thereto, should in the interpretation thereof apply the rules prescribed by the Code. Civ. Code, § 1637. The court, upon the theory that the contract in question was uncertain and ambiguous in meaning, permitted defendants, over plaintiff's objection, to introduce parol evidence as to the relation of the parties, the circumstances under which the contract was executed, and the subject to which it related. This evidence, though conflicting, clearly tended to establish the following facts: At the time of the execution of the contract plaintiff was the owner of a three-quarters interest in the mining property mentioned therein, and the defendants were the owners of a one-quarter interest, which they had theretofore purchased from appellant. Plaintiff was in straitened circumstances financially, and for the purpose of raising ready money approached defendants with a view of selling to them another one-fourth interest in the mine. The negotiation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

resulted in defendants declining to buy outright, but they did agree to take a 30-day option thereon, and did agree that defendant Long should immediately advance to plaintiff \$300 in cash, for which he gave his note, payable within 30 days; it being understood that if defendants exercised the option to buy Long should retain \$300 out of moneys so due thereon from him to plaintiff, and if defendants did not so exercise the option then defendants McCourt and Newport should sign the note for \$300 so given by plaintiff to Long. At the expiration of the 30 days, and after defendants had determined that they would not buy the property, McCourt and Newport, in accordance with this understanding, signed the note in question. The contract was prepared by appellant, but before the execution thereof, and at the suggestion of defendants, the words, "otherwise one-quarter interest in the Hattie B. Mica and Felspar Mine, situated in Los Angeles county, to revert back to F. H. Griffin, party of the first part," were added thereto. Within 30 days plaintiff was informed that defendants declined to exercise the option to buy, but nothing appears to have been said or done by any one of the parties with reference to the obligation claimed to have been imposed by the contract until the commencement of the action, nearly four years later. Neither at the time of the execution of the contract, nor at any other time, did plaintiff deliver to defendants a deed or other conveyance to the one-fourth interest so covered by the option. While the court accorded to defendants considerable latitude in the introduction of evidence, for the purpose of placing itself in the position of the parties, we are unable to perceive any prejudicial error in its rulings. Indeed, appellant fails to point out any specific error by reason whereof his substantial rights were prejudiced.

[1] The chief contention of appellant is that the evidence shows that at the time of the execution of the contract plaintiff delivered to defendants a bill of sale of the one-fourth interest in the mine, and that if this fact be deemed established the entire fabric of defendants' evidence, and upon which the court based its decision, is destroyed. A sufficient answer to this contention is that there was a substantial conflict of the evidence touching the question of delivery of the deed; and under the rule the conclusion of the trial court with reference to the delivery or nondelivery of the conveyance, as well to all other facts which the evidence tends to show, must, if necessary in support of the decision, be accepted by this court as established facts.

[2] In the interpretation of a contract it is the duty of the court to give effect to every part thereof, if reasonably practicable. Under this rule some effect must be given to the words added to the contract at the sug-

gestion of defendants, namely, that upon failure to pay the \$1,500 the one-fourth interest in the property was to revert back to plaintiff. In no other way than by construing the whole contract as an option can effect be given this language. The contract as originally drawn obligated defendants to pay plaintiff the amount specified within 30 days. As thus prepared, it was, upon plaintiff's theory of the case, complete, and fully expressed the intention of the parties; hence the clause added thereto at the suggestion of defendants subserved no purpose whatever. Appellant's contention that the clause in question inserted (at defendants' request) was for plaintiff's benefit and intended as a lien or mortgage for the purpose of securing the sum specified in the contract is, upon the record, untenable.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

HUMPHREY v. DUNNELLS. (Civ. 1,248.)

(District Court of Appeal, Second District, California. Feb. 25, 1913.)

1. NUISANCE (§ 72*)—ABATEMENT—PERSONS BY WHOM ACTION MAY BE BROUGHT.

The provisions of a city charter vesting authority in the common council to declare what should constitute a nuisance and to abate the same did not take from private citizens the right to proceed to have a thing constituting in fact a private nuisance abated under Code Civ. Proc. § 731, providing that an action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance, and that by the judgment in such action the nuisance may be enjoined or abated, as well as damages recovered, although such thing had never been declared a nuisance by the common council.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

2. MUNICIPAL CORPORATIONS (§ 663*)—TREES IN STREETS—MUNICIPAL ORDINANCES.

A municipal ordinance, authorizing the planting of trees along the sidewalk lines and providing that it should be unlawful to cut, girdle, or mutilate, damage, or injure any trees planted in any of the streets in the city, only made it unlawful to remove trees planted on the sidewalk lines, and did not make it unlawful for a person who had planted trees in a part of the street designed for the passage of vehicles to move them when ordered by the court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

3. MUNICIPAL CORPORATIONS (§ 669*) — STREETS—OBSTRUCTIONS—COMPELLING REMOVAL.

The right of ingress and egress is a right of property to which an abutting owner is entitled, even against the municipality, and a violation of which constitutes a private nuisance, and hence a person who had planted and maintained trees in the portion of the street designed for vehicles, of a size and number sufficient to damage an abutting owner's means of ingress and egress, would be required to remove them, even though planted with the pas-

sive consent of the city authorities or even by its permission.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1445; Dec. Dig. § 669.*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by William Humphrey against E. B. Dunnells. From a judgment of nonsuit, plaintiff appeals. Reversed.

Wm. Humphrey, of San Diego, in pro. per. Eugene Daney, of San Diego, for respondent.

JAMES, J. Plaintiff brought this action to compel defendant to abate an alleged nuisance and for damages. The trial court granted a motion for judgment of nonsuit, and plaintiff has appealed.

The facts constituting the cause of action set out in plaintiff's complaint were fully sustained by the evidence. It appears that plaintiff and defendant are the owners of property abutting upon that portion of Third street, the same being a public street in the city of San Diego, lying between Redwood and Quince streets. Third street extends north and south and it is intersected at right angles from the west by Redwood and Quince streets; Redwood street being at the north. The distance between Redwood and Quince streets is 300 feet. Defendant's property is located on the west side of Third street and extends from the corner of Redwood street south 150 feet. Plaintiff is the owner of the 50 feet immediately adjoining defendant's property at the south, upon which there is a modern residence building. Plaintiff also is the owner of the ground immediately opposite that of defendant and extending from the corner of Third and Redwood streets 100 feet south on Third street. Third street, between Quince and Redwood streets, is admitted to be a public street, but the same has never been graded by the municipality, and at its junction with Redwood street a fence has been placed by the city to prevent vehicles from entering Third street toward the south. Third street is 80 feet in width, but the ground from Quince street northerly toward Redwood, for a large portion of its width, falls away in a sharp declivity which forms a deep canyon at the east. From a point opposite the line dividing the property of defendant from plaintiff, the canyon or declivity bears toward the east, and the ground constituting Third street from that point north to Redwood street is comparatively level. Defendant's property fronts also upon Redwood street, which is a graded, traveled street, and which furnishes him means of access and egress at the north line of his property. Commencing about 12 years ago, from time to time, defendant planted trees in Third street across almost the entire width thereof and for the full length of the 150 feet along and opposite his property. These

trees were so located and grew to such a size as to make that portion of Third street impassable to vehicles. About 27 or 30 feet of the width of Third street from Quince northerly to plaintiff's 50-foot lot is passable and had been used as a driveway, but the location of the trees planted by defendant has made it extremely difficult, if not impossible, for vehicles to turn about at the point where such drive ends. Further, the trees prevent free passage for vehicles to plaintiff's 100-foot lot on the opposite side of Third street. It was shown by the evidence that plaintiff could have leased his 100-foot lot for a term of years at \$15 per month, providing the trees were removed, and that plaintiff was compelled to accept at least \$5 less per month as rental for the use of the house on the 50-foot lot than he would receive were the obstruction caused by the trees removed.

The foregoing statement shows, in substance, the undisputed evidence as it was submitted to the trial court upon the motion for judgment of nonsuit, except that there was introduced, by way of documentary evidence, an ordinance of the city of San Diego affecting the planting of trees on the public streets. This ordinance was one designed to provide for the planting of trees along sidewalk lines, but not in the street way proper. Its provisions were specific in that respect, as it directed that on streets with 10-foot sidewalks trees should be planted 8½ feet from the property line; on streets with 12-foot sidewalks such trees should be planted 10 feet from the property line, et cetera. It also contained a provision declaring that it should be unlawful "to cut, girdle, or mutilate, or in any manner damage or injure, any tree or trees planted in any of the streets of the city of San Diego, provided that nothing herein contained shall prevent the owner or agent of the property in front of which such trees are planted from properly trimming such trees." A penalty was fixed for the violation of this latter provision. The freeholders' charter, under which the government of the city of San Diego is carried on, contains a provision that the common council shall have authority to regulate and control the use of streets, sidewalks, and highways and prevent encroachments upon the same, and to declare what shall constitute a nuisance and provide for the abatement or removal thereof. The judgment of nonsuit as entered contained the following recital: "The plaintiff having rested his case, thereupon the defendant moved that a nonsuit be granted herein on the ground that the plaintiff had not established a cause of action against the defendant, and that it affirmatively appeared from plaintiff's testimony that, by virtue of the provisions of the city charter and of the city ordinances of the city of San Diego, Cal., the defendant did not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have the legal right to abate the alleged nuisance complained of or to remove the trees mentioned in plaintiff's complaint. And said motion having been argued by counsel and submitted to the court for consideration and decision, the motion of said defendant was this day granted by the court." The view apparently taken by the trial judge, and which is urged in the brief of respondent filed herein, was that the trees planted by defendant in the public street could not constitute a nuisance under the provisions of the city charter, unless so declared to be by the common council, and that the ordinance referred to was designed to protect all trees wherever they might be planted in a public highway.

[1] It cannot be said that the provisions of the city charter, vesting authority in the common council to declare what may constitute a nuisance and to abate the same, take away from any citizen the right to proceed to have a thing which may constitute in fact a private nuisance abated, notwithstanding that the common council has never taken cognizance of it as such. In no wise can it be said that the provisions of section 731, Code of Civil Procedure, in the rights there conferred, are thus affected or abrogated. This section provides in part as follows: "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor." By section 3479, Civil Code, a nuisance is defined to be: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."

[2, 3] As we read the provisions of the city ordinance affecting the matter of the planting or removal of shade trees along public streets, we conclude that such provisions were designed to regulate the planting and removal of such trees only where planted along sidewalk lines; and, even though the effect of the ordinance should be extended and be said to apply to trees planted in that portion of a street designed for the passage of vehicles, surely it must be that the city council would be without power to legalize the location of such trees where they are of sufficient size and number as to affect an abutting property owner and damage his means of ingress and egress. The right of ingress and egress is a right of property which the abutting owner is entitled to be protected in, and even against

encroachments created by a municipality. A violation of this right by obstruction creates a private nuisance for the abatement of which and for damages an individual is entitled to sue. *Schaufele v. Doyle et al.*, 86 Cal. 107, 24 Pac. 834; *Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82; *Lind v. City of San Luis Obispo*, 109 Cal. 340, 42 Pac. 437. The trees planted by defendant, and which obstructed the use of the street in the manner complained of by plaintiff, may have been planted with the passive consent of the city authorities, but, as we have noted, any permission so obtained to plant the trees, whether of an active or passive sort, could furnish no protection to defendant where the result of his act was to injuriously affect the right of ingress or egress which plaintiff was entitled to enjoy. The case of *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267, cited by respondent, does not conflict with the conclusions herein expressed. That was an action brought by an individual to enjoin the authorities of Salinas City from cutting down and removing as a nuisance certain shade trees growing along the sidewalk in front of plaintiff's premises; the court holding that the city had the right, under its charter, to cause the removal of trees if they were deemed to be an obstruction to public travel and as a nuisance, and that an action by the property owner could not be maintained for that cause. The trees of which plaintiff complains were planted by defendant, watered, and maintained by him. Defendant was the active cause, not only in creating the obstruction complained of, but in preserving it and making it even more effective as a complete obstruction to the street.

For the reasons stated, we think the judgment of nonsuit should not have been entered.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

STOREY v. MUELLER. (Civ. 1,138.)

(District Court of Appeal, First District, California. Feb. 24, 1913.)

1. JUSTICES OF THE PEACE (§ 127*)—OPENING OR VACATING DEFAULT.

A justice of the peace could not set aside a default judgment for plaintiff on the ground of defendant's excusable neglect, where the notice of motion and the affidavit in support thereof based the motion on the ground that defendant's time for answering had not expired when the judgment was entered.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 401; Dec. Dig. § 127.*]

2. JUSTICES OF THE PEACE (§ 127*)—OPENING OR VACATING DEFAULT.

A justice's court has no jurisdiction to set aside a default judgment for plaintiff on the ground that defendant's time for answering

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had not expired when the judgment was entered.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 401; Dec. Dig. § 127.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by I. Holgate Storey against Henry Mueller. From a judgment of the Superior Court, reversing and annulling an order of the Justice's Court, setting aside a default judgment for plaintiff, defendant appeals. Affirmed.

L. S. Melsted, of San Francisco, for appellant. J. R. Pringle, of San Francisco, for respondent.

MURPHEY, Judge Pro Tem. Appeal from the judgment of the superior court of the city and county of San Francisco reversing and annulling an order of the justice's court of said city and county, wherein the justice of the peace set aside a default judgment theretofore made and entered by him in favor of the plaintiff and against the defendant. Upon the face of the record the judgment in the justice's court was regularly and properly entered. Subsequently defendant noticed a motion to set aside said judgment for hearing on the 7th day of October, 1911, concededly the tenth day after he had knowledge of the entry of said judgment, and based his motion upon the ground that "defendant's time for answering had not elapsed when said judgment was entered." In support of this motion an affidavit of defendant was filed, reciting that the summons had been served upon him on the 22d day of September and not on the 21st, as alleged in the affidavit of service, and therefore that the default and judgment entered on the 27th was premature. By stipulation of counsel the hearing of the motion was continued from the 7th to the 11th day of October "or as soon as counsel can be heard," and it was further stipulated that "said continuance will in no way prejudice defendant's right to make said motion and does not in any way constitute a waiver of any rights of defendant thereunder." The hearing of the motion actually took place on the 13th day of October, the record nowhere disclosing just when, if ever, the motion was made, the court and counsel proceeding on the mistaken theory, frequently indulged in, that a motion noticed is a motion made, and the following entry appears in the justice's docket: "The court rendered judgment on October 13, 1911, in setting the default against the defendant Henry Mueller aside." Subsequently on the 20th day of October, 1911, the court made the following order: "Good cause appearing therefor, it is hereby ordered that the default of the above-named defendant heretofore entered in the above-entitled action be and the same

is hereby set aside, and the judgment entered against said defendant by reason of such default vacated. * * * This order is made on the ground of defendant's excusable neglect."

[1] The respondent's contention is that the judgment of the superior court, reversing and annulling this order, must be affirmed upon the ground that the action of the justice of the peace was in excess of his jurisdiction; and we are of the opinion that this contention should be sustained.

The ground upon which the motion was granted was not responsive either to the motive noticed or to the affidavit filed in support thereof, and was therefore void, as the plaintiff was not called upon to defend the action of the court against objections that were not made. *McDonald v. California Timber Co.*, 151 Cal. 159, 90 Pac. 548; *Gould v. Moss*, 158 Cal. 548, 111 Pac. 925.

[2] We are satisfied that upon the motion noticed the court had no power to set aside the default judgment. In the case of *Winter v. Fitzpatrick*, 35 Cal. 269, a case wherein the statutory time had not elapsed between the service of summons and the rendition of the judgment, the Supreme Court says: "In making the order of the 10th of February, vacating and setting aside the judgment on the 24th of January" (the complaint having been filed on the 21st of January), "the justice of the peace acted without jurisdiction. Inferior courts cannot go beyond the authority conferred upon them by the statute under which they act. They can assume no power by implication, but must keep within the power expressly given. Neither the Practice Act nor the statute in relation to justices' courts in the city and county of San Francisco authorizes a review by the justice of his own judgment except upon motion for a new trial." The action of the district court in annulling the order of the justice setting aside the judgment was approved.

In *Simon v. Justice's Court*, 127 Cal. 45, 59 Pac. 296, the Supreme Court, commenting on *Winter v. Fitzpatrick*, supra, says: "The rule thus declared has never been since questioned and has been frequently affirmed; and so far as the question here involved is concerned the provisions of the Code of Civil Procedure are the same as those of the old Practice Act." In the case last cited the question under consideration was as to whether the answer had been filed in time, and the court further says: "If the motion made in the justice's court to set aside the judgment was based upon the 'mistake, inadvertence, surprise and excusable neglect,' * * * then the court had no jurisdiction, because it was not made within ten days after judgment." And we may interject the remark here that in the case at bar the record does not disclose the exact date when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the motion was made, but inferentially it was probably made after the ten days from the entry of the judgment, and there is no suggestion that it was made upon the ground of "excusable neglect," etc. "If it was based upon the theory that the answer was filed on the 31st day of August" (concededly within the statutory time) "then it raised very serious issues of both law and fact, which the justice's court had no jurisdiction to determine on such a motion. Whether the judgment could be set aside by a court of equity on a bill framed for that purpose is a question not now before us. We think the orders reviewed on the writ should have been vacated by the superior court."

In the case at bar the order was vacated by the superior court and, as we think, properly.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

BOULDEN v. THOMPSON et al.
(Civ. 1,246.)

(District Court of Appeal, Second District, California. Feb. 21, 1913. Rehearing Denied by Supreme Court April 22, 1913.)

1. COURTS (§ 92*)—OPINIONS—"DICTUM."

A statement in an opinion not necessary to the decision of the case is "dictum."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2051, 2052.]

2. ACTION (§ 48*)—JOINDER OF CAUSES OF ACTION—CONTRACT IN TORT—"CLAIMS"—"CLAIMS ARISING OUT OF THE SAME TRANSACTION."

Under Code Civ. Proc. § 427, providing that the plaintiff may unite several causes of action in the same complaint when they all arise out of classes of action enumerated in the first seven subdivisions, and that "claims arising out of the same transaction" and not included within any one of the subdivisions may be united, the word "claims" embraces not only such as are based upon contract but also those based upon tort; and a claim for a breach of a covenant contained in a lease, a claim sounding in tort for damages in taking away property owned by plaintiff, and a claim under Civ. Code, § 43, for threatening the lives of plaintiff and his wife during their ejection from the premises arose out of the same transaction, and hence were properly joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 450, 471, 490-510; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by E. W. Boulden against H. N. Thompson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

E. S. Torrance, of San Diego, for appellants. C. N. Andrews, of San Diego, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by reason of

the wrongful acts of defendants. The complaint is in three counts, each of which is stated to be a separate cause of action. Defendants demurred thereto, alleging as ground therefor that several causes of action had been improperly united therein. The demurrer was overruled, whereupon defendants answered, and upon trial the court found: "That all the allegations contained in the first cause of action are true, and that, except as to the allegations contained in said cause of action, the other allegations of the complaint are untrue"—and in accordance therewith gave judgment for plaintiff, from which, claiming that their demurrer was improperly overruled, defendants appeal upon the judgment roll.

[1, 2] The complaint contains much evidentiary matter which, upon any theory of the case, is mere surplusage. The first count, as we construe it, alleges a cause of action based upon a breach of covenant contained in a lease of real and personal property made by defendants to plaintiff; it being alleged that during the term thereof defendants wrongfully and forcibly ejected plaintiff from the leased property, to his damage in the sum of \$1,000. The second count states a cause of action sounding in tort; it being alleged that, at the time defendants wrongfully entered upon and took possession of said leased property, plaintiff owned and had in the dwelling house certain household furniture and other personal property, of which defendants took possession and refused to deliver the same to plaintiff, to his damage in the sum of \$1,000. The third count states a cause of action based upon section 43 of the Civil Code, alleging that at the time and in the unlawful act of dispossessing plaintiff, and as a part of the acts of defendants in ejecting plaintiff from said premises, they swore at plaintiff and his wife, called him vile names, threatened his life and that of his wife, by reason whereof plaintiff was put in great fear and caused great mental worry and pain and subjected to insult, by reason whereof he sustained damage in the sum of \$1,000.

The contention of appellants is that, under the provisions of section 427 of the Code of Civil Procedure, a cause of action in tort and one arising upon contract cannot be joined in the same complaint. In *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259, it was expressly held that section 427 of the Code of Civil Procedure, as it then stood, did not authorize such joinder. In deciding the case, Commissioner Temple referred to the fact that the Code of this state did not contain the provision which prevails in some states to the effect that causes of action arising out of the same transaction or transactions connected with the same subject of action might be united, "and," said the commissioner, "had this been in our Code, it would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have authorized the joinder of the causes of action in this case." While this statement was not necessary to the decision of the case, and is therefore dictum, nevertheless it is but reasonable to assume that it prompted the action taken by the Legislature in 1907 whereby the identical provision referred to by the learned commissioner was added to section 427, as subdivision 8 thereof. It is as follows: "Claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section," may be united. If the causes of action so united are within any one of the first seven subdivisions of the section, they may, by reason of that fact, be united. If not so included (and in this case they were not), they may nevertheless be united by virtue of subdivision 8, if they arise out of the same transaction or transactions connected with the same subject of action. We think it clearly appears from the complaint that the alleged claims did arise out of transactions connected with the subject of the action (*Corcoran v. Mannering*, 10 App. Div. 516, 41 N. Y. Supp. 1090; *Doyle v. Am. Wringer Co.*, 60 App. Div. 525, 69 N. Y. Supp. 952), which was the breach of contract in the commission of which defendants committed the torts upon which the other claims are based. The word "claims" as here used embraces not only such as are based upon contracts, but includes those based upon torts as well. *Eagan v. New York Transp. Co. et al.*, 39 Misc. Rep. 111, 78 N. Y. Supp. 209.

The ruling was not error, and the judgment is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

TOWNSEND v. PARKER, Justice of the Peace, et al. (Civ. 1,168.)

(District Court of Appeal, First District, California. Feb. 25, 1913. Rehearing Denied by Supreme Court April 25, 1913.)

1. JUSTICES OF THE PEACE (§ 209*)—CERTIORARI—JUDGMENT—MODIFICATION.

Under Code Civ. Proc. § 663, authorizing the superior court to set aside and vacate its judgments or decrees and enter another and different judgment, where, in a certiorari proceeding against a justice of the peace and another, an order of the justice's court was affirmed and approved with costs against the defendants, the superior court did not err in modifying and vacating the judgment in so far as costs were taxed against the justice.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 818-828; Dec. Dig. § 209.*]

2. TIME (§ 10*)—COMPUTATION—SUNDAY.

Under Code Civ. Proc. § 859, authorizing a justice's court to relieve parties from judgments by default taken against them by their mistake, inadvertence, surprise, or excusable neglect, if the application for such relief is made within ten days after notice of the entry of the judgment, where the last day of the

ten days after notice of the entry of a judgment was Sunday, application for relief against the default could be made the following day.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

3. JUSTICES OF THE PEACE (§ 127*)—OPENING DEFAULT—TIME FOR GRANTING APPLICATION.

Where a motion to open a default in a justice's court was made within ten days after notice of the entry of the judgment as required by Code Civ. Proc. § 859, the court did not lose jurisdiction of the application by continuing the hearing beyond the ten days, on plaintiff's application.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 401; Dec. Dig. § 127.*]

4. JUSTICES OF THE PEACE (§ 127*)—OPENING DEFAULT—ENTRY OF JUDGMENT—NOTICE.

Under Code Civ. Proc. § 1012, providing that service by mail may be made when the person making the service and the person on whom it is to be made reside or have their offices in different places, between which there is a regular communication by mail, an affidavit of the service of the notice of entry of a justice's judgment by mail, which did not show that the party making the service and the party upon whom it was made resided or had offices in different places, was insufficient, and on an application to open the default could not be received as evidence of the date of service.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 401; Dec. Dig. § 127.*]

5. JUSTICES OF THE PEACE (§ 127*)—OPENING DEFAULT—EVIDENCE.

On an application in justice's court to open a default, where defendant's affidavit that he received notice of the entry of the judgment within ten days prior to the application, and that he had no knowledge or notice of such entry prior to that date, was uncontradicted, the court properly held that the application was made in time and granted the application.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 401; Dec. Dig. § 127.*]

6. PROCESS (§ 68*)—SERVICE—EFFECT OF SECOND SERVICE.

A second service of process does not waive the first service nor effect a shortening of the time allowed a defendant to do an act under the law applying to the first service.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 52; Dec. Dig. § 68.*]

7. CERTIORARI (§ 49*)—RETURN—EFFECT.

The return to a writ of certiorari constitutes the answer as well as the evidence, and the recitals in the petition for a writ were therefore not admitted by the respondent's failure to answer the petition.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 129, 130, 137, 147-149; Dec. Dig. § 49.*]

8. JUSTICES OF THE PEACE (§ 197*)—MODE OF REVIEW—CERTIORARI.

The setting aside of a default judgment by a justice's court, without making the order conditional upon the payment of costs by defendant, was a mere error of law, not jurisdictional, which could not be corrected by certiorari.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 768-771; Dec. Dig. § 197.*]

9. JUSTICES OF THE PEACE (§ 205*)—RETURN—CERTIFYING EVIDENCE.

In the return to a writ of certiorari to review an order of a justice of the peace setting aside a default judgment, it was proper

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the justice to certify the evidence taken at the hearing on controverted jurisdictional facts, since it is the universal rule on certiorari to determine from the record whether the inferior tribunal exceeded its jurisdiction, and evidence de hors the record is never permitted.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 793-799; Dec. Dig. § 205.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Certiorari by E. F. Townsend against A. C. Parker, as Justice of the Peace of Stockton Township, County of San Joaquin, and another. From a judgment affirming and approving an order of the justice's court, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Ben Berry and Gordon A. Stewart, both of Stockton, for respondents.

MURPHEY, Judge, pro tem. This is an appeal from a judgment of the superior court of the county of San Joaquin on certiorari, affirming and approving an order of the justice's court of Stockton township, made on the 11th day of June, 1912, wherein the said justice of the peace set aside a judgment theretofore made and entered by him on the 22d day of December, 1911, in favor of plaintiff and against the defendant, on the ground of mistake, inadvertence, and excusable neglect. The record includes also an appeal from an order of the superior court, modifying its judgment theretofore made, by "vacating said judgment in so far as costs were taxed against the defendant A. C. Parker," who was the justice of the peace and one of the respondents in the certiorari proceedings.

[1] In passing it may be said that there is no merit in this appeal last mentioned. The modification was to a portion of the judgment of the superior court from which no appeal was taken, and simply determined that the costs should be assessed against Eccleston, the real party in interest in the litigation, and relieving the justice of the peace from any responsibility on that account. This procedure is fully warranted by law (Code Civ. Proc. §§ 662 and 663; Gibson v. Hammang, 145 Cal. 454, 78 Pac. 953), and we are satisfied that the court wisely exercised its discretion.

The facts of the appeal under consideration are as follows: The appellant recovered a judgment in the justice's court of Stockton township against Edward Eccleston and F. E. Quail. Suit was filed December 11, 1911, and summons was served on defendant Eccleston on December 13, 1911, in the county of Alameda. Subsequently, on the 16th day of December, 1911, while in Stockton on business connected with the litigation, defendant Eccleston was, on leaving the office of the attorney for the plaintiff, again served with a copy of the summons and complaint originally served on him in Alameda county; defendant, however, contending that he knew

nothing of this service. After the expiration of five days from this second service, to wit, on the 22d day of December, 1911, a default judgment was rendered against defendant. On the 23d of December plaintiff, according to the affidavit of one Marrs, mailed a copy of the judgment to defendant at the Hearst building, San Francisco; defendant Eccleston claiming, however, that he did not receive any notice of said judgment until the 28th day of December, 1911, when he did receive such notice through the mail. On January 6, 1912, defendant's attorneys filed notice of a motion, together with affidavits in support thereof, to vacate and set aside the judgment of December 22d, and noticed the same for hearing on the 8th day of January, 1912. The motion was actually heard and allowed on the 10th day of January, 1912, some 13 days after defendant acknowledged receipt of notice of the entry of judgment. Under these circumstances, the appellant contends that the justice of the peace had no authority to grant the motion to vacate (Code Civ. Proc. § 859), more than ten days having elapsed.

[2] Conceding that defendant had notice of the entry of judgment on the 28th of December, the ten-day period within which he must move expired on the 7th day of January, 1912; but, as that day fell upon Sunday, he had all of the following day in which to move; "as judgment was entered on the 20th and the last day of April was Sunday, defendant had until May 1st within which to make his application." *Spencer v. Branham*, 109 Cal. 336, 41 Pac. 1005.

[3] Respecting the time when the motion was noticed and heard, we find the following transcription of the justice's docket embodied in the return to the certiorari made by the justice of the peace to the superior court: "Notice of motion to set aside default judgment and affidavits filed January 6, 1912. On January 8, 1912, Ben Berry and Gordon A. Stewart, Esqs., counsel for defendant Edward Eccleston, appeared in court at the hour of 10 o'clock a. m. for the hearing upon the motion to vacate and set aside the judgment of default made and entered herein; but at said time A. H. Carpenter, Esq., informed the court that it would be impossible for him to take the matter up before January 10, 1912, at the hour of 9 o'clock a. m., and thereupon counsel for the defendant Edward Eccleston agreed to a continuance of motion until said last-named date to accommodate plaintiff's counsel, and the hearing of said motion was regularly continued until January 10, 1912, at said hour of 9 o'clock a. m." From an inspection of this record it will appear that the defendant did move on the 8th day of January, and that the plaintiff had notice of his intention so to do and requested a continuance to a future date. If the defendant was within the ten days' statutory limitation on the 8th, the motion

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was made in due time, and the court, notwithstanding the continuance, had jurisdiction. In *Spencer v. Branham*, supra, the court says: "If the motion had been made, and the court continued the hearing for argument or further evidence, it would not have lost jurisdiction, for in such a case the application would have been made in time." We now come to a consideration of the question as to whether the defendant was actually within the time on the 8th of January; and, in the determination of this matter, the reasoning of the learned judge of the trial court seems conclusive. He says:

[4] "Section 1012, C. C. P., is as follows: 'Service by mail may be made when the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail.' Section 1013 of the same Code provides the manner in which the paper constituting the notice must be inclosed in an envelope, addressed, postage prepaid, etc.

"The affidavit of service of the notice of the entry of judgment in said action is in the following words and figures: 'State of California, County of San Joaquin—ss: O. L. Marrs, being duly sworn, says: That he is a citizen of the United States and a resident of the state of California, over the age of 21 years and not a party to or interested in the within entitled action; that on the 23d day of December, 1911, he served the annexed notice of the entry of judgment on Edward Eccleston, one of the defendants therein named, by depositing a full, true and correct copy of such notice in the United States post office at Stockton, California, duly inclosed in a sealed envelope upon which the postage was fully prepaid, and which said envelope containing said notice was plainly addressed to Edward Eccleston, 401-7 Hearst Building, San Francisco, California, which was the said defendant Edward Eccleston's last known residence or place of business; that between said Stockton, California, and San Francisco, California, there is a regular and daily communication by mail, and that this affidavit is made for and on behalf of the plaintiff, E. F. Townsend. [Jurat] O. L. Marrs.'

"It will be observed that this affidavit fails to comply with the provisions of section 1012 of the Code of Civil Procedure hereinbefore quoted in that it fails entirely to show that the party making the service and the party upon whom the service is to be made reside or have their residences or offices in different places. This is one of the prerequisites and a condition which must exist before service by mail can be made, and the affidavit of such service must plainly and distinctly show such jurisdictional fact.

"In the case of *Linforth v. White*, 129 Cal. 188 [61 Pac. 910], our Supreme Court says: 'An affidavit of service of notice of appeal must show a strict compliance with the pro-

visions of the statute, otherwise it is insufficient to establish the fact of service,'—and, in the absence of sufficient proof of the fact of service of the notice, the appeal must be dismissed. In that case, as in this, the attempted service was by mail, and the court held that an affidavit of service by mail of the notice of appeal must show that the attorneys for the appellant, whose duty it is to make the service, and the attorneys for the respondent, upon whom it is to be served, reside in different places, between which there is a regular communication by mail; and the affidavit of service by mail by a third person, which fails to show the residence of the attorneys for the appellant, is insufficient.

"In the case of *Hogs Back Company v. New Basil Co.*, 63 Cal. 121, the court held an affidavit similar to the one at bar insufficient.

"Upon this affidavit a default was entered, and the Supreme Court set aside the default on the ground that there was no proof of the service of said amended complaint by mail as required by the Codes.

[5] "There are other California cases to the same effect, but these two are sufficient to show that the affidavit filed with the justice's court, purporting to show service of the notice of the entry of judgment in the action entitled '*E. F. Townsend v. Edward Eccleston et al.*' constituted no proof of service thereof, and was not such an affidavit as the justice of the peace of said court could consider for any purpose. This being true, the question arises, When did the defendant, Eccleston in fact have notice or receive notice of the entry of the default judgment hereinbefore referred to? In his affidavit on his motion to set aside and vacate the said default judgment, the defendant swears that he received the notice by mail on the 28th day of December, 1911, and that he had no knowledge or notice of the entry of said judgment prior to said date. Whether said defendant did or did not in fact have knowledge or notice of the entry of said default judgment prior to said date cannot be considered, because there is no other testimony on this question upon which either the court below or this court can act, and being the only testimony upon this question, the court must conclude that notice of the entry of said default judgment was received and had by said defendant Eccleston on the 28th day of December, 1911.

"Section 859 of the Code of Civil Procedure provides that such motion must be made within ten days after notice of the entry of judgment. * * *

[6] "That the second service of summons upon the defendant Eccleston was of no avail is clearly established by the cases of *Mayenbaum v. Murphy*, 5 Nev. 383, and *Russell v. Millett* [20 Wash. 212] 55 Pac. 44, as soon as that fact was made to appear in a proper proceeding before said court. A second service of process does not waive the first serv-

ice; nor can a second service of process effect a shortening of the time allowed a defendant under the law specified and applying to the first service."

From what has been said, we have no hesitancy in holding that the justice of the peace had jurisdiction to make the order vacating the judgment, and that the superior court correctly concluded that this action should be sustained.

[7] Appellant contends for an entirely different statement of facts, based upon the recitations of his petition for the writ of certiorari, which recitations, he maintains, became admissions by reason of the respondent's failure to answer the petition. There is no merit in this contention. In *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350, the court says: "The defendant also filed an answer to the petition for the writ, denying the allegations of the petition. This was irregular. The return to the writ constitutes the answer as well as the evidence, and the case is heard thereon unless upon motion an additional and amended return is made."

[8] The appellant further insists that the justice of the peace had no jurisdiction to set aside said judgment without making said order conditional upon the payment of plaintiff's costs. This question is not jurisdictional, and no case cited by counsel supports his contention. The refusal of the justice to impose costs as a condition of making the order vacating the judgment was an error of law for the correction of which the writ of certiorari may not properly be invoked. "The writ of review cannot be used to correct errors of law or fact committed by the inferior tribunal within the limits of its jurisdiction." *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565.

[9] In the return to the writ the justice of the peace certified to the superior court certain evidence taken at the hearing to determine the controverted facts in relation to the service of summons. Appellant specifies the certification of this evidence and the consideration of the same by the superior court as error. We cannot agree with this contention. In *City of Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234, the Supreme Court of this state said substantially that it is a universal rule of certiorari to determine from the record whether the inferior tribunal, court, or board has exceeded its jurisdiction, and that evidence dehors the record and contradicting it is never permitted. After stating the common-law rule, the court concludes: "If the jurisdiction of the inferior tribunal depended upon a question of fact, that fact was never tried de novo upon its merits, but the inquiry thereupon was limited strictly to the evidence upon which the inferior tribunal acted." In the case at bar the procedure indi-

cated by the language above set out was literally followed.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

BROWN et al. v. RATLIFF. (Civ. 1,080.)
(District Court of Appeal, Third District, California. Feb. 24, 1913.)

1. WATERS AND WATER COURSES (§ 158½*)—EASEMENTS FOR IRRIGATION DITCHES—QUIETING TITLE—COMPLAINT—SUFFICIENCY.

A complaint in a suit to quiet title to an easement for a lateral irrigation ditch, which alleges there was and is appurtenant to described lands of plaintiffs a water ditch constructed to carry water over the lands for irrigation, which describes the way of the ditch over the lands of defendant, and avers that the ditch connects with the main canal of an irrigation company, from which plaintiffs have the right of securing water for irrigation, and that plaintiffs possess a joint easement and right of way for the ditch by purchase and grant over the lands of defendant, shows that plaintiffs claim an easement for a specific right of way in the maintenance of the ditch, and it is immaterial whether the particular right of way was acquired through a specific grant or a particular location under a general grant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 189; Dec. Dig. § 158½.*]

2. PLEADING (§ 403*)—COMPLAINT—DEFECTS—CURING BY ANSWER.

The defect in the complaint in a suit to quiet title to an easement for an irrigation ditch arising from the failure to state whether plaintiff relies on a grant of a specific right of way or on a right of way located under a general grant is cured by answer denying every issue tendered and admitting the right of way for a ditch, and merely setting up the objection that the location of the ditch is not over a way designated by defendant, and that the way of the ditch is more disadvantageous to him than a different location equally valuable to plaintiff would be.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

3. PLEADING (§ 403*)—COMPLAINT—ERRONEOUS RULING ON DEMURDER—CURING BY ANSWER.

The error in overruling a demurrer to a complaint which is defective because uncertain is cured by an answer raising issues involving the questions in the case.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

4. WATERS AND WATER COURSES (§ 158½*)—IRRIGATION DITCHES—SUIT TO QUIET TITLE—IMMATERIAL FINDINGS.

Where, in a suit to quiet title to an easement for a right of way for an irrigation ditch, the issue was whether the ditch had been located and established by a former owner of the servient estate, and there was evidence of his acts showing an intention to designate a specific route for the ditch, which was constructed thereon, a finding that the former owner when locating the line of the ditch caused the same to be surveyed is immaterial and may be disregarded as surplusage, so that its nonsupport in the evidence is immaterial.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 189; Dec. Dig. § 158½.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—49

5. EASEMENTS (§ 48*) — WAY — ESTABLISHMENT.

Where an unlocated right of way is granted or reserved, the owner of the servient estate may, in the first instance, designate a reasonable way; and, where he fails to do so, the owner of the dominant estate may designate it.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 103-107; Dec. Dig. § 48.*]

6. WATERS AND WATER COURSES (§ 158½*) — IRRIGATION DITCHES — ESTABLISHMENT — EVIDENCE.

Evidence held to warrant a finding that the owner of the servient estate over which an unlocated right of way for an irrigation ditch was granted located the line of the ditch which was constructed thereon.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. § 158½.*]

7. WATERS AND WATER COURSES (§ 156*) — LOCATION OF RIGHT OF WAY—EFFECT.

Where a right of way for an irrigation ditch is located and established, it becomes a permanent way, and neither party may change the location without the consent of the other, and a way whether actually located by the owner of the servient estate or located by use and acquiescence is the way to which the owner of the dominant estate is entitled.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

8. WATERS AND WATER COURSES (§ 158½*) — IRRIGATION DITCHES—RIGHT OF WAY—LOCATION—EVIDENCE.

In a suit to quiet title to a right of way for an irrigation ditch, evidence held to support a finding that the ditch as maintained was sufficient and practical, and imposed no greater servitude on the servient estate than was required.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. § 158½.*]

9. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence is binding on the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

10. EASEMENTS (§ 53*) — REPAIRS AND IMPROVEMENTS—RIGHTS OF OWNER OF SERVIENT ESTATE.

The owner of the servient estate may make repairs and improvements in the easement without changing its character, or affecting its substance.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 117-119; Dec. Dig. § 53.*]

11. EASEMENTS (§ 61*)—RIGHTS OF SERVIENT OWNERS—EQUITABLE RELIEF.

Where an actual exercise of an easement for a right of way shows that the servient estate suffers, unnecessarily great or irreparable injury, equity may, in a proper proceeding, make such changes in the manner of the exercise of the easement as will conserve his estate and protect the owner of the easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

12. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

A question to a witness, who was a salesman in the employ of a corporation when it constructed an irrigation ditch, whether it was the intention of the officers of the corporation

to permanently locate the ditch, was objectionable as calling for the conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

13. WATERS AND WATER COURSES (§ 156*) — RIGHT OF WAY FOR IRRIGATION DITCHES—LOCATION—CHANGES.

Where a right of way for an irrigation ditch was located by the owner of the servient estate or established by usage, the owner of the servient estate could not justify a destruction of the ditch on the ground that a mistake was made in locating it, or that it was located on the part of his land which made the servitude more burdensome than was necessary.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

14. WITNESSES (§ 236*)—EXAMINATION—INDEFINITE QUESTIONS.

On the issue whether another route for an irrigation ditch would be less burdensome to the servient estate than the route established, questions to a former owner of the servient estate whether he ever had any trouble with the water from the ditch were indefinite as to meaning and scope and properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817-826; Dec. Dig. § 236.*]

15. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in excluding evidence of a fact established by other evidence, is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

16. WATERS AND WATER COURSES (§ 156*) — RIGHT OF WAY FOR IRRIGATION DITCHES—CONSENT TO CHANGE OF LOCATION — AUTHORITY.

The consent of an irrigation company contracting to furnish the lands of another with water for irrigation to a change in the location of a right of way over the land of a third person for an irrigation ditch appurtenant to the lands to be irrigated is without legal effect.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by D. E. Brown and others against O. S. Ratliff. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant. Robert W. Miller, of Hanford, for respondents.

HART, J. This action involves a controversy over an easement in certain of the lands of the defendant for the maintenance of a lateral water ditch over and through said lands. It is conceded that the plaintiffs are entitled to a right of way over the defendant's lands for the maintenance of a water ditch, but the dispute is the outgrowth of an attempt upon the part of the defendant to change the route or course of said ditch over his lands; it being the claim of the plaintiffs that a way for the purposes of the

ditch had been previously located and established. The principal relief prayed for by the complaint is for a decree quieting the title of the plaintiffs to an easement for the use of said ditch in that particular part of the defendant's lands over and through which the route or line of the ditch now runs. The plaintiffs were awarded judgment, from which and the order denying him a new trial the defendant prosecutes these appeals.

The judgment and the order are assailed upon the following grounds: (1) That the second amended complaint is obnoxious to the objections pointed out by the special demurrer; (2) that certain findings are without sufficient support from the evidence; (3) that the court erroneously ruled against the admission of certain evidence proposed by the defendant to the prejudice of his rights.

The undisputed facts are: All the lands belonging to the parties to this action were up to the year 1902 parts or portions of the Laguna De Tache grant, owned by the Laguna Lands, Limited, a corporation. On the 15th day of December, 1900, the Centerville & Kingsburg Irrigation Ditch Company entered into a contract in writing with the Fresno Canal & Irrigation Company, whereby the former agreed to furnish from its main canal all the water required, not exceeding a certain specified amount, for irrigating certain lands, including those owned by the parties to this action. The contract made provision for the extension of the main canal to a point with reference to the lands to be so irrigated from which, by means of branch or lateral ditches, the water might be conveniently taken for the purpose of irrigating said lands. The water right thus acquired, "with all and every necessary easement and right of way for canals, ditches, and flumes, for the conveyance of water for the irrigation of said lands and the whole thereof," thereby became and 'is appurtenant to said lands. "Subsequent to the year 1902 the lands described in the complaint were, with the water right above mentioned, and subject to the burden of servitudes for rights of way over and through the same for canals, ditches, and flumes, sold in separate parcels to the plaintiffs and one Purley Murdock, the grantor of the defendant." The ditch in question—that is, the lateral ditch across the Ratliff lands—was not in existence when Murdock purchased said lands from the Laguna Lands, Limited, but it appears that, after such purchase, and in the month of August, 1903, he constructed said ditch across his land—that is, he plowed a furrow over the line and "V'd" it out with a "V." In the month of November, 1903, one H. L. Ward, a civil engineer in the employ of the Laguna Lands, Limited, surveyed and constructed the ditch over the route or line thus established or "V'd" out by Murdock. This ditch was maintained and used until 1905, in the month of November of which year the defendant purchased from Murdock the lands

over and through which said ditch is located. The defendant became dissatisfied with the location of the ditch thus constructed and maintained over his lands, and it appears consulted some of the plaintiffs with the view of securing their consent to a change in the location of the line or route thereof over his lands. He thereafter constructed a new ditch, and proceeded to plow in the old ditch, when the plaintiffs instituted this action and secured a preliminary injunction restraining him from interfering with or disturbing the old ditch pending the final determination of the issue tendered by the complaint.

[1] 1. The objection to the complaint, raised by the special demurrer, is that it cannot be determined from an inspection thereof "whether the plaintiffs rely upon a grant or conveyance of a specific right of way, or whether they rely upon a grant of the general right to run water across the defendant's lands at no specific place but at a place located by them." There is no substantial merit in this objection. The complaint alleges that "at all the times hereinafter mentioned there was, and now is, appurtenant to the said lands above described (the lands of the plaintiffs) a certain water ditch built, dug, and constructed for the express purpose of carrying and conveying water from that certain waterway * * * to, over, and on the lands above described, for irrigation of said lands and other domestic uses and purposes," following which averment is a description of the route or way of said ditch over the lands of the defendant; that said ditch connects with the main canal of the Centerville & Kingsburg Irrigation & Ditch Company, from which the plaintiffs enjoy the right of securing water for the purposes above mentioned, and to be carried onto and over their respective parcels of land by means of the lateral ditch constructed over and across the land of the defendant; that the "plaintiffs, and each of them, allege that they own, enjoy, and possess a joint easement and right of way for said ditch, by purchase and grant, over, across, and through the lands of said defendant, and that the ditch hereinabove described is along and upon said right of way in traversing and crossing the lands of the said defendant. * * *" It is very clear from the foregoing averments that the plaintiffs claim an easement in the defendant's lands for the specific right of way now used or exercised by them in the maintenance of the lateral ditch in existence at all the times mentioned in the complaint and which is specifically described therein. Whether, therefore, the particular right of way so claimed and described was acquired by the plaintiffs through a specific grant thereof or the particular location of the same, as said location is described in the complaint, was the result of the exercise of a general reservation in the grant of an easement in the defendant's lands for the purpose mentioned, is immaterial. It is enough

to know, for the purposes of this action, that the right of way was located, and that the plaintiffs claim the right to its enjoyment as so located.

[2] But there is even another answer to the objection here made to the complaint: If the complaint may be said to be faulty for uncertainty in the respect as to which it is here criticised, the reply is that the answer not only meets by denial every issue tendered by that pleading, but, furthermore, admits the right of the plaintiffs to an easement in the defendant's lands for the purposes of a right of way for a water ditch over and across the same, and merely sets up the objection that the location of the ditch in question is not over a way designated by the defendant, and that said way is more disadvantageous to or burdensome upon his estate than another and different location which would equally and as fully subserve the purposes of the easement. Thus it will be observed that, conceding that the plaintiffs' pleading is vulnerable in the respect as to which it is assailed, the defendant, by his answer, has cured the defects complained of, and has thus and by his denials succeeded in putting in issue all the questions essential to a full and just determination of the paramount issue in the case.

[3] What is said in *Dennis v. Crocker-Huffman, etc., Co.*, 6 Cal. App. 58, 61, 91 Pac. 425, 427, has peculiar relevancy to the proposition under consideration: "The rationale of the rule requiring certainty in pleading is that the opposing party may be made fully cognizant of the facts upon which the plaintiff relies and which the defendant must meet by denial or in avoidance. * * * Moreover, the answer specifically denies all the material averments, and thus the issues involving all the important questions which could arise were fairly made and squarely presented. Therefore, even if it were conceded that the court erred in its ruling on the demurrer, the same was cured by the full and complete denials of the answer. Besides, it is not every erroneous ruling of the trial court in this regard that demands a reversal of the judgment. Substantial injury to defendant must have resulted from the action of the court"—citing the following cases: *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9; *Jager v. Cal. Bridge Co.*, 104 Cal. 542, 38 Pac. 413; *Stephenson v. Deuel*, 125 Cal. 656, 58 Pac. 258; *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380; *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523. It follows from the condition of the pleadings as thus explained that by findings 3 and 4 the court did not transcend the issues thus submitted.

2. Findings 6, 7, 8, 9, 10, and 11 are assailed by the defendant upon the ground that there is no evidence in the record from which they derive support. But an examination of the record will not sustain this contention. The facts which the court was justified in finding from the evidence are substantially

as they are briefly given in the beginning of this opinion. But we will specially review each of the assignments under this head in the order in which they are treated in the opening brief of counsel for the defendant.

[4] The specific objection to finding 6 is that there is no evidence which supports that part thereof to the effect that Murdock, when locating the line of the ditch in question over his lands, caused the same to be surveyed. It is true that there is no evidence which justifies that part of said finding; but whether the ditch or the line thereof as located by Murdock was or was not surveyed by him is clearly immaterial, since the sole purpose of the evidence addressed to the proof of Murdock's acts in connection with the marking out of a route for a ditch over his land was to disclose that as the owner of the servient estate thus the right of way reserved in the grant for the ditch was selected and designated by him in the first instance. If, as will later be perceived to be true, there were other acts on his part sufficiently indicative of an intention to designate the route over and along which the ditch was finally constructed as the particular route which he preferred should be used for the purpose of the right of way to which the plaintiffs were entitled in the enjoyment of the easement reserved to them in his lands, then it is manifest that it can make no difference whether, when he first outlined the route, he surveyed it or not, and therefore that part of finding 6 may be regarded and treated as surplusage or of no importance.

3. The seventh and eighth findings are objected to because thereby the court decides that the plaintiffs have a vested right in and ownership of the ditch in question and the right of way upon, over, and along which the said ditch is built, and that the defendant purchased the land from Murdock "subject to the burdens and servitudes herein found to exist by reason of said ditch and its appurtenances of easements and right of way." The point made against these findings is that the court thus decided that the plaintiffs are entitled to a specific right of way over the defendant's land, whereas, under the terms of the reservation, the former are "only entitled to the right to convey their water across defendant's lands in such manner as will do the least possible injury to defendant," and that the defendant has the right to compel the plaintiffs to locate and construct their ditch across his land at a point or over a route selected and pointed out by him.

[5] It is, of course, "settled law that, where an unlocated right of way is granted or reserved, the owner of the servient estate may in the first instance designate a reasonable way, and if he fails to do so, the owner of the dominant estate may designate it." *Ballard v. Titus*, 157 Cal. 673, 683, 110 Pac. 118; *Jones on Easements*, § 337; *Kripp v. Curtis*,

71 Cal. 62, 65, 11 Pac. 879; *Blum v. Weston*, 102 Cal. 362, 369, 36 Pac. 778, 41 Am. St. Rep. 188.

[6] We think the evidence fairly shows that this is precisely what the owner of the servient tenement did in this case. Murdock, the grantor of the defendant, testified that early in the year 1903 he plowed and "V'd" out a furrow across his lands which is the route over and along which the ditch was later completed. It is true that he said that he merely "V'd" out the ditch for the purposes of experiment; that is to say, to determine whether the route thus marked out would be suitable or adaptable to the purposes of a water ditch. It is also true that he testified that some two weeks after the water company had completed the ditch he went to the person who had superintended the work for the company, and to him protested against the maintenance of the ditch over the route previously marked out by him, and that by said person he was told that the line or route of the ditch could be changed at any time thereafter. But against these statements is the admitted fact that he never ran any water through the "smaller ditch" or otherwise attempted to test it, as he claimed was his sole purpose in the first place in building it, and, furthermore, that the ditch thus outlined by him remained in that condition until it was enlarged and completed for practical purposes by the land and water companies; that he never thereafter attempted to change the ditch or place it over and along a different route; that (so he himself testified) during the three years that he had possession of the lands across which the ditch passes he kept up the ditch himself, and that the plaintiffs did absolutely nothing toward keeping it in working order; that he used the ditch for the purpose of conveying water from the main canal onto his own land, and that some of the plaintiffs, as to their lands, did likewise; and that he not only never objected to the use of the ditch by the latter, but was willing that they should so use it. These acts and the conduct upon the part of Murdock manifestly constituted evidence of the most forcible and persuasive character of his intention to designate that particular route for the right of way over his lands for the ditch. Thus it sufficiently appears that the court was warranted in finding that the right of way was located by Murdock himself over the route indicated, and that as so located and established the plaintiffs and all directly concerned accepted it. But, even if it might with some reason be held that the evidence does not clearly show that Murdock himself actually designated or pointed out the route over and along which the ditch in controversy was constructed and which as so laid out and constructed is now and for many years has been accepted, maintained, and used by the plaintiffs and the land company, still it is

certainly true that the evidence shows a location by use and acquiescence, and thus the right of way has been regularly located and fully established.

[7] And the rule is that, where a way is thus located and fully established, it then becomes the permanent way, and that neither party can change the location without the consent of the other. *Jones on Easements*, § 343, and cases cited in the foot notes. So, whether the way was actually selected by Murdock or located and established by use and acquiescence, in either case it became and constituted the specific right of way for the satisfaction of the easement to which the plaintiffs were entitled in the defendant's land. It therefore follows that the court with perfect propriety found that the plaintiffs acquired a vested right in the right of way and ditch as thus located and established, and that the defendant Ratliff purchased the land over which the right of way for the ditch was reserved, and took title thereto subject to the burdens of said easement.

[8] 4. The ninth and tenth findings, which are challenged by the defendant, involve a decision by the court that the route along which the ditch is maintained "is a good, sufficient, and practical ditch, and subserves the purposes for which the same was constructed," and that the ditch or the right of way as located imposes no greater burden or servitude upon the lands of the defendant than is absolutely required; that the uses and easements of the plaintiffs in said right of way and ditch are exercised by the plaintiffs to the least possible damage and injury to the lands and premises of the defendant. It is not intended nor is it regarded necessary to reproduce here an elaborate résumé of the evidence to show that these findings are based upon evidence amply sufficient to support them. In confirmation of this declaration it is only requisite to briefly refer to the testimony of the witnesses, D. E. Brown, W. R. Hunt, and Frank Brown, who worked on and assisted in the construction of the ditch, and that of F. J. Boland, a civil engineer, who surveyed the ditch. D. E. Brown testified that "there is not a foot of that old ditch (referring to the ditch in question here) on what would be termed a fill; it is not above the surface of the ground along the ditch line. None of the ground on the Ratliff land is below the ditch, where the ditch runs. The ditch is in the ground from the headgate to where it leaves Mr. Ratliff's lands, and there is not a fill in it. * * * I have never known of a break in it." Hunt and Frank Brown corroborated the foregoing testimony.

Boland declared that the ditch "was cut in the ground. No part of it is in a fill. * * * I found that the banks were sufficiently proportioned to hold the amount of water that I determined could be turned in-

to this ditch by the checks in the main canal. * * * There is sufficient bank to this ditch to make it stout. The ditch is built on what is termed 'high land,' higher than the surrounding land, and consequently it answers the purpose for which it is built, for the irrigation of the land, and is undoubtedly placed on the most advantageous contour of the earth, which is usually conceded to be the highest surface point in the territory irrigated by the canal. The soil along the course of the ditch is a sort of silt, not the best in the world for building ditch banks, but of sufficient substance to hold the water, which could be carried in a ditch of this size. I calculated that this ditch under ordinary conditions would carry 12.67 second feet. * * * Of course, squirrel holes and natural wear and tear, to which *each and every ditch is subject in this country*, might occur here to make this a dangerous ditch. * * * From elevations I took I found the old Brown ditch (referring to the ditch in controversy) to be three inches to the thousand feet. *The Brown ditch is on the highest practical ground.* I understand by the grade line of the ditch the difference in elevation between any two given points. In some instances it would be the point of departure and the terminal point." Later on, in reply to a question by counsel for the defendant as to whether the fact that the old ditch was of greater length than the new and "the fact that it (the old) has more turns and twists, would make any difference in your comparison of the carrying capacity of the two ditches," Mr. Boland testified, in part: "There are one, two, three right angles in the new ditch. There are no right angles in the old ditch, as I remember it, and this map shows it curves naturally around and don't tend to decrease the flow, whereas in the new ditch the right angles in it materially decreases the flow." He further stated that the "difference in the length of the two ditches is only 149 feet, including the distance from the mouths of the two ditches up stream." (It will be understood that the "new ditch" referred to by Boland is the ditch constructed by the defendant and intended by him to be used in lieu of the "old ditch," or the one directly involved in this dispute.)

[8] There is other testimony to the same effect as the foregoing, but enough of the evidence bearing upon the question determined by findings 9 and 10 has been given above to disclose that, as stated, said findings are well fortified against successful attack. There is, of course, a sharp conflict between the testimony given by the defendant and that produced by the plaintiffs with regard to the proposition, but it was for the trial court to determine that conflict and reach a conclusion of its own as to the truth of the matter. Such conclusion is manifestly binding upon this court.

5. That part of finding 11 in which the court found that in the month of January,

1908, the defendant wrongfully interfered with the plaintiffs "in the exercise of their rights, uses and easements in said right of way and ditch," etc., is assailed for an alleged insufficiency of the evidence to sustain or support it. The specific contention with respect to this assignment is that, the defendant having prepared, previously to the destruction of the old ditch, another ditch across his lands of like capacity in all respects as the old ditch and dedicated the same to the plaintiffs for the purpose of conveying their water over and through his land, it cannot be said that he in any manner or measure interfered with the easement of the plaintiffs.

Testimony has already been examined which discloses the circumstances under which the old ditch was located and that said location is a reasonable one, subjecting the lands of the defendant to no greater inconveniences or disadvantages than would the way along which the new ditch is located or any other route over said lands along which the ditch might be maintained. In addition to the testimony so referred to, the record discloses other evidence, which need not be adverted to in detail here, tending to show that the "new ditch," in respect of grade (a most important factor in the matter of the practicability of a water ditch to perform the functions for which it is intended) and the width and depth, is very inferior to the old ditch. Moreover, the objection to that portion of finding 11 referred to assumes the right of the defendant to arbitrarily or without the consent of the owners of the easement change the right of way over which the ditch passes, and, as shown, this assumption has in law no foundation for its support. And in this connection it may be remarked that, while the defendant testified that, before constructing the "new ditch," he obtained the consent of some of the plaintiffs to change the line of the ditch, the latter contradicted his testimony in that particular, and declared that they not only did not give their consent to such change, but vigorously protested against it, thus creating a conflict in the evidence upon that proposition.

[10] It is, however, contended that the evidence shows that the proposed change in the course of the ditch across the defendant's lands involved nothing more than mere "repairs and improvements in the easement and does not change its character or affect its substance," and that the defendant, as the owner of the servient estate, has the right to make changes and repairs which in no way affect the rights of others or which do not change or alter or materially affect the character of the easement. This is the rule as to the owner of the dominant estate (*Burris v. People's Ditch Co.*, 104 Cal. 248, 252, 37 Pac. 922), and is no doubt the rule as to the owner of the servient tenement.

[11] And we think we may safely go fur-

ther, and say that where it might be shown that, by the actual exercise of the rights of an easement for a right of way for a water ditch or a roadway—that is, after the right of way had been established and was being used—the servient estate was required to suffer unnecessarily great or irreparable injury, a court of equity, under such circumstances and in a proper proceeding, would perhaps be authorized to sustain the bearer of the servitude or burden in an application to make such changes in the manner of the exercise of the right of easement as would afford him the full protection and conservation of his estate and his rights therein, at the same time keeping in view and fully protecting the just rights of the owners of such easement. But, according to the evidence from which the findings were obviously educed, the change proposed by the defendant would go beyond the mere question of repairing or improving the old ditch. It would result in changing almost the entire course of the ditch and (according to the testimony of the engineer) in deteriorating its ability or practicability properly to subserve the purposes and consequently the just rights of the plaintiffs in the easement, while it would not materially lessen the burdens of the servitude upon the defendant's land as said servitude is now exercised.

[12] 6. The rulings upon the evidence to which objections are urged by the defendant are numerous but, in our opinion, without substantial merit. The witness Cornell, at the time the ditch was constructed a salesman in the employment of the Laguna Lands, Limited, was not allowed to answer the question propounded by the defendant's attorney whether or not the intention of the officials of said corporation in laying out and constructing the lateral ditch in question was that it was to be a permanent ditch across the defendant's lands, and the location not subject to change. The question thus propounded, it is very clear, as was pointed out by counsel for the plaintiffs when the objection was made, called for the conclusion of the witness as to the intention of the officers of the land company with respect to the matter to which the question related, and for this reason, if for no other, the objection was properly sustained.

[13, 14] 7. The objections to the questions to the witness Murdock as to whether he ever had any trouble with the water from the ditch when he owned the defendant's lands were properly sustained. The asserted object of the questions was to show that the water from the ditch had overflowed or seeped out and passed over and damaged the land of the defendant. The argument advanced in support of the propriety of the testimony sought to be elicited through those questions was that thus it would be shown that the ditch was located "in an unsatisfactory place." The reply to this suggestion is: (1) That the

issues submitted by the pleadings for decision are whether the right of way for the ditch was located in the first place by the defendant, or established by usage, and, if so, whether the defendant wrongfully interfered with it and thus the easement of the plaintiffs. If the first of the propositions as thus stated was true, then clearly it could be no defense to the defendant's conduct in destroying the ditch to say that he had discovered, after the way was located, that a mistake had been made in locating it, or that it was located on that part of his land which made the servitude more burdensome thereto than was necessary for the full enjoyment by the plaintiffs of their rights. (2) The questions were so indefinite as to their meaning and scope that answers thereto could have thrown no light on the question whether another route over the defendant's lands for the right of way would have been less of a burden thereon than is the present site of the ditch. The water could have run over or seeped through the banks of the ditch, and still the line of the ditch be no more disadvantageous to or burdensome upon the servient estate than would be some other route selected for the purpose.

[15] 8. The defendant could have suffered no prejudice from the refusal by the court to allow the witness Ward to say, in reply to a question by the defendant's counsel, how far the "little ditch"—that is, the ditch furrowed or "V'd" out by Murdock—extended. Ward was the engineer who surveyed and superintended the construction of the ditch in question, and the immediate purpose of the question to which objection was made and sustained was to secure a statement from Ward as to the distance over the defendant's land the original ditch extended, the ultimate object of this testimony being to show that Murdock did not originally build the ditch entirely across his lands or with an idea of its permanency. But Ward had previously testified that "the small ditch was just about where the old ditch now stands." Murdock had testified that "after purchasing the lands I built the ditch on lots 2, 15, and 16 where the old ditch is marked on the surveyor's plat." This testimony was sufficient to show how far the "little ditch" extended.

[16] 9. The letter from Tellman, the engineer of the Consolidated Canal Company, to the defendant, giving the latter the company's consent to change the location of the ditch in controversy, was properly excluded as evidence. Neither Tellman nor the canal company had any interest in the easement in the defendant's lands. The company had merely contracted to furnish the Laguna Lands, Limited, with water for its lands, of which the defendant's lots originally constituted a part. The consent of the canal company to change the route of the ditch was therefore without the remotest legal force.

There are some other exceptions to the

court's rulings, but they are, in a general sense, of the same character as those to which special attention has been given, and there is therefore no necessity for reviewing them in detail in this opinion.

The sum and substance of the whole case, as it is presented here, is that the plaintiffs were and are entitled to a right of way over the defendant's lands for a water ditch; that said right of way was located and established, accepted and acquiesced in by all the parties, and, as so established and acquiesced in, used for a number of years for the purposes for which it was intended; that the defendant, who is the grantee of the owner of the servient lands at the time the right of way was located and established, some two years after purchasing said lands, has arbitrarily or without the permission or consent of the owners of said right of way, undertaken to change the location of the same and thus without right interfere with the easement of the plaintiffs in said lands.

The record discloses no prejudicial error, and the judgment and the order appealed from are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

FRANKLIN et al. v. VISALIA ELECTRIC R. CO. (Civ. 1,219.)

(District Court of Appeal, Second District, California. Feb. 20, 1913. Rehearing Denied by Supreme Court April 21, 1913.)

1. CARRIERS (§ 317*)—PASSENGERS—INJURIES—SUBMISSION OF EVIDENCE.

In an action for injuries by the sudden, negligent starting of a street car while plaintiff was alighting, evidence was admissible by other passengers, who did not see the accident, that they were also passengers and attempted to alight at the same point, but that the car started before they could alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.*]

2. CARRIERS (§ 303*)—PASSENGERS—ALIGHTING.

A street railroad company must stop its cars reasonably long enough to allow passengers to alight in safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.*]

3. CARRIERS (§ 303*)—PASSENGERS—NEGLIGENCE—PREMATURE STARTING.

It is negligence to start a street car prematurely after it has stopped for passengers to alight, whether it is started violently or not.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST.

It was not prejudicial error to refuse requested instructions embodying questions covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for injuries to a street car passenger by the sudden starting of the car while she was alighting, a requested charge on the contributory negligence of plaintiff's husband, who was with her, was not applicable where the evidence merely showed that no employé was on the ground to assist ladies to alight, which the husband observed without himself assisting his wife.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 508-612; Dec. Dig. § 252.*]

6. TRIAL (§ 219*)—INSTRUCTIONS—DEFINING TERMS—PREPONDERANCE.

Failure to define the word "preponderance" is not of itself prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by C. H. Franklin and another against the Visalia Electric Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. W. McKinley, of Los Angeles, Power & McFadzean, of Visalia, and A. W. Ashburn, Jr., of Los Angeles, for appellant. Feemster & Walker, of Visalia, for respondents.

ALLEN, P. J. The action was by Franklin and wife to recover from defendant damages on account of personal injuries received by the wife while a passenger on one of defendant's cars. The complaint alleged that the car was by defendant stopped for the purpose of permitting passengers to alight therefrom; that, while said car was standing still for the purpose aforesaid, the wife, whose ticket entitled her to passage to such point, with due care, endeavored to alight from said car; that while so attempting to alight, and when in the act of stepping from the second to the last step on the car, the defendant, without warning, negligently, carelessly, and unexpectedly to said plaintiff, set said car in motion suddenly and violently and with such force that the wife was thrown violently from the car to the ground, suffering injuries particularly described, to her damage in the sum of \$1,000. The answer denied these allegations and pleaded contributory negligence. The case was tried to a jury, which returned a verdict in plaintiffs' favor for \$600. From the judgment rendered thereon, defendant appeals under the alternative method.

[1] Appellant's first contention is that the court erred in permitting other passengers, who did not see the accident, to testify that they too were passengers ticketed for the same point and attempted to alight from the car, but that the car was started before they had an opportunity to alight without jumping therefrom while the train was in motion. We see no error in this. The evidence tended to show conditions at the time and place of the accident and the premature starting of the train. The real issue presented

was as to the negligence of defendant in setting the car in motion without warning and while plaintiff was in the act of alighting therefrom. This was the specific act of negligence. Any evidence on plaintiffs' part tending to support this issue was, in our opinion, competent. The cases of *Foley v. Northern Cal. Power Co.*, 14 Cal. App. 410, 112 Pac. 467, *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1829, and others cited by appellant, are inapplicable. These cases all refer to proffered or accepted evidence in relation to acts of negligence not included or comprehended within the allegations of the complaint.

[2] The same observations may be made with reference to appellant's second point, in which it challenges the correctness of an instruction as follows: "It is the duty of a railroad company carrying passengers for hire to stop its cars at the end of their journey a reasonable time for the purpose of allowing them to get off the train in safety."

[3] Also another instruction to the effect that such carrier has not discharged its duty to passengers if it omits to stop its train for such reasonable time; and further that the court erred in refusing instructions to the effect that such premature starting of the train must be shown to have been violent. In our opinion, the negligence arose from the act of starting the train prematurely, without warning, whether violently or otherwise. The refusal of the court to give certain other instructions proffered by defendant is assigned as error.

[4] An examination of the instructions actually given shows that the same cover the questions presented by those refused, and under the rule recognized and approved in *Henderson v. L. A. Traction Co.*, 150 Cal. 689, 89 Pac. 976, no prejudicial error resulted by reason of the refusal of the court to give such instructions.

[5] It is further urged by appellant that the court erred in refusing instructions to the effect that if the husband, the head of the community and the legal owner of the damages, was guilty of contributory negligence, proximately contributing to the injury, then a recovery could not be had. The instruction as a legal proposition is unassailable, but we find no evidence in the record tending to show any contributory negligence on the part of the husband. The only evidence specified by counsel in the abstract required by section 953c of the Code of Civil Procedure tends only to show that defendant was running a train of three cars and had provided no one, or at least no one was on the ground, to assist ladies in alighting from the cars, and this the husband observed; but nothing appears even hinting at negligence on the husband's part, unless lack of gallantry should be so construed. This being the state

of the record, the instructions asked in relation to contributory negligence on the part of the husband were properly refused, even upon the theory that it is error to refuse instructions, however meager the evidence to sustain the hypothesis contained in them. The evidence so abstracted does not bring the case within such rule.

The court instructed the jury that, unless plaintiffs made proof of negligence by a preponderance of the whole evidence, they could not recover, and that preponderance was not determined alone by the number of witnesses testifying to particular facts, but in determining upon which side is the preponderance it should take into consideration opportunity, conduct, demeanor, etc.

[6] These and other instructions clearly called the attention of the jury to their duty, and it was not necessary for the court to instruct an intelligent jury as to the meaning of the word "preponderance" and give illustrations, as suggested in the instruction refused. Failure of the court to further define the word "preponderance" was not such prejudicial error as will warrant the reversal of what appears from the record to be a righteous judgment.

An examination of the whole record satisfies us that no prejudicial error intervened, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

LOUGEE et al. v. WILSON.

(Court of Appeals of Colorado. April 14 1913.)

1. QUIETING TITLE (§ 44*) — EVIDENCE — DEEDS—EXECUTION—RECITALS.

A trustee's deed under which plaintiff claimed title described the grantor as the "Nebraska Loan & Trust Company." The corporate seal attached thereto also contained the same name, and the deed recited that such company had caused the instrument to be subscribed by its second vice president and its corporate seal to be attached. The acknowledgment stated that before the notary came the Nebraska Loan & Trust Company, by W. F. Buchanan, second vice president, personally known to the notary to be the identical person and officer who executed the deed and acknowledged the same to be his voluntary act and deed and the voluntary act and deed of the corporation. *Held*, that such recitals constituted sufficient prima facie proof in an action to quiet title to show that the trust company was a corporation to put defendant, whose plea was title in himself, to his proof of title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

2. QUIETING TITLE (§ 44*)—PLEADING AND PROOF.

Where, in the Code action to quiet title, defendant denies the allegations of the complaint and pleads an adverse tax title void on its face, plaintiff, to sustain the issues, must produce sufficient proof only to show possession, or, in case of vacant or unoccupied land, a title sufficient on its face to show constructive possession, after which the burden is on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant to prove title, as in ejectment or in the Code action for possession and damages, and, failing this, judgment will follow for plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

3. CORPORATIONS (§ 672*)—FOREIGN CORPORATIONS — NONCOMPLIANCE WITH STATE STATUTES.

Noncompliance with state statutes regulating foreign corporations, when suit is brought by them in Colorado, is matter of defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. § 672.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Asher B. Wilson against F. C. Lougee and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. H. Gilmore, of Denver, for appellants. Chalkley A. Wilson and Asher B. Wilson, both of Akron, for appellee.

MORGAN, J. Appeal from a decree in favor of the plaintiff and setting aside a tax deed in an action under the Code to quiet title to one-half of a quarter section of vacant and unoccupied land.

[1] The contention is that, as the plaintiff introduced a deed of trust (the grantor in which, it was stipulated, was the patentee) and the trustee's deed following the same as proof of title, it was necessary for him to prove that the trustee, the Nebraska Loan & Trust Company, was a corporation; that it was authorized to hold and convey the title as trustee; and also that it had complied with the laws of this state necessary to enable it to do so. The trustee's deed, in addition to the suggestive name of the trustee, and the corporate seal, contained a statement that "the Nebraska Loan & Trust Company has caused this instrument to be subscribed by its second vice president, and its corporate seal to be attached;" and the acknowledgment stated that before the notary "came the Nebraska Loan & Trust Company, by W. F. Buchanan, second vice president, personally known to me to be the identical person and officer who executed the foregoing deed and he acknowledged the execution of the same to be his voluntary act and deed and the voluntary act and deed of said corporation." This was sufficient prima facie proof, in an action to quiet title, to require the defendant, whose plea was title in himself, to prove it. The authorities relied upon by appellant are upon actions in ejectment, or trespass and damages. The defendant introduced a tax deed, void on its face, to sustain his title, which was excluded, but afterwards admitted as color of title.

An examination of some of the authorities as to the order and the nature of the proof in actions to quiet title under the Code will determine that plaintiff's proof was sufficient.

Pomeroy, in his work on Code Remedies, says: "In this position the possessor of the land, without waiting for any proceedings, legal or equitable, to be instituted against him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, assert their title, and have the controversy put to rest in a single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment." Pomeroy's Code Remedies (4th Ed.) § 266. It necessarily follows that it is the defendant in this case, and not the plaintiff, who must stand or fall upon his own title.

In *Wall v. Magnes*, 17 Colo. 476, 490, 30 Pac. 56, 58, the court, quoting from *Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 Sup. Ct. 293, 32 L. Ed. 688, said: "An allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer or to allegation and proof of the estate or interest which he claims."

In the case of *Lambert v. Shumway*, 36 Colo. 350, 85 Pac. 89, in an action to quiet title, wherein the defendant, in the second defense, pleaded a tax deed, the court said: "The second defense failing, the denial of plaintiff's possession in the first defense is not sufficient to put plaintiff upon proof touching the same."

In the case of *Empire Co. v. Bender*, 49 Colo. 522, 113 Pac. 494, in an action to quiet title, wherein the defendant pleaded a tax deed, and the land was vacant and unoccupied, the court found the tax deed void on its face, and the court said: "The moment defendant's alleged adverse title failed, as it did when it offered in support of it a tax deed void on its face, it had no further interest in the cause, and could raise no other issue. * * * It is only because of his adverse interest that a defendant is permitted to question a plaintiff's rights at all."

In the case of *Foster v. Clark*, 21 Colo. App. 192, 121 Pac. 130, in an action to quiet title, wherein defendant pleaded four void tax deeds, this court said: "Appellant's claim of title, as we have seen, was based upon tax deeds, which, if they had been valid, would have vested in him a title paramount and adverse to the title claimed by appellees and their privies. Hence, the validity or invalidity of the trust deeds would have been a matter of no importance to appellant had his tax deeds been valid."

In the case of *Inman v. White*, 21 Colo. App. 427, 122 Pac. 65, in an action to quiet title, wherein the defendant claimed under a tax deed and a judgment and objected to plaintiff's proof of title, this court said: "This could have in no way availed the defendant, for he had no claim upon which title to himself could have been based, and therefore no interest in the regularity or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

validity of the foreclosure proceedings under which plaintiff claimed. The judgment of foreclosure, the sale, and the subsequent deed are prima facie valid and regular; therefore the defendant has no such interest as justifies the court in questioning the regularity of such proceedings." *Craft v. Merrill*, 14 N. Y. 456; *Webster v. Kautz*, 22 Colo. App. 111, 123 Pac. 140; *Empire Co. v. Lansing*, 53 Colo. 151, 124 Pac. 579.

[2] It may be deduced from the foregoing authorities that in the Code action to quiet title, if the defendant has denied the allegations of the complaint and pleaded an adverse title, void on its face, the plaintiff, to sustain the issues, must produce sufficient proof only to show possession, or, in case of vacant and unoccupied land, a title sufficient on the face thereof to show constructive possession; thereafter the burden is upon the defendant to prove title as in ejectment, or in the Code action for possession and damages, and, failing to prove a valid title, judgment would follow for the plaintiff, as defendant would be in no position to attack the proof.

[3] Furthermore, the reference to the trustee as a corporation in the trustee's deed and acknowledgment, the corporate seal thereupon, together with the rulings in the following cases that noncompliance with our statute is a matter of defense where the foreign corporation sues in our courts, discloses quite clearly that plaintiff's proof was sufficient. *Holmes v. Bank*, 23 Colo. 210, 47 Pac. 289; *Ill. S. M. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177; *Herman Bros. Co. v. Naslacos*, 46 Colo. 208, 103 Pac. 301. All other assignments of error have been resolved against the appellant by former decisions of this court and of the Supreme Court upon identical conditions.

The judgment is therefore affirmed.
Affirmed.

EMPIRE RANCH & CATTLE CO. v. WILSON.

(Court of Appeals of Colorado. April 14, 1913.)

1. QUIETING TITLE (§ 21*)—STATUTORY ACTION—EFFECT.

In an action to quiet title under Mills' Ann. Code, § 255, providing that an action may be brought by a person in possession of real property against any person who claims an estate therein adverse to him to determine such adverse claim, estate, or interest, a person in possession of real property may compel his adversaries to come into court and assert title thereto, notwithstanding it is based on an instrument void on its face.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 51-53; Dec. Dig. § 21.*]

2. QUIETING TITLE (§ 52*)—STATUTORY ACTION—VACATION OF INSTRUMENT.

Where a statutory action to quiet title, authorized by Mills' Ann. Code, § 255, is brought

to set aside an instrument void on its face, it is not necessary that the judgment should set aside the instrument or remove the cloud, if any, created thereby, but it is sufficient if it states that plaintiff's title is quieted as to such instrument without further recitals.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 99, 102, 103; Dec. Dig. § 52.*]

3. TAXATION (§ 799*)—TAX DEED—VACATION—ACTION.

A statutory action to quiet title, authorized by Mills' Ann. Code, § 255, may be maintained to set aside a tax deed void on its face.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1584, 1585; Dec. Dig. § 799.*]

4. QUIETING TITLE (§ 49*)—NATURE OF ACTION—CHARACTER OF RELIEF—VACATION OF DEED.

In a statutory action to quiet title, authorized by Mills' Ann. Code, § 255, the cancellation of an instrument or the setting aside of a deed, constituting an alleged cloud on plaintiff's title, is an incident to the relief granted rather than the primary object and purpose of the action.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 98, 99; Dec. Dig. § 49.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Asher B. Wilson against the Empire Ranch & Cattle Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant.
Chalkley A. Wilson and Asher B. Wilson, both of Akron, for appellee.

MORGAN, J. The pleadings and the facts involved herein are similar to those in the case of *Lougee et al. v. Wilson* (No. 3,581) 131 Pac. 777, just decided, and the opinion in that case determines this appeal. However, appellant interposes herein one contention not advanced on that appeal—that the plaintiff ought not to be permitted to invoke the authority of a court of equity to quiet his title as to a deed which he alleges is void on its face.

[1] Our Code provides that: "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest." Section 255, Mills' Ann. Code. Under this Code provision, a plaintiff may, as Mr. Pomeroy says, "compel his adversaries to come into court and assert their title."

[2] If a defendant's claim so asserted should be void on its face, the judgment may quiet plaintiff's title as to such claim, and it is not necessary that the judgment should set aside the instrument upon which the claim is based or remove the cloud, if any, created thereby. A decree in such an action is sufficient if it states that the plaintiff's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

title is quieted as to such instrument, without further recitals.

[3] This court and the Supreme Court, however, in many recently adjudicated cases, have recognized the right of a plaintiff, under this Code provision, to set aside a tax deed, void on its face, although in those cases this question may not have been directly considered. *Empire R. & C. Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005; *Munson v. Kelm*, 53 Colo. 576, 127 Pac. 1026; *Inman v. White*, 21 Colo. App. 427, 122 Pac. 65; *Kit Carson Co. v. Rosenberry*, 21 Colo. App. 439, 122 Pac. 72; *Terry v. Gibson*, 128 Pac. 1127. All of the authorities relied upon by the appellant involve actions in equity to remove a cloud wherein it became the duty of the plaintiff to allege in his complaint, in many instances, the nature and kind of instrument that constituted the cloud. Those cases are not directly applicable here, notwithstanding it has been held that our Code action to quiet title is but a recognition of the old chancery proceeding of a similar nature. *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56. It has never been held that the pleadings and the practice under the suit in equity to remove a cloud are the same as in this action.

[4] Under this Code provision, however, the cancellation of an instrument or the setting aside of a deed is an incident to the relief granted rather than the primary object and purpose of the action. The purpose of the action is to quiet a plaintiff's title as to adverse claims made by certain persons against whom the action is commenced, to require them to come into court and plead the title upon which their claims are based, and although the plaintiff, in a replication, alleges that such claims are void on the face thereof, and although the court may conclude, after an examination, that such allegation is true, such fact does not prevent the plaintiff from obtaining the relief sought, although the effect is to set aside a void deed, as the very object of the action is to have the validity of such claims determined.

Appellant says its void tax deed did not cast any cloud on plaintiff's title, and therefore it should not be "dragged into a court of equity" to have a cloud removed that is no cloud. This might be true, under many authorities, if its claims were as noiseless as its title, and if this had been a direct suit in equity to remove such a cloudless cloud as defendant would have its deed considered; but this action is the Code action to quiet the title as to defendant's adverse claims, and to render them as void and harmless as the basis thereof. Therein lies the efficiency of this Code provision and the extent of the remedy provided. This remedy in equity has been greatly extended by statute. *Pomeroy's Code Remedies*, § 266.

Judgment affirmed.

LOUGEE et al. v. WILSON.

(Court of Appeals of Colorado. April 14, 1913.)

QUIETING TITLE (§ 29*)—STATUTORY ACTION—DEFENSES—LACHES.

Since a statutory action to quiet title presupposes an impregnable position on plaintiff's part, and it is only to allay the clamor of adverse claimants and force them into court to assert their claims and have them determined and plaintiff's title quieted, plaintiff's right to relief in such action cannot be barred by laches.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 63; Dec. Dig. § 29.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Asher B. Wilson against F. C. Lougee and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. H. Gilmore, of Denver, for appellants. Chalkley A. Wilson and Asher B. Wilson, both of Akron, for appellee.

MORGAN, J. This appeal is from a judgment for plaintiff in an action to quiet title and is fully determined by the opinions in the two cases just decided (*Lougee et al. v. Wilson* [No. 3,581] 131 Pac. 777, and *Empire Co. v. Wilson* [No. 3,585] 131 Pac. 779). However, appellant on this appeal urges with extreme vigor the defense of laches denied by the lower court. The plaintiff in this action must be in possession, or have sufficient title to give constructive possession; there is no statute limiting the time within which the action may be commenced; the very nature of the remedy presupposes an impregnable position; it is only to allay the clamor of adverse claimants, force them into court to assert their claims and have them determined, and the plaintiff's title quieted, that the remedy is provided. His delay, therefore, can only be measured by his forbearance as to the annoyance of adverse claimants who "fear their fate too much" to begin an action themselves, and, if the doctrine of laches is applicable in such action at all, it affects the defendant rather than the plaintiff. *Coffee v. Emigh*, 15 Colo. 184, 191, 25 Pac. 83, 10 L. R. A. 125; *Nichols v. McIntosh*, 19 Colo. 22, 28, 34 Pac. 278; *Terry v. Gibson*, 128 Pac. 1127.

Judgment affirmed.

ROSENBAUM et al. v. McEWEN.

(Court of Appeals of Colorado. April 14, 1913.)

1. APPEAL AND ERROR (§§ 592, 1075*)—RECORD—ABSTRACT—WAIVER—RULINGS ON DEMURRER.

Appellants' failure to present an abstract of the record of the proceedings on demurrer to a bill, and a statement in the abstract that the demurrer was not set forth because it was not urged, deprived them of their right to a hearing on the demurrer in the Court of Appeals on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ground that the bill was ambiguous and uncertain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618, 2619, 2620, 3126, 4253; Dec. Dig. §§ 682, 1075.*]

2. ACCOUNT STATED (§ 5*)—REQUISITES.

The general requirements of an account stated are that there be a mutual examination of the claims of each other by the parties; that there be a mutual agreement between them as to the correctness of the allowance and disallowance of the respective claims and of the balance as struck, so that, if it appears that either of the parties did not understand that there had been a final adjustment of the respective demands between them, the courts will not enforce the account as an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 16-29; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 1, pp. 93-98; vol. 8, p. 7561.]

3. ACCOUNT STATED (§ 8*)—CONCLUSIVENESS—IMPEACHMENT.

An account stated is only prima facie evidence of its own correctness, and may be impeached in an original proceeding in equity, or may be overthrown when put forward as a defense in the same action.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 50-56; Dec. Dig. § 8.*]

4. ACCOUNT STATED (§ 18*)—IMPEACHMENT—PLEADING.

Where, in an action for partnership accounting, defendants pleaded an account stated, the validity of which plaintiff denied in a replication, the pleading was sufficient to justify proof that there was no mutual statement of account between the parties.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 85-90; Dec. Dig. § 18.*]

Appeal from District Court, Larimer County; Harry P. Gamble, Judge.

Action by James McEwen against H. Rosenbaum and another. Judgment for plaintiff, and defendants appeal. Affirmed.

T. J. Leftwich, of Ft. Collins, for appellants. Rhodes & Temple, of Ft. Collins, for appellee.

BELL, J. The complaint avers, among many other things, that on August 10, 1906, the plaintiff and defendants associated themselves for the purpose of buying, selling, feeding, and disposing of cattle, each of the parties sharing equally in the expenses and profits; that, in pursuance of this agreement, \$29,056.02 worth of cattle were purchased; that the plaintiff contributed from his own funds for said purchase \$2,125.07, and that the balance of said purchase price was paid from the proceeds of certain joint notes executed by each and all of the parties to this action; that the expense of feeding, handling, and disposing of said cattle was \$11,920.83, all of which was paid in cash by the plaintiff, and that both of the above specified sums were paid from his own private resources; that said cattle were sold for \$48,683.28, resulting in a net profit of \$7,706.43, and that all the returns that plaintiff has received from said firm or the defendants is \$5,315.80; that there is ow-

ing to the plaintiff from the defendants the sum of \$11,298.91, which they have refused and neglected to pay, though often requested so to do. The plaintiff demands judgment for \$11,298.91 or such other sum as the court may find on final accounting to be due from the defendants, and prays that the defendants be required to answer, under oath, setting forth any other, further, or different accounts which they may have relating to the said business, for interest, cost, and general relief. The defendants demurred to the complaint because, they allege it did not state facts sufficient to constitute a cause of action, and because ambiguous, unintelligible, and uncertain, stating divers alleged ambiguities, etc.

The court overruled the demurrer, and the defendants filed a joint answer and cross-complaint denying most of the allegations in the complaint, and alleged that on August 1, 1907, all the parties hereto met and settled all of their unfinished partnership business, except 26 head of unsold cattle, and then and there stated all of their accounts up to August 1, 1907, excluding said 26 head of unsold cattle, and then and there found that the defendants owed the plaintiff the sum of \$1,175.50, which they then and there paid in full settlement, relinquishment, accord, satisfaction, and discharge of any and all claims owned, held, or asserted by the plaintiff against defendants or against said association, and that the plaintiff then and there executed and delivered to defendants his said relinquishment or release in writing therefor. And that thereafter, on or about the 1st day of September, 1907, the plaintiff and defendants entered into a subsequent settlement of the affairs of said association, including said 26 head of unsold cattle, fixtures and appliances upon their feeding lots, and then and there mutually stated, between themselves, an account of all matters accruing subsequent to the date of the earlier settlement, and as a result of said mutual statements of accounts of said association and of the mutual accounts of the members thereof, and after deducting all credits due to the said plaintiff, it was then and there ascertained and agreed that there was due from the plaintiff to defendants the sum of \$236, which the plaintiff then and there agreed to pay, but failed so to do, and the defendants pray judgment against the plaintiff in the cross-complaint for the sum of \$236.

The plaintiff filed a replication denying all accounts stated, final settlements in part or whole, all acquittances, whether in writing or verbal, and other new matter in the answer and cross-complaint, and alleges that, if defendants have any such release or discharge in writing purporting to be a settlement, the same has been obtained fraudulently, is without consideration, and is not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the act of the plaintiff. The parties by consent joined the court in the appointment of Winton M. Ault, Esq., an attorney of the Larimer county bar, as referee to take the testimony, make findings of fact and conclusions of law, and recommend to the court a proper judgment.

The referee took the evidence in full on all material issues raised by the pleadings and reported specific findings of fact and conclusions of law and recommended a judgment in favor of the plaintiff and against the defendants for the sum of \$1,642.16. The court approved the findings and rendered judgment thereon for the amount recommended by the referee, from which findings and judgment the defendants appealed.

The appellants have materially limited the scope of our consideration in reviewing this record by abandoning many of their former positions. At folios 68, 69 the abstract reads as follows: "Demurrer filed in district court, Larimer county, April 7th, 1908. (Note.—As demurrer is not urged, it is not set forth in the abstract.)"

[1] As we understand, the appellants' failure to present an abstract of the record of the proceedings on the demurrer and their express waiver set forth in the abstract deprive the appellants of the right to a hearing on the demurrer in this court for ambiguity, uncertainty, etc. *Roberts et al. v. Handasyde*, 21 Colo. App. 450, 122 Pac. 60.

Appellants' counsel, at page 7 of brief, asserts "the principal points discussed in this brief are that the complaint fails to state a cause of action," and then proceeds to point out four alleged material omissions from the complaint, viz.: That the complaint fails to state whether an accounting had been taken or attempted before suit brought; that there were no charges of fraud in any of the prior dealings of the parties, nor does complaint seek to invalidate any act by reason of fraud; that complaint does not show whether a dissolution had taken place; or whether there was any firm indebtedness. If we should feel disposed to consider the demurrer or the sufficiency of the complaint, notwithstanding the waivers above set forth, then we should feel compelled to hold that the allegations in the answer and cross-complaint supplied the material omissions in the complaint. *Thalheimer v. Crow et al.*, 13 Colo. 397, 400, 22 Pac. 779; *Barth v. Deuel*, 11 Colo. 494, 19 Pac. 471; *Horner v. Bramwell*, 23 Colo. 238, 243, 47 Pac. 462; *McConathy v. Deck*, 34 Colo. 232, 82 Pac. 702.

Counsel for appellants states at page 7 of brief that: "Appellants will not in this court discuss the amount of the award or judgment, or the method adopted by the referee in reaching it. In so far as the judgment is itself concerned, only such errors will be relied on as would, in the judgment of the appellants, vitiate any judgment at all whatever its amount." After disposing of the sufficiency of the complaint, appellants claim

that there were complete accountings and settlement of the firm business alleged in the answer and established by the overwhelming weight of the evidence, and that "the further findings and determination, in effect at least, that the settlement was tainted with fraud is supported by neither pleadings nor proof; that a solemn settlement, evidenced in writing, signed by the parties affected, cannot be attacked or invalidated without proper pleadings, and by proof of a character that arises above mere conjecture and inference."

We understand that the trial court did not question the efficiency of the pleadings setting up the stated accounts, acquittances, accord and satisfaction, or releases; but the referee finds in No. 24 "that there was never had, by and between the parties to this action, any mutual settlement of accounts of this copartnership." The referee further states, in the latter part of No. 24, regarding Exhibits D, E, and F, which purport to be written acknowledgments of plaintiff of settlements as charged in the answer: "I examined the instruments and am convinced that the signatures are those of the plaintiff, and I therefore consider them as competent evidence. I do not, however, consider them as conclusive evidence of a settlement between the parties. After carefully weighing the evidence, I have come to the conclusion that there was no mutual settlement between the parties hereto for a number of reasons, a few of which are as follows: That the plaintiff is 79 years old, uneducated, and incapable of entering into a settlement of accounts of the magnitude of this enterprise. Again, a large part of the papers, such as the notes, expense drafts drawn by the defendants, vouchers, etc., were not present at the alleged settlement. About all the papers present were the checks and some papers of the plaintiff and a few sale bills and a statement from the McKee books written in Hebrew, furnished by the defendants. Having seen the plaintiff on the stand, I do not believe he understood the nature of the instruments he signed." The record strongly supports the conclusions of the referee, and we must be governed by his findings. *Johnson v. Johnson*, 18 Colo. App. 493, 72 Pac. 604; *Perdew v. Creditors, etc.*, 11 Colo. App. 157-159, 52 Pac. 747; *United Water Works Co. v. Farmers' Loan & Trust Co.*, 11 Colo. App. 225, 230, 53 Pac. 511; *X. Y. Irrigating Ditch Co. v. Buffalo Creek Irrigating Co.*, 9 Colo. App. 438-441, 49 Pac. 264; *L. P. C. M. Co. v. L. C. C. M. Co.*, 11 Colo. 223, 225-229, 17 Pac. 760, 7 Am. St. Rep. 226.

[2] The general requirements of an account stated are, first, that there be a mutual examination of the claims of each other by the parties; second, that there be a mutual agreement between them as to the correctness of the allowance and disallowance of the respective claims, and of the balance as it is struck. If the evidence shows, however,

that either of the parties did not understand that there had been a final adjustment of their respective demands between them, the courts are not to decree an adjustment between them contrary to their own understanding in the matter. *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548-551; *Lockwood v. Thorne*, 18 N. Y. 285.

[3] This court in *C. F. & I. Co. v. Chappell*, 12 Colo. App. 385, 392, 55 Pac. 606, 609, said: "We think counsel attach undue solemnity to an account stated. It is only prima facie evidence of its own correctness, and while a party may, if he finds it oppressive, institute an original proceeding in equity to be relieved from it, yet when it is interposed as a defense to an action, either at law or in equity, it may be disputed and overthrown in the same suit. * * * Wherever it is thrust forward, in whatever form of action it is pleaded, it may be impeached."

[4] The settlements were set up as new matter in the second, third, and fourth further defenses of the appellants, and denied in replication of appellee. This court agrees with the referee and trial court that no mutual settlement of the accounts of the partnership transactions was proven. The referee expressed himself as impressed with the idea that the appellee was entitled to even more credits than he gave him, but says that the appellee could not positively distinguish his partnership checks from his private checks, and therefore some of the checks which he believed were partnership checks, or given for partnership purposes, were excluded, and that a credit of \$4,000 was given to the appellants for which they could not account other than by their own statements that this amount was expended for the co-partnership.

Under the report and findings of the referee, judgment of the court, and the record before us, we cannot say that substantial justice has been done to the appellee; but, as he did not file cross-errors, we cannot increase the judgment.

We do not find that any injustice has been done to the appellants, and therefore the judgment should be and is hereby affirmed.

GRAND LODGE A. O. U. W. OF COLORADO v. TAYLOR.

(Court of Appeals of Colorado. April 14, 1913.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF THE CASE.

The opinion of the Supreme Court on a former appeal was thereafter the law of the case as to all questions passed upon by it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. EVIDENCE (§ 211*)—ADMISSIONS—TESTIMONY OF FORMER TRIAL.

On the second trial of an action on a benefit insurance certificate defended on the

ground that the member had been suspended for nonpayment of an assessment, where plaintiff attempted to show that the assessment was paid before it became overdue, defendant should have been permitted to introduce testimony given by one of the beneficiaries on the original trial that the assessment was not paid until after the member's death, although she did not testify as a witness on the second trial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 738-744; Dec. Dig. § 211.*]

3. EVIDENCE (§ 262*)—ADMISSIBILITY—ADMISSIONS.

Rev. St. 1908, § 7284, permitting a party to call an opposing party for cross-examination without being concluded thereby, does not prevent proof of admissions by such an opposing party without calling him for cross-examination.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1019-1021; Dec. Dig. § 262.*]

4. INSURANCE (§ 693*)—MUTUAL BENEFIT INSURANCE—LAWS OF THE ORDER—FORCE.

The rules and regulations of benefit insurance societies, providing such discipline as will enable them to promptly collect their dues and meet their obligations, will be enforced by the courts.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1833; Dec. Dig. § 693.*]

Appeal from District Court, Pitkin County; John T. Shumate, Judge.

Action by Uriah Taylor, as guardian of May McDonald and others, minor heirs of William H. McDonald, deceased, against the Grand Lodge of the Ancient Order of United Workmen of the State of Colorado. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 44 Colo. 373, 99 Pac. 570.

S. S. Abbott, of Denver, for appellant. Lyman H. Hays, of Willcox, for appellee.

BELL, J. This suit was brought in the district court of Pitkin county, Colo., by Uriah Taylor, as guardian of May, Helen, William, and Bryan McDonald, minors, heirs of William H. McDonald, deceased, against the Grand Lodge of the Ancient Order of United Workmen of the State of Colorado on a certificate of insurance to recover the sum of \$2,050, with interest at the rate of 8 per cent. per annum.

The controlling issue in the case is whether the deceased, William H. McDonald, or any one for him, paid the assessment due in February, 1904, before the death of the insured, which took place about March 13, 1904. William H. McDonald, deceased, held his certificate on condition that he should "pay assessments made upon him for the beneficiary or guaranty fund or lodge dues to the financier of the lodge of which he was a member on or before the last day of the month, in which said assessment or lodge dues are levied (or) shall forfeit all his rights as such member, shall stand suspended from all rights, benefits and privileges of the order from and after that date, and shall not be reinstated except as hereinafter provided." The power is taken away by the constitution

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the order from any grand lodge officer, subordinate lodge, or any other officer to waive any provision whatever of the constitution of the lodge.

Under the constitution and general laws of the order, any suspended member, who has forfeited all of his rights by reason of the nonpayment of his assessments for the beneficiary or guaranty funds or lodge dues, may be reinstated, if he be living, at any time within three months from the date of such suspension by paying all assessments and lodge dues that have been levied during the time of the suspension, including the pending assessments and dues at the time of the suspension, and upon furnishing a certificate of good health at the time the assessments are paid in the manner and upon the blank prescribed by the order, by a majority vote of the lodge.

It is charged and proven that there was an assessment called for on the 1st day of February, 1904, as provided for in the laws of the order; and it is charged by the appellant that the said William H. McDonald did not pay the same on or before the last day of the said calendar month, to wit, the last day of February, 1904, and, by reason of the nonpayment thereof, the said McDonald became suspended from the order, and lost and forfeited all his rights, and that the said beneficiary certificate became suspended; and that the said McDonald was never in his lifetime reinstated in said order, and could not, under the laws of said order, be reinstated after his death. The appellee avers in his replication that the appellant is estopped to plead the constitution and laws of the order or of the state because he alleges that the order has, by custom and conduct in dealing with the deceased and other members of the order, waived and condoned the payment of all dues, assessments, and requirements of the technical regulations of the order, and pleads payment on the 26th day of February, 1904, of the \$3.50 assessment then due. This case was before the Supreme Court on substantially the same pleadings and the same evidence as are before us in this hearing, and was decided at the September term, 1908, and is reported in 44 Colo. 373, 378, 99 Pac. 570.

[1] The opinions of the Supreme Court on a former appeal of the case become there-after the law of the case as to all questions passed upon by it. *First National Bank of Ouray v. Shark, City Treasurer*, 53 Colo. 446, 128 Pac. 58-60.

When this case was before the Supreme Court it held that: "No officer or member of the supreme or of the subordinate or inferior lodge had the power to waive performance of any duty imposed upon or required by any lodge officer or member by any of the laws, rules, or regulations of the supreme lodge." *Grand Lodge of the Ancient Order of United Workmen v. Taylor*, 44 Colo.

376, 99 Pac. 572. The Supreme Court further held that: "The uncontradicted evidence is that McDonald, the insured, died not later than the 13th day of March, 1904. The assessment upon him and other members for the next preceding month of February had been levied, and the assessment was not paid before the last day of that month, or at all, and was not tendered by any one to the financier until the 14th of the following month of March, the day after the death of the insured. Mugfur was then the financier of the lodge. Its members, it appears, were mostly workmen, and to accommodate them Mugfur permitted payments of monthly assessments to be made to his wife at their home and authorized her to sign receipts for such payments in his name. The evidence is clear that no one but Mugfur and his wife had any authority to receive payment of assessments. Both of them swore positively that neither McDonald nor any one for him paid or offered to pay McDonald's February assessment during that month. The day after McDonald's death, one of his children tendered to Mugfur the February assessment, but was informed at the time by him that it was too late and that he could not receipt for the same. Being further importuned to accept this money and tender it to the subordinate lodge to see if it would be accepted by the order, Mugfur took the money from the insured's daughter and told her that, while he could not receipt for the same, he would present the matter to the lodge to see if any relief could be given. Subsequently he presented his request to the lodge and was informed that under the rules and regulations the money could not be accepted and was ordered to return the money. Mugfur tendered the money back to the insured's daughter, and she refused to accept it. The only testimony that might be claimed as tending to contradict this testimony was the statement of Mugfur himself on cross-examination that some of the members of the order, but not McDonald, had left money for their assessments with a local merchant, which afterwards was tendered to the financier and receipts therefor given, and that assessments, but not McDonald's, had sometimes been received after the last day of the particular month for which they were levied; but in no case is there any evidence that money had been tendered by or accepted from, beneficiaries of an insured after his death. We think this evidence shows that McDonald's assessment for the month of February was not paid during that month, and that payment of the same was not tendered until after his death. This, under the plain and unambiguous language of the rules and regulations of the order, operated as a suspension, and thereby the insured forfeited all rights to participate in the beneficiary fund." 44 Colo. 371, 378, 99 Pac. 572, supra. This effectually disposes of the claim of waiver

or estoppel of the subordinate lodge or the supreme lodge as far as the evidence was concerned when before the Supreme Court. We think that there is no material change in the weight of the evidence now from what it was when before the Supreme Court.

On the first trial the plaintiff tried the case upon the theory that the money to pay the February assessment was left with May McDonald in due time and that she, for some cause, failed to pay the same; and on the further assumption that the financier of the lodge had been accustomed to receive the money after the suspension, and therefore it was estopped from claiming a forfeiture. The Supreme Court, when this case was before it, conclusively settled that question. After discussing the contention of the appellee that the financier had at some times received assessments after the last day of the particular month for which they were levied, the court forcibly said: "But in no case is there any evidence that money had been tendered by, or accepted from, beneficiaries of an insured after his death. We think this evidence shows that McDonald's assessment for the month of February was not paid during that month and that payment of the same was not tendered until after his death, and thereby the insured lost all right to participate in the beneficiary fund."

[2] We have closely compared the evidence considered by the Supreme Court when the case was before it and the evidence presented to us here, and there is no substantial difference, except that the trial court in the second trial excluded, wrongfully we think, the admissions of May McDonald, one of the beneficiaries, in her testimony in the original trial to the effect that her father gave her the money to pay the February assessment and told her to pay it if he did not, and that she kept the money until after the death of her father and then tendered it to the financier of the lodge; that she knew that her father was dead at the time and knew that he had not paid the assessment.

On the first trial in the district court, the chief purpose seemed to be to establish a custom to take money after the suspension for failure to pay. The Supreme Court when the case was before it, held that this did not relieve them from a failure to pay before the insured died. On the second trial the pressure seems to have been directed toward an effort to prove an actual payment of the assessment within the time required by the regulations of the order; but we think they utterly failed to improve on the case as presented in the Supreme Court.

The appellee did not call May McDonald as a witness. The appellant called the stenographer, who took her testimony when on the stand in the former trial wherein she admitted that her father gave her the money to pay the assessment on or about the 26th

day of February, 1904, and directed her to pay if he did not, and had him thoroughly identify her testimony, and then offered it in evidence as admissions against her interests as a beneficiary under the certificate. Counsel for appellee objected because she was in court and could testify.

[3] The judge sustained the objection, particularly calling attention to section 7284 of the Revised Statutes of 1908, permitting one party to an action to call another party opposing him to the stand for cross-examination without the party calling for such examination being concluded thereby, and allows the party, so calling for such examination, to rebut it by counter testimony. We think this clearly injurious error. The statute cited does not take from either party any legal right they had before to use the admissions of parties in interest made in opposition to principles for which they were then contending.

Jones on Evidence (2d Ed.) § 236, states the rule in this language: "If the testimony is of such a character as to constitute an admission of the parties, it is not necessary to lay a foundation for its reception by first asking the party if he has made such statements, nor is it necessary that the statement should at the time of making it appear to be against the interest of the party. The statement is admissible if at the time of the trial it is inconsistent with the contention of the party who made it." Mr. Jones further states: "In a suit by or against several persons, who are proved to have a joint interest in the decision a declaration made by one of them while engaged in the joint business concern, a material fact within his knowledge is evidence against him and against all who are parties with him in the suit." Jones on Evidence, supra, § 248. In speaking to the same subject, our Supreme Court says: "The fourth error assigned is that the court erred in allowing the defendant to introduce in evidence the testimony of appellant given on the trial of this action in the county court. The objection made to the introduction of this evidence, and to the reading of the same to the jury, was that the appellant was present in court and could have been made a witness. This objection is not well taken. The sworn testimony of a party to an action may be used against such party as an admission." *Buddee v. Spangler*, 12 Colo. 216, 223, 20 Pac. 760, 763; *Clayton v. Clayton*, 4 Colo. 410-417; *Holman v. Land*, etc., 20 Colo. 7-12, 36 Pac. 797.

We find the overwhelming weight of the evidence in both records sent to the Supreme Court against the allegation that the assessment, due in February, 1904, was paid; and we think in each instance that the trial judge should have directed judgment in favor of the defendant.

[4] These fraternal organizations are not

for profit, but, as the certificates, constitution, and by-laws indicate, a body of neighbors, usually of small means, who affiliate for mutual benefits, and each member is subject to the same rules and regulations. It is essential that they require such discipline as will enable the circles or lodges to promptly collect their dues so as to meet their obligations; otherwise the very existence of the body would be destroyed.

There is no provision or authority, either by the lodges or the state, for the collection of dues by process of law. The organization makes its own laws and regulations. The relations of the members to the lodge are such that every member knows these regulations and is aware of the consequences if he dies while suspended. And, much as we may regret to see these beneficiaries lose all interest in the benefit fund, we are compelled, under our duties, to enforce all rules and regulations, like those involved in this case, on the demand of the lodges against their own members.

There are many more important questions raised in this record; but we feel that we should devote no more time to the same, and the judgment is hereby reversed,* for the reasons herein stated.

CITY AND COUNTY OF DENVER v. RHODES.

(Court of Appeals of Colorado. April 14, 1913.)

1. MUNICIPAL CORPORATIONS (§ 771*)—SIDEWALKS—REPAIRS.

A municipal corporation is under a duty to keep its sidewalks in a reasonably safe condition and is liable, where the accumulation of ice and snow rendered the same unsafe for travelers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1627; Dec. Dig. § 771.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—INJURIES FROM STREETS—ACTIONS—JURY QUESTION.

It is usually a question for the jury whether a city had notice of the unsafe condition of a sidewalk by reason of snow, ice, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Cunningham, P. J., and King, J., dissenting.

Appeal from District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Ella R. Rhodes against the City and County of Denver. From a judgment for plaintiff, defendant appeals. Affirmed.

H. Lindsley, F. W. Sanborn, G. Q. Richmond, W. H. Bryant, and J. A. Marsh, all of Denver, for appellant. Stephen W. Ryan and H. N. Hawkins, both of Denver, for appellee.

HURLBUT, J. Action begun February 13, 1909. In her amended complaint plaintiff (appellee) alleges that she received personal

injuries from having fallen upon defendant's sidewalk on December 22, 1908. The right to recover is based upon the alleged negligence of defendant in permitting an accumulation of snow and ice to remain upon its sidewalk in a populous part of the city from December 17th to the 22d, after due notice of the unsafe condition of the sidewalk occasioned thereby. Plaintiff recovered judgment, and the case is here by appeal.

The undisputed evidence tends to show that there was a snowfall of about eight inches on December 16th and 17th, followed by general cold weather from that time until the 22d; that about 7:30 in the evening of the last-mentioned day plaintiff, accompanied by three other pedestrians, was walking on the sidewalk in a westerly direction on the north side of Fourteenth avenue, and, after crossing the alley between Pennsylvania and Logan streets, stepped upon the sidewalk and immediately slipped and fell thereon, receiving the injuries of which she complains; that the part of the sidewalk on which she fell was covered with a rough and slippery accumulation of ice and snow and was in an unsafe condition for use by pedestrians; that the place where the injury occurred was in a populous residential portion of the city; that the sidewalk where the accident happened was adjacent to vacant lots; and that the city had known for years that the lots adjoining the sidewalk where the injury occurred were vacant. The evidence also shows amount of thawing, freezing, and sunshine each day, and the general weather conditions existing at the time and for a week or more prior to the happening of the accident.

[1] The rule respecting duties of municipalities to maintain safe sidewalks for the use of pedestrians is stated in *City of Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632, as follows: "It may be said, generally, that the duty imposed upon municipal corporations in respect to its sidewalks is a duty to keep them in a reasonably safe condition. Upon persons using the sidewalks the duty imposed is that of ordinary care. Under conditions of increased danger, there is imposed a duty of increased care. These are general principles to be understood and applied in the light of the circumstances of each particular case."

In 28 Cyc. p. 1373, we find the following: "The rule requiring a municipal corporation to exercise ordinary care to keep its sidewalks in a reasonably safe condition for the ordinary purposes of travel applies to the removal of accumulations of ice and snow, and for injuries due to its negligence in this regard it will be liable," etc.

In the instant case it is conclusively shown that the accumulation of ice and snow on the sidewalk rendered the same unsafe for travel by pedestrians.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] The extent of the snowfall is also shown, condition of the weather thereafter, location of the sidewalk as a public way, and lapse of time between the snowfall and accident. Such being the case, the court below left it to the jury to say whether or not, under all the circumstances, the city had due notice of the unsafe condition of the sidewalk and a reasonable time thereafter in which to remove the ice and snow, and whether or not, in the exercise of reasonable care, the city was negligent in not remedying the defect prior to the accident. The jury passed on these questions and rendered a modest verdict for plaintiff. The case seems to have been fairly and impartially tried. We are not inclined to disturb the verdict; nor would we have felt disposed to disturb the verdict had it been in favor of defendant. The general current of authority seems to assign to juries the duty of determining controverted facts in this class of cases. Thompson on Negligence, § 6184; Cloughessey v. City of Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Hall v. City of Lowell, 10 Cush. (Mass.) 260; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Foxworthy v. City of Hastings, 25 Neb. 183; † Townsend v. City of Butte, 41 Mont. 410, 109 Pac. 969; Nebraska City v. Rathbone, 20 Neb. 288, 29 N. W. 920; District of Columbia v. Frazer, 21 App. D. C. 154; Griffith v. City and County of Denver, 132 Pac. 57, decided by the Supreme Court April 7, 1913.

In the last case cited the court was called upon to decide whether or not the city was negligent in constructing and maintaining a sidewalk at a greater angle than that fixed by ordinance. It was held that the city's acts in that respect were not negligence per se, but it was for the jury to decide whether or not, under all the circumstances of the case, the sidewalk so constructed and maintained was dangerous to travel and constituted negligence on the part of the city. Justice Bailey, speaking for the court, said: "The testimony shows that the walk in question had an inclination toward the street slightly in excess of that fixed by ordinance. Counsel for plaintiff urge that this conclusively establishes negligence against the city. The court instructed the jury that such fact did not in and of itself alone necessarily establish negligence, but that it was a fact which the jury should take into consideration, with all of the other testimony, in reaching a conclusion as to whether the walk was of a defective or dangerous construction. * * * The effect of the excessive inclination upon the safety of the walk was one of fact, involving the question of negligence on the part of the city, a matter clearly for the jury to determine upon all of the testimony, where it was properly left."

Reading the instructions as a whole, we

think they were consistent with each other, and fairly submitted the case to the jury upon all substantial issues before them for consideration. Under the views above expressed, we deem it unnecessary to notice other assignments of errors discussed by counsel in their oral argument and briefs.

The judgment is affirmed.

CUNNINGHAM, P. J., and KING, J., dissent.

MEYER v. WRIGHT.

(Court of Appeals of Colorado. April 14, 1913.)

1. PLEADING (§ 193*)—DEMURRER—GROUNDS. Under Mills' Ann. Code, § 50, prescribing the available grounds of demurrer, a demurrer on the ground that the contract pleaded in the complaint was illegal and void, contrary to public policy and good morals and could not be enforced, was unauthorized.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

2. CORPORATIONS (§ 186*)—STOCKHOLDERS—RIGHTS—FIDUCIARY RELATION.

A mere stockholder of a corporation, unlike a director, sustains no fiduciary relation to the corporation and is under no duty to serve it; hence, in the absence of fraud, he may deal with the corporation, its debts or property, as though he were a stranger.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695-701; Dec. Dig. § 186.*]

3. CORPORATIONS (§ 183*)—STOCKHOLDERS—PROPERTY—PURCHASE OF TAX TITLE.

Property of a corporation having been sold for taxes, a contract by a stockholder with the tax sale purchaser, by which the latter agreed to procure a tax deed and then convey the tax title to such stockholder, was neither contrary to public policy, honesty, or good morals, and hence the stockholder could not be deprived of a decree of specific performance on that ground.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 691; Dec. Dig. § 183.*]

Appeal from District Court, Eagle County; Charles Cavender, Judge.

Suit by George S. Wright against R. J. Meyer. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry R. Rhone, of Grand Junction, for appellant. John A. Ewing and Frazer Arnold, both of Denver, for appellee.

HURLBUT, J. May 28, 1908, plaintiff (appellee) instituted suit against defendant (appellant) in Eagle district court. The complaint, among other things, alleged that on June 10, 1907, the Gold Belt Mining, Milling & Prospecting Company of Council Bluffs, Iowa, a corporation, was the owner of certain patented claims, machinery, and improvements therein described; that the taxes upon said premises were delinquent for the year 1900, and the property had been sold by the treasurer of Eagle county on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† 41 N. W. 132.

17th day of October, 1901, for such delinquent taxes; that at the tax sale defendant purchased said property and received a treasurer's certificate therefor; that on June 10, 1907, plaintiff was interested in the property as a stockholder and as attorney for the stockholders of said mining company, and on that day entered into a written contract with defendant, under the terms of which defendant agreed to obtain a treasurer's deed for the premises in pursuance of his certificate of sale and thereupon convey the said property to plaintiff; and that, in consideration of such conveyance, plaintiff agreed to pay defendant the full amount of taxes, with interest and penalties and all other expenses incurred by defendant in obtaining said deed. The contract provided for an alternative consideration to be paid by plaintiff at his option, not necessary to consider. The contract contained an acknowledgment by defendant of the receipt of \$10 from plaintiff as part payment of the consideration. The complaint further alleges that on August 2, 1907, it was found and determined that a balance of \$397.75 was due defendant under the terms of said contract, which sum, on the 7th day of August, 1907, plaintiff paid to defendant, which he received and retained; that on October 27, 1907, defendant received from the treasurer of said county the tax deed for the premises described; that defendant had paid all subsequent taxes and had done all things necessary and requisite to entitle him to the tax deed aforesaid; that plaintiff complied with and performed all the terms of said contract on his part to be complied with and performed; that defendant refused to convey to plaintiff the said property and his interest therein acquired by virtue of the tax deed, closing with a prayer for specific performance of the contract and general relief. To this complaint a demurrer was interposed by defendant, containing two grounds: First, that the complaint did not state facts sufficient to constitute a cause of action; second, "that the contract set out in said complaint is illegal and void, contrary to public policy, contrary to good morals, and cannot be enforced." The demurrer was afterwards heard by the court and overruled, whereupon defendant elected to stand on his demurrer, saved proper exceptions to the court's ruling, and took the case, by appeal, to the Supreme Court. The case is now before us for determination by lawful transfer from the Supreme Court.

[1] As we interpret the demurrer, only one ground recognized by the Code is therein stated, to wit, the first. The alleged second ground does not state any one of the seven reasons for demurrer found in section 50, Mills' Annotated Code. The matters, however, contained in this second ground could probably be urged in support of the first. The record shows that, after defendant elected to stand on his demurrer, evidence was

introduced on behalf of plaintiff to sustain the allegations of the complaint, but such evidence does not appear in the abstract of record. The decree, however, appears therein and is conclusive as to its finding of facts.

But one question is before the court, a determination of which is decisive of this appeal: Did the complaint state facts sufficient to constitute a cause of action? Appellant contends that the contract of June 10, 1907, set out in the complaint is illegal, void on its face, and contrary to public policy and good morals, and that other averments of the complaint confirm such contention. The averments alluded to read as follows: "That prior to the said 10th day of June, 1907, the plaintiff herein, being interested as a stockholder and as the attorney for the stockholders of said mining company, began negotiations with the defendant with a view of purchasing said tax sale certificates and the rights of the defendant, R. J. Meyer, therein or thereto, and to acquiring the title to said property under the tax deed to be issued by the treasurer of Eagle county under said tax sale certificate or certificates, and to acquire such title under said tax deed as could be acquired under and by virtue of such sale thereof for the taxes of the year 1900." In view of these allegations, appellant reasons that a stockholder or stockholder's attorney sustains a trust relation toward the company, and cannot purchase its property at a tax sale, either in the name of the stockholder or the attorney; that the same is prohibited under a well-known rule of equity; that one occupying a fiduciary relation towards his principal may not purchase the property of the principal without his consent, nor otherwise deal with the same to his own advantage and profit. We fail to see wherein this rule is applicable in this case.

[2] A mere stockholder, unlike a director, is under no duty to serve his corporation. In the absence of fraud, he may deal with it or its debts or property as any stranger. He does not occupy a trust relation towards the other stockholders, and he may deal with them or with the corporation in good faith.

[3] It is not alleged that plaintiff was the attorney for the company, but, even if such were the case there is no averment from which the inference can be drawn that he acted fraudulently or prejudicial to the rights of the company in executing the contract in question. The contract set out in the complaint is free from ambiguity. It requires defendant to obtain a treasurer's deed for the property described in the complaint, and, as soon as such deed is obtained, convey such property to plaintiff. It requires plaintiff to pay defendant certain sums of money to be used for the purposes stated. The complaint shows that plaintiff made all payments required of him and

otherwise complied with all the terms of a contract, while, on the contrary, defendant secured the tax deed but refused to make the conveyance as he had agreed to.

As we read the complaint, not a line word therein shows, or tends to show, violation of any trust by plaintiff, nor does show any act or thing done or said by him which suggests bad faith or moral turpitude on his part. Everything said or done by him, as shown by the complaint, appears to be entirely consistent with honesty and good morals. True, the complaint shows that plaintiff, while a stockholder and attorney for other stockholders, contracted with the holder of the tax sale certificate to secure the same from him by deed to the company's property previously sold at tax sale. It cannot be successfully contended that this act by itself justifies a legal presumption of fraud. For anything that appears to the contrary in the complaint, the entire transaction may have been conducted with the full knowledge of plaintiff's clients or brother stockholders. It is not disclosed by the complaint that any client of plaintiff, the company itself, or any stockholder thereof complaining of the contract or plaintiff's action thereto. We do not think the authority or reasoning found in appellant's brief are applicable to the issues presented in this appeal. The demurrer admits all the facts well pleaded in the complaint, and we are satisfied it states a good cause of action.

The judgment is affirmed.

MOUNTAIN SUPPLY DITCH CO. v. LINDEKUGEL

(Court of Appeals of Colorado. April 14, 1913.)

PLEADING (§ 202*)—DEMURRER—INCORPORATING IN ANSWER.

The practice of challenging the sufficiency of the complaint by a clause incorporated in the answer not called to the court's attention until trial, instead of filing a separate demurrer, is not to be commended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 480; Dec. Dig. § 202.*]

PLEADING (§ 403*)—COMPLAINT—DEFECTS CURED BY ANSWER.

Alleged defects in the complaint were cured by the answer which put in issue the very matters which defendant contended should have been pleaded in the complaint, in order to state cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

WATERS AND WATER COURSES (§ 252*)—MUTUAL DITCH COMPANIES—DUTIES TOWARD STOCKHOLDERS.

It is the duty of a company organized to supply water to its stockholders by means of ditches and reservoirs to exercise reasonable care and diligence in procuring and storing water, keeping its reservoirs in repair and condition to retain the water, and making a ratable distribution thereof, and, if a stockholder's land so situated that it can be irrigated from only

certain reservoirs, to retain a sufficient amount of water in those reservoirs for his land if practicable by the exercise of reasonable care and diligence and without prejudice to the other stockholders.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 252.*]

4. WATERS AND WATER COURSES (§ 252*)—MUTUAL DITCH COMPANIES—DUTIES TOWARD STOCKHOLDERS.

Where a mutual ditch company was not distributing its water to its stockholders in proportion to their shares of stock, but was distributing to each stockholder what he might need while the water lasted, it did not perform its duty to a stockholder by limiting him to his strict pro rata share while water was being held unused.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 252.*]

5. WATERS AND WATER COURSES (§ 263*)—ACTIONS—QUESTIONS FOR JURY.

Whether a ditch company willfully or negligently diverted water from upper to lower reservoirs from which a stockholder's land could not be irrigated as shown by his evidence, or whether it exercised reasonable care and diligence for the protection of his rights, were questions for the jury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. § 263.*]

6. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

A jury's finding on competent, substantial, conflicting evidence is conclusive on the Court of Appeals, although it may believe from a reading of the record that the verdict might well have been otherwise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

7. APPEAL AND ERROR (§§ 1032, 1033*)—BURDEN OF SHOWING ERROR.

The judgment will not be reversed unless appellant shows error actually or presumptively prejudicial to it, and hence, where the only error shown was manifestly favorable to appellant, it would be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051, 4052-4052; Dec. Dig. §§ 1032, 1033.*]

Appeal from District Court, Larimer County; James E. Garrigues, Judge.

Action by August Lindekugel against the Mountain Supply Ditch Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rhodes & Temple, of Ft. Collins, for appellant. John J. Herring, of Aztec, N. M., for appellee.

KING, J. From a verdict and judgment in favor of the plaintiff in the sum of \$1,225, the defendant appealed.

[1] The first question presented by the assignments of errors is that the complaint does not state a cause of action. No separate demurrer was filed, but the sufficiency of the complaint was challenged by a clause incorporated in the answer, and the attention of the court was first called to it after the jury had been impaneled and sworn to try the cause upon its merits. That practice has become customary in some sections

of the state but is not to be commended, either as to the manner of pleading or the delay in presenting the issue of law. "It is a custom more honored in the breach than in the observance." It is dilatory and savors of obstructive tactics rather than of an attempt to reach trial on the merits. The demurrer was overruled, and no objection on the ground of insufficiency of the complaint was made to the evidence offered.

[2] However faulty it may be, we think the complaint, as aided by the answer, which to some extent cured its defects, may be sustained. It is alleged, in substance, that defendant, appellant here, is a mutual ditch company organized as a corporation under the laws of Colorado for the purpose of furnishing water to its stockholders for irrigation; that plaintiff was a stockholder of said corporation to the extent of 62½ shares, and was the owner of 240 acres of land requiring irrigation, lying under defendant's ditches and reservoirs and having no other source of supply; that in the spring of 1907 plaintiff prepared and seeded to grain 178 acres of said land, and was entitled to and demanded water for its irrigation; that a small quantity was furnished in June, sufficient only to irrigate 40 acres once, and that thereafter defendant failed, refused, and neglected to furnish plaintiff any water; that it purposely and voluntarily diverted all the water stored in certain reservoirs for the express purpose of irrigating plaintiff's land, and the only reservoirs from which his land could be irrigated, from those reservoirs into other reservoirs and to other lands, by reason of which plaintiff's crops were destroyed or seriously injured. Defendant answered, denying its willful diversion of the water so stored, as alleged in the complaint, and alleged that it distributed the water in accordance with its regular custom, and to the best interests of all its stockholders, including the plaintiff whenever he was entitled thereto, and it had any water for the use of its stockholders, thus putting in issue the very matter which defendant contends was necessary to be pleaded in the complaint in order to state a cause of action.

[3] The defendant company, having been organized for the purpose of supplying water to its stockholders by means of a ditch and reservoir system, assumed and was charged by law with the duty of exercising reasonable care and diligence in procuring and storing the water, keeping its storage reservoirs in repair and condition to retain the same, and making ratable distribution thereof; and, if plaintiff's land was so situated that it could be irrigated from certain reservoirs only, it was its duty, if practicable, by the exercise of reasonable care and diligence, and without prejudice to the other stockholders, to retain a sufficient amount of water in such reservoirs to irrigate those lands. *Rocky Ford, etc., Co. v. Simpson, 5*

Colo. App. 30, 33, 36 Pac. 638; Knowles v. Clear Creek, etc., Co., 18 Colo. 209, 32 Pac. 279; Miller v. Imperial Water Co., 156 Cal. 27, 103 Pac. 227, 24 L. R. A. (N. S.) 372. Its failure to perform this duty and the injury resulting to plaintiff therefrom is charged in the complaint. No reason is assigned why the defendant, in the exercise of that reasonable care and ordinary prudence with which it was charged, should run the stored water out of the upper reservoirs, whence it could be readily distributed to all parties entitled thereto, until it became apparent and reasonably certain that they could be refilled from the stream, or unless the condition of the reservoirs rendered it unsafe to retain the water therein. It is asserted by defendant that the reservoirs were refilled to about the extent of the depletion, but upon that point the evidence was conflicting.

It is contended that the evidence is insufficient to support the verdict. It was admitted that defendant is a mutual ditch company, but it is claimed that the evidence fails to show either willful or negligent failure of defendant to perform any of its duties, and particularly that it failed to deliver to the plaintiff his full share of the water in proportion to his stock. The evidence on plaintiff's part shows that early in May all the water was run from the two upper reservoirs, the only ones from which plaintiff could be supplied that year, into another situated below his land, and there held unused throughout the entire season while plaintiff's crops were burning up with drought.

[4] Defendant's evidence shows that the water was not being distributed in proportion to the stockholding, but to each stockholder what he might need while the water lasted; and it is further shown by one of its witnesses who farmed a large acreage that year for the president of the company that he had plenty of water. Under this evidence, the plaintiff could not be limited to his strict pro rata share while water was being held unused.

[5, 6] Whether the defendant exercised reasonable care and diligence for the protection of plaintiff's rights as a stockholder when it ran all the water from the upper storage to the lower, and whether in fact it did so divert it, willfully or negligently, were matters for the jury, and its finding on competent, substantial, conflicting evidence is conclusive on this court, although we may believe from a reading of the record that the verdict might well have been otherwise. The verdict is not obviously excessive, and counsel have not pointed out wherein its excess, if any, may be discovered.

[7] It is also contended that instruction No. 5, given by the court, is erroneous. In that respect we agree with counsel, as there is no evidence on which to predicate the instruction; but it is manifestly favorable to the defendant, and therefore not prejudicial

to it. Reversal may not be required unless appellant shows error, actually or presumptively prejudicial to it. *Harrison v. Hodges et al.*, 49 Colo. 105, 111 Pac. 706.

The judgment is affirmed.

PUZZLE MINING & REDUCTION CO. v. MORSE BROS. MACHINERY & SUPPLY CO.

(Court of Appeals of Colorado. April 14, 1913.)

1. SALES (§ 472*)—CONDITIONAL SALES—SECRET LIEN—VALIDITY.

A conditional sale reserving a secret lien to the vendor is void in Colorado as against creditors or subsequent holders having no notice thereof, and who are injuriously affected thereby, being treated as to such persons as an absolute sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

2. SALES (§ 472*)—CONDITIONAL OR ABSOLUTE SALE—THIRD PERSONS.

A lessee of a mine contracted with the lessor to place certain machinery on the property, and for this purpose purchased the machinery from plaintiff under a conditional sale of which the lessor had no knowledge, and had the same installed on the property. *Held*, that as to the lessor the sale of the machinery was absolute and not conditional.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

3. FIXTURES (§ 14*)—NATURE OF ARTICLES—MINING MACHINERY—PERMANENT ACCESSION TO FREEHOLD—REPLEVIN.

Plaintiff sold certain boilers and mining machinery for installation at a mine. The boilers were incased in masonry and the machinery bolted to solid foundations. All of the articles were necessary to the successful operation of the whole plant, or to some part of the machinery, and it appeared that it was the buyer's intention to make a permanent accession to the freehold and to use it solely for the development and operation of the mine. *Held*, that the machinery constituted a part of the freehold, and that replevin could not be maintained by the seller to recover the same.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 22, 25; Dec. Dig. § 14.*]

Appeal from District Court, Summit County; Charles Cavender, Judge.

Action by the Morse Bros. Machinery & Supply Company against the Gold Dust Consolidated Mining Company, in which the Puzzle Mining & Reduction Company intervenes. From a judgment for plaintiff, intervener appeals. Reversed.

Charles F. Carnine, of Denver, for appellant. Elliott & Bardwell, of Denver, for appellee.

CUNNINGHAM, P. J. January 30, 1908, appellee (hereinafter referred to for convenience as the Machinery Company) instituted a replevin suit against the Gold Dust Consolidated Mining Company (hereinafter referred to as the Gold Dust Company) to recover possession of certain mining machinery which the Machinery Company had theretofore sold to the Gold Dust Company, and on

which a balance remained due. The Machinery Company insists that the sale was a conditional one, and the title was not to pass from it to the Gold Dust Company until the machinery had been paid for. There were two sales and two written contracts of sale, in all respects alike, in which it was specifically provided that "the entire title and ownership of the machinery should remain in the Machinery Company and vendor until the full payment of all installments due thereon, together with interest." And it was further stipulated in said written contracts between the Machinery Company and the Gold Dust Company, vendor and vendee, "that the latter received the property as bailee of the former." The Gold Dust Company was in possession of certain placer mining property as lessee, the title to the property being in the Puzzle Mining & Reduction Company, appellant here; said company being hereinafter referred to as the Puzzle Company. The machinery in question was purchased for and installed upon this property. The pertinent portions of the lease under which the Gold Dust Company was operating the mine required it "to take possession of the mill then on the property, to add to and install therein such machinery and appliances as might be necessary in the treatment of the ore from the mine, and to increase the capacity of said mill to at least sixty tons daily." Incorporated in the lease was an option which permitted the Gold Dust Company, under certain conditions, to become the purchaser of the mining property covered by the lease. In connection with this option agreement appears the following: "It is further understood and agreed that in case of the forfeiture of the said lease, the payments made thereunder shall be considered as rental for said property up to the time of such forfeiture, and that all machinery and appliances installed in, and all improvements made upon, said property shall revert to the first parties hereto"—the first parties being the Puzzle Company.

It will be seen that one of the considerations for the lease and option agreement was the purchase and installation by the lessee, the Gold Dust Company, of such machinery and appliances as might be necessary for the treatment of the ore; said purchase and installation of machinery to be in addition to the machinery on the property at the time the lessee and prospective purchaser, the Gold Dust Company, took possession thereof. This is an important fact which must be borne in mind. It may, we think, be fairly inferred that the machinery here involved was purchased by the Gold Dust Company of the Machinery Company, and added to the plant already upon the property, in fulfillment of that requirement of the lease and option to which we have just directed attention.

Aside from certain objections which it filed to the replevin bond, the Gold Dust Company made no appearance whatever in the case. On February 3, 1908, appellant, the Puzzle Company, filed its petition in intervention, and thereafter the contest was solely between the intervener and the Machinery Company. For the purpose of preventing the Machinery Company from removing the machinery from the mine, the Puzzle Company instituted injunction proceedings, which were, as we view the record, but auxiliary to the replevin proceeding and designed simply to maintain the statu quo. We shall therefore make no reference to the injunction feature of the case, further than to say that it was disposed of on the trial at the same time the issues raised in the replevin suit were heard; the two cases being consolidated by stipulation. The case was tried to the court without a jury; the trial judge finding that there was due the Machinery Company from the Gold Dust Company \$1,085.14. By the decree the intervener, the Puzzle Company, was given 30 days in which to pay this amount to the Machinery Company, and in case payment of this sum was not made by the Puzzle Company within the time specified the right of possession of the machinery was awarded to the Machinery Company.

The Puzzle Company defended upon two distinct theories; the first being that the sale was, under the authorities of this state, an absolute one, and that the attempt on the part of the Machinery Company to reserve a secret lien should not be upheld. Its second defense was based upon the contention that the mining machinery had become so affixed to the realty as to become a part thereof; hence could not be recovered in a replevin suit in any event, nor at all as against the intervener, which had in the meantime declared a forfeiture of the lease and re-entered into possession of the mining property. It will thus be perceived that two difficult questions are presented for our determination.

1. The authorities pertaining to conditional sales are far from harmonious; the rule pertaining to fixtures, and when personal property loses its identity as such and becomes merged in the real estate to which it is attached, is made to depend largely upon the facts of each particular case. *Hardware Co. v. McCarty*, 10 Colo. App. 220, 50 Pac. 744. The first question has been repeatedly before the courts of this state for consideration. See *George v. Tufts*, 5 Colo. 165; *Weber v. Diebold*, 2 Colo. App. 68, 29 Pac. 747; *Tufts v. Beach*, 8 Colo. App. 35, 44 Pac. 771; *First Congregational Church v. Grand Rapids Co.*, 15 Colo. App. 46, 60 Pac. 948; *Andrews v. Colo. Savings Bank*, 20 Colo. 313, 36 Pac. 902, 46 Am. St. Rep. 291; *Jones v. Clark*, 20 Colo. 353, 38 Pac. 371; *Clark v. Bright*, 30 Colo. 199, 69 Pac.

506; *Coors v. Reagan*, 44 Colo. 126, 96 Pac. 966.

[1] It is not necessary that we should analyze these cases, or quote at length from them. Suffice it to say that, contrary to the ruling in many, perhaps the majority, of the states, the doctrine in Colorado has become well established that a conditional sale reserving a secret lien to the vendor is void as against creditors or subsequent holders having no notice thereof, and who are injuriously affected thereby. Mr. Justice Maxwell, in the *Coors Case*, supra, quotes the following with approval from the *Weber Case*, supra: "Appellee, having vested Wood with the possession and all indicia of ownership, it was not a bailment, but a sale subject to defeasance upon a subsequent condition, an arrangement known only to the parties themselves. A party who, by his own acts, places another in the ostensible position of owner should be estopped to deny such ownership. Private transactions of this character are not favored, and they are opposed to public policy." In other words, such conditional sales, as against third parties having no notice thereof, and who are injuriously affected thereby, must be treated as absolute sales. Hence, so far as the Puzzle Company is concerned, the sale of the machinery in the instant case must be treated as absolute.

[2] There are additional reasons appearing in the contracts of sale entered into between the Machinery Company and the Gold Dust Company why these sales must be regarded as absolute, so far, at least, as the Puzzle Company is concerned, under the rule in *Andrews v. Colorado Savings Bank*, supra, viz.: A promissory note was given by the Gold Dust Company, the vendee, to the Machinery Company, the vendor, for the balance due, and the agreements further provided that: "Said party of the second part, the vendee, agrees that they will promptly pay to the party of the first part the purchase price for said property, when and as the same shall become due and payable as aforesaid." In the *Andrews Case* Mr. Justice Goddard, speaking for the court, says: "Notwithstanding the agreement itself provides that the title to the seating shall remain in *Andrews & Co.* until such payment in cash shall have been made therefor, thus evidencing an intent to make the sale conditional, so far as the transfer of the title is concerned, that such an intention is rebutted by the terms and stipulations in the notes given in pursuance of the agreement; they being absolute obligations, making the purchaser unconditionally liable for the purchase price. The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the

property delivered, however characterized by the parties, is essentially and in legal effect an absolute, and not a conditional, sale."

Inasmuch as the lease from the Puzzle Company to the Gold Dust Company required the latter to purchase and install, by way of addition to the plant, other mining machinery necessary to the proper operation of the mine, such requirement being one of the considerations moving from the lessee to the lessor, in the purchase and installment of the machinery here involved the Gold Dust Company, the lessee, was but carrying out one of the conditions of the lease and option. The consideration having been in a sense paid to the lessor (who is not shown to have had knowledge of the secret lien) by the lessee when it installed the machinery in question, this consideration can not now be recovered by the Machinery Company from the lessor, in virtue of a secret lien incident to a so-called conditional sale. The harshness of this rule is more apparent than real, since the records of the county wherein the mining property is located afforded notice to the Machinery Company at the time it sold the machinery to the lessee that the record title of the mining property was in the Puzzle Company. While the lease in question appears not to have been recorded, yet the Machinery Company could have easily ascertained what the provisions of the lease were; at least there is nothing in the record to indicate any difficulty which it would have encountered in this behalf. No great hardship is perceived in a rule which requires the vendor of mining machinery to obtain from the owner of the record title of mining property on which the machinery he sells is to be installed and used consent to the reservation of a vendor's lien before delivering such machinery to a purchasing lessee.

[3] 2. The machinery sold by the Machinery Company to the Gold Dust Company, and which is involved in this controversy, consisted of the following articles: One 35 H. P. boiler; one 80 H. P. boiler; two Frue-Vanners; four iron pulleys; one wood pulley; and four No. 5 Wilfley tables. We have followed the language used in the abstract in describing these articles of machinery. As we understand the terms, the Frue-Vanners and the Wilfley or Wilfey tables are all used for the same purpose, and constitute heavy mining machinery. The testimony concerning the installation of this machinery shows that the boilers were held in place by stone casings laid up in mortar and cement, and were connected with the balance of the mill by proper piping. The shafting was attached by bolts to the timber or framework of the mill. The tables were framed in a foundation resting upon the earthwork of the mill, and all the tables being connected to the shafting by bolts. The machinist who helped install this machinery

was asked the following questions and gave the following answers: "Q. Describe to the court the manner in which the tables are installed. A. We put them down the way we usually do to make them stay. Q. Describe more in detail. A. In that we made an extra foundation and set them on, made a good solid foundation, and they were fastened down solid. They fasten the Wilfley table down with a lag screw to this foundation made especially for that. That is about all that was necessary to do. Q. Tell the manner in which it [the 80 H. P. boiler] was installed. A. It's put in in a stone wall, as we usually install boilers of that kind, and connected to the engine. Both boilers are connected. Q. What would be necessary, Mr. Gilbert, in order to remove the 80 H. P. boiler you refer to? A. Disconnect the engine. * * * Q. What else would be necessary in order to remove the 80 H. P. boiler from the mill besides disconnecting it from the engine? A. Just simply a lot of work. Q. What effect would it have, if any, on the stone or cement casing? A. We would tear that all down." Under the ruling in this jurisdiction these fixtures become a part of the realty. *Roseville Co. v. Iowa Co.*, 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373; *Hardware Co. v. McCarty*, 10 Colo. App. 200-219, 50 Pac. 744; *Mosca Town Co. v. Wellington*, 39 Colo. 826, 89 Pac. 783, 121 Am. St. Rep. 175; *Gibson Co. v. McNichols*, 51 Colo. 59, 116 Pac. 1041. The facts in the last case cited, and the *Roseville Case* in 15 Colorado, are strikingly similar to the facts here under consideration, both as to the character of the property and the manner of its installation. In *Hardware Co. v. McCarty*, supra, it is said: "Now, it is not absolutely necessary that in order to constitute a fixture, so as to take an article from without the line of personal property, it should be permanently affixed to the freehold by physical attachment. This may or may not be the case. * * * The controlling questions now, in determining as to a large class of articles whether they partake of a real or a personal character, are the intention of the party to make a permanent accession to the freehold and the use to which the article is to be applied. [Citing cases.] If it constitutes a part of a plant of machinery necessary to the successful operation of the whole, or if its use is essential to the operation of some part of the machinery which is physically attached to the freehold, then it may in many cases be properly termed a fixture, even though it wholly lacks a permanent physical attachment to the realty."

The record in this case, we think, clearly shows, not only that the articles of machinery here in controversy were necessary to the successful operation of the whole plant, or at least to the operation of some part of the machinery, but it further shows, with reasonable clearness, that it was the intention of the party who installed the machin-

ery to make a permanent accession to the freehold and to use these articles of machinery for the sole purpose of the development and operation of the mine on which they were installed. Moreover, they appear to have been attached to the freehold with this particular purpose in view. To hold that this machinery did not become a part of the real estate upon which it was installed would be to fly in the face of an unbroken line of adjudications from the two appellate courts of this state.

The judgment of the district court is reversed.

NATIONAL CONST. CO. v. OWENS.

(Court of Appeals of Colorado. April 14, 1913.)

APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

If after careful weighing the conflicting evidence leaves it doubtful as to which side should prevail, the Supreme Court will not disturb the trial court's finding; the burden being on appellant to affirmatively show error to his prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Robert L. Owens against the National Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert Collier and T. Webster Hoyt, both of Denver, for appellant. James J. McFeeley, of Denver, for appellee.

CUNNINGHAM, P. J. On March 26, 1908, plaintiff filed his complaint in the district court to recover damages for the violation of a contract or agreement, whereby he was to perform for the defendant certain work in and about the construction of manholes and flushers which constituted, or were to constitute, a part of a sanitary sewer system in the city of Denver. After having completed a portion of the work covered by the contract, plaintiff ceased working. He avers that the defendant violated the agreement, while the defendant claims that the plaintiff, without cause, ceased work, and became thereby responsible for the breaking of the contract. Certain modifications as to prices for different items of work were made by mutual consent of the parties, after the plaintiff had entered upon the work, but we think these modifications did not constitute a new contract, as appellant contends. Plaintiff alleges that at the time the contract was broken by the defendant there remained work to be performed under the contract upon which he would have made a clear profit, had he been permitted to complete the same, of \$1,500. This is denied by the defendant.

The jury, upon conflicting evidence, found that the plaintiff was entitled to recover \$739.50, and judgment for that amount was entered in favor of plaintiff. The evidence adduced by the plaintiff to support his damages is not in all respects clear and satisfying, but an examination of the entire evidence discloses sufficient grounds to support the judgment. After hearing all the evidence, and the motion for a new trial, the trial judge evidently took this view of the matter, and we cannot say that he was not warranted in so doing.

[1] The Supreme Court of West Virginia, commenting upon the duty of appellate courts, when reviewing a judgment based upon conflicting testimony, uses this language: "If, after the most careful scrutiny, the conflicting testimony leaves the case in such a pivotal condition that it is a matter of doubt as to which side ought to prevail, it becoming a mere matter of conjecture, this court will not disturb the determination of the lower court, in obedience to another well-established rule that the burden is on the appellant to affirmatively show error to his prejudice." Ward v. Ward, 43 W. Va. 1-10, 26 S. E. 542, 546.

Judgment affirmed.

CASTRILLA et al. v. VELOTTA et al.

(Court of Appeals of Colorado. April 14, 1913.)

1. WATERS AND WATER COURSES (§ 158*)—LEASE—WATER RIGHTS.

Under a lease of farming lands for three years, with an option to purchase at the end of the term, which provided that the lessees should have the right to use the seepage water, subject to use by the lessors when they should need it, the lessees, on their election to purchase the land, were not entitled to a specific conveyance of the right to the seepage water, free from any prior right of the lessors.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186-188; Dec. Dig. § 158.*]

2. WATERS AND WATER COURSES (§ 158½*)—AGREEMENT TO FURNISH WATER TO LESSEE—DAMAGES.

In a lessor's action for the recovery of farming lands for which the lessee had paid a rental of \$150 a year for three years, in which the evidence as to damages claimed to have been suffered by the lessee from the lessor's failure to furnish water was conflicting, the court could not say that a finding of \$150 for each of the two years that the lessee held over was unreasonable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. § 158½.*]

Appeal from District Court, Chaffee County; Lee Campion, Judge.

Action by Michele Velotta and another against Pompeo Castrilla and another, with cross-action for specific performance, etc. Judgment for plaintiffs, and defendants appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

George D. Williams, of Salida (John A. Perry, of Denver, of counsel), for appellants.

CUNNINGHAM, P. J. On the 1st day of August, 1904, the appellants, as lessees, entered into an agreement with the appellees, who were the owners of a tract of farming land consisting of about 125 acres, whereby the appellants agreed to lease said land for three years at an agreed price of \$150 per year. Incorporated in this agreement was an option permitting the lessees to purchase the land at the expiration of their lease on the terms and conditions in said agreement set forth. The controversy arises over the different construction placed upon a certain clause in the agreement pertaining to water rights.

At or before the expiration of the lease the appellants signified their desire and intention to exercise their option of purchase, and tendered the first payment in accordance with the provisions of the option, demanding, however, that certain water rights should be specifically set forth in the deed of conveyance. The appellees, placing a different construction upon the option purchase than that contended for by the appellants, declined to make the deed, and after much unavailing effort to reach some basis of settlement appellees, on February 1, 1909, filed their complaint in the district court for the recovery of the possession of the land, which appellants continued to hold after the expiration of the lease, and for \$1,500 damages. By the terms of the leasehold provisions of the agreement, the rights of the appellants thereunder expired on January 1, 1908. The trial occurred August, 1909. Nothing was paid by the appellants for the use of the land after the expiration of the leasehold. The defendants answered, admitting the leasing provisions of the agreement, and by way of cross-complaint asked for the specific performance of the option agreement. They also asked for damages in the sum of \$1,000 for loss of crops, which they alleged was due to the failure on the part of appellees to furnish during the leasing period the amount of water which they alleged they were entitled to use under the agreement. All of the parties to this action are Italian, as were many of their witnesses. They spoke our language indifferently; certain of the witnesses speaking through an interpreter, thereby more or less affecting, in point of clearness, the testimony given. The contract on which the rights of all of the parties depend was written in Italian, and the translations introduced add appreciably to the difficulty of a clear understanding thereof.

[1] 1. As we have said, the whole difference between the parties arises over the construction of that feature of the lease and option agreement pertaining to water rights which the appellants would be entitled to

use during the time they operated the land as lessees, and which they would be entitled to a conveyance of in the event of purchase. The following is all that appears in the agreement that in any wise refers to the water rights. We quote from one of the translations which appellants set forth in their brief, and with which, apparently, they are satisfied: "The Velotta formally bind themselves to furnish to Castrilla & Capra all the spring water coming from the farm in where they are actually settled, viz., the water commonly called 'seepage water,' and this outside of the one that they have actually the right. During the term of the rental any and all trouble that may be caused by the fault of Castrilla and Capra will fall over them and at any time that the Velotta will be in need of the seepage water they have a right to use the same." It appears from the record, although there is nothing specific in the written agreement of the lease and option so indicating, that there was other water belonging to the land leased which, under the intention and understanding of the parties, appellants would be entitled to use, and to receive a conveyance for if they purchased, besides the so-called "seepage" or spring water; but as there was no controversy over these last-named water rights further reference to them is unnecessary.

It will be seen from what we have quoted from the written agreement that the quantity of seepage or spring water which appellees were to furnish appellants is extremely uncertain and quite incapable of ascertainment. There is nothing whatever in the record which discloses with anything even approaching definiteness how much of this seepage or spring water appellees needed, or for what portion of time they used it, and the controversy was limited to this seepage water right. Appellants were unwilling to accept a deed to the land, unless this particular water right was therein specifically and unqualifiedly conveyed. The following questions propounded to and answers made by Castrilla (who seemed to represent and speak for both appellants) while he was on the stand indicate with reasonable clearness his attitude at the time he made the tender and demanded a deed. He was testifying through an interpreter, which explains the use, at times, of the pronouns in the third person. "Q. But were you willing that Mike [referring to one of the appellees] should reserve the first right to the use of the seepage water to himself? A. He might use the water when he needs it. Q. Was he [Castrilla] willing that the deed should state that Mike should have the first right to use it? A. If he needed it. Q. Were you willing that the deed should so state? A. [by the interpreter]. He wants to know why Velotta should have the first right. Q. Was he willing that the deed should say that Mike should reserve to himself the first

right? A. No, sir; he would not be willing that the contract says so; he can use the water any time he wants it." Under this testimony we think the trial judge, before whom the case was heard without a jury, was warranted in finding that the tender made by appellants was accompanied by a condition, as to the conveyance of the seepage water, not warranted by the written agreement or contract; hence of course, specific performance could not be awarded, and the defendants (appellants here) were not entitled to retain possession of the premises after the expiration of their leasehold right in January, 1908.

[2] 2. The evidence on the question of the amount of damage suffered by appellants while they were farming the land under their leasing agreement is conflicting. The fact that year after year they paid to appellees in cash the full stipulated rental price, without claiming any damage due to the insufficient water supply, greatly weakens the force of the testimony given by appellants on this subject. Their contract required that they pay \$150 a year for the use of the land while they were farming it under the leasing agreement. This amount they did pay. The court fixed the appellees' damages at \$150 for each of the years 1908 and 1909, being the two farming seasons during which appellants retained possession of the premises after the expiration of their leasehold rights.

There are other features connected with the case, and discussed in appellants' brief, which we have not found it necessary, after due consideration, to comment upon.

We cannot say from the record before us that the finding of the trial court was unjust or unreasonable, or that the appellants have not had substantial justice.

The judgment of the trial court is affirmed.

EMPIRE RANCH & CATTLE CO. v. LUMELIUS.

(Court of Appeals of Colorado. April 14, 1913.)

1. TAXATION (§ 790*)—SALE OF LAND FOR TAXES—ACTION TO TRY TITLE—STIPULATION.

Where, in an action to quiet title to land as against a tax deed void on its face, it was stipulated that as to the deed in question and certain other deeds, also set aside, the treasurer might compute the taxes and interest and render a statement thereof, and the amount so stated should be inserted in the judgment, such stipulation converted the action into one for the recovery of land sold for taxes, authorized by Rev. St. 1908, § 5733.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1570, 1572, 1573; Dec. Dig. § 790.*]

2. EVIDENCE (§§ 332, 340*)—JUDGMENT (§ 951*)—RECORD.

Where a court decree is offered to prove its existence and contents or its mere rendi-

tion, the record or an authenticated copy is sufficient without producing the remainder of the record; but if the record is offered as an estoppel, or as an adjudication of certain facts, it must be accompanied by the judgment roll.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246, 1294-1301; Dec. Dig. §§ 332, 340.* Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.*]

3. TAXATION (§ 813*)—SALE FOR TAXES—STATUTORY ACTION—SCOPE OF DECREE.

Where, in a statutory action for possession of property sold for taxes, the answer was a general denial, and a county court decree sustaining the tax title, not referred to in the pleadings, was valid on its face, and the judgment roll was not introduced to show its invalidity, the court's judgment in favor of plaintiff should have been limited to a statement that the county court decree was to have no force or effect as against plaintiff's title, and should not have held it void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1811; Dec. Dig. § 813.*]

4. TAXATION (§ 769*)—TAX DEEDS—CORRECTION DEED—EXECUTION—VALIDITY.

Where, in an action to recover possession of land sold for taxes, defendant claimed under a tax deed which was void on its face, and also introduced a correction deed, to attack which no evidence was introduced, but it appeared that it was issued on the same sale as the first deed, which was void because the certificate was assigned by the county clerk more than three years after the sale, it would be presumed that the recitals in the first deed with reference to the assignment spoke the truth, and hence that the correction deed was void for the same reason, though it did not disclose what officer assigned the certificate, nor when it was assigned, but recited that the assignment was authorized by the board of county commissioners on the ____ day of April, 1901, the same month, with the day omitted, that appeared in the first deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1533-1536; Dec. Dig. § 769.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Eugene Lumellius against the Empire Ranch & Cattle Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

MORGAN, J. [1] Appeal from a judgment for the recovery of a quarter section of land that had been sold for taxes. Appellant contends that the judgment was erroneous wherein it set aside a judgment and decree of the county court and a tax deed offered in evidence, but excluded, because the county court decree was not supported by an offer of the judgment roll, and the tax deed was void on its face. This contention is not without merit, as the complaint was for the possession of land under the Code, and the answer a general denial. However, it appears in the record that as to the tax deed, aforesaid, and two other tax deeds, also set aside, a stipulation was made, in reference to these deeds and the contents of the decree, that "the treasurer might compute the taxes and interest and render a statement

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

thereof, and the amount so stated should be inserted in the judgment," thus bringing the action, under the decisions of this and the Supreme Court, within the scope and purview of an action for the recovery of land sold for taxes under section 5733, Rev. St. 1908. *Empire Ranch & Cattle Co. v. Howell*, 129 Pac. 247; *Rustin v. M. & M. T. Co.*, 27 Colo. 358, 47 Pac. 302. The stipulation shows a desire to have the taxes paid by defendant returned, and premises the concession that the deeds under which they were paid might be set aside and canceled, as done by this court in the first case above cited.

[2] As to the decree of the county court, it was not error to exclude it, under the ruling of this court in the case of *Terry v. Gibson*, 128 Pac. 1127, wherein a similar judgment was excluded and set aside under almost identical circumstances, and the judgment affirmed. In that case *Cunningham, Judge*, citing numerous authorities, said: "The true rule with reference to the admission of a document of this sort is that, for the purpose of proving the existence and contents of the judgment, or the mere rendition of it, the record thereof, or an authenticated copy of it, is sufficient without producing the remainder of the record; but when the record of a judgment is offered as an estoppel, or when, as in this case, it is offered as an adjudication of certain facts, it must be accompanied by the judgment roll."

[3] In the later case, also, of *Empire Ranch & Cattle Co. v. Coleman*, 129 Pac. 522, the same conclusion was reached. However, the error particularly complained of on this appeal is that the judgment of the lower court set the decree of the county court aside and held it for naught, because it was void, although it was not referred to in the pleadings, was valid on its face, and the judgment roll was not introduced to show its invalidity. That the lower court was in error in this particular has been determined by this court in the case above cited (*Empire Ranch & Cattle Co. v. Coleman*), wherein the court, by *King, Judge*, said: "There is no doubt as to the right of the district court to hold a county court decree void on a collateral attack, provided it affirmatively appears from the judgment roll that the judgment was void for want of jurisdiction in the county court. *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005. But we think that where, as in the instant case, the decree of the county court, regular on its face, containing recitals which, if true, would give the court jurisdiction to pronounce the decree, is rejected, when offered as evidence of title and as an estoppel, for the sole reason that the judgment roll was not offered to support it—in other words, the decree is excluded for want of competent and sufficient evidence to show that the court had jurisdiction of the parties, instead of for the reason that an affirmative showing has been made that the court had not jurisdiction

to render the decree—the court was without authority to adjudge the decree null and void, and the judgment should have been limited to holding the said decree of no force or effect as against the plaintiff's title. A decree that is not affirmatively shown to be void, should not, upon a collateral attack, be so adjudged."

This is particularly true where, as in this and the *Coleman Case*, the complaint was the code action for possession, and the answer was a general denial. The judgment of the court should therefore be modified and limited to a statement therein that the decree of the county court has no force or effect as against the plaintiff's title. The better pleading in all such cases, when the plaintiff desires to have tax deeds and decrees of courts set aside, is to attack them in the complaint, or, when pleaded in the answer, to attack them in the replication.

[4] All other assignments concerning the tax deeds relied upon by defendant and offered or admitted under its general denial have been heretofore determined against the appellants, with the possible exception of the deed admitted without objection, dated and recorded June 28, 1908, in Book 44, page 21, of Yuma County Records. This deed was not recognized in the judgment; however, appellant contends that it was absolute proof of title in the defendant, because it was admitted without objection, and fair on its face, and that plaintiff could not introduce proof of its latent infirmities, under the general denial of the replication. An examination of the record discloses that no evidence was introduced attacking it, but it appears to have been issued upon the same sale as the first deed offered and excluded as void on its face, because the certificate was assigned by the county clerk more than three years after the sale, and must have been in the nature of a correction deed. It does not disclose what officer of the county assigned the certificate, nor when it was assigned, but it does disclose that the assignment was authorized by the board of county commissioners "on ——— day of April, 1901," the same month, with the day omitted, that appears in the first deed aforesaid. This brings the deed within the rule announced in *Empire Ranch & Cattle Co. v. Neikirk*, 128 Pac. 468, 470, wherein this court said: "But, inasmuch as the original tax deed recites that the assignment was made by the county clerk, and the correction deed does not negative that statement, the defendant having offered both deeds in evidence, it must be assumed that the recitations of the first tax deed with reference to the assignment spoke the truth, and defendant is bound thereby. The clerk has no authority to assign a certificate after three years from its date. *Lambert v. Scott* [53 Colo. 357] 127 Pac. 142."

Therefore, as modified, the judgment is affirmed.

EMPIRE RANCH & CATTLE CO. v. HOWELL.

(Court of Appeals of Colorado. April 14, 1913.)

1. QUIETING TITLE (§ 44*)—TRUSTEE'S DEED—RECITALS—PRIMA FACIE EVIDENCE.

Where, in a statutory action to quiet title, plaintiff claimed under a trustee's deed, the recitals in the deed, introduced as a part of plaintiff's chain of title, were prima facie evidence of the facts recited.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

2. ADVERSE POSSESSION (§ 95*)—COLOR OF TITLE—PAYMENT OF TAXES—TIME.

Defendant claimed color of title by reason of a tax deed void on its face, dated April 10, and recorded April 22, 1901, and proved payment of taxes for 1900 on April 2, 1901, and annually thereafter, including the taxes for 1907, paid in 1908. Held that, since the first payment of taxes that could be counted under Rev. St. 1908, § 4090, conferring title by limitations on proof of payment of taxes under color of title for seven years, was that made in 1902 for the taxes of 1901, the proof was insufficient to show an acquisition of title under such act in an action to quiet title, commenced December 29, 1908.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 530-532; Dec. Dig. § 95.*]

3. APPEAL AND ERROR (§ 1051*)—EVIDENCE—MATERIALITY.

Where a tax deed under which defendant claimed title in a statutory action to quiet title was rejected, when offered in evidence, because void on its face, it was not reversible error to permit the introduction of further evidence to show the invalidity of the deed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. TAXATION (§ 805*)—TAX SALES—VOID DEED—LIMITATIONS.

A tax deed, void on its face, is insufficient on which to base a defense of limitations, under Rev. St. 1908, § 5733, providing that no action to recover land sold for taxes shall lie, unless brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding, etc.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Lardner Howell against the Empire Ranch & Cattle Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

MORGAN, J. [1] Appeal from a judgment for possession of a quarter section of land. Appellant's contention that the recitals in a trustee's deed introduced as part of plaintiff's chain of title are not prima facie evidence of the facts therein recited has been determined against such contention in the recent case between the same parties, 129 Pac. 521, affirming a case between the same parties, 22 Colo. App. 389, 125 Pac. 593.

[2] The only other assignment of error discussed in appellant's brief necessary to be considered is that the lower court erred in holding that the proof made by the defendant in support of its plea of the seven-year statute of limitations (section 4090, Rev. St. 1908) was insufficient to support the plea. The defendant claimed color of title by reason of a tax deed, void upon its face, for reasons given in several cases recently decided between the same parties by this court. The deed was admitted as proof of color of title. The proof, chronologically stated, was that the taxes for 1900 were paid by the defendant April 2, 1901, and annually thereafter, including the taxes of 1907, paid in 1908; the tax deed was dated April 10, and recorded April 22, 1901. The first payment of taxes that can be counted under this statute was made in 1902, for the taxes of 1901. The action was commenced December 29, 1908, less than seven years after the first payment. In the case between the same parties, 22 Colo. App. 584, 599, 126 Pac. 1096, 1101, on rehearing, this court, through Cunningham, Judge, said: "Taxes that have been assessed and which are due and payable at the time the color of title is taken cannot thereafter be paid and counted as one of the seven payments required by the statute, and that seven full years must elapse between the first payment of taxes on vacant and unoccupied land and the institution of the suit to recover the land." Followed and cited in *Marks v. Morris* (Colo.) 129 Pac. 828. It appears that seven full years did not intervene between the first payment of taxes duly and timely made after the recording of the deed and the commencement of the action, under the foregoing decisions; hence the facts did not sustain the plea.

Although not necessary to determine on this appeal, another assignment will be considered, whereby appellant contends that, under a general denial in the replication, a plaintiff, in the code action for possession of land, cannot introduce evidence attacking a tax deed, introduced by defendant, for defects not appearing on the face thereof. This contention is not without merit, where the defendant pleads a tax deed, fair on its face, to establish title in himself. *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225; *Schlageter v. Gude*, 30 Colo. 310, 70 Pac. 423; *Harrison v. Hodges*, 49 Colo. 105, 111 Pac. 706. In the last case cited, however, the Supreme Court held that in the code action to quiet title it is impossible to conceive how a defendant can plead the infirmities in a tax deed that is not pleaded by the plaintiff; and it would seem that in the code action for possession of land it would be no less impossible to conceive how a plaintiff could be expected to plead in a replication the defects leading up to the execution of a tax deed relied upon by defendant, where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the defendant has not pleaded it in the answer. In so far as it may have been intimated in the opinion in the case of *Empire Ranch & Cattle Co. v. Howell*, 128 Pac. 474, 475, that the plaintiff in that case could not introduce proof of the defects in the proceedings leading up to the issuance of the tax deed, fair on its face, relied upon by defendant, the court was led into error by the mistaken impression, no doubt, that the defendant had pleaded such a tax deed, without realizing that the answer of the defendant was a general denial only. The opinion in that case should be limited to instances where a tax deed, valid on its face, has been sufficiently pleaded.

[3, 4] In the pending case the defendant pleaded, in one of its defenses, a tax deed which was rejected when offered in evidence, because void on its face; and the appellant contends that it was reversible error to permit the introduction of further evidence to prove the invalidity of said deed. This might have been unnecessary, but not reversible, matter. As the deed was void on its face, it was properly excluded. It was insufficient upon which to base the statute of limitations pleaded in the fourth defense (section 5733, Rev. St. 1908), and, as hereinbefore stated, it was insufficient upon which to base the plea of the seven-year statute of limitations, on account of the lack of the necessary period of seven years between the first payment of taxes and the commencement of the action.

Judgment affirmed.

EMPIRE RANCH & CATTLE CO. v. FARMER.

(Court of Appeals of Colorado. April 14, 1913.)

1. JUDGMENT (§ 489*)—VACATION—COLLATERAL ATTACK—JURISDICTION.

A district court may decree that a judgment of a county court is void, even on collateral attack, if it affirmatively appears from the judgment roll that the county court judgment is void for want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

2. JUDGMENT (§ 950*)—VALIDITY—PLEADING—ESTOPPEL—TITLE.

In an action to recover land sold to defendant for taxes, plaintiff may introduce evidence showing defects in a judgment or decree quieting defendant's title under the tax deed, when such decree is offered as evidence of estoppel or of title, though the decree is not pleaded in defendant's answer, and plaintiff's replication is but a general denial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1804, 1805, 1807; Dec. Dig. § 950.*]

3. PLEADING (§ 427*)—WAIVER OF OBJECTIONS—EVIDENCE.

Where, in an action to recover land sold for taxes, defendant offered in evidence certain county court decrees quieting its tax title which were not pleaded, plaintiff's failure to object to the admission of the decrees with-

out the judgment roll did not preclude him from producing the judgment roll himself, even under a general denial, and thereby showing that the decrees were void.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1428-1432; Dec. Dig. § 427; Trial, Cent. Dig. § 286.]

4. TAXATION (§ 813*)—QUIETING TITLE—VACATION OF JUDGMENT.

Where plaintiff sued at law to recover land sold for taxes, and defendant, without pleading them, introduced certain void county court decrees quieting its tax title, the court should have limited its judgment to a holding that the decrees were ineffective to bar plaintiff's right to relief, and should not, in the action at law, have decreed that they be set aside and held for naught.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1611; Dec. Dig. § 813.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Jasper Farmer against the Empire Ranch & Cattle Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. J. F. Mail, of Denver, for appellee.

MORGAN, J. Appeal from a judgment in favor of plaintiff for possession of three quarter sections of land that had been sold for taxes. All of the assignments of error herein have been determined heretofore against appellant's contention, with possibly one exception, particularly by two cases in which the opinions have just been written: *Empire Ranch & Cattle Co. v. Lumellus* (No. 3,488) 131 Pac. 796, and *Empire Ranch & Cattle Co. v. Howell* (No. 3,562) 131 Pac. 798. In this case the defendant pleaded in its answer four decrees of a county court, quieting the defendant's title in the property involved herein, that were offered in evidence, two of which were excluded because not accompanied by the judgment roll, and two admitted without objection. Appellant contends that, as two of these decrees were admitted without objection, were pleaded in the answer, and were not attacked in the replication, except by general denial, they should stand as evidence of title, and that the court erred in admitting evidence attacking them, and in setting them aside in its judgment.

The contention is that, the decree in each instance being pleaded, and valid on its face, the plaintiff could not, under the general denial in the replication, introduce any proof of defects in the proceedings prior to its entry. This necessarily contemplates a technical question of pleading not decided in the *Lumellus* Case, or, so far as the investigation has been extended, in any other case decided by the Supreme Court or the Court of Appeals of this state.

[1] We have decided in the *Lumellus* Case, citing *Terry v. Gibson*, 128 Pac. 1127, that it was not error to exclude such decrees from the evidence, when not accompanied by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the judgment roll, and that a district court may decree that a judgment of a county court is void, even on collateral attack, if it affirmatively appears from the judgment roll that the county court judgment is void for want of jurisdiction, citing *Empire Co. v. Coleman*, 129 Pac. 522.

[2] We have decided in the *Howell Case*, in reference to a tax deed, citing *Harrison v. Hodges*, 49 Colo. 105, 111 Pac. 706, that where it is not pleaded in the answer in an action of this character the plaintiff may introduce evidence, even under a general denial in the replication, showing defects in the proceedings prior to its execution. The same rule will apply to a judgment or decree when it is offered as evidence of estoppel, or of title.

Consequently, the question presented is: Was the evidence proving the invalidity of the two admitted decrees admissible under the general denial in the replication? The answer must be in the negative, under strict rules of pleading; but applying the same strict rule the answer should specifically plead a decree, so that it may be identified, and show that the *title of the parties* in issue in the decree pleaded is the same title in issue in the pending case. 2 Freeman on Judgments, § 461.

[3] The title may have been the same, but neither the answer nor the decrees themselves disclose it, and under these conditions it was not reversible error to permit the plaintiff to prove, under the general denial in his replication, by introducing the judgment roll, that the decrees were void. A reversal and another trial would result in the same judgment. Furthermore, a mere failure of plaintiff to interpose an objection to the admission of the decrees (without the judgment roll, which would have excluded them or required the roll to be produced by the defendant) ought not to preclude the plaintiff from producing the roll himself, even under a general denial. The technical "pound of flesh" seems to be demanded on both sides, but this court is pleased to find itself bound to disregard such demands, under the more persuasive influence of section 84, Rev. St. 1908, which provides: "The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

[4] We are not disposed, however, to say that it was not error to hold them for naught and set them aside in this action at law, but will only say that the judgment of the lower court should be modified, in accordance herewith, as to all of said decrees, as directed in the case of *Empire Ranch &*

Cattle Co. v. Lumellus, supra, appealed from the same court. This does not conflict with any former opinions of this or the Supreme Court holding that tax deeds may be set aside under similar pleadings, because, in reference to such deeds, the courts are controlled by the peculiar provisions of section 5733, Rev. St. 1908. *Empire Ranch & Cattle Co. v. Howell*, 129 Pac. 247; *Rustin v. M. & M. T. Co.*, 23 Colo. 358, 47 Pac. 302. Furthermore, in all cases brought to recover land sold for taxes, founded upon the code action of possession, and recently decided by this court, including the present case, the parties have either stipulated that the taxes and interests should be returned, as provided in section 5733, supra, and thus brought the cases within the scope of said section, or else the case has been tried without objection as to the pleadings, and in all respects the same as if the proceedings had been a suit in equity or to quiet title. No error is found concerning the setting aside of the tax deeds on this appeal, and the questions involved concerning the same have been heretofore determined by recent decisions of this court.

The judgment is affirmed.

WESTERN INVESTMENT & LAND CO. v. FIRST NAT. BANK OF DENVER.

(Court of Appeals of Colorado. April 14, 1913.)

On motion to amend former opinion. Motion granted.

For former opinion, see 128 Pac. 476.

PER CURIAM. The attention of the court has been called to the fact that the opinion filed herein on October 14, 1912, appears to reverse the judgment of the court below as to the defendant Frank J. Macarthy, as well as to his codefendant, the Western Investment & Land Company. The appeal was taken by the Western Investment & Land Company only. No exceptions were taken to, and no appeal prayed from, the judgment of the trial court against the said Macarthy, and so far as the opinion of this court appears to reverse the cause as to him it was unintentionally and inadvertently so written.

The last paragraph of said opinion is hereby amended so as to read as follows: "For the error of the court in withdrawing the cause from the jury and directing a verdict, the judgment, as to the appellant, the Western Investment & Land Company, will be reversed, and the cause remanded for a new trial; but this opinion shall not affect the judgment of the trial court as to the defendant Frank J. Macarthy. Reversed and remanded."

BLOOMFIELD v. NEVITT.

(Court of Appeals of Colorado. April 14, 1913.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

A finding of the jury on an issue of fact, where the evidence was in sharp conflict, was conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. ATTORNEY AND CLIENT (§ 26*)—LIABILITY OF ATTORNEY—EXPENSES OF SUIT.

An attorney who directed an official reporter to prepare a bill of exceptions, and who made no claim that he had authority to bind his client to pay therefor, was liable for the value of the reporter's services.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 38, 39; Dec. Dig. § 26.*]

3. ATTORNEY AND CLIENT (§ 26*)—LIABILITY OF ATTORNEY—EXPENSES OF SUIT.

Where an attorney without authority from his client directed an official reporter to prepare a bill of exceptions, but did not represent to the reporter that he had authority from his client, and the reporter with knowledge that the client denied liability, but under the mistaken belief that the attorney had implied authority, brought suit against the client, he could not recover from the attorney his expenses in unsuccessfully prosecuting such suit.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 38, 39; Dec. Dig. § 26.*]

Morgan, J., dissenting.

Appeal from District Court, Rio Grande County; Charles A. Pike, Judge.

Action by John Nevitt against Ira J. Bloomfield. Judgment for plaintiff, and defendant appeals. Modified and remanded.

Jesse Stephenson and James P. Veercamp, both of Monte Vista, for appellant. Charles M. Corlett and John Nevitt, both of Monte Vista, for appellee.

CUNNINGHAM, P. J. John Nevitt, the appellee, was the official reporter of the district court of Rio Grande county and other counties of the Twelfth judicial district. In this capacity he reported the proceedings of a certain trial in Saguache county. Thereafter he made a bill of exceptions, including all of the testimony taken on the trial. This service was performed, as he alleges, at the instance and request of the appellant, Bloomfield, who was the principal attorney for the losing parties, Emil and Frances Tobler. The Toblers declined to pay Nevitt's bill, or any part thereof, contending that they had not authorized their attorney to have the testimony extended, and did not desire to appeal from the judgment which had been rendered against them. Thereupon Nevitt brought suit against the Toblers, and obtained a judgment for \$450 (with interest), which was the amount plaintiff was justly entitled to charge for his services under the prevailing prices for such work. The Toblers appealed the case to the Supreme Court, where the judg-

ment was reversed. This case is reported in 45 Colo. 231, 100 Pac. 416, 23 L. R. A. (N. S.) 702, 132 Am. St. Rep. 142, 16 Ann. Cas. 925. A careful statement of facts involved in that case was made by Mr. Justice Campbell, and by reference we adopt so much thereof as may be applicable to the case before us. Following the decision in the Supreme Court, and on May 25, 1909, Nevitt filed suit in the district court of Rio Grande county against Bloomfield to recover the amount claimed for his services, with interest thereon, together with the additional sum of \$309.72, which represents the amount which he, Nevitt, laid out and expended in the prosecution of his suit against the Toblers. The jury returned a verdict in favor of Nevitt for \$957, which includes accrued interest upon the original claim, though this fact is not clearly deducible from the abstract filed. We discover no complaint made in brief of defendant on the grounds of the excessiveness of the verdict, other than the general claim of nonliability on the part of defendant for any sum whatever. From this judgment Bloomfield, the defendant, brings this cause here on appeal.

[1] 1. Appellant denies that he ever ordered, directed, or instructed Nevitt to make the bill of exceptions. His sole defense is predicated upon this single contention. The testimony upon this point is conceded by counsel for appellant to be in sharp conflict. From the verdict of the jury it is manifest that on this issue of fact they found against appellant, and we are concluded by that finding. The Supreme Court, on the trial of the Tobler Case, held that Bloomfield had no authority whatever to order the bill of exceptions. Indeed, in the instant case, Bloomfield makes no contention that he had such authority, but as we have already pointed out, predicates his entire defense upon a flat denial that he gave any instructions to Nevitt to make the bill of exceptions. All argument, therefore (and there is much of it in the briefs), pertaining to agency and innocent mistake on the part of the agent as to his authority, has no application.

[2] The jury having found that appellant directed the appellee to make the bill of exceptions, and there being no dispute as to the value of the work, the liability of the appellant to the appellee, in the circumstances of the case as just stated, follows as a natural consequence. We have therefore no difficulty in reaching the conclusion that the appellant should pay the appellee for the service which he, the appellee, rendered; the former's liability to the latter in the sum of at least \$450, with interest thereon from the date that the amount became due, seems clear.

[3] 2. The liability of the defendant Bloomfield for the costs incurred by Nevitt in the prosecution of his suit against the Toblers presents a more difficult question.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—51

On this point the record discloses, without any serious conflict, that Bloomfield never made any specific or direct representation to Nevitt that he had authority to bind his clients for the work which the jury found he had directed Nevitt to do. Nevitt appears to have assumed, from the fact that Bloomfield was the leading counsel for the Toblers, and from that fact alone, that his, Bloomfield's, order for the bill of exceptions bound his clients, and upon this erroneous assumption brought suit against the Toblers and incurred expenses amounting to something over \$300, in the unsuccessful prosecution thereof. On this point the Supreme Court, in *Tobler v. Nevitt*, *supra*, says: "There is no evidence in this case of ratification of, or acquiescence in, such employment of plaintiff by defendants in this action. The cause having been tried by plaintiff's counsel upon the theory, which the trial court adopted by so instructing the jury, that the special retainer of Bloomfield to try the case in the district court necessarily carried with it the implied power, without any special authority from his clients, to perfect an appeal and represent his clients therein and to bind them to pay all the costs and expenses necessarily incurred in the prosecution of such review, his judgment cannot stand." From this it will be seen that Nevitt's prosecution of his case against the Toblers was the result of a mistaken conception of the law of agency, and not from any mistaken view of the facts for which Bloomfield was at all responsible. Indeed, the record in this case discloses that Nevitt knew, before he instituted the former suit against the Toblers, that they denied all liability on his claim, and denied that they had authorized Bloomfield to order the bill of exceptions, or that they had any intention of appealing the case. Bloomfield himself practically told Nevitt, before the latter instituted his suit against the Toblers, that he had no such authority, for he, Nevitt, testified that, when he asked General Bloomfield about whether he was authorized to order the work done, all that he, Bloomfield, said was, "Sometimes attorneys take a great deal of authority." We therefore are in accord with the statement of Mr. Justice Campbell, which we have already quoted, to the effect that Nevitt prosecuted his case against the Toblers upon a mistaken theory that the special retainer of Bloomfield to try the case in the district court necessarily carried with it the implied power, without any special authority from his clients, to perfect the appeal and contract the debt for the bill of exceptions. Bloomfield may not be held responsible for the results which Nevitt's ignorance of the law occasioned himself. We are therefore of opinion that the trial court erred in submitting to the jury the question of Bloomfield's liability to Nevitt for the latter's expenses incident to the unsuccessful prosecution of his suit against the Toblers.

For this error the judgment of the trial court must be modified, with instructions to enter a judgment in favor of appellee and against appellant for \$450, with interest thereon at the rate of 8 per cent. per annum from May 2, 1904 (which is the date from which the appellee in the former suit reckoned interest, and which appears without contradiction to be a somewhat later date than the completion of his work on the bill of exceptions), to the date of the entry of judgment, and for the costs of this suit.

Judgment modified, and case remanded, with directions.

MORGAN, J., dissents.

STEVENS v. TOMPKINS.

(Court of Appeals of Colorado. April 14, 1913.)

1. APPEAL AND ERROR (§ 1002*)—QUESTIONS OF FACT—CONCLUSIVENESS OF VERDICT.

The credit to be given witnesses was for the jury, and its verdict upon conflicting evidence may not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. COURTS (§ 213*)—APPELLATE JURISDICTION OF SUPREME COURT.

No appeal to the Supreme Court lies from a judgment for less than \$500, not relating to a franchise or a freehold.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 517-519, 522-526; Dec. Dig. § 213.*]

3. APPEAL AND ERROR (§ 14*)—DISMISSAL OF NONAPPEALABLE JUDGMENT—RE-ENTRY AS PENDING ON ERROR.

Where appellee enters no appearance, so that no jurisdiction of his person is obtained, the appeal, if dismissed, cannot be re-entered as pending on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.*]

4. APPEAL AND ERROR (§ 801*)—DISMISSAL OF APPEAL—AFFIRMANCE OF JUDGMENT BELOW.

Where the Court of Appeals has no jurisdiction, and the appeal, if dismissed, cannot be re-entered as pending on error, it may be properly affirmed under rule 1 of the Court of Appeals (127 Pac. ix), providing, that, whenever an appeal or writ of error shall be dismissed, the court, in its discretion, may affirm the judgment of the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. § 801.*]

Appeal from El Paso County Court; John E. Little, Judge.

Action by Frank Tompkins against H. H. Stevens. Judgment for plaintiff, and defendant appeals. Affirmed.

William C. Robinson, of Colorado Springs, for appellant.

KING, J. Action for the reasonable value of materials furnished and labor performed by plaintiff (appellee here) for defendant at his request in repairing a building belonging

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to defendant. Judgment for plaintiff, from which defendant appealed.

The errors assigned and relied on raise only the question of the sufficiency of the evidence to support the verdict and judgment; the contention being that the verdict includes compensation for work and material for which no provision was made in the contract between the parties, as shown by the evidence. The testimony upon the part of the plaintiff was positive and clear that the materials furnished and the work done was in accordance with directions given by the defendant, and, if believed by the jury, was amply sufficient to sustain the verdict.

[1] The credit to be given to the witnesses was for the jury to determine, and, having resolved the issues in favor of the plaintiff upon conflicting evidence, the verdict may not be disturbed.

[2] The judgment was for an amount less than \$500, did not relate to a franchise or a freehold, and therefore an appeal therefrom to the Supreme Court did not lie, and the cause might, and perhaps should, be dismissed for lack of jurisdiction to entertain the appeal.

[3] Inasmuch as the appellee has entered no appearance, and therefore jurisdiction of his person has not been obtained, the cause, if dismissed, cannot be re-entered as pending on error. *Brady v. People*, 45 Colo. 364, 101 Pac. 340; *Perkins v. Russell*, 21 Colo. App. 212, 121 Pac. 955; *D. & R. G. R. Co. v. Casady*, 50 Colo. 351, 115 Pac. 532.

[4] And we think, if dismissed, it is a proper case for the application of rule 1 of this court (127 Pac. ix) that, whenever an appeal or writ of error shall be dismissed, the court may, in its discretion, affirm the judgment of the court below. But whether affirmed upon the merits of the cause, or under the rule, the effect is the same.

The judgment is affirmed.

WELLINGTON REALTY CO. v. GILBERT.

(Court of Appeals of Colorado. April 14, 1913.)

1. VENDOR AND PURCHASER (§ 48*) — CONTRACTS—CONSUMMATION.

Where a vendor, by a written contract containing every condition necessary to make a complete agreement, agreed to sell land, and the vendee, who also signed the instrument, agreed to purchase and pay the price, the contract was consummated on the date of the written agreement, for a contract is consummated when the minds of the parties meet, understandingly, in the same sense.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 48.*]

2. ESTOPPEL (§ 72*)—EQUITABLE ESTOPPEL—NEGLIGENCE.

Where a misrepresentation as to the recodation of a plat of land is made by inadvertence or honest mistake, the loss must fall upon

the party first at fault in making the misrepresentation.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 188; Dec. Dig. § 72.*]

3. VENDOR AND PURCHASER (§ 33*) — CONTRACTS—VALIDITY.

Where a vendor of land showed the purchaser a plat and represented that it was recorded, and the purchaser, by means of the plat, identified certain land and entered into a contract to purchase the same, the contract describing the land as a certain numbered block "according to the recorded plat thereof," the contract is not invalid because the plat was never recorded and the land was subsequently platted in a different way, for the recital in the contract that the plat was recorded will be rejected as falsa demonstratio.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. § 33.*]

4. VENDOR AND PURCHASER (§ 82*)—MODIFICATION OF CONTRACT—TIME OF TAKING EFFECT.

Where, after the execution of a contract by a corporation for the sale of land, it was discovered that the president of the corporation had signed the name of the wrong corporation to the contract, and a new contract was executed which was an exact copy of the old contract except as to the name of the vendor corporation, a new contract was not consummated, but the rights of the purchaser were to be determined as of the date of the execution of the original contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.*]

5. EVIDENCE (§ 461*)—PAROL EVIDENCE RULE—ADMISSIBILITY.

Parol evidence of the attending circumstances surrounding the making of a written contract for the sale of land is admissible to show the real intentions of the parties at the time the instrument was signed, when not used to add to or take anything from the agreement itself.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

6. SPECIFIC PERFORMANCE (§ 10*)—RIGHT TO—PART PERFORMANCE.

Where a vendor agrees to convey a body of land for a fixed consideration and then by his own act renders himself incapable of wholly fulfilling the contract, the purchaser may obtain specific performance in so far as the vendor is able to give it with an abatement of the contract price.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 20-25, 50; Dec. Dig. § 10.*]

Appeal from District Court, Boulder County; Harry P. Gamble, Judge.

Action by Oscar M. Gilbert against the Wellington Realty Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

O. A. Erdman, of Denver, for appellant. Reed, West & Goss, of Boulder, for appellee.

BELL, J. We gather from the record before us in this case that on February 20, 1907, the Wellington Realty Company, appellant, presented to Oscar M. Gilbert, appellee, a blueprint copy of a plat of Well-

ton Heights addition to the city of Boulder, Colo., exhibiting an area of ground 350x285 feet, marked block 2, containing 14 lots, and represented that a plat of same was filed in the clerk's office of said county; that, with the aid of said blueprint of plat, the appellee made a personal examination of the ground and compared it with the description exhibited on the blueprint, and, relying on such blueprint, the representations of the appellant, and the ground itself when examined, the appellee negotiated for and purchased said block 2 for which he paid \$100 in cash on February 20, 1907, and agreed to pay \$900 more in 30 days and an additional sum of \$4,000 within 2 years from the last-named date and to pay 6 per cent. on deferred payments until due; that the appellant then and there agreed with appellee, in writing signed by it, to sell said premises on said terms, and on said date receipted for said \$100 payment, and agreed, in writing, to execute and deliver to appellee a good and sufficient warranty deed for said block on the completion of said payments, and to accompany said deed with an abstract showing a perfect title to said premises; that before the \$900 payment became due the appellant informed the appellee that it would be necessary for it to obtain a court decree quieting the title to said block in the appellant, and, then and there, executed, signed, and delivered to the appellee a written extension of the time of payment of said \$900 until said title could be quieted in the appellant; that on the 24th day of September, 1907, the appellant, in writing, notified the appellee that the technical defect in the title to the land had been removed, and demanded the immediate payment of the \$900; that on September 25, 1907, the appellee tendered the \$900, but limited the tender, in writing, to the contract made February 20, 1907, and to the land purchased as it appeared on the plat exhibited to the appellee on February 20, 1907, and, notwithstanding such limitations, the appellant, then and there, accepted said payment.

At the time the said \$900 payment was tendered as aforesaid, according to the testimony of the appellee, the appellant said: "By the way, this contract was signed by Mr. Degge as president of the Wellington Association instead of the Wellington Realty Company, a technical error, and we have made out a duplicate of that which you sign first, you haven't signed the other one, so sign this." The appellee further testified as follows: "I took that (duplicate) and read it over and we compared them word for word and I asked Mr. Webber (sales agent for both companies) if it was understood that this was a duplicate of the other to correct the technical error—the signature of the Wellington Association instead of the Wellington Realty Company. He, Webber, said 'It was—otherwise identical.' At the suggestion of Mr. Webber I signed it."

Agent Webber testified at the trial that when he sold block 2 to appellee in the name of the Wellington Association the legal title stood in the name of W. W. Degge, the president of each company, and the property was handled by him (Degge) through the association, but that afterward the title was transferred to the Wellington Realty Company, when new contracts were made out to take the place of the original ones.

However, W. W. Degge, president of each company, testified that block 2, February 20, 1907, belonged to the Wellington Realty Company; that the Wellington Association was financing the Wellington Realty Company and owned a large block, if not the bulk of, the Wellington Realty Company stock, and stated that he intended to sign the name of the Wellington Realty Company to the written agreement of sale, but, by force of habit, he inadvertently signed the name of the Wellington Association, as most of the sales were then being made through it, but announced to the court that he did not mean to take advantage of that or to go back on the signature and would not repudiate the agreement on the ground that it was signed by the Wellington Association. Whereupon, counsel for appellant announced in open court: "We are perfectly willing that the record may state that the Wellington Realty Company was bound by this instrument."

On February 20, 1908, the appellee tendered \$240 to the appellant, the interest due on the deferred payment, and accompanied the same with a writing confining the tender to a payment on the contract dated February 20, 1907, for purchase of block 2 according to the plat exhibited to the appellee at the time of the purchase. The appellant accepted the tender and money. On February 20, 1909, the appellee tendered the balance of the purchase money in gold and demanded a deed for block 2 covering 14 lots. The appellant made a counter offer to accept the money and give a deed covering 12 lots, and afterward the appellee offered to take a deed for block 2 covering 12 lots if appellant would allow a reasonable sum for the two lots eliminated in the amended plat. It developed after the consummation of the purchase that no plat covering said block 2 had been filed, and no plat was ever filed in the clerk's office until April 3, 1907, covering block 2, and this plat and the survey for it were made by the same engineer who made the original plat which was in existence, but not recorded, on February 20, 1907. As we understand the record, the plat, of which the appellee had a blueprint, was not acceptable to the city as an addition to the city of Boulder, and that the blocks prepared for said addition in the amended plat were required to be, and were, reduced to respective areas of 300x285 feet and to 12 lots, so as to render the same admissible as an addition.

The trial court found on adequate testi-

mony that the reduction of block 2 to the smaller area, and so that it covered only 12 lots after the sale to the appellee, reduced the value thereof \$1,100, and deducted this amount from the original purchase price and ordered the appellee to pay the remainder thereof, and that the appellant should execute and deliver to the appellee, upon tender made to it of the remainder above mentioned, a good and sufficient warranty deed for said block 2 as reduced in area, together with an abstract thereto showing a clear title thereto as provided in the original instrument of sale.

From the foregoing statements it will readily be seen that the controlling points of contention between the parties are as to the time when the contract was consummated, and the area of the block sold. The appellee says that it was consummated February 20, 1907, and that he then purchased block 2 containing 14 lots.

The appellant says the contract was not consummated until September 25, 1907, and at that time block 2 contained only 12 lots.

[1] The contract was consummated when the minds of the parties met, understandingly, in the same sense.

On February 20, 1907, the appellant stated, in writing, every condition necessary to make a completed agreement, and the same was signed by the Wellington Association, by W. W. Degge, president, and who, with counsel for appellant, agreed that his signature was intended to bind, and should bind, the appellant company. The appellee on February 20, 1907, understandingly, accepted the terms of the appellant, paid the \$100 required of him on the purchase price on that day, and has diligently sought to comply with every condition on his part from that time until the present. The contract of purchase and sale between the parties was completed on February 20, 1907, and the property, as then contracted for, must be delivered by the appellant according to the terms of the contract, without reduction on its part; otherwise it will be held responsible to the appellee for the difference in the value thereof.

[2, 3] The first real contention arises upon the wording of the written offer of sale signed by the appellant and delivered to the appellee. The offer of sale was of "block two (2) in Wellington Heights addition to the city of Boulder, Colo., according to the recorded plats thereof." The evidence discloses that a survey had been made of a large plot of ground and that it had been divided into blocks and lots for the purpose of making it an addition to the city of Boulder, and the Wellington Association, through which the property was being handled, had the plat thereof blueprinted and was using it for the purpose of advertising and selling the property represented therein. This blueprint showed that block 2 covered 14 lots

and had an area of 350x285 feet; and appellee swore on the hearing that the appellant furnished him a blueprint and especially pointed out to him on the plat, and informed him, that said block 2 contained 14 lots and the area as above set forth.

It is evident to our minds that this contract was made for the 14-lot block, and the understanding of the parties was, at the time the sale was closed, that the appellant was selling, and that the appellee was purchasing, a 14-lot block. The appellant says, however, that at the time the writing was made on February 20, 1907, no plat covering block 2 was recorded. That is quite true; but it was the appellant that falsely stated in the written instrument of sale, as well as verbally, that it was selling this block according to a recorded plat.

There is and was no question before the parties as to whether a plat was recorded for the purpose of validating the addition. In fact, the appellee testified that he did not care to have the land in question included in the addition; that what he desired was the area of the ground bargained for. The purpose for which the plat was used was to assist in identifying the ground, and determining the location and area thereof. The only plat in existence covering block 2 was used for these purposes, but it turned out not to be of record as represented by the appellant. If this misrepresentation should have been by inadvertence or honest mistake, and either of the parties should be required to sustain a loss thereby, then it should fall upon the one who was first at fault. However, we do not apprehend any such serious results from this misrepresentation. The plat without being recorded served all the purposes for which it was desired.

In speaking to a like question, the Supreme Court of Michigan said: "The deeds, it is true, referred to a plat adopted by the Portsmouth Company, and stated to have been recorded; but these deeds would, I think, still be good, though the plat should not in fact have been recorded; the declaration that it was recorded would be rejected as *falsa demonstratio*, as an incidental circumstance of much less importance than the fact of the existence of the plat itself, and therefore a fact about which the parties drawing the deed would be likely to be less careful and precise." *Johnstone v. Scott*, 11 Mich. 239.

[4] We can see no pertinence in the contention of the appellant that the contract was consummated on September 25, 1907. The evidence shows that there was no endeavor upon that day to make a new contract; but the parties themselves, on the initiation of the appellant, sought to reform the contract consummated February 20, 1907, so as to show the Wellington Realty Company as the grantor instead of the Wellington Association, as the parties intended to do

and should have done when the contract was closed in February. In the substituted contract the parties recopied the whole of the original draft including February 20th as the date, provided for the \$100 to be paid on that date, for the \$900 to be paid on March 20th, and every other provision that was contained in the original draft, except the substitution of the appellant as grantor. The very conditions upon which the reformation was made were that no other changes should be made in the original draft. If the parties had been seeking to make a new contract, then logically they would have recited the original agreement, that \$100 had been paid upon the same on February 20th, \$900 on September 25th, and then would have provided for the future conditions. The very fact that the appellant gave the substituted agreement the date of February 20th, when it was written on September 25th, furnishes a strong inference that there was no thought in the minds of the contracting parties of changing the contract or making a new one, but the purpose was to preserve the evidence of the contract they made in February in writing and to make it enforceable according to the agreement and original intentions of the parties.

[5] Counsel for appellant insists that the trial court violated the elementary rules prohibiting the varying of written contracts by parol evidence when it permitted the witnesses to show the attending circumstances when the written instrument, preserving the evidence of the contract, was made and delivered in February. The purpose was not to add to or take from anything expressed in writing, but the purpose was to find the real intentions of the parties at the time the instrument was signed. Counsel for appellant confessed in open court, or his client did, that the real owner did not appear in the writing as grantor, and the appellant, on September 25, 1907, insisted to the appellee that the writing did not state the real intentions and contract of the parties, and asked the appellee to join it in so reforming the writing as to make the real owner of the property the grantor.

Now the appellant strenuously insists that the reformed agreement made on September 25, 1907, which bore date February 20, 1907, does not express the real intentions of the parties, but says that that was intended as the only consummated contract, and that its life should begin from September 25th instead of from February 20, 1907, as provided in the writings, both original and substituted.

We can see no force whatever in this contention. Neither do we think that the contention that the law regarding the admission of parol evidence was substantially violated by the trial court.

[6] Counsel for appellant also denies the

power of the trial court to reduce the purchase price agreed upon for the 14 lots and order the deed and abstract to be executed and delivered to the appellee upon his paying the agreed price, less a reduction of the difference of the value of the 14-lot block sold and the 12-lot block now in the power of the appellant to transfer.

We think the better rule is that where a vendor agrees to convey a body of land for a fixed consideration, and then by his own act, as in this case, renders himself or itself incapable of wholly fulfilling the contract, upon application of the purchaser the vendor may be required to accept such an abatement on the agreed price as would equal the above-stated difference in value, and then be ordered to convey all the property sold that he is capable of delivering, as the court ordered in this case. It saves a multiplicity of suits, needless expense, the time of the parties and the court, and is more in harmony with the substantial principles of equity. 2 Story, Equity Jur. 779; Melin v. Woolley, 103 Minn. 498, 115 N. W. 654, 946, 22 L. R. A. (N. S.) 595; Schiffer v. Adams, 13 Colo. 582, 22 Pac. 964.

We are impressed with the conclusions that the pleadings and evidence, in this case, justified the findings and decree of the court, and that substantial justice has been done, and therefore such findings and decree are hereby affirmed.

HERTZOG et ux. v. STAR LOGGING CO.

(Supreme Court of Washington. April 28, 1913.)

1. TRESPASS (§ 45*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action for damage for cutting and removing timber from plaintiffs' land, a question as to what timber of a certain quality was selling for in the market at the time of the trespass was competent.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. §§ 116-122; Dec. Dig. § 45.*]

2. WITNESSES (§ 248*)—QUESTIONS—RESPONSIVENESS.

An answer, "Yes, sir; it was selling for \$3 a thousand," was not responsive to a question, "Do you know what timber of that quality was selling for in the market at that time? You can say whether you know or not."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

3. TRIAL (§ 95*)—OBJECTIONS TO EVIDENCE—GENERAL OBJECTIONS.

A general objection by merely moving to strike an answer to a question would not reach an objection that the answer was not responsive.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 250; Dec. Dig. § 95.*]

4. EVIDENCE (§ 474*)—EXPERT EVIDENCE—VALUE.

Where a witness is testifying to the value of his own property, the strict rule as to the qualification of expert witnesses in testifying to value is not applied; it being sufficient that

the witness has some idea as to the value of his property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

5. TRESPASS (§ 46*)—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for damages to timber by trespass, held to sustain a finding for plaintiffs as to the value of the timber taken.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

6. TRESPASS (§ 46*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for damages from trespass, held to sustain a finding for plaintiffs as to the amount expended by them in removing brush left on the land by defendant after the trespass.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

7. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONFLICTING EVIDENCE—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Department 2. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by James Hertzog and wife against the Star Logging Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hulbert & Husted, of Everett, for appellant. Robert McMurchie, of Everett, for respondents.

ELLIS, J. The plaintiffs brought this action against the defendant, Star Logging Company, to recover damages on three causes of action, as follows: (1) For the cutting and removal of timber from certain lands belonging to the plaintiffs, of the alleged value of \$145. (2) For destroying young growing timber upon the plaintiffs' land of the value of \$100. (3) For expenses in the sum of \$90 incurred by the plaintiffs in the removal of brush alleged to have been left on the land by the defendant. The defendant denied the allegations of the complaint and set up as a counterclaim an alleged agreement between the plaintiffs and the defendant that, in consideration of the defendant surveying the line between the lands of the parties, the defendant should have the right to take any timber that remained standing upon the plaintiffs' land; that the plaintiffs refused to allow the defendant to remove the timber, by reason whereof the defendant was damaged in the sum of \$20, the cost of the survey, \$12, the cost of cutting the timber, and \$27, loss of profits on the timber. The affirmative matter was traversed by the reply. The jury found for the plaintiffs on the first cause of action in the sum of \$145, and on the third cause of action in the sum of \$30, but found for the defendant on the second cause of action. The defendant has appealed.

The several assignments of error are all

directed to the admissibility and sufficiency of the evidence. It is contended, first, that the court committed error in refusing to strike the answer of the respondent James Hertzog to the following question: "Do you know what timber of that quality was selling for in the market at that time? You can say whether you know or not. Answer: Yes, sir; it was selling for \$3 a thousand." It is argued that this answer should have been stricken as not responsive to the question. The objection, however, was not placed upon that ground. The motion to strike was in general terms: "I move that the answer be stricken."

[1] The answer, though irregularly elicited, was competent evidence.

[2, 3] While not responsive to the question, it was not error to refuse to strike it upon an objection so general as that made. It is further argued that the witness was not qualified to answer the question in that he admitted a lack of definite knowledge as to the market value of timber. We think, however, that the evidence was competent as tending to show market value, regardless of the witness' qualification to testify as to market value generally.

[4] He was testifying as to the value of his own property. In such a case, the strict rule of qualification is not applied. If it was a fact that timber was selling at \$3 a thousand, that tended to prove the market value of timber in that vicinity. There was no error in the refusal to strike.

[5] It is next argued that there was not sufficient proof to sustain the verdict as to the quality or value of the timber taken. The respondent was the only witness who testified as to the quality of the timber. While he was unable to state the grade of the timber for the reason that he had no technical knowledge of grades, he did testify that he knew good timber when he saw it, and that his timber was good. As to the value of the timber, the evidence to which we have already referred tended to establish a value of \$3 a thousand. There was ample evidence to establish the fact that the timber cut amounted to something over 21,000 feet of cedar and 32,500 feet of fir. This at that price would much exceed the value found by the jury. On cross-examination, this witness was asked what was the value of the timber taken, and answered, without objection, that it was worth at least \$145. Without regard to the other evidence, this would be sufficient to sustain the verdict. The values placed upon the timber by the respondent himself were in no manner contradicted by any other witness.

[6] It is also contended that there was no evidence to sustain the verdict of the jury upon the third cause of action. While it is true that the respondent testified that he had not yet removed the brush and debris

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

left upon his land by the appellant, he did testify that it would cost him \$75 or \$100 to remove it. The verdict on this cause was for \$30, and we cannot say that it was not justified by this evidence. The appellant also contends that it ran a line between its land and that of the respondents under an agreement that, in consideration of the survey, it would be permitted to take the timber from the respondents' land.

[7] This agreement was denied by the respondents, and on such a conflict of testimony we cannot interfere with the verdict of the jury, which evidently found that no such contract was ever made. There being competent evidence to support the verdict on both the first and third causes of action, we cannot, without invading the province of the jury, disturb the verdict.

The judgment is affirmed.

MOUNT, MAIN, MORRIS, and FULLERTON, JJ., concur.

FERRALL et al. v. CITY OF SPOKANE et al.

(Supreme Court of Washington. April 28, 1913.)

MUNICIPAL CORPORATIONS (§ 535*) — LOCAL IMPROVEMENTS — SPECIAL ASSESSMENTS — INVALIDITY — RIGHT TO SUE — IRREGULARITIES — OBJECTS BEFORE COUNCIL.

Rem. & Bal. Code, § 7532, provides that whenever any assessment roll shall have been confirmed by the city council after notice to property owners, so that they may have a reasonable opportunity to object, the regularity and correctness of the assessment cannot be questioned by any person not having filed written objections to the roll prior to confirmation. Section 7533 makes the action of the city council in confirming the assessment roll conclusive on all parties not appealing therefrom, with certain immaterial exceptions. *Held* that, where property owners made no objection before confirmation of an assessment for the construction of a trunk sewer in a city of the first class, they had no standing to sue to restrain the enforcement of the assessment because of any irregularities as to the improvement and assessment ordinances, or in the method of the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253; Dec. Dig. § 535.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by G. H. Ferrall and others against the City of Spokane and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Burcham & Blair, of Spokane, for appellants. John E. Orr and Allen & Allen, all of Spokane, for respondents.

MAIN, J. This is an action to test the validity of an assessment for local improvement.

To the plaintiffs' third amended complaint

a demurrer was sustained by the trial court. The plaintiffs elected to stand upon their complaint, and refused to plead further. Thereupon a judgment was entered dismissing the action, from which the plaintiffs appeal. On August 23, 1910, the city council of the city of Spokane passed an ordinance providing for the construction of what is known as the Fifth ward trunk sewer, and that the same should be paid for by local assessment upon the property benefited. The boundaries of the district were fixed by ordinance. Thereafter an assessment roll was prepared by which the property within the confines of the district was assessed upon the square foot basis. The assessment roll was confirmed by ordinance. The complaint here for consideration is somewhat of a dragnet, voluminous, and involved. Aside from the formal parts, the material allegations attacking the validity of the assessment appear to be as follows: First. That both the improvement and confirmation ordinances are invalid because they were passed containing an emergency clause as follows: "Whereas, an emergency exists in which it is necessary for the immediate preservation of the public peace and safety that this ordinance shall become effective without delay, it is ordained that this ordinance shall be in force and effect from and after its passage." It is alleged that this emergency clause does not meet the charter requirement relative to emergency ordinances, which is as follows: "When an emergency exists in which it is necessary for the immediate preservation of the public peace, health or safety that an ordinance shall become effective without delay, such emergency and necessity and the facts creating the same shall be stated in one section of the bill. * * *"

Second. It is alleged that the assessment is invalid, in that it is made solely upon the basis of the area of the respective lots in the assessment district, regardless of their proximity or remoteness to the line of the sewer. Third. That the assessment is invalid because there was other property outside of the assessment district as defined by the ordinance which could be drained into the sewer, but which was not assessed therefor. It appears to be conceded that none of the plaintiffs filed any objections to the confirmation of the assessment roll by the city council after having received notice as provided by law. Neither does the complaint contain any charge of fraud. The allegations of the complaint question neither the ordinances nor the mode or manner of assessment on jurisdictional grounds, or the lack of power on the part of the council to pass the ordinances and to make the assessment. But the questions raised by the allegations question the regularity of the method by which the ordinances were passed, and the mode or manner of making the assessment.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The first and final question to be determined is the right of the appellants to maintain the present action. The respondents contend that the appellants, by reason of their failure to file objections to the confirmation of the assessment roll before the city council have waived their right to object in this proceeding, and in this objection plant themselves upon the statutes of this state and the decisions of this court. Section 7532, Rem. & Bal. Code, provides: "Whenever any assessment roll for local improvements shall have been prepared as provided by law, charter or ordinance of any city of the first class, and such assessment roll shall have been confirmed by the council or legislative body of such city, after due and proper notice to the property owner, as provided by law, charter or ordinance, so that said owners of property may have a reasonable opportunity to object to or protest against any assessment, the regularity, and correctness of the proceedings to order said improvement, and the regularity, validity and correctness of said assessment cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll, prior to the same being confirmed, as aforesaid, and at such time or times as may be prescribed by charter or ordinance. * * * " This statute does not permit the regularity, validity, or the correctness of an assessment roll to be questioned except by persons filing written objections to the roll prior to its confirmation. Section 7533, Rem. & Bal. Code, provides: "The action of the council or other legislative body, hereinbefore mentioned in confirming such assessment roll shall be conclusive in all things upon all parties not appealing therefrom in the manner and within the time hereinbefore mentioned, and no proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment or the foreclosure of any lien herein provided for: Provided, this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds: (1) That the property about to be sold does not appear upon the assessment roll, and (2) that said assessment has been paid." This section makes the action of the city council in confirming the assessment roll conclusive upon all parties not appealing therefrom, except the two classes specified in the proviso, which are not material in this case. The language of these statutes is clear and positive. A person desiring to contest an assessment roll

must conform with the provisions of these statutes; otherwise, he waives all irregularities, if any, in the passage of the ordinances providing for the improvement and the confirmation of the assessment roll and the method of assessment.

In *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010, it was held in an action to enjoin the city of Ellensburg from collecting a special tax or assessment for sewer construction that the failure to initiate the improvement by a petition of the owners of one-fourth in value of the abutting property was a mere irregularity, and not a jurisdictional defect. It is there said: " * * * It is self-evident that no irregularity can be successfully asserted in a suit to enjoin the collection of an assessment which would not constitute a valid defense to an action to foreclose the assessment. * * * The petition is not a jurisdictional prerequisite. To proceed without petition was not to proceed without power. It was at most the exercise in an irregular manner of a power amply conferred. The Legislature might have conferred the power without requiring any petition. There is no constitutional inhibition against such a course. * * * " In *Rucker Bros. v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582, which was an action begun for the purpose of annulling a local improvement assessment because the assessment upon the property there in question was in excess of the amount permitted by the city charter, it was held: "A requirement of the law to be observed in levying a tax by taxing officers, which requirement could have been dispensed with by the law in the first instance, can become conclusive as to its observance, against the property owner, by the law awarding him a hearing thereon. That is what has been done by these statutes, which declare the effect of the decision upon such hearing in such comprehensive language as to render finally adjudicated against appellants the objections now made against the assessment."

The principle announced in these cases is decisive of the present action. The third amended complaint did not state a cause of action. The appellants by failing to appear and file written objections before the city council to the confirmation of the assessment ordinance thereby waived their right to contest any irregularities as to the improvement and assessment ordinances and the method of assessment.

The judgment will therefore be affirmed.

MOUNT, FULLERTON, MORRIS, and ELLIS, JJ., concur.

IDAHO & W. RY. CO. v. COEY et al.
(Supreme Court of Washington. April 28, 1913.)

1. EMINENT DOMAIN (§ 111*) — DAMAGES — ITEMS OF DAMAGE—DAMAGE FROM FIRE.

Danger from fire communicated from passing engines, if appreciable and imminent, may be considered in estimating the damages to the land not taken for a railroad right of way in so far as its market value is thereby depreciated, though merely possible or probable damages from such cause cannot be considered.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 294, 298; Dec. Dig. § 111.*]

2. EMINENT DOMAIN (§ 95*) — DAMAGES — LAND NOT TAKEN.

Danger resulting from the tendency to propagate gophers or squirrels along the right of way if appreciable and imminent may be considered in determining the damage to land not taken for a railroad right of way in so far as the market value is thereby depreciated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 239-242, 244, 266-268, 273; Dec. Dig. § 95.*]

3. EMINENT DOMAIN (§ 102*) — DAMAGES — LAND NOT TAKEN.

In determining the damage to land not taken for a railroad right of way, any unsightliness to such land caused by cuts and fills made in constructing the road, the destruction of any natural water supply, and the inconvenience of transporting crops, farm machinery, etc., between the part of the land separated by the railroad, may be considered.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 271, 272; Dec. Dig. § 102.*]

4. EMINENT DOMAIN (§ 113*) — DAMAGES — LAND NOT TAKEN—DEPRECIATION OF MARKET VALUE.

In determining the damage to land not taken for a railroad right of way, the effect upon its market value by reason of the construction and operation of the railroad is the principal question for consideration.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 236, 243, 265; Dec. Dig. § 113.*]

5. EMINENT DOMAIN (§ 137*) — DAMAGES — LAND NOT TAKEN.

In determining damage to land not taken for a railroad right of way, the entire tract should be considered as one farm, and the damages determined upon the basis of one tract, and not of several tracts.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 367-369; Dec. Dig. § 137.*]

Department 2. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by the Idaho & Western Railway Company against C. P. Coey and others. From a judgment for plaintiff, defendants appeal. Reversed and new trial ordered.

Hurn & Upton, of Spokane, for appellants. F. M. Dudley, of Seattle, and Cullen, Lee & Hindman, of Spokane, for respondent.

MORRIS, J. Action by respondent to appropriate lands of appellants for its right of way. Appeal is taken from the judgment, alleging errors by the court in withholding from the jury certain elements claimed by

appellants as proper to be considered in determining the depreciation in value of the land not taken. The errors are assigned in various ways. They can, however, be best treated by discussing appellants' requested instructions which the court refused to give.

[1] The first of these requested instructions is as follows: "You are hereby instructed that danger from fire communicated from passing engines to buildings, improvements, and crops situated upon the part of the premises not taken for railroad purposes, if such danger is appreciable and imminent, may be considered by you in estimating the damages to the residue of the land not taken, in so far as the market value of the land not taken is thereby depreciated, but the possible or probable damages that may result from such a cause to the defendants in the future cannot be considered by you. It is the danger from fire and not losses that may probably be occasioned thereby that should be considered in determining the compensation to the defendants for the land not taken."

[2] By the second requested instruction the court was requested to instruct the jury that danger which might result from the tendency to propagate gophers or squirrels along the right of way of the railroad, if they found that such danger was appreciable and imminent, should be taken into consideration by them in determining the damages to the land not taken limiting the damage as in the first instruction to the depreciation of the market value of the land and not permitting the jury to determine any possible or probable loss that might result from the destruction of crops.

[3] The third requested instruction told the jury that it was proper for them to take into consideration, in determining the damages to the remainder, the unsightliness, if any, to the premises caused by the cuts and fills made in the construction of the road, the destruction of any natural water supply, the inconvenience of transporting the crop from the part of the land separated from the buildings, the inconvenience of transferring machinery and farm implements and the like from one part of the premises to another, the inconvenience in farming and cultivating the land occasioned by the construction of the railroad, in so far as these elements entered into any depreciation of the market value of the land not taken. In instruction No. 4 the court was requested to charge the jury that in estimating the damages to the land not taken they should consider the whole land as one body, and not divide it up into parts for the purpose of estimating such damages. Each of these requested instructions correctly stated the law and should have been given, and, since no other instruction covered the points, refusal was error.

[4] In cases of this kind in determining

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the damages, if any, to the land not taken, the ultimate question to be determined is the effect upon the market value of the land by reason of the construction and operation of the railroad. Whatever is reasonably certain to follow as an incident to such construction and operation, which in an appreciable degree depreciates the value of the remaining land, is a proper element of damage to be considered by the jury in arriving at its verdict. Remote, imaginary, uncertain, and speculative elements of damage may not be shown, but anything which from the continuous presence and operation of the railroad across a farm or other lands is, in view of the experience of mankind, reasonably sure to follow, is to be considered by the jury in ascertaining the damage, if any, to the lands not taken. Thus the danger from fire, in so far only as it depreciates the market value of the remaining lands, is a proper element. Not that the jury could estimate any probable loss from fire nor award damages for any increased exposure to fire, but simply depreciation in the value of the property because of the danger from fire. In other words, how much less, if any, would an intending purchaser be willing to give for the lands because of the danger from fire, if any, appreciable and imminent, by reason of the continuing operation of the road. This court has determined this question in *Seattle & Montana R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738, where it is said: "Danger from fire communicated from passing engines to buildings and improvements situated upon the part of the premises not taken for railroad purposes, if such danger is appreciable and imminent, may be considered in estimating the damages, in so far as the residue of the land is thereby depreciated in value. But the possible or probable damages that may result from such a cause to the landowner, in the future, cannot be considered by the jury. Such damages are purely speculative, and not capable of satisfactory proof. A railroad company is liable, in an action for damages, for property destroyed by fire resulting from its negligence, but not for damages occurring without negligence in the proper operation of its road. And it is therefore the danger from fire, and not losses that may probably be occasioned thereby, and for which no recovery can be had, that should be considered in determining the compensation to be paid to the owner of the land." Other cases in point are *Kell v. Grays Harbor & P. S. R. Co.*, 127 Pac. 1113; *Leroy & W. R. Co. v. Ross*, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; *C. & C. R. Co. v. Brake*, 125 Ill. 393, 17 N. E. 820; *Weyer v. C. W. & N. R. Co.*, 68 Wis. 180, 31 N. W. 710; *St. L. & S. E. R. Co. v. Teters*, 68 Ill.

144; *Lewis, Eminent Domain* (2d Ed.) §§ 496, 497.

These principles determine the correctness of requested instructions 1, 2, and 3. In ruling upon the admission of testimony the trial court, while seemingly recognizing these principles, especially as to the danger from fire, for some reason refused to so instruct the jury. Appellants' farm, across which the right of way is to be constructed, consists of a full half section in one body.

[5] In estimating the damage to the land not taken it was proper to consider the entire tract of land as one farm, and to determine the damages upon the basis of how the construction of the railroad would affect the whole body of land as one farm. In other words, the jury should consider two farms, one without any railroad across it as it now exists, and the other with a railroad across it as it will exist when respondent's line is built and in operation. This is the rule where, as here, the whole farm is in one continuous tract and is used and farmed as one body of land. This principle was announced by us in *Sultan W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114, where it was said in seeking to formulate a rule for determining what should be considered as an entire tract for the purpose of estimating damages to the part not taken: "In general, it is so much as belongs to the same proprietor as that taken, and is continuous with it, and used together for a common purpose"—citing *Lewis on Eminent Domain* (2d Ed.) § 475. See, also, *Wilmes v. M. & N. W. R. Co.*, 29 Minn. 242, 3 N. W. 39; *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421; *Ham v. W. I. & N. Ry. Co.*, 61 Iowa, 716, 17 N. W. 157; *F. & L. R. Ry. Co. v. Hunt*, 51 Ark. 330, 11 S. W. 418; *Chicago, M. & St. P. Ry. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64; *Chicago, K. & W. R. Co. v. Brunson*, 43 Kan. 371, 23 Pac. 495; *Northeastern Nebraska Ry. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604.

Request No. 4 was also proper because of the evidence of some of the witnesses in estimating the damage to the different 40-acre tracts. While for convenience of witnesses or to enable the jury to obtain a better understanding of the situation, it might in some cases be proper to inquire as to the damage to each subdivision of the whole tract, yet in arriving at its verdict the jury must consider the land as one tract, and determine the damages upon the basis of one entire tract and not several tracts.

For these reasons, we conclude that the judgment should be reversed, and a new trial ordered.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

HENRY v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Washington. April 28, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 51*)—MESSAGES—ACTIONS—CONTRIBUTORY NEGLIGENCE.

Whether the sendee of a telegram should, in the exercise of ordinary care, have been misled by an error in quoting the price of a commodity in a telegram went to the question of his contributory negligence as a defense, and should be determined upon the principles applying to that defense in other cases.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 35; Dec. Dig. § 51.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*) — MISDELIVERY OF MESSAGE—ACTIONS—SUFFICIENCY OF EVIDENCE — CONTRIBUTORY NEGLIGENCE.

Evidence, in an action against a telegraph company for the negligent transmission of a telegram, sent by an agent for buying sheep, so as to read that they could be purchased for \$4.20 instead of \$4.70, causing the principal to order them to be purchased, *held* to sustain a finding that the principal was not negligent in not discovering the discrepancy in price.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 70*) — NEGLIGENCE—MEASURE OF DAMAGES.

A sendee's measure of damages for the negligent transmission of a telegram to him by his agent to buy sheep, that they could be purchased for \$4.70, so as to read \$4.20, causing sendee to order them to be bought, was the excess of the price paid because of such error over the market price of the sheep at the time and place of such delivery, plus the cost of the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

4. EVIDENCE (§ 113*)—MARKET VALUE.

In an action for damages from misquoting the price at which sheep were ordered to be purchased at D. by plaintiff's agent, evidence that the price at D. was determined by the market price at Portland and Chicago by deducting from those prices the freight and the losses incident to transportation, and that at the time in question the prevailing prices at Chicago and Portland were \$5.25 a hundredweight, which would make the price at D. a certain amount, was competent on the market price at that point.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

5. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action against a telegraph company for damages for misstating in a message the price at which plaintiff's agent could purchase sheep at D., *held* to sustain a finding that the market price at D. at the time was \$4.25 a hundredweight.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by James Henry against the Western Union Telegraph Company. From a

judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons, of New York City, and Hughes, McMicken, Dovell & Ramsey, of Seattle, for appellant. John E. Ryan and Grover E. Desmond, both of Seattle, for respondent.

ELLIS, J. This is an action to recover damages alleged to have been sustained through error in the transmission of a telegram. The plaintiff is a wholesale and retail butcher and packer in the city of Seattle, and in the conduct of his business employs live stock buyers throughout the several states of the northwest. Among these, in the month of December, 1910, was one C. F. Walker, employed as a cattle buyer in Montana. He was not an expert sheep buyer, but in buying sheep he would report their condition and the price asked, and be guided by the plaintiff's instructions as to purchases. Early in December this buyer was directed by the plaintiff to investigate a certain band of 2,500 sheep near Dillon, Mont., referred to throughout the record as the "Maurer sheep." On December 5, 1910, Walker wired the plaintiff to the effect that these sheep could be purchased 1,000 for delivery January 1st at \$4.70 a hundredweight, 1,000 February 1st at \$5.30 per hundredweight, and the balance February 20th at \$5.70 a hundredweight. On the next day the plaintiff answered: "Maurer sheep too high. Could not use them." On December 7th Walker delivered to the defendant's agent at Dillon for transmission to the plaintiff a message reading as follows:

"45 Collect Night Letter.

"Dillon, Mont., 12/7, 190—

"To James Henry, 818 Western Ave., Seattle: I contracted three loads of steers and calves at four and five delivered Jan. fifteen Belgrade grain fed stuff. I think I can contract Maurer sheep thousand Jan. first four seventy thousand Feb. first five. Answer as soon as you get this.

"C. F. Walker."

As delivered to the plaintiff at Seattle, that portion of the message referring to the sheep read: "I think I can contract Maurer sheep thousand Jan. first *four twenty*, thousand Feb. first five." Plaintiff, in response, wired as follows:

"12/8—10.

"C. F. Walker, Dillon, Montana: Contract all good cattle you can get some bulls. Get Idaho Falls Cattle. If you can get proper shrinkage buy Murer sheep. Cant you get some good lambs also load small calves answer. James Henry."

Upon the receipt of this telegram Walker immediately entered into a contract to pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

chase the sheep in question at the price of \$4.70 per hundredweight; the total weight of the sheep contracted for January delivery being 115,905 pounds. Walker telegraphed to plaintiff that he had bought the sheep, but as the price was not again given it was several days before the error in the transmission of the message of December 7th was discovered. The plaintiff's evidence tended to show that the market price of the sheep at Dillon for January 1st delivery was approximately \$4.25. The trial resulted in a verdict for the plaintiff for the sum of \$522.17; this being the difference between the market price and the price paid, plus 60 cents paid for the transmission of the message. Motions for a nonsuit, a new trial, and for judgment notwithstanding the verdict were made at appropriate times and overruled. Judgment having been entered on the verdict, defendant appealed.

The several assignments of error are all directed to two grounds, a consideration of which will be determinative of the case:

1. It is first contended that the respondent was not misled by the error in the transmission of the telegram. As to the actual fact of deception, the respondent and his manager, who consulted and determined upon purchases, both testified, in substance, that they were misled by the erroneous telegram of December 7th; that they would not have authorized the purchase at \$4.70 the hundredweight; and that when they authorized the respondent's purchaser in the field to contract for these sheep it was in the belief, induced by the telegram as received, that the purchase was being made at \$4.20 a hundredweight. The appellant argues, however, that the respondent should not have been misled; that the difference between the prices stated in the two telegrams as received and the discrepancy between the price for January 1st delivery and February 1st delivery as stated in the erroneous telegram were so great as to put an ordinarily prudent man upon inquiry and make it his duty to have the telegram repeated, or bear the consequences of his failure to do so.

[1,2] This argument presents the simple question of contributory negligence as a defense. It must be determined upon the same principle as when the same question arises in other relations. *Jones, Telegraph & Telephone Companies*, § 314. Were these discrepancies so extraordinary as to challenge the attention and excite the caution of a man of ordinary business prudence and experience? The uncontradicted evidence shows that sheep for January delivery would be very little corn fed; that they would be practically grass-fed sheep; and that the expense of feeding to keep in fit condition for later deliveries would be much greater. The jury might easily find from this circumstance that the caution of a man of or-

inary prudence would not be aroused by the wide difference in price for January 1st and February 1st deliveries contained in the erroneous telegram. Nor can we say, in view of respondent's flat refusal to purchase at the prices stated in the prior telegram, that the discrepancy in prices between the offer contained in that telegram and the later erroneous message should be held, as a matter of law, to impose notice of the error. Was it not natural that the respondent, as an ordinarily prudent man, would assume that his purchasing agent, fortified by the refusal to consider the price stated in the prior message, had succeeded in reducing the offer to what the evidence shows was about the market price for January delivery? There was obvious ground for reasonable difference of opinion on these things. The question was properly submitted to the jury, and we are concluded by the verdict. *Tobin v. Western Union Telegraph Co.*, 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802; *Garrett v. Western Union Telegraph Co.*, 83 Iowa, 257, 49 N. W. 88, 90; *Western Union Telegraph Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 905, 71 Am. St. Rep. 682; *Western Union Telegraph Co. v. Virginia Paper Co.*, 87 Va. 418, 12 S. E. 755.

2. It is next contended that, assuming that he was misled, there was no competent proof that respondent was damaged. The argument is that the respondent might have made a profit on these sheep at the price actually paid; that, there being no evidence as to whether he did or not, there was no evidence that he was damaged. It seems to us that the matter of profits was not involved. The respondent did not sue for loss of profits, but for damages suffered by reason of the purchase to which he was committed through appellant's negligence. That the loss of profits could not be the correct measure of damages is demonstrated by the obvious fact that, even if it had been proven that there could have been no profit on a purchase at \$4.20 a hundredweight, still the respondent would have been damaged by the purchase at \$4.70 a hundredweight in just the amount in which that price exceeded the market price at the time and place of the purchase. On the other hand, if it had been proven that the sheep, as mutton, were resold by the respondent at a clear profit above the \$4.70 a hundred paid, his profits would be diminished by just the excess of the price paid over the market price. His loss in either case would be the same. The message itself gave notice to the appellant that it might become the basis of a business transaction, and that a failure to properly transmit it might result in a purchase at a price greater than intended to be paid, and that in such a case, whatever the profit might be, there would be a certain loss equal to the excess of the price paid over the market price.

[3] The only measure of damages, therefore, both free from uncertainty and speculation, and within the reasonable contemplation of the sender and the appellant when it undertook to transmit the message, was the excess of the price paid through its error over the market price of sheep at Dillon on December 7, 1909, for January delivery, plus the cost of sending the message. Nothing less would compensate the respondent; anything more would penalize the appellant. The inevitable tendency to this conclusion was emphasized by a colloquy between the court and appellant's counsel during the argument of the motion for a nonsuit. The contention was made that the respondent had made no effort to minimize the loss. The court asked: "How could he have minimized the loss? He bound himself on a written contract to take the sheep." And counsel replied: "If he had turned around and immediately sold the sheep for what he could get at the market price, he could have recovered from us the difference. As soon as he found the mistake, he could have sold them at the market, and he could have recovered his actual loss from us. If he kept them, the question is whether he can turn around and say: 'I can take care of these sheep and save myself from loss; I will keep them; I will butcher them and retail them out and save myself from a loss.' He may have done that. We don't know in this case. It is up to him to show whether he actually suffered any loss. It is not a question of whether he should be allowed to have made a profit on this transaction." We can hardly formulate a clearer demonstration than this that the certain loss determinable by the excess of the price paid over the market price, and not the speculative loss contingent upon the profits of a butchering business and the future fluctuations of the meat market, must be the true measure of damages. The minimum attained by the course suggested by counsel would be reached by exactly the same process which we hold fixes the true measure of damages. The minimum so attained is all that this measure requires the appellant to pay. That the measure above stated is the true measure is sustained both by what we conceive to be the better reasons and the more persuasive authorities. This principle, under varying conditions, is exemplified and sustained by the following decisions: *Strong v. Western Union Telegraph Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, 423, Ann. Cas. 1912A, 55; *Wallingford v. Western Union Telegraph Co.*, 53 S. C. 410, 31 S. E. 275, 276; *Hays v. Western Union Telegraph Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 483, 106 Am. St. Rep. 731, 3 Ann. Cas. 424; *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 498, 58 Am. St. Rep. 609; *Bowie v. Western Union Telegraph Co.*, 78 S. C. 424, 59 S. E. 65; *McCarty v. Western Union Telegraph Co.*, 116 Mo. App.

441, 91 S. W. 976, 977; *Western Union Telegraph Co. v. Shotton*, 71 Ga. 760, 767; *Turner v. Hawkeye Telegraph Co.*, 41 Iowa, 458, 464, 20 Am. Rep. 605; *Western Union Telegraph Co. v. Landis* (Pa.) 12 Atl. 467, 469; *United States Telegraph Co. v. Wenger*, 55 Pa. 262, 267, 93 Am. Dec. 751; *Western Union Telegraph Co. v. Spivey*, 98 Tex. 308, 83 S. W. 364, 365; *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 10 Atl. 495, 498, 1 Am. St. Rep. 353; *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 238, 93 Am. Dec. 157; *Rittenhouse v. Independent Line of Telegraph Co.*, 44 N. Y. 263, 265, 4 Am. Rep. 673.

There are cases which sustain the theory of recovery advanced by the appellant. We have been cited to one, *Western Union Telegraph Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741. It is not convincing. It seems to us that to measure the damages by the difference between the price paid and the sum realized on a resale at a different time and place, under different conditions, would in many cases render the telegraph company liable for a loss in excess of that traceable to its error, and in others cause the purchaser to sustain a loss traceable solely to the error in the telegram. The measure which we approve is not subject to these possibilities. Of course, if the market price was equal to or greater than that paid because of the error, there would be no loss traceable to the error; but where it is less there is an inevitable loss in just that amount, regardless of the actual profits realized through a resale by the purchaser at another time and place and under different conditions.

[4] The contention of the appellant that there was no evidence as to the market price of sheep at Dillon, Mont., at the time of respondent's purchase is not tenable. The evidence shows, without contradiction, that the market price at Dillon at a given time would be determined by the then market prices at Portland and Chicago by deducting from the market prices at those points the freight, shrinkage, and other losses and expenses incident to transportation, amounting to about \$1 on the hundredweight; Chicago and Portland being the two competing sheep markets for that part of Montana. While neither the respondent nor his business manager could recall the exact prices prevailing at Chicago and Portland on December 7, 1910, both stated that it was in the neighborhood of \$5.25 a hundredweight, and both testified in substance that respondent received current Chicago and Portland quotations; that they knew these prices at that time, and then on the prices then quoted estimated that a purchase at \$4.20 a hundredweight would approximate or be a little under the then market price at Dillon so determined. No evidence was offered to the contrary. This evidence was competent as tending to establish the market price of sheep at that time at

Dillon, Mont. *Graham v. Frazier*, 49 Neb. 90, 68 N. W. 367; *Rothrock v. Hunter*, 66 Wash. 543, 119 Pac. 1114; 35 Cyc. 638; 24 Am. & Eng. Encyc. of Law, 1154.

[5] The weight of this evidence was for the jury, which evidently found that the then market price at Dillon was \$4.25 a hundred-weight. We cannot say that the finding was not justified by the evidence.

Other claims of error are predicated upon the instructions given by the court. These, however, present the same questions which we have considered in the foregoing discussion, and it will be unnecessary to notice them further. We find no error in the instructions.

The judgment is affirmed.

CROW, C. J., and FULLERTON, MAIN, and MORRIS, J.J., concur.

CITY OF SPOKANE v. ARNOLD.

(Supreme Court of Washington. April 28, 1913.)

1. WEIGHTS AND MEASURES (§ 1*) — ORDINANCES—VALIDITY.

Spokane City ordinance regulating weights and measures, and providing in sections 22-25 that a cake of butter for commercial purposes shall contain a pound net avoirdupois, that whoever puts up or sells any goods or articles by weight into any package and omits to mark on the package the gross and tare or weight in pounds, and fraction of a pound, shall be guilty of a misdemeanor, and that it shall be unlawful for any person, firm, or corporation, where goods are sold by weight, to sell or deliver less than the amount or quantity contained or bargained for or named in the sale thereof, and any person giving short weight, etc., shall be guilty of a misdemeanor, is not unconstitutional as beyond the city's power, nor void for unreasonableness.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 1; Dec. Dig. § 1; * *Municipal Corporations*, Cent. Dig. § 1360.]

2. MUNICIPAL CORPORATIONS (§ 625*) — WEIGHTS AND MEASURES (§ 6*)—CITY ORDINANCES—CONSTRUCTION—VIOLATION.

Spokane City Ordinance, § 22, provides that a brick or cake of butter shall contain a pound net avoirdupois, and section 23 declares that whoever puts up, packs, or sells any goods or articles by weight into any case or package, and fails or omits to mark on the package the gross and tare or net weight in pounds and fraction of a pound, shall be guilty of a misdemeanor. Sections 24 and 25 make it unlawful to sell or deliver less than the quantity bargained for, or to give less in weight than the prescribed standards. *Held*, that a sale of butter in cartons containing less than a pound avoirdupois was not a violation of the ordinance, where each carton had plainly marked on each end the words, "Full weight 15 oz. net 16 oz. gross."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625; * *Weights and Measures*, Cent. Dig. § 8; Dec. Dig. § 6.*]

Department 1. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

J. F. Arnold was convicted of a violation

of the weights and measures ordinance of the city of Spokane, and he appeals. Reversed and dismissed.

Wakefield & Witherspoon, of Spokane (A. C. Shaw, of Spokane, of counsel), for appellant. H. M. Stephens, Wm. E. Richardson, and Arthur L. Hooper, all of Spokane, for respondent.

MOUNT, J. The appellant was convicted of a misdemeanor, and fined \$25 and costs for violating the provisions of an ordinance of the city of Spokane relative to weights and measures. The facts are stipulated as follows: On August 19, 1911, appellant sold and delivered within the limits of the city of Spokane to the Home Supply Company, a retail grocery therein, "five bricks or cakes of butter weighing a fraction over fifteen ounces and less than sixteen ounces avoirdupois, net." That these bricks or cakes were put up in cartons of the size usually used to contain one pound of butter. On each end of the package or carton were the following words: "Commercial Cream Co., Ltd., Spokane, Washington. Full weight 15 oz. net 16 oz. gross." There was no representation as to the weight other than as thereon stated. That these cakes or bricks of butter were prepared by appellant in sealed packages ready for delivery in the manner as shown on the carton. That on said 19th day of August the appellant was manager of the Commercial Cream Company, Limited, in charge of the packing and selling of the butter. The city ordinance of the city of Spokane relating to weights and measures provides as follows:

"Sec. 22. * * * A brick or cake of butter for commercial purposes in the city of Spokane, shall contain one pound of butter, net avoirdupois.

"Sec. 23. Whoever puts up or packs or sells at wholesale, or retail, any goods or articles sold by weight into any case or package * * * and fails or omits to mark on said package the gross and tare or net weight in pounds, and fraction of a pound, * * * shall be guilty of a misdemeanor.

"Sec. 24. It shall be unlawful for any person, firm or corporation, where goods are sold by weight or measure, to sell or deliver less than the amount or quantity contained or bargained for or named in the sale thereof.

"Sec. 25. It shall be unlawful for any person to sell direct or to permit any person, whether agent or employé, or servant, to sell any property of whatever kind or character that shall be short in weight or measurement, and no (any) person * * * who shall sell any article of food, beverage or medicine that shall be short in weight, according to the prescribed standards of the state of Washington and the city of Spokane, or shall represent the same to con-

tain a certain quantity, which it does not contain, shall be guilty of a misdemeanor."

[1] Counsel for appellant argues that these statutes are unconstitutional and void because they are without the power of the city, and unreasonable. But these contentions have been determined adversely to appellant in *City of Seattle v. Goldsmith*, 131 Pac. 456, and we therefore need not notice such questions further here.

[2] Appellant also contends that the act complained of was not a misdemeanor under the ordinance, and that section 23 above quoted authorizes the sale of any articles by weight in any quantity where the quantity gross and tare is marked on the container. Section 22 plainly provides that a brick or cake of butter for commercial purposes shall contain one pound of butter net, avoirdupois. Section 23 provides: "Whoever puts up or packs or sells * * * any goods or articles sold by weight into any case or package * * * and fails or omits to mark on said package the gross and tare or net weight in pounds and fraction of a pound * * * shall be guilty of a misdemeanor." The inference is, of course, that, if the gross and tare or net weight is marked upon such package of any weight, the sale will be lawful. Sections 24 and 25 above quoted simply provide that it shall be unlawful to sell or deliver less than the quantity bargained for, or to give short weight, according to the prescribed standards. It is common knowledge, of which courts will take judicial notice, that butter is one of the common and ordinary articles of trade and consumption, that it is usually sold in cakes or bricks by the pound, and where there is no mark upon it to indicate its weight. It is also put up in cartons or containers where the weight is not stated. The object of this ordinance, no doubt, was to prevent the practice of fraud upon consumers who purchased articles therein referred to. The ordinary person purchasing a cake or brick of butter, whether incased in a carton or not, would naturally suppose that it contained at least one pound of butter, unless it was marked otherwise. In the ordinance section 22 requires cakes or bricks of butter to contain one pound net avoirdupois. No provision is called to our attention prohibiting the sale of butter in less than one pound lots. Section 23 was evidently enacted for the purpose of authorizing the sale of any article, including butter, in less quantities than one pound, in cases or packages where the case or package states both the net and tare weight thereof; otherwise, it would be unlawful for any person to sell butter in packages in less quantities than one pound. We are satisfied that the ordinance was not so intended, because it does not so state. It seems to us that the plain meaning of the ordinance is that, where butter is sold in cakes or bricks without any

mark thereon, such cakes or bricks must contain one pound net avoirdupois. And, where any quantity less than one pound is sold in cases or packages, the net and gross weight must be stated upon the container.

We are satisfied, therefore, that the appellant in this case was not guilty of violating the ordinance, because the butter here sold, while it was in the form of cakes or bricks, these cakes or bricks were inclosed in sealed cases which stated plainly the net and gross weight upon each case.

The judgment is therefore reversed, and the case ordered dismissed.

CROW, C. J., and GOSE and PARKER, JJ., concur.

STATE ex rel. BOARD OF COM'RS OF KING COUNTY v. SUPERIOR COURT OF WASHINGTON FOR KING COUNTY.

(Supreme Court of Washington. April 28, 1913.)

1. PROHIBITION (§ 3*) — EXTENT AND ADEQUACY OF OTHER REMEDIES.

Prohibition will not lie to prevent a lower court exceeding its jurisdiction, where there is an adequate remedy by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

2. PROHIBITION (§ 3*) — EXTENT AND ADEQUACY OF OTHER REMEDIES.

The adequacy of the remedy by appeal which will prevent resort to prohibition does not depend upon the question of delay or expense.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

3. PROHIBITION (§ 3*) — EXTENT AND ADEQUACY OF OTHER REMEDIES.

Under Rem. & Bal. Code, § 1062, providing that either party to a judgment in a proceeding for a contempt may appeal therefrom in like manner and with like effect as from a judgment in an action, parties found guilty of contempt by the superior court and ordered arrested and imprisoned had an adequate remedy by appeal, and could not resort to prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

4. CONTEMPT (§ 66*)—APPEAL—STAY OF PROCEEDINGS.

On an appeal from a judgment for contempt the appellant is entitled to the provisions of law governing appeals, including the right to a stay of execution pending the appeal.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.* Appeal and Error, Cent. Dig. §§ 365, 462.]

5. MANDAMUS (§ 57*)—PROCEEDINGS TO PROCURE.

Where the court refuses to fix a superseas bond, he may be compelled to do so by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 68, 114-120; Dec. Dig. § 57.*]

Department 1. Original prohibition proceeding by the State, on the relation of the Board of County Commissioners of King County, against the Superior Court of the

*For other cases see same topic and section NUMBER in D. C. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

State of Washington for King County (John E. Humphries, Judge). Writ denied.

S. H. Steele and John F. Murphy, both of Seattle, for relator. Edward Judd, Jay Allen, and Wilmon Tucker, all of Seattle, for respondent.

MOUNT, J. On April 1, 1913, the judge in department 5 of the superior court of King county entered an order finding the relators guilty of contempt, and directed their arrest and imprisonment; whereupon the relators filed a petition here for a writ of prohibition, on the ground that the judge of the superior court was acting without jurisdiction, and that his order was void. Upon this hearing counsel for respondent contends, among other things, that the writ of prohibition is not the proper remedy. This contention must be sustained.

[1, 2] In State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925, after reviewing many cases in this court upon the question here presented, we held that the extraordinary writ of prohibition would not lie where there was an adequate remedy by appeal, and that the adequacy of the remedy by appeal is the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction in the court below to render the judgment, and that the adequacy of the remedy by appeal does not depend upon a mere question of delay or expense. See, also, State ex rel. Peterson v. Superior Court, 67 Wash. 370, 121 Pac. 836.

[3] In the case last cited, where the writ was applied for on a show cause order which threatened the relator in that case with punishment for contempt, we held that such order was not an appealable order, and that the relator could not be required to await a final order, and that a remedy by appeal was not adequate, and for that reason the writ issued. But in this case the final order was made before application for the writ. So that the question before us now is whether the relators have an adequate remedy by appeal. We think there can be no doubt upon this question, for the statute (section 1062, Rem. & Bal. Code) provides as follows: "Either party to a judgment in a proceeding for a contempt may appeal therefrom in like manner and with like effect as from judgment in an action. * * *" See, also, State ex rel. Martin v. Pendergast, 39 Wash. 132, 81 Pac. 324; State ex rel. Olson v. Allen, 14 Wash. 684, 45 Pac. 644; State ex rel. Denham v. Superior Court, 28 Wash. 590, 68 Pac. 1061.

[4, 5] In the last case cited we held that on an appeal from a judgment for contempt the appellant is entitled to the provisions of law governing appeals, including the right to a stay of execution pending his appeal. And where the court refuses to fix a super-

sedeas bond he may be compelled to do so by a writ of mandamus.

It is plain therefore that the relators have a plain, speedy, and adequate remedy by appeal. The writ is therefore denied.

CROW, C. J., and ELLIS, PARKER, and MAIN, JJ., concur.

BARNES et al. v. BELSAAS et al.

(Supreme Court of Washington. April 28, 1913.)

1. WATERS AND WATER COURSES (§ 33*) — WATER RIGHTS—QUIETING TITLE.

An action may be maintained to quiet title to water rights acquired by appropriation in the same manner as an action to quiet title to real property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.*]

2. WATERS AND WATER COURSES (§ 137*) — RIGHT TO WATERS—PRESCRIPTION—ADVERSE USER.

Defendants did not acquire a prescriptive right to the waters of a creek by prescriptive user as against prior appropriators, where defendants had not continuously for ten years deprived such prior appropriators of water to which they were entitled or diverted the same under claim or color of title other than as pertained to appropriations subsequent in time to the prior appropriations.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 149; Dec. Dig. § 137.*]

Department 2. Appeal from Superior Court, Kittitas County; E. B. Preble, Judge.

Action by A. Barnes and others against Ole Belsaas and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. K. Brown and Pruyn & Hoefler, both of Ellensburg, for appellants. Carroll B. Graves, of Seattle, and John H. McDaniels, of Ellensburg, for respondents.

MAIN, J. This action was brought for the purpose of quieting title to the right to use the waters of Manastash creek. The plaintiffs were 46 in number and the defendants 15.

Manastash creek rises in the mountains west of the Kittitas valley and flows through a canyon until it enters the valley, thence through the valley to the Yakima river. The plaintiffs are the owners of farm lands in the valley tributary to the creek, and they and their predecessors in interest have appropriated water from the creek for irrigation purposes. It was stipulated upon the trial that the plaintiffs or their predecessors in interest had all made appropriations of the water which they claimed between the years 1871 and 1877, and that the defendants' appropriations all dated subsequent to the year 1883.

The walls of the canyon, between which the creek flows, are high and steep and at no

place is the distance between them greater than one-half mile. Twelve of the defendants own land above the mouth of the canyon; three below the mouth of the canyon. Of these three, the lands of two are tributary to what is known as the Keach ditch. During the spring of the year and the early part of the irrigation season, there flows in the creek a very considerable volume of water, but commencing in the month of July it diminishes rapidly, and during the months of August and September it becomes a very small stream. During the periods of moderate and low flow, the waters of the creek are not sufficient in quantity to meet the demands of the plaintiffs and also the defendants. The amount of the water which each of the plaintiffs is entitled to, as between themselves, was adjudicated and determined by the superior court of Kittitas county in the year 1891. The total amount of water which the plaintiffs are entitled to under their appropriations is 4,200 inches, miner's measure, under a $4\frac{1}{2}$ -inch pressure for the first six months of the year and 2,100 inches during the remaining portion of the year.

The cultivated lands of the defendants, which are in the canyon, consist of narrow strips along the banks of the stream. The soil is gravelly. Numerous springs rise upon the land which find their way to the creek. The water from the springs and that used by them for irrigation purposes, so far as it is not absorbed by the plant life and evaporation, by seepage returns to the stream. The defendants claim that their use of the waters does not materially diminish the flow. A number of defendants own land in school section No. 16, which was surveyed in the year 1871. It is also claimed by the defendants that they have acquired rights by prescription or adverse user to the waters of the creek; it being more than ten years since their first appropriation and use.

The plaintiffs in their complaint sought to restrain the defendants from appropriating the water at times when the amount of water flowing in the stream was less or not more than equivalent to the amount which the plaintiffs had a right to under their prior appropriations. The cause was tried to the court without a jury and resulted in a decree favorable to the plaintiffs. The defendants appeal.

The questions to be determined upon this appeal are: First. Will an action lie in this state to quiet title to water rights acquired by appropriation? Second. Did the appellants, who owned land in section No. 16, have riparian rights to the stream superior to those acquired by the respondents by appropriation? And Third. Had the appellants acquired rights to the water by prescription or adverse user?

[1] 1. The right to maintain an action to quiet title to water rights acquired by appropriation is well settled. *Miller v. Lake*

Irrigation Co., 27 Wash. 447, 67 Pac. 996. In *Wiel on Water Rights*, vol. 1, § 283, it is said: " * * * Ditches and water rights may be sold on execution as real property. An action to quiet title as for real property is proper. And an action to settle rights is one to quiet title to realty. * * * "

2. It is claimed on the part of the appellants who own land in section 16, which they or their predecessors purchased from the state since the year 1889, that their riparian rights attached as of the date of the government survey in the year 1871. But since appellants' brief was written, this court in *State ex rel. Olding v. Stampfly*, 69 Wash. 368, 125 Pac. 148, has decided the precise question adverse to their contention. In that case, in an opinion written by Judge Fullerton, the question is fully discussed and the views of the court set forth.

[2] 3. It is finally contended that the appellants acquired rights to the water of Manastash creek by prescription or adverse user. Upon this question, the trial court made the following finding of fact: "That none of the defendants has continuously, for a period of ten years, deprived any of the plaintiffs of water to which such plaintiff was entitled as hereinabove found, nor have the diversions of any of the defendants been with or under any other claim of right or color of title other than as pertained to appropriations subsequent in time to the appropriations of plaintiffs and their respective predecessors in interest; the defendants having merely from time to time trespassed upon the superior rights of the plaintiffs. * * * " This finding positively negatives the appellants' claim of rights acquired by prescription or adverse user, and is supported by the evidence contained in the record. A number of other questions are presented in the briefs, but the conclusions already reached are determinative of the entire controversy and renders further discussion unnecessary.

The judgment will therefore be affirmed.

MOUNT, FULLERTON, ELLIS, and MORRIS, JJ., concur.

LIVINGSTON v. GAMBLE-ROBINSON COMMISSION CO. et al.

(Supreme Court of Washington. April 23, 1913.)

ATTACHMENT (§ 308*)—CLAIM OF THIRD PERSON—SUFFICIENCY OF EVIDENCE—OWNERSHIP OF STOCK.

Evidence in an action to recover possession of shares of stock held by the sheriff under attachment by defendant against the property of S., based on the claim that plaintiff had purchased the stock from S. prior to the attachment, and paid full value therefor, held not to establish plaintiff's ownership of the stock, so that a judgment in her favor would be reversed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1109, 1111-1113; Dec. Dig. § 308.*]

Department 2. Appeal from Superior Court, Spokane County; Thos. E. Grady, Judge.

Action by Nona Livingston against the Gamble-Robinson Commission Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Tolman & King, of Spokane, for appellants. O. B. Setters and V. T. Tustin, both of Spokane, for respondent.

MORRIS, J. Action to recover possession of 333 shares of the capital stock of the International Casualty Company, held by the sheriff of Spokane county under a writ of attachment against the property of Thomas Stevenson, issued in an action brought by appellant company against Stevenson et al. The court below sustained the claim of respondent to the ownership of the stock, and the commission company appeals.

Respondent's claim is based upon her contention that she purchased the stock from Stevenson prior to its attachment, paying full cash value therefor. To sustain her claim, she testifies that about a year prior to the time of her purchase her father made her a gift of \$1,000 in bills of various denominations, and that she carried this money continually on her person; that about seven months previous to the trial she first met Stevenson; that at the time she was living with her parents, but cannot remember where, except that it was at one or the other of two hotels at Spokane; that she was then working attending the cigar stand at the Victoria hotel at Spokane, for which she received \$12 a week; that about August 1st she went to Wenatchee with Stevenson, and entered his employ as a bookkeeper; that during all this time her father, who was at Toronto, was in the habit of writing her about twice a week, and that in about every letter he would inclose a bill which she added to the amount on her person, until she had accumulated, at the time of the purchase of the stock, \$2,300, which was the amount paid Stevenson on various days from October 2d to October 21st. She does not remember how often the father sent this money or how much he sent at a time, except she recalls one instance when he sent a \$100 bill and another when he sent a \$50 bill. In one place she says this money was sent her because she asked for it; in another, the sending was voluntary on the part of the father; that since she purchased the stock the regularity of these remittances has ceased, and that for the five months intervening between the purchase and the trial the father had only sent her \$100. The father does not seem to have any business, and we know nothing of him except her statement that he was the bountiful source of her wealth. At the time she was negotiating for the purchase of this stock, Stevenson was defendant in an action in the superior court of Spokane county, which ri-

pened into judgment against him for \$913 on October 28th. The appellant company was also seeking to obtain an adjustment of its claim against him. He was apparently anxious to dispose of this stock, but would consider only cash offers. The stock at the time was held as collateral to his note. He made arrangements with the holder of the note to accept some real estate in payment of the note, and, the stock being thus released, directed its transfer to the respondent. As soon as the transfer was made, respondent and Stevenson both left Spokane for British Columbia.

There are many sidelights on this story of respondent's that give it an appearance of untruth. We cannot refer to all of them. It is evident the relation between respondent and Stevenson was a very friendly one. After the return from Wenatchee her apartments seem to have been his business headquarters, and she seems not to have been disturbed, or thought it strange, that inquiries should be made for him at her apartments as early as 9 o'clock in the morning. Respondent seems to have had a very bad memory of everything except the fact that her father was continually sending her this money. She cannot remember the places in which she lived at various times while she was receiving this money; and, when she does remember, her memory sometimes proves faulty. For instance, she testifies she received \$12 a week while working at the Victoria hotel cigar stand, while her employer remembers it as \$8. She produces a witness who did some sewing for her, to whom she loaned \$600 for use in buying a home. After keeping the money two or three months, the witness changed her mind about buying the home, and repaid the money to respondent on the same day respondent paid Stevenson \$600. This witness thought at first that she saw respondent give the \$600 to Stevenson, but upon subsequent examination recalled that all she knew about it was that, when she handed the money to respondent, respondent went into an adjoining room and telephoned, and that shortly thereafter Stevenson came up, and that respondent and Stevenson then went into the adjoining room, and that she supposed the money was then given to Stevenson because respondent showed her 333 shares of stock, and told her she had invested her money in this stock. It seems just a little strange that although respondent returned to Spokane from Wenatchee about October 1st, and the scheme of investing this \$600 was given up prior to that time, and respondent informed of that fact, yet no demand is made for the return of the money, and the witness who had borrowed it without security of any kind is permitted to retain it until the day when that sum is required to be produced to make the final payment on the purchase of this stock.

In fact, without saying more, the whole

story of these various transactions is so improbable that we are not impressed with its truth, and the judgment is reversed.

CROW, C. J., and MAIN and ELLIS, JJ., concur.

WAINWRIGHT v. UNITED STATES LUMBER CO.

(Supreme Court of Washington. April 28, 1913.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

In an action for injuries to a servant in a sawmill by being struck by the automatic reversal of certain rolls, causing the return of a piece of timber, whereby he was thrown against a cut-off saw, evidence held to require submission to the jury of defendant's alleged negligence in permitting the machinery to be and remain in a dangerous condition, and in directing plaintiff to work in a position of special and unnecessary peril without warning him of the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010, 1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—SPECIFICATION OF DEFECT.

Where plaintiff, a servant in a sawmill, was struck and injured by the return of a piece of timber, due to the automatic reversal of certain rolls, the jury might find that defendant was negligent in not having the rolls properly constructed and adjusted before plaintiff was permitted to work about them, though the specific defect that caused the rolls automatically to reverse was not shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO ISSUES—FORM.

Where a servant charged negligence in three particulars, an outline of which had been previously given by the court, and to support each of which some evidence had been given, an instruction, that if the jury found from the evidence that defendant was negligent in any one of the "three particulars" above mentioned, and if such negligence was the proximate cause of plaintiff's injury, they should find for plaintiff, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—INSTRUCTIONS.

Where a servant was injured as the result of the automatic reversal of certain rolls in a sawmill, and there was no direct evidence charging defendant with knowledge of the fact that the rolls would automatically reverse, the court properly charged that if the appliances were defective in any particular as charged in the complaint, and the jury found that such defects had existed so long that defendant, by ordinary care, should or could have discovered them, then the jury should find that defendant did, as a matter of law, know of such defective condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

5. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—NOTICE—INSTRUCTIONS.

Where a servant in a sawmill was injured by the automatic reversal of certain rolls, and he testified that he was not informed of any defect in the rolls when he was told to work thereon, the court properly charged that if the master, knowing of any defect in any machine or appliance, places an employé at work on or about it, without notice, and the servant, while so employed and without fault on his part, is injured as the proximate result of the defect, the employer is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

6. TRIAL (§ 260*)—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

The court need not give a requested instruction in the language and form submitted, though it may be pertinent and in other respects unobjectionable, provided the subject is sufficiently covered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Richard E. Wainwright against the United States Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant. Cooley & Horan, R. Mulvihill, and A. M. Wendell, all of Everett, for respondent.

FULLERTON, J. The appellant, in the year 1910, owned and operated a sawmill, located at Darrington, in this state. The respondent was employed therein as off-bearer at the cut-off saw, and was injured by coming in contact with such saw. This is an appeal from a judgment in his favor, entered in an action brought to recover damages for such injury.

The saw at which the respondent was injured was set in a swinging frame, hung in such manner that the saw could be used to trim and cut into proper lengths cants and other timbers brought to it from the head saw of the mill. The means used to bring the timbers to the saw were a series of rolls, made to revolve by being geared to the power shaft of the mill. After the timbers were properly trimmed at the cut-off saw, they were transferred either to the pony saw, or to the edger at the end of the mill in the opposite direction from the head saw. Between the cut-off saw and edger was another series of rolls, operated in a manner similar to these first described, by which the timbers designed for the edger could be carried from the saw to that machine. These rolls were controlled by a lever placed near the stand of the person operating the cut-off saw, and could be made to stand still, go forward, or reverse, at the option of the person handling the lever. The respondent commenced work at the appellant's mill four

days prior to the time he was injured. He commenced work at the cut-off saw on the morning preceding his injury. His duties in that position were to take care of the refuse matter from the saw and assist the sawyer in handling the timbers brought to the saw for cutting. Some three or four hours after the work began on the morning of the accident, a piece of timber of considerable length was sent down to the cut-off saw from the head saw. The timber contained a flaw near its middle, which it was necessary to cut out. A dimension piece some 16 feet in length was cut from the end and started down towards the edger by means of the rolls. The cut-off sawyer then proceeded to cut off a block from the timber which contained the flaw, and the respondent stood facing him ready to receive and carry away the piece cut off. As he thus stood with his back towards the direction of the edger, the rolls in some manner became reversed and brought the timber that had been started towards the edger back again to the cut-off saw. As it came back, it turned somewhat upon the rolls, so that the end towards the respondent projected to the side on which he was standing. As it came forward, the end of the timber struck the respondent and pushed him forward to a place immediately in front of the cut-off saw just as its operator had succeeded in pulling the saw through the timber he was cutting. The result was that the saw came in contact with the respondent's back and left shoulder, inflicting upon him the injuries for which he sues in this action.

The grounds of negligence on which the respondent based his complaint were three, namely: (1) That the appellant suffered and permitted the rolls and the mechanism controlling the same to become and remain in a defective and dangerous condition, so that the rolls would, without any manipulation of the lever intended to control them, automatically reverse, thereby bringing material which had been carried to the edger back from that machine to the cut-off saw; (2) that it suffered and permitted the cut-off saw to become and remain in a defective condition, in that there was no stop provided to prevent the saw from swinging beyond the rolls into the space provided for the persons working with the saw to stand, and that to allow it to so swing was both dangerous and unnecessary; and (3) that the appellant was guilty of negligence in directing the respondent to work in a position of special and unnecessary peril without giving him notice or warning of the danger to be encountered.

[1] The principal contention of the appellant is that the evidence is insufficient to justify the verdict; the special point being that there was no evidence of negligence on the part of the appellant. We have not, however, been able to take this view of the record. A number of witnesses testified

to the fact that these rolls frequently reversed automatically; that they had observed them do so at different times for many months immediately prior to the accident; and one witness testified that it was common talk among the employes of the mill that these particular rolls were out of repair. A millwright called as an expert testified that rolls that would thus start automatically were either improperly constructed or improperly adjusted, and that properly constructed and adjusted rolls would remain stationary until put in motion by the act of the person controlling them. The respondent testified that he was injured some four hours after he had begun work at the cut-off saw, and on the fourth day after he had begun work in the mill, and that he was not told and did not know of the tendency of these rolls to reverse and bring back timbers that had been sent forward to the edger, until after he received his injury. There was evidence also that a properly adjusted cut-off saw should have a stop upon it to prevent its swinging too far into the space beside the rolls, and the respondent testified that if this saw had been so adjusted he would not have been injured.

[2] We think there was here sufficient evidence to carry the question of negligence to the jury. It is true that the respondent was unable to point out the specific defect that caused these rolls to reverse. But having shown that they actually reversed automatically, and that properly constructed rolls do not so reverse, the jury were warranted in finding that the appellant was negligent in not having them properly constructed and adjusted before it put the respondent to work thereon. *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675; *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 28 N. E. 352; *Towle v. Stimson Mill Co.*, 33 Wash. 305, 74 Pac. 471. We conclude, therefore, that the court did not err in refusing to sustain the challenge to the sufficiency of the evidence.

The appellant has excepted to a number of the instructions given by the court, not, as we understand, because they do not state correct principles of law, but because there was no evidence before the jury on the subject-matter to which they relate. For example, the court gave the following instructions, to which exceptions were taken:

"If you should find under the evidence, that said defendant was guilty of negligence in any one of the three particulars above mentioned, and that such negligence on the part of the defendant was the proximate cause of the injury to the plaintiff, you are then instructed that your verdict would be for the defendant."

"I instruct you that if you should find from the evidence that any of the appliances mentioned in the complaint were defective in any particular as charged in the complaint, then if you should further find that

such defects existed for such length of time that the employer, in the exercise of ordinary care, could or should have discovered such defect or defects, then I instruct you that it is your duty to find that the defendant did, as a matter of law, know of such defective condition."

"You are instructed that if the employer, knowing the existence of any defect in any machine or appliance, places an employé to work upon or about such defective machine or appliance without notifying the employé of the existence of such defect, and if the employé while so employed, and without fault on his part, is injured as the proximate result of such defect, then the employer is liable to the employé for such injury."

[3-5] But it seems to us that these instructions were clearly pertinent, both to the issues and the facts shown by the evidence. The "three particulars" referred to in the first instruction quoted was a statement by the court of the grounds of negligence charged against the appellant in the complaint, an outline of which we have heretofore given; and as we have shown there was clearly some substantial evidence that the appellant was negligent in each of the particulars alleged. The second instruction was pertinent in the light of the fact that there was no direct evidence charging the appellant with knowledge of the fact that the rolls would automatically reverse, and the third is pertinent since the respondent testified that he was not informed of any defect in the rolls at the time he was told to go to work thereon. So with the exceptions taken to other instructions. Their pertinency depends upon the view taken of the evidence, and since we disagree with the construction the appellant puts on the evidence we cannot hold the instruction erroneous.

[6] Certain proposed instructions on the question of contributory negligence were requested, which the court refused to give. But, in so far as they were pertinent, they were covered by the court's general instructions. This is a sufficient compliance with the rule, as in this jurisdiction it is not necessary to give a requested instruction in the language and form submitted, even though it may be pertinent and in other respects unobjectionable.

The judgment is affirmed.

MOUNT, MAIN, ELLIS, and MORRIS, JJ., concur.

SHINN v. KEMP & HEBERT et al.

(Supreme Court of Washington. April 28, 1913.)

1. BANKRUPTCY (§ 262*)—SALES FREE AND CLEAR FROM LIENS—JURISDICTION OF BANKRUPTCY COURT.

The bankruptcy court may order a sale of the property of a bankrupt free from liens, and,

when that is done, the purchaser acquires a good title and existing liens are transferred to the proceeds, and a mechanic's lien claimant, having notice of the sale, must resort to the fund.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

2. EVIDENCE (§ 82*)—SALES IN BANKRUPTCY.

A state court must assume that everything necessary to make a sale in bankruptcy regular was done by the bankruptcy court, and that the trustee in making a sale proceeded with due regularity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.*]

Department 2. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by E. H. Shinn against Kemp & Hebert and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

W. C. Hinman, of Spokane, for appellant. Danson, Williams & Danson, of Spokane, (Geo. D. Lantz, of Spokane, of counsel), for respondents.

MORRIS, J. Appellant brought this action to foreclose a mechanic's lien on certain counters, shelving, tables, and other fixtures in the store of E. Rosenthal, at Spokane. The amount claimed was \$1,282. Between the filing of the claim of lien and the commencement of this foreclosure, Rosenthal was adjudged a bankrupt, and the property had been sold by the trustee in bankruptcy, acting under orders in the bankruptcy proceedings. These orders directed the sale to be made free and clear from all incumbrances. At the sale Kemp & Hebert became the purchaser. Appellant, when he brought his action, joined the bankrupt, the trustee in bankruptcy, Kemp & Hebert, the purchaser at the bankrupt sale, and the owner of the store building as defendants. The trustee in bankruptcy demurred to this complaint, and Kemp & Hebert answered. Appellant then filed an amended complaint which differed from the original complaint only in that it set forth the matter of the sale to Kemp & Hebert free and clear from all liens under the order of the referee in bankruptcy, and made this order a part of his complaint. He also set forth the publication of the notice of this sale and that prior to the day of sale he served upon the trustee and referee in bankruptcy a notice of his claim of lien on the property ordered to be sold. To this amended complaint demurrers were filed and sustained. A second amended complaint was then served, which differed in no material respect from the amended complaint. This second amended complaint was, on separate motions of the trustee in bankruptcy and Kemp & Hebert, stricken, and separate judgments of dismissal entered, from which appeals have been taken. These appeals, since they present the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

same question, were consolidated and heard as one.

[1] The only thing to be considered by us is, Under the allegations of the second amended complaint, is a cause of action stated? We think not. It appears that the property passed into the control of the bankruptcy court before the commencement of the action to foreclose, and that, acting under orders issued in the bankruptcy proceeding, the trustee sold the property free and clear from all liens. It also appears that appellant had notice of this sale, as he alleges that prior to its date he served his notice of claim of lien upon both the referee and trustee in bankruptcy. That the bankruptcy court acquired jurisdiction over the property cannot be doubted. It is equally clear that it had the power to sell the same free and clear from all liens, thus investing the purchaser at its sale with good title and transferring the existing lien to the fund derived from the sale. *Brandenburg on Bankruptcy* (3d Ed.) § 1195; *In re Prince & Walter* (D. C.) 131 Fed. 546; *Houston v. City Bank*, 6 How. 486, 12 L. Ed. 528.

[2] The sale being made under order from a court of competent jurisdiction, we must assume that everything necessary to make the sale regular was done, and that the trustee in making it was proceeding with due regularity. It is also alleged in the amended complaint that, out of the money obtained by the trustee in bankruptcy, some \$35,000, \$1,282, the amount claimed by appellant, was paid for the purpose of satisfying his lien, and appellant now claims a lien upon such sum. There is then a fund in existence created to satisfy appellant's lien, and he should proceed against that fund, to which his lien has been transferred, rather than against these purchasers who, under a sale from a court of competent jurisdiction, acting, so far as we know, with due regard to the rights of all parties, have paid full value for the property and placed in the hands of the trustee sufficient funds to satisfy appellant's lien.

The judgments are affirmed.

CROW, C. J., and FULLERTON, MAIN, and ELLIS, JJ., concur.

CARPENTER-McNEILL INV. CO. v. CITY OF SPOKANE.

(Supreme Court of Washington. April 28, 1913.)

EMINENT DOMAIN (§ 243*)—CONCLUSIVENESS OF JUDGMENT—RES JUDICATA.

Rem. & Bal. Code, § 7820, provides that if any city has heretofore taken or shall hereafter take possession of any land or other property, or has or shall damage the same, for any public purpose mentioned in the act, or for any other purpose within the authority of the city without having made just compensation therefor, the city may cause the compensation to be

ascertained and paid to the persons entitled thereto by proceedings taken in accordance with the provisions of the act, and the payment of such compensation and costs as shall be adjudged in favor of the persons entitled thereto in such proceedings shall be a defense to any other action for the taking or damaging of such property. *Held*, that such section does not limit the damages recoverable in an action so brought to those which might have been anticipated in advance of the taking or damaging, but includes the determination of damages after the taking or damaging of the property, and hence, where work incident to a change of street grade or other improvement which may have caused damage to private property had already been performed at the time the suit in condemnation was commenced, the damage occasioned thereby was within the issues in such suit, and the judgment *res judicata* thereof.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 551, 627-629, 700; Dec Dig. § 243; * Judgment, Cent. Dig. §§ 1071, 1072.]

Department 2. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by the Carpenter-McNeill Investment Company against the City of Spokane. Judgment for defendant, and plaintiff appeals. Affirmed.

Morrill, Chester & Skuse, of Spokane, for appellant. H. M. Stephens and Bruce Blake, both of Spokane, for respondent.

ELLIS, J. This action was brought to recover damages caused by the alleged removal of lateral support of property belonging to plaintiff, abutting upon Main avenue in the city of Spokane, in the course of the improvement of that street by the city. By ordinance passed in 1893, the grade of Main avenue was established in front of the property in question. The street was not graded to that grade, and on the 21st day of June, 1910, a new grade was established and the street was graded, sidewalked, parked, and curbed to conform to that grade. The work was done by contract. On the 8th day of June, 1911, when the work was practically completed, the plaintiff filed a claim against the city for damages to its property by reason of the manner in which the work was done. On the 19th day of July, 1911, the city having taken no action in the premises, this action was instituted to recover the damages. On October 31, 1911, the city, in pursuance of an ordinance passed on the 26th of October, commenced suit in condemnation for the purpose of ascertaining the damages to property abutting upon Main avenue by reason of the change of grade of that street. The plaintiff in this action was a party to the condemnation suit and its property included therein. It appeared in that action by the same attorneys who represent it in this, and the trial resulted in a verdict of no damage to its property. Judgment was entered accordingly on the 22d day of January, 1912, and no appeal was ever prosecuted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed therefrom. The plaintiff thereafter pressed the present suit, which had lain dormant throughout the condemnation proceedings. The city filed an amended answer in which, among other things, it set up as an affirmative defense the judgment entered in the condemnation suit as *res judicata*. The action was tried on June 27, 1912. The plaintiff's evidence and offers of evidence were all directed to proof of damages to its property caused by the manner in which the grading was done, the faulty and insecure construction of a retaining wall in front of the property, the probable cost of reconstructing the wall, and a loss of rents incident to interference with access to its property. The defendant introduced in evidence the petition, verdict, and judgment in the condemnation suit. Both parties having rested, the defendant moved for a dismissal of the action. The motion was granted, judgment of dismissal was entered, and the plaintiff appealed.

The appellant concedes that, if the damages sought to be recovered in this action are such as were or could have been taken into consideration in the condemnation proceedings, then the judgment in that action is *res judicata* of the issues in this. It contends, however, that inasmuch as the ordinance, pursuant to which the action for condemnation was brought, contemplated the fixing of damages to the appellant's property, and other properties abutting upon the street, caused by the change of grade, and provided that such damages should be paid by special assessment against the property benefited thereby, the damages resulting from the manner in which the work was done were not within the issues nor determinable in that action. The contention is based upon the provision of section 16, art. 1, of the state Constitution, and upon two sections of the statute conferring upon cities the power of eminent domain and governing the manner of its exercise. If we have correctly caught the appellant's argument, it is this: That since the Constitution provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner," and since the statute (Rem. & Bal. Code, § 7768) authorizes cities to take or damage property for street purposes, the making or change of grades, or other public use, "after just compensation having been first made or paid into court for the owner," and since the statute (Rem. & Bal. Code, § 7769), which directs the initiation of condemnation proceedings by ordinance and authorizes the payment of the damages by special assessments, further provides "that no special assessment shall be levied under authority of this act except when made for the purpose of streets, avenues, alleys, or highways or alterations thereof or changes of the grade therein or

other improvements in or adjoining the same," therefore the issue in the condemnation action could only include damages which could be anticipated and ascertained in advance of the actual performance of the work of changing the grade, and only damages the payment for which could be assessed against the abutting property benefited by the change of grade. Appellant's conclusion is that damages resulting from the manner in which the work was done are not damages which could be ascertained and paid in advance, and are not damages which could be paid by special assessment, and hence are not damages which could have been considered and determined in the condemnation suit. We believe that the foregoing fairly presents the appellant's position. If it is sound, this case does not fall within the rule announced in *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757, and *Johnson v. Spokane*, 130 Pac. 341. If it is not sound, then the rule in those cases is decisive of this, and the court committed no error in dismissing the action.

If the statutory provisions cited by the appellant were the only provisions on the subject, there would be much force in the argument. There is, however, another section of the statute (Rem. & Bal. Code, § 7820) which we conceive was enacted to meet just such cases as that here presented. It reads as follows: "If any city has heretofore taken or shall hereafter take possession of any land or other property, or has damaged or shall hereafter damage the same for any of the public purposes mentioned in this act, or for any other purpose within the authority of such city or town, without having made just compensation therefor, such city or town may cause such compensation to be ascertained and paid to the persons entitled thereto by proceedings taken in accordance with the provisions of this act, and the payment of such compensation and costs as shall be adjudged in favor of the persons entitled thereto in such proceedings shall be a defense to any other action for the taking or damaging of such property." This section can have no other purpose than the determination of damages after the taking or damaging of the property. It does not limit the damages recoverable in an action so brought to those which might have been anticipated in advance of the taking or damaging. Where the work incident to the change of grade or other improvement of the street, which may have caused damage to private property, has already been performed at the time the suit in condemnation is commenced, it is obvious that under this section an action thereafter brought to ascertain the damages puts in issue all such damages, whether resulting from things which might have been anticipated before the work was commenced or from the manner in which the work was done and only ascertainable after the work was completed.

As we have seen, the work here in question, for the alleged faulty performance of which the appellant in this action seeks damages, was all performed prior to the commencement of the condemnation suit. The appellant was a party to that suit and appeared therein. It was incumbent upon the appellant to set up in that suit all damages which it claimed by reason of the physical change of grade, and all damages which it claimed resulted from the manner in which that work was done. Whether damages resulting from an improper performance of the work of changing the grade may be assessed against the property benefited by the change is a question with which we are not here concerned. That is a question in which the owners of the property to be assessed are alone interested, and it can only be determined in an action involving the validity of the assessment when made. It can have no bearing upon the question of compensation for the taking or damaging of the appellant's property. It was the right and duty of the appellant to set up and prove all damages which it claimed to have suffered in the condemnation action. The judgment in that action is therefore conclusive upon the same issue which is presented in the present action. The defense of *res judicata* was properly sustained. This action was properly dismissed.

The judgment is affirmed.

MOUNT, FULLERTON, MAIN, and MORRIS, JJ., concur.

LEHMAN v. HEUSTON et al.

(Supreme Court of Washington. April 23, 1913.)

1. LIMITATION OF ACTIONS (§ 19*)—NATURE OF ACTION—RECOVERY OF REAL PROPERTY.

An action to recover from the widow of plaintiff's deceased partner an undivided one-half of certain tide lands to which plaintiff claimed an equitable title was not a suit to establish a trust, but rather an action to recover real estate, and, having been brought within three years after the partner's death, was not barred by any statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

2. PARTNERSHIP (§ 258*)—SETTLEMENT—IMPEACHMENT.

Where partners engaged in a general adjustment of their business affairs and executed a settlement paper by which they released each other from all obligations, and on the same day plaintiff executed to his partner written assignments of all tide land applications, subsequent declarations alleged to have been made by such partner, indicating that plaintiff had an equal interest in the tide lands with him, were insufficient to establish such interest as against the partner's widow after his death.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 564-576, 578-598; Dec. Dig. § 258.*]

3. TRUSTS (§ 44*)—EVIDENCE—SUFFICIENCY.

Evidence held to show that defendant's deceased husband held title to certain city lots in trust for plaintiff, and to secure advances made by him for taxes, special assessments, etc., and, the lots having been sold by defendant after her husband's death, she was liable to plaintiff for the purchase money after deducting the disbursements, etc.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

Department 2. Appeal from Superior Court, Pierce County.

Action by Robert B. Lehman against May N. Heuston and others. From a judgment for less than the relief demanded, both parties appeal. Affirmed.

T. W. Hammond and E. R. York, both of Tacoma, for plaintiff. Fletcher & Evans, of Tacoma, and Fenley Bryan, of Seattle, for defendants.

CROW, C. J. This action was commenced by Robert B. Lehman against May N. Heuston, Elizabeth Heuston Huston, and Catharine A. Heuston to recover certain tide lands in Pierce and King counties, certain lots in the city of Tacoma, personal property consisting of office furniture and law books, and to obtain an accounting. No findings of fact were made, but the trial court entered a decree, dismissing plaintiff's complaint as to the tide lands, awarding plaintiff certain lots in the city of Tacoma, together with the sum of \$75, the net proceeds of lots theretofore sold by defendants after deducting disbursements made by defendants for taxes and improvements, and awarding plaintiff the office furniture and law books in dispute. Plaintiff has appealed from that portion of the decree by which his complaint was dismissed as to the tide lands. Defendants have appealed from the remainder of the decree.

As both parties have appealed, we will designate them as plaintiff and defendants. The record and printed briefs are voluminous, the transactions involved extending over a period of more than 10 years. To state the evidence, or completely detail the ultimate facts, which it tends to establish, would require an opinion of interminable length, and serve no good purpose. We have not the benefit of findings made by the trial judge, and now make our own findings.

Relative to the office furniture and law books, we do not think it necessary to make any statement of the evidence. After a careful consideration of the entire record, we conclude that they belonged and were properly awarded to the plaintiff.

Relative to the tide lands, we find the following facts: Prior to 1891, plaintiff, Robert B. Lehman, an attorney at law, was engaged in the practice of his profession in the city of Tacoma. In that year B. F. Heuston, now deceased, then a young attorney of limited means, entered plaintiff's law

office, working for plaintiff upon a salary and perhaps for other compensation. From that time until Mr. Heuston's death, which occurred on May 6, 1907, plaintiff and Heuston were, and continued to be, intimate friends, sustaining the most cordial relations. In connection with his practice plaintiff purchased and equipped, at his own expense, an abstract plant, with title and trust features. After 1896, by a readjustment of their business relations, plaintiff devoted most of his time and energies to the abstract business, while Mr. Heuston continued the law business with an office in plaintiff's building, which he occupied without the payment of rent. During this period plaintiff and Mr. Heuston investigated tide lands then owned by the state, and on or about February 17, 1898, plaintiff filed with the land commissioner applications 2720, 2721, and 2722 for the purchase of large tracts of second-class tide lands in Pierce and King counties. On December 10, 1898, plaintiff presented to the land commissioner a further application, No. 2794, for certain tide lands which he and Heuston insisted were second-class tide lands, but which the land department insisted were first-class tide lands. All applications were made in the name of Mr. Lehman, Mr. Heuston acting as his attorney, but they appear to have been jointly and equally interested in the enterprise until December 23, 1899. The land commissioner rejected application 2794, whereupon plaintiff, through Mr. Heuston as his attorney, applied to this court for a writ of mandate, requiring the commissioner to allow its filing. The writ was granted on March 30, 1901 (*State ex rel. Lehman v. Bridges*, 24 Wash. 363, 64 Pac. 518), but subsequent litigation hereinafter mentioned arose relative to the lands included in application 2794. For a number of years plaintiff continued the management of his abstract office, while Mr. Heuston continued the practice of law, their business, professional, and personal relations being intimate. On December 23, 1899, as shown by an executed written agreement, and other papers found to have been in the possession of Mr. Heuston at the date of his death, a settlement was had between the parties, upon which the defendants now rely. This agreement reads as follows: "The undersigned having had extensive business relations and dealings with each other during the past nine years and wishing to settle their affairs, wind up all business relationships, and exchange receipts and releases in full to this date, do hereby mutually agree as follows: (1) That all business relations heretofore existing between us of every kind and nature are hereby dissolved and declared at an end. (2) That the parties hereto mutually release each other from all accounts and accountings, the one with the other, and hereby acquit each other from all obligations, the one with the oth-

er to this date: Provided, and it is mutually agreed, that one certain note and chattel mortgage for \$1,000 made by R. B. Lehman to B. F. Heuston and now in the Puget Sound Savings Bank has a balance due and unpaid at this date of \$500, payments having been made on this note reducing it to that amount, and certain of the mortgaged property having been heretofore released and delivered to said Lehman. Executed in duplicate this 23rd day of December, 1899. R. B. Lehman. [Seal.] B. F. Heuston. [Seal.]" On the same day, December 23, 1899, Mr. Lehman executed written assignments of all the tide land applications to Mr. Heuston. These assignments recite that they were executed for the consideration of \$1, and other valuable considerations. In these assignments, Mr. Lehman as party of the first part expressly stipulated and agreed to execute any further assignment or transfer of any such contract or interest at the request of the party of the second part, his heirs, or assigns. From this time until Mr. Heuston's death, the management, control, and sale of these tide lands appear to have been in the exclusive charge of Mr. Heuston, save and except that on several occasions he would request the plaintiff to execute contracts and deeds to third parties for lands involved in the pending litigation, which was being conducted in Mr. Lehman's name, and that plaintiff did execute such instruments. The litigation mentioned arose relative to tide lands near Seattle and Tacoma, which plaintiff and Heuston claimed were second-class lands, but which other parties to the litigation insisted were first class, and it was while this litigation was pending that a number of interested parties, desiring to quiet their titles, negotiated with Heuston for deeds and releases, many of which, at Heuston's request, were executed by Lehman, the party in whose name the litigation was pending. The consideration for these deeds paid by the third parties, which amounted to a very considerable figure, was received and retained by Heuston, with the exception of perhaps \$150, which plaintiff concedes he at one time received. The assignments of the applications to Heuston, executed by Lehman, subsequent deeds from the state to Heuston, various deeds executed by Lehman and by Heuston to third parties, deeds for tide lands sold by Heuston after 1899, and also deeds executed by May N. Heuston, his widow and legatee, were from time to time filed and recorded in the offices of the auditors of King and Pierce counties. Mr. Heuston died testate on May 6, 1907, having devised to his widow the tide lands and the city lots, and having named her as his executrix. It may be noted, however, that none of the real estate was described in the will. The will was probated on May 20, 1907, at which time the plaintiff appeared in court and testified as a witness to its execution. The estate

was settled, and final distribution of the tide lands and lots which had been returned in the inventory was made to the defendant May N. Heuston on May 1, 1900. At no time did Mr. Lehman present any claim to the estate. In this action plaintiff claims that all interests acquired by Mr. Heuston in the tide lands under the various assigned applications were obtained equally for Mr. Heuston and plaintiff; that such joint interest and ownership continued until Mr. Heuston's death, and at all times thereafter; that the assignments of the applications which plaintiff made on December 23, 1899, were made without other consideration than for the purpose of enabling Heuston as attorney for himself and plaintiff to handle the tide lands, raise funds to pay the purchase money to the state, to act at all times equally for himself and plaintiff; that plaintiff had no knowledge of the fact that Heuston was handling the tide lands as his own, or that he was receiving any money from their sale, or from settlements, further than was necessary to pay the state, and meet taxes and other necessary disbursements; that, in fact, B. F. Heuston during his lifetime and the defendant May N. Heuston, his widow, since his death, have realized upwards to \$40,000 from settlements and sales in excess of such necessary disbursements; that the record title to tide lands, of the value of \$40,000 or more, above mentioned, now stands in the name of the defendant May N. Heuston, who claims exclusive ownership; that the plaintiff did not discover these facts until after final settlement of the estate; that upon receiving his first intimation of these conditions he immediately entered upon an investigation, and that as soon as he had sufficiently completed the same he instituted this action, which was commenced in November, 1900.

Upon these facts the question presented is whether plaintiff has established a trust in these tide lands for his benefit, whether he can recover any of them, and whether he is entitled to an accounting from the defendant May N. Heuston. The trial court held against him on all of these issues, and we have concluded that the holding must be sustained.

Defendants insist that this action is barred by the statute of limitations; that plaintiff is estopped from maintaining the same; that he has been guilty of laches; and that the evidence is insufficient to charge May N. Heuston as trustee.

[1] Although defendants with much earnestness insist that this action has been commenced to establish a trust, and that as such it has not been commenced within the time limited by law, we hold that it nevertheless is an action to recover real estate, as to an undivided one-half of which plaintiff claims the equitable title, and that it is not barred by any statute of limitations.

[2] There is no dispute as to the execu-

tion of the agreement of December 23, 1899, by which the parties appear to have settled all their business relations to that date. The purpose of the agreement is disputed. It is conceded that on the same date plaintiff executed the written assignments to Mr. Heuston of all interest obtained by him in and to the tide lands under the applications theretofore filed with the land commissioner. These instruments are absolute and unconditional; they recite no trust, nor do they allude to any other instrument creating any trust. They are not susceptible of construction, and, if sustained, are sufficient to support defendants' contention that plaintiff then parted with all of his interests in and to the tide lands, and that he then transferred them to Mr. Heuston, who thereafter held and owned them in his own right. The plaintiff has produced a number of witnesses, who testified to statements and admissions made by Mr. Heuston at various times subsequent to December 23, 1899, and insists that such statements and admissions show that Mr. Heuston, against his own interests, acknowledged that plaintiff had an equal interest with him in and to the tide lands at all times after December 23, 1899. The testimony of the witnesses, as to any such statements, is uncertain, unsatisfactory, and not sufficient to sustain an order setting aside the absolute contract of settlement and the transfers which plaintiff has executed. *Chambers v. Emery*, 18 Utah, 374, 45 Pac. 192.

In *Burrows v. Williams*, 52 Wash. 278, 100 Pac. 340, this court in substance held that when parties are engaged in a general adjustment of business matters, and execute papers of settlement, the law raises a strong presumption that the executed instruments of settlement are final, and include all claims which the one could then make upon the other. The contract and assignments executed by plaintiff on December 23, 1899, indicate a full and complete settlement of all matters then pending between the parties, and plaintiff has not produced evidence sufficient to modify, vary, or annul such instruments. In *Burrows v. Williams*, supra, speaking of the parties to the contract of settlement there involved, this court said: "They were engaged in a general settlement, and no attack upon the title was anticipated or threatened. The law raises a strong presumption of fact that, when parties are so engaged, they will consider and settle every existing difference. 'Courts do not encourage the overturning of settlements voluntarily made and long acquiesced in.' 8 Cyc. 533. In the case at bar, although in equity respondents may have had (although we do not so decide) an interest in the property, they can only overcome the presumption arising from the settlement, and declare a trust, by testimony so clear and convincing that the court can free the transaction from all doubt as to the intent of the parties. *Spencer v. Ter-*

rel, 17 Wash. 514, 50 Pac. 468; *Burke v. Fuller*, 41 La. Ann. 740, 6 South. 557; *Desha v. Smith*, 20 Ala. 747; *Wells v. Erstein*, 24 La. Ann. 317; *Murry v. Elston*, 24 N. J. Eq. 310; *Little v. Little*, 2 N. D. 175, 49 N. W. 736; 47 Cent. Dig. § 137; *Patterson v. Martin*, 28 N. C. 111."

Numerous transactions were had relative to these tide lands by Mr. Heuston after December 23, 1899, and prior to his death. Many instruments affecting the title were executed and recorded, money was collected by him in payment for tide lands sold, and in partial settlements of the litigation then pending. In one instance two checks for \$1,000 each received in settlement, were made payable to plaintiff's order, were indorsed by him and returned to Heuston, who appropriated the proceeds with the exception of \$150, which plaintiff says he received. It is contended that the litigation relative to tide lands in King and Pierce counties was prosecuted in the name of Mr. Lehman as plaintiff, but that fact is not of controlling importance, as the original applications were made to the land commissioner in his name, and the litigation was doubtless continued in his name for the benefit of his grantees, under the doctrine of *lis pendens*. *Trumbull v. Jefferson County*, 60 Wash. 479, 111 Pac. 569, 140 Am. St. Rep. 943.

In the light of all these transactions and others disclosed by the record, and in view of the fact that for nearly 10 years after December 23, 1899, the plaintiff made no demand for an accounting or settlement from Heuston or his widow, we conclude that he cannot recover any interest in the tide lands or the proceeds of their sales. There is an utter absence of that clear, cogent, and convincing evidence which should be required to satisfy an impartial mind of fraudulent acts on the part of Mr. Heuston, or to show that the instruments which plaintiff has executed should be ignored, rejected, modified, or annulled. They must be sustained in strict compliance with their clearly expressed terms.

[3] As to the city lots awarded to plaintiff by decree of the trial court, we find the following facts: Some time prior to June, 1899, the plaintiff Lehman had been appointed by the superior court of Pierce county as receiver for a corporation known as the Oakland Land, Loan & Trust Company. When the affairs of this corporation were to be finally adjusted, the property remaining in the receiver's hands included two mortgages covering the city lots in controversy. The court allowed Mr. Lehman a considerable compensation as receiver, which had not been paid. The assets were ordered sold, and the receiver, by order of court, was permitted to bid at the sale. Instead of bidding, he procured one Fred Eidemiller to purchase the mortgages at the receiver's sale in trust for him. The mortgages were conveyed to Mr. Eidemiller by a receiver's deed, which

upon its face described and purported to convey the land, upon which the mortgages were liens. The only effect of this deed was to assign the mortgages. Prior to the written contract of settlement of December 23, 1899, between Lehman and Heuston above mentioned, Heuston, as attorney for Lehman, had instituted actions in the superior court of Pierce county in the name of Eidemiller as plaintiff to foreclose these mortgages for the benefit of Lehman. Evidence produced on the trial of this action shows that Mr. Lehman was paying the expenses of the litigation. The foreclosure proceedings were continued by Mr. Heuston as attorney for Mr. Lehman after December 23, 1899. Thereafter, and while the foreclosure proceedings were still pending, Mr. Heuston, as attorney for himself and various clients, undertook the adjustment of certain tax claims on numerous lots in the city of Tacoma. He then conceived the idea that it would be well to adjust delinquent taxes in the same action without additional expense, and for Mr. Lehman's benefit on the city lots now in controversy. With this purpose in view, he asked Mr. Eidemiller to execute a deed to him for the city lots. This was done, and as Eidemiller had no legal title, but held the mortgage lien only in trust for Mr. Lehman, the deed which he executed had no other force or effect than to assign the mortgage lien to Mr. Heuston. Thereafter Mr. Heuston effected an adjustment with Pierce county as to these and other lots. A foreclosure decree was entered in favor of the county, the property was sold at tax sale, and on December 31, 1904, the treasurer of Pierce county, by tax deed, conveyed the lots to Calvin Phillips & Co., a corporation, which had purchased them at Mr. Heuston's request. On January 11, 1905, Calvin Phillips & Co., at Mr. Heuston's solicitation, conveyed the lots to him, the only consideration being that Heuston then agreed that Calvin Phillips & Co. should act as agent for the sale of the lots whenever they should be placed upon the market. The lots were then of small value, but have since become quite valuable. Subsequent to the execution of these deeds Mr. Heuston, during his lifetime, and the defendant May N. Heuston since his death, made heavy disbursements for taxes and special assessments upon the lots. The widow, May N. Heuston, sold some of the lots, and the trial court in effect made a finding which is not questioned, that the purchase money received by her from their sale exceeded all disbursements made by Mr. Heuston, by herself and also by Elizabeth Heuston Huston and Catharine A. Heuston by the sum of \$75, which excess was awarded to plaintiff by the final decree herein. Shortly after the foreclosure actions were commenced in Eidemiller's name, and from that time until Mr. Heuston's death Mr. Lehman seems to have been financially involved, and, to avoid being continually harassed by

his creditors, went into retirement, or as he expressed it, into isolation, in some rural locality between Seattle and Tacoma, where he resided at the date of Mr. Heuston's death. During this period he was doubtless unable to pay taxes upon the lots, and there is no contention that he did pay them. The evidence is that they were paid by Heuston, his widow, and her grantees. After final distribution of Mr. Heuston's estate, his widow, May N. Heuston, as a gift, and in consideration of love and affection, conveyed several of the city lots to the defendants Elizabeth Heuston Huston and Catharine A. Heuston, relatives of her deceased husband, and these lots are awarded to plaintiff by the final decree herein. The defendants named, who were not bona fide purchasers for value, held the record title to the lots thus conveyed prior to and at the time of the commencement of this action. No further reference to these defendants need be made, as their rights and liabilities must necessarily be controlled by the determination of the rights and liabilities of May N. Heuston, their grantor. The trial court, upon conflicting evidence, concluded that the title to the lots in dispute, which had been obtained by B. F. Heuston through Eldemiller and the tax foreclosures had been obtained by him for the benefit of Lehman, and we conclude that this finding must be sustained. From office dockets in Mr. Heuston's possession at the date of his death it appears in his handwriting that the mortgage liens upon these lots were being foreclosed for Mr. Lehman. It is evident that Mr. Heuston, as his attorney, was foreclosing the mortgages with the intention of procuring the legal title, that later he ascertained it could be procured through the tax foreclosures and that for such purpose he had tax deeds made to Calvin Phillips & Co. Mr. Lehman and Mr. Heuston were at all times close and intimate friends, one reposing and having complete confidence in the other. Mr. Lehman was in financial distress, and bad health. It is evident that Mr. Heuston therefore held title to the city lots in trust for Mr. Lehman, and also to secure advances which he had made for taxes and special assessments; that the equitable title to the lots, subject to Mr. Heuston's lien for such advancements and expenses, was in Mr. Lehman; that Heuston held the legal title as security; and that his only claim was of the nature of a mortgage lien to secure such advances. There is nothing in the record to indicate that Mr. Heuston at any time was guilty of unprofessional or dishonorable conduct, that he was attempting to defraud the plaintiff, or that he ever had the slightest intention of so doing. We are convinced that, had his life been spared, he would have recognized the plaintiff's equitable title to these city lots, and would have effected a proper adjustment at some appropriate time. We are further satisfied that

May N. Heuston, as his widow, honestly believed the lots belonged to his estate, and that she was ignorant of the circumstances relative to the foreclosure proceedings and tax sales now disclosed by the evidence. There may be some little doubt as to Mr. Lehman's exact rights in the premises, but in view of the finding which the trial court must have made, and after weighing the evidence, especially the testimony of the witnesses Eldemiller, Johnson, and Gove, which cannot be here detailed, we are satisfied that the court properly awarded the unsold city lots to plaintiff.

It must be conceded that this opinion, although of too great length, does not completely detail all evidence, facts, and circumstances disclosed by the record; but, were the same to be more fully stated, we feel assured that the only effect would be to fortify the conclusion we have reached that justice has been done, and that the decree is equitable.

The judgment is affirmed. None of the parties will recover costs in this court.

MOUNT, GOSE, and FULLERTON, JJ.,
concur.

LYNCH et al. v. LOWER YAKIMA IRR. CO.

(Supreme Court of Washington. April 28, 1913.)

WATERS AND WATER COURSES (§ 21*)—PUBLIC LANDS—IRRIGATION DITCH—PRIORITIES.

Under U. S. Rev. St. §§ 2339-2340 (U. S. Comp. St. 1901, p. 1437), respectively providing that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes shall have vested and are recognized by local customs, laws, and decisions, the possessors and owners of such vested right shall be protected therein, and the right of way for ditches and canals for the purposes specified shall be confirmed, and that all patents granted or preemption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches, and despite Act of Congress March 3, 1891, c. 561, § 19, 26 Stat. 1102 (U. S. Comp. St. 1901, p. 1571), providing that whenever any ditch or canal company desiring to secure the benefits of this act shall, within 12 months after the location of its canal upon the public domain, file with the register of the district land office a map of the same, and thereafter all lands over which such right of way shall pass shall be disposed of subject thereto, an irrigation company, which began the construction of its ditch upon the public land, before plaintiffs' grantor filed its lieu land selection has priority, being first in time, and having a reasonable time to construct the ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 14; Dec. Dig. § 21.*]

Department 2. Appeal from Superior Court, Benton County; Ralph Kaufman, Judge.

Action by M. J. Lynch and another against the Lower Yakima Irrigation Company. From

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a judgment notwithstanding the verdict, plaintiffs appeal. Affirmed.

C. C. Gose, of Walla Walla, for appellants. Henry J. Snively, of North Yakima, and Andrew Brown, of Prosser, for respondent.

MAIN, J. This is an action to recover damages on account of the taking of certain land as a right of way for an irrigation ditch. On December 30, 1909, the Northern Pacific Railway Company filed with the Register of the United States Land Office at Walla Walla its lieu land selection for the southeast quarter of section 4, township 10 north, range 28 east, W. M. And on February 23, 1910, proof by publication and posting of notice as required by law was filed. The plaintiffs, at the time this action was begun, were the owners of the land over which the ditch passed. Their title was initiated by the filing of the Northern Pacific Railway Company, to which reference has been made. The cause was tried to the court and a jury. The trial court submitted to the jury two special interrogatories. These, with the jury's answers thereto, are as follows:

"Was the irrigation ditch in question in process of construction across the lands described on the 30th day of December, 1909? Answer: Yes.

"Was the ditch in question fully constructed and completed across said tract of land on the 30th day of December, 1909? Answer: No."

These interrogatories and their answers show that on December 30, 1909, the date of the filing, the irrigation ditch was in the process of construction but not completed. A general verdict in favor of the plaintiffs was returned in the sum of \$500. Motion by the defendant for a judgment notwithstanding the verdict being made and granted, the plaintiffs appeal.

The sole question is whether the defendant acquired the right to appropriate the strip of land over which its ditch was being constructed by reason of the fact that it had the ditch in process of construction over public land when the same was filed upon.

It is claimed by the appellant that inasmuch as the ditch was not completed at the time of the filing upon the land by the Northern Pacific Railway Company, and the respondent had not filed with the Register of the Land Office for the district a map of its canal or ditch, respondent acquired no rights by appropriation to complete the ditch without answering in damages for the land taken. In support of this contention, reliance is placed upon section 19 of an Act of Congress approved March 3, 1891, c. 561, 26 Stat. 1102 (U. S. Comp. St. 1901, p. 1571), which provides: "That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the

same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." But an examination of this section and the act of which it forms a part demonstrates that the rights there provided for are those which are acquired by the filing of a map of the ditch. This statute does not deal with those rights that are acquired by the taking of possession and the performance of the work of construction, or a part of it. Consequently, to determine the rights of the parties here, it is necessary to look to other statutory provisions.

Rev. St. U. S. § 2339 (U. S. Compiled Statutes 1901, p. 1437), provides: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Section 2340: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

It is the construction to be placed on these two sections which will determine the rights of the parties upon this appeal. Section 2339 recognizes the right to construct ditches over the public domain through which is to be conveyed water for agricultural and other purposes, while section 2340 makes patents granted by the government subject to the right to ditches used in connection with water rights.

The undisputed facts are that the ditch in question was under construction at the time of the lieu land filing. To what extent the

construction had been carried is not disclosed by the record. But, the ditch being under construction, it must necessarily follow that the respondent was in possession. The right of the respondent to construct the ditch across the land which was a part of the public domain was initiated when possession was taken for the purpose of constructing the ditch. Thereafter it would have a reasonable time in which to complete the work of construction. The appellants' right dates from the filing of the map of location by the railroad company. The respondent's title, being prior in time to that of appellants' is superior in right.

In *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 18, 17 Sup. Ct. 12, 41 L. Ed. 327, it is said: "Undoubtedly rights as against third persons are acquired by priority of possession, and the government will and does recognize such rights as between those parties. This is the principle running through the cases cited by the counsel for appellants. In *Sullivan v. Northern Spy Mining Co.*, 11 Utah, 438 [40 Pac. 709, 30 L. R. A. 186], which is one of those cases, the priority of possession of the person who entered upon the public land and dug the well was recognized as thereby making a superior title to the use of the water from the well over that acquired by a person who was the subsequent purchaser of the land from the government. In that case the well had been dug and the condition fulfilled. If no well had ever been dug, and a reasonable time for digging it had passed, the mere priority of possession would have given no superior title to the land over that acquired by the grantee from the government. It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land."

The judgment will therefore be affirmed.

MOUNT, FULLERTON, ELLIS, and MORRIS, JJ., concur.

SIMILA v. NORTHWESTERN IMPROVEMENT CO.

(Supreme Court of Washington. April 28, 1913.)

1. PLEADING (§ 382*) — AFFIRMATIVE DEFENSES.

The pleadings must disclose the contentions of the parties, and a distinctive affirmative defense cannot be proved under a general denial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1280-1294; Dec. Dig. § 382.*]

2. MASTER AND SERVANT (§ 259*)—INJURIES TO SERVANT—PLEADINGS.

An employé suing for a personal injury must, to state a cause of action, allege that the

injury was inflicted on him by persons for whose acts the employer is responsible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 837-843; Dec. Dig. § 259.*]

3. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—PLEADINGS—DEFENSES.

That the person causing an injury to an employé was an independent contractor of the employer may be shown under the general denial, whether the complaint specifically points out the particular persons charged with causing the injury or contains a mere general allegation in that respect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. MASTER AND SERVANT (§ 88*)—"INDEPENDENT CONTRACTOR"—WHO IS.

An agreement binding one to furnish at a mine specified timbers for specified prices during a specified period does not make him an independent contractor, such a contractor being one who renders service to another in the course of an independent occupation, representing the will of the employer only as to the result of his work and not as to the means by which it is accomplished; and, where the employer may control the manner of doing the work, the relation of master and servant exists.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-151; Dec. Dig. § 88.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3542, 3543; vol. 8, p. 7686.]

5. MASTER AND SERVANT (§ 284*)—INDEPENDENT CONTRACTOR—EVIDENCE—QUESTION FOR JURY.

Whether one was an independent contractor *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.*]

6. MASTER AND SERVANT (§ 265*)—INDEPENDENT CONTRACTOR—EVIDENCE—QUESTION FOR JURY.

Presumptively, one employed to work on the premises of another for the latter's benefit is an employé, and the employer, seeking to avoid liability on the ground that the employé is an independent contractor, has the burden of establishing it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

Morris, J., dissenting.

Department 2. Appeal from Superior Court, Pierce County.

Action by Jacob Simila against the Northwestern Improvement Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

Gordon, Easterday & Askren, of Tacoma, for appellant. Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for respondent.

FULLERTON, J. This action was brought by the appellant against the respondent to recover for personal injuries. The respondent owns and operates a coal mine located near Melmont, in Pierce county. The appellant was an employé in the mine. In passing to and from his boarding place and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his place of work, the appellant was obligated to travel for the greater part of the way along the track and right of way of a railroad company; there being no other open way between the two places, and seemingly no other place where board could be had without making use of this particular way. In and about the underground workings of the mine, the respondent used props, lagging, gangway sets, and other timbers, which it obtained from its own property situated on the side of a mountain sloping upwards from the railroad track and about 500 feet therefrom. The timbers were brought to the railroad track by means of a gravity slide, an open-topped, trough-shaped chute, extending from the place where the timbers were cut to the railroad right of way; the end of the chute stopping about ten feet short of the nearest rail and about five feet above the ground. The appellant, while passing along the track to his place of work, was struck and severely injured by a piece of timber which came down the chute.

In his complaint the appellant alleged facts which tended to show that his injuries were caused by the negligence of the persons getting out the timbers, and these he alleged to be the agents and servants of the respondent. In its answer the respondent denied generally the allegations of the complaint, and for an affirmative answer alleged "that whatever injury the plaintiff received at the time and place mentioned in his complaint was in no manner caused by the carelessness and negligence of this defendant, or any of its agents, servants, or employés, but was caused by the carelessness and negligence of the said plaintiff in failing to exercise ordinary care and caution for his own safety and protection," but no other or further affirmative defense was pleaded. At the conclusion of the trial, the respondent moved for an instructed verdict on the ground that the negligence, if any, which resulted in the injury to the plaintiff was the negligence of the independent contractor and not the negligence of the respondent. This motion the trial judge sustained and entered a judgment against the appellant to the effect that he take nothing by his action.

[1-3] The evidence introduced by the respondent to prove that the persons getting out the timbers were independent contractors was introduced over the appellant's objection, and the appellant now insists that its admission was error requiring reversal because not set out as an affirmative defense in the answer. The appellant admits that there is considerable authority in support of the rule that evidence of the relationship of independent contractor may be given under a general denial; but it is contended that the cases so holding are not in harmony with the spirit of our Code and contrary to cases from this court involving similar principles. Undoubtedly it is the spirit of the Code that the pleadings should reflect the contentions

of the parties, and this court has many times said that a distinctive affirmative defense cannot be given in evidence over objection under a general denial. But is the showing that a person causing an injury and alleged to be the agent or servant of another was not such agent or servant the showing of an affirmative defense? It seems to us that it is not. The appellant, in order to state a cause of action against the respondent, was obligated to allege that the injuries for which he sought to recover were inflicted upon him by persons for whose acts the respondent was responsible. The respondent was entitled to put in issue the allegation and in case the appellant sought to sustain it by proofs to offer in evidence counterproofs, and it seems to us clear that it is legitimate counterproof to show the actual relations existing between it and the persons for whose acts it is asserted to be responsible. It must be remembered also that the appellant did not point out in his complaint the particular persons whom he expected to show caused his injury; his allegation was general in that respect. We think it was competent, therefore, for the respondent to deny the allegation generally, and, when the appellant pointed out the particular persons whom he charged represented the defendants, to show that such persons were not its representatives, but were persons operating on their own initiative, or, in other words, were independent contractors. No case has been pointed out to us from our own decisions which determines the precise question; nor do we think those relied upon by the appellant sustain the principle contended for. Cases that seem to us to be more closely analogous and which oppose the principle are the following: *Kerron v. North Pacific, etc., Mfg. Co.*, 1 Wash. 241, 24 Pac. 445; *Chamberlin v. Winn*, 1 Wash. 501, 20 Pac. 780; *Carkeek v. Boston National Bank*, 16 Wash. 399, 47 Pac. 884; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Harvey v. Ivory*, 35 Wash. 397, 77 Pac. 725; *Coe v. Low*, 36 Wash. 10, 77 Pac. 1077; *Chrast v. O'Connor*, 41 Wash. 300, 83 Pac. 238; *Shine v. Culver*, 42 Wash. 484, 85 Pac. 271. The more difficult question is whether the court erred in taking the question of the respondent's liability from the jury. The court rested his decision on the ground that the persons getting out the timbers were independent contractors and themselves liable to the appellant, if any one was so liable.

[4] In support of its contention, the respondent introduced the following agreement entered into between itself and the persons getting out the timbers:

"Melmont, Wash., December 2, 1907. This agreement made this second day of December, nineteen hundred and seven, by and between the Northwestern Improvement Company in the first part and Dominick Yazzolina, Carmen Yazzolina, John Yazzolina, G.

F. Yazzolina and Frank Ippolita, parties of the second part, to furnish timbers at Melmont Mine at the following prices and under the conditions herein specified. All timbers to be delivered at the mouth of the mine and mine openings. This contract expires November 30, 1908, or at any time previous to that date providing the party of the first part should not be in need of the said timbers. Prices:

6' split props	5x5 at small end	3c each
8' " "	5x8 " " "	5c "
10' " "	6x8 " " "	7c "
Round props	7" dia	1c per ft.
6' & 7 ft. lagging	2x6	2c each
Ties	6" face	2c per ft.
Gateway sets barked and framed	12 to 16" dia	3c per ft."

But it seems to us that the writing alone proves nothing. It is as consistent with the claim that the parties thereto sustain the relationship of master and servants as it is with the claim that the relationship is that of employer and independent contractor. It does no more than fix a price for the delivery of timbers at the mine. This is not sufficient to make the parties performing the work independent contractors. An independent contractor is one who renders service to another in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. If the employer may control the manner of doing the work, the relation of master and servant exists, no matter what terms may have been agreed upon as to the method of payment. *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904; *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 116 Pac. 861.

[5, 6] The respondent, realizing the inconclusiveness of the terms of the contract, sought to supplement it by parol, and one of the parties to the contract did testify that the chute was constructed and operated by the parties getting out the timbers, and that the respondent had nothing to do with the work, but did not testify that the respondent did not reserve the right to superintend and control the work. Moreover, on cross-examination he testified as follows: "Q. * * * This is the company's timber you were cutting? A. I would say so. Q. And it was cut from the company's land? A. Upon their land, certainly. Q. And the timbers were cut to be used in the mine? A. Yea. Q. And instead of paying you by the day or wages, they paid you so much a piece? A. Yea."

The testimony of the superintendent of the mine was more to the point. He did say that the company had no control over the work. But it was testified by the appellant's witnesses that only a short time before the accident complaint was made to him of the reckless manner in which timbers were being sent down the chute, and that he did not then disclaim authority, but promised to see

that the trouble was remedied. This was not only contrary to his present contention but tended to mislead the workmen.

Presumptively a person employed to work on the premises of another and for that other's benefit is a servant, and, if the employer seeks to avoid liability for the employé's acts on the ground that he was an independent contractor, the burden is upon him to establish the independence of the employé. *Midgett v. Manufacturing Co.*, 150 N. C. 333, 64 S. E. 5; 1 *Shearman & Redfield on Negligence*, § 71. We think, therefore, that the question of the relationship of the parties was here one of fact rather than one of law, and that it should have been submitted to the jury. It is argued that there is not sufficient evidence of negligence on the part of the persons getting out the timbers to make a case for the jury, or, if there was such evidence, the appellant is estopped to avail himself of it because of his contributory negligence. But, without further elucidating the facts, we think these were also questions properly to be submitted to the jury.

The judgment is reversed and remanded for a new trial.

OROW, C. J., and MAIN and ELLIS, JJ., concur.

MORRIS, J. I think the record sustains the lower court in holding the negligence, if any, was that of an independent contractor. I therefore dissent.

WILLIAMS v. CITY OF SPOKANE.

(Supreme Court of Washington. April 28, 1913.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—SAFE PLACE—DUTY TO FURNISH—"REASONABLE CARE."

It is a master's duty to exercise reasonable care to furnish a servant a reasonably safe place and to keep it reasonably safe; what is reasonable care depending on the nature of the enterprise, and, if the enterprise is inherently dangerous, reasonable care means great care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5954-5956; vol. 8, p. 7779.]

2. MASTER AND SERVANT (§ 130*)—INJURY TO SERVANT—DEFECTIVE PLAN.

Where a plan or method of operation deliberately adopted by a master is inherently defective and unnecessarily dangerous, its adoption is negligence, entailing a liability on the master for resulting injuries to servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.*]

3. NEGLIGENCE (§ 136*)—REASONABLE CARE—QUESTION FOR JURY.

What is reasonable care in a given situation, whether as applied to the question of defendant's negligence, or that of contributory negligence of plaintiff, is always a question for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 181 P.—53

the jury, whenever on the evidence reasonable minds might reach different conclusions.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 134.*]

4. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT — NEGLIGENCE — DEFECTIVE PLAN.

Defendant in the construction of concrete bridge piers continued to use the same long sections as the pier narrowed toward the top, permitting sections of the forms after being loosened, prior to being reset, to be shoved out from one to four inches on projecting rods before attaching the tackles or conveyers, and without tying them to the forms above, and without other support than the rods. As plaintiff was loosening one of the forms, and without knowledge that only three of such rods were imbedded in the pier, he shoved out a portion of the form; and, the rods being insufficient to hold it, it fell to the bottom, carrying plaintiff with it. *Held* to show actionable negligence on defendant's part in failing to provide a safe plan for the accomplishment of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

5. MASTER AND SERVANT (§ 219*)—DANGEROUS PLAN—ASSUMED RISK.

Whether a servant assumes the risk of extraordinary dangers resulting from an unnecessarily dangerous plan of operation adopted by the master depends on the obviousness and imminence of the danger, and on the servant's appreciation or lack of appreciation thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

6. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT — DANGEROUS PLAN — ASSUMED RISK.

A servant only assumes the risk of a dangerous plan adopted by the master, when the danger is open, obvious, and apparent alike to both master and servant, is equally appreciated by both, and is so imminent and certain of disastrous results as to make it incumbent on the servant, as an ordinarily prudent man, to quit work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

7. MASTER AND SERVANT (§§ 288, 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—QUESTION FOR JURY.

In an action for injuries to a servant by falling with part of a form from a concrete bridge pier in process of construction by reason of defendant's alleged negligence in providing an unsafe plan for the doing of the work, whether plaintiff was negligent and whether he assumed the risk *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088, 1089, 1090, 1092-1132; Dec. Dig. §§ 288, 289.*]

8. DAMAGES (§ 132*) — EXCESSIVENESS — PERSONAL INJURIES.

Plaintiff, a man 31 years old with an expectancy of 34 years, was injured by a fall of 68 feet from a concrete bridge pier in process of construction. He suffered a compound comminuted fracture of the left ankle. The fibula was broken into fragments, and several pieces of bone, including a part of the ankle joint, were removed. The muscles of the calf of the right leg were torn away, and the right ankle severely injured. There was considerable sloughing of the muscles of the right leg, which became gangrenous, and large portions of the muscles were removed, leaving a large cavity. The large muscles of the leg were permanently

impaired. There was also a fracture of the eighth rib on the right side, causing an adhesion which interfered with plaintiff's respiration, caused pain, and made him subject to pleuritic troubles. He also suffered numerous cuts, bruises, and sprains. All of the physicians testified that his injuries were permanent, and he incurred a \$300 doctor bill. *Held*, that a verdict for \$9,750 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, Spokane County.

Action by Walter Williams against the City of Spokane. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Cannon, Ferris & Swan and A. M. Craven, all of Spokane, for appellant. Samuel T. Crane, Robertson & Miller, and T. J. Corkery, all of Spokane, for respondent.

ELLIS, J. This is an action for personal injuries claimed to have been suffered by the plaintiff through the negligence of the defendant, City of Spokane, in connection with the construction of the Monroe Street Bridge in that city. The bridge was being constructed by day labor, and the plaintiff was one of the bridge carpenters employed upon the work. The southerly span of the bridge consisted of concrete piers, which were being built by pouring the concrete into forms of wood. These forms were constructed in sections 16 feet long by 8 feet high in the following manner: The boards which formed the inner surface against which the concrete was poured were spiked or bolted to 2 by 8 inch timbers, placed edgewise against the boards, and back of these were two 8 by 8 inch timbers spiked or bolted to the 2 by 8's to which the boards were nailed. Each of these sections weighed about 1,400 pounds. The base of the pier was 32 feet long by something less than 30 feet wide; but as it rose it narrowed in length at the rate of 4 inches to the foot. At the base it required two sections of form to reach the length of the pier. Three sets of form were used for the work, one superimposed upon the other, and when the concrete had been poured into these three sets, and sufficiently hardened, the lower set would be removed by sections, raised above the other two, and placed in position and filled with concrete, when, in turn, the then lower set would be removed and replaced above in the same manner; this process being repeated as the pier rose in height. These sections were held in position by rods of corrugated iron about $\frac{3}{4}$ of an inch square, passing through the outside forms on either side with a nut and washer screwed firmly against the heavy 8 by 8 timbers, thus holding in position the forms on the outside of the pier, and drawing them against the ends of the forms on the slanting surface of the inner sides of the pier, making a complete box into which the concrete was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

poured. These bars extended 6 to 8 inches beyond the forms. The whole work of constructing the bridge was under the general supervision of an engineer, and different parts of the work were under the direct supervision of a foreman. The foreman in charge of the construction of this pier was one Beardsley, whose duty it was to direct the men in all of the work in connection therewith. Down to this point there was practically no divergence in the testimony. As to the manner of removing the sections for the purpose of replacing them on top of the remaining forms there was a sharp conflict. The plaintiff's testimony and that of the witnesses who testified in his behalf was clear and positive to the effect, that, when the foreman was ready to have these forms removed, he would direct two of the workmen to descend upon the 8 by 8 inch pieces, take off the nuts and washers, and with a steel bar pry the 16-foot section of form from the concrete and out a short distance upon the rods passing through the forms and embedded in the concrete. After this, either by means of a block and tackle or by means of ropes or chains attached to a conveyer called a "traveler," which passed over the entire structure, the sections would be either lowered to the ground until such time as they were ready to be replaced above the remaining sections, or would at once be raised and placed in position as parts of the form for the next pouring of concrete. The plaintiff and the witnesses testifying in his behalf all stated that neither the block and tackle when used, nor ropes from the traveler when it was used, nor other supports of any kind, were ever attached to these forms until after they had been loosened from the concrete, and pushed out from 1 to 4 inches from the face of the concrete. Witnesses testifying on behalf of the city stated that usually the block and tackle or the ropes from the conveyer or ropes tied to the forms above were attached to these sections before they were loosened from the concrete. On the morning of the 31st day of May, 1910, the plaintiff and one McNeill were ordered by the foreman to descend upon the lower of the three sets of forms then in position some 68 feet above the ground, loosen these lower sections from the concrete, and shove them out upon the rods a few inches preparatory to replacing them above the two remaining sets. The nuts and washers had been previously taken off by another workman. At this point the pier had narrowed in length until it was only about 25 feet long, but under the direction of the foreman the same long sections of form were used as had been used at the commencement of the work, so that the outer sections projected beyond the pier a distance of 8 or 9 feet, leaving only the inner part of the section for a distance of 7 or 8 feet against the concrete. Four rods were used to each 16-foot section of form, and

those which passed through the concrete were allowed to remain after the work was completed. At the time in question, by reason of the narrowing of the pier, the two inner rods of the outer section of form and the lower one of the two outer rods were wholly within the concrete, while the upper of the two outer rods was outside the concrete and passed merely through the forms on either side of the pier. Prior to that time the pier had been long enough to include all four of the connecting rods within the concrete. Where the sections of form joined each other, it was usual to nail boards called "scabs" to prevent the concrete from passing out, and to make a more perfect joint. In compliance with the order of the foreman, the plaintiff and McNeill descended upon the lower and outer section of form and McNeill, sitting upon the outer end of the upper 8 by 8 timber, sawed the scab in two which joined this section with the one above it, while the plaintiff, sitting at the other end of the section on the lower 8 by 8 beam, was engaged in prying away the scab connecting that end with the next section of the same set. There was evidence tending to show that these men had pried this section on which they sat loose from the concrete at the upper part, and out upon the rod for a distance of about one inch. While the men were engaged in removing these scabs, the form suddenly settled, bent the ends of the rods on which it was hanging, slipped off, and fell to the ground, carrying the two men with it, injuring the plaintiff.

The negligence charged was that the defendant adopted an improper and unnecessarily dangerous method of performing the work; that the work was carried on without sufficient supervision; that there was failure to guard the men while at work by securing the forms so as to prevent them from falling; that the foreman in charge of the work was incompetent; and that the foreman, having caused one of the rods to be placed outside the concrete without the knowledge of the plaintiff, failed to notify him of that fact or to warn him of the added danger of the form falling by reason of its being sustained upon the ends of only three rods instead of four as usual. The defendant denied all the allegations of negligence, and interposed the affirmative defenses of assumption of risk and contributory negligence. At appropriate times, the defendant moved for a nonsuit and for a directed verdict, which motions were overruled. The jury returned a verdict in favor of the plaintiff for the sum of \$9,750. The defendant's motion for judgment notwithstanding the verdict was overruled. Judgment was entered upon the verdict, from which the defendant appeals.

There are 20 assignments of error, but all, save the claim of excessive damages, present but 3 questions, the answers to which will be determinative of the case: (1) Was the

appellant guilty of any negligence charged? (2) Did the respondent assume the risk? (3) Was the respondent guilty of contributory negligence?

[1] 1. That it is the duty of the master to exercise reasonable care to furnish the servant a reasonably safe place of work, and to keep that place reasonably safe, is law so familiar as to require no citation of sustaining authority. In the prosecution of an inherently dangerous enterprise reasonable care is care commensurate with the danger reasonably to be anticipated. In such a case reasonable care "means great care." 1 Labatt, Master & Servant, § 16, p. 30; Sprague v. New York & N. E. R. Co., 68 Conn. 345, 36 Atl. 791, 37 L. R. A. 638; 1 Thompson on Negligence, § 25.

[2] "This is especially true as applied to the plan or method of operation deliberately adopted by the master or his representatives. When the plan is inherently defective and unnecessarily dangerous, its adoption is negligence entailing a liability upon the master for resulting injuries." Jobe v. Spokane Gas & Fuel Co., 131 Pac. 235, just decided; Ball v. Megrath, 43 Wash. 107, 109, 86 Pac. 382; Blair v. Spokane, 66 Wash. 399, 405, 119 Pac. 839; Etheridge v. Gordon Constr. Co., 62 Wash. 256, 259, 260, 113 Pac. 639; Rogers v. Valk, 131 Pac. 231, just decided; 1 Labatt, Master & Servant, § 118.

[3] What is reasonable care in a given situation, whether as applied to the question of the defendant's negligence or that of the contributory negligence of the plaintiff, is always a question for the jury, whenever, upon the evidence, reasonable minds might reach different conclusions. 1 Thompson on Negligence, § 425; Richmond v. Tacoma Ry. & P. Co., 67 Wash. 444, 122 Pac. 351.

[4] An application of these principles to the conflicting evidence presented by the record makes the question of the appellant's negligence clearly one for the jury. All of the respondent's witnesses who testified upon the subject stated that from the beginning and throughout the work the forms were loosened from the concrete and shoved out an inch to four inches upon the projecting rods before attaching the tackles, or conveyer, and without tying them to the forms above and without other support than the projecting ends of the four rods imbedded in the pier. One of the appellant's witnesses confirmed this and testified that neither tackle, conveyer, nor ropes were ever used without direction from the foreman. The superintending engineer testified, in effect, that the men would have no right to use the tackle or the traveler without specific direction from the foreman. There was no evidence that ropes were supplied to the two men on the day in question, but there was evidence that tools and appliances could not be secured from the supply house without a specific order from the foreman. The

foreman testified that the tackle was already adjusted to the pier and hanging near the men, but this was contradicted by nearly every other witness. He also testified that he directed the respondent and McNeill to attach the tackle before loosening the form, but this was denied by both of these men and by another man who was present when the order was given to loosen the forms. He further testified that the forms were never loosened or shoved out upon the rods, or even the nuts and washers removed without first attaching tackle, or conveyer, or tying to the upper form with ropes, but he was contradicted in all this by four or five witnesses. It must be conceded that, if the plan adopted was to loosen the forms and shove them out without other support than the ends of the rods, that plan was unnecessarily dangerous. It must also be conceded that when but three of the four rods were imbedded in the concrete that unnecessary danger was further, and greatly, unnecessarily augmented. As one expert witness testified, the sustaining force would not only be greatly diminished, but would be unequally distributed, so that a slight movement of the top of the heavy form from the face of the pier would tip the form, bend the rods, and cause it to fall. It is obvious that, being sustained by only one rod at the top and two at the bottom, any loosening of the form from the concrete would tend to cause it to tip out at the top. Moreover, it was obviously false economy to use these long sections which projected more than half their length beyond the pier. This injected another element of unnecessary danger. If the respondent's witnesses are believed, the appellant's negligence in exposing the respondent to unnecessary danger was amply established. Their credibility was for the jury.

[5] 2. Did the respondent assume the risk? That the servant ordinarily assumes as a matter of law the risk of those dangers which are open and obvious and necessarily incident to the work is also so well established as to require no citation of authority. Whether he assumes the risk of extraordinary dangers resulting from an unnecessarily dangerous plan of operation adopted by the master is dependent upon the openness, obviousness, and imminence of the danger, and upon his appreciation or lack of appreciation of it. The question becomes one of fact for the determination of the jury whenever the minds of reasonable men may differ upon it. Pearson v. Federal Min. & Smelting Co., 42 Wash. 90, 84 Pac. 632; Etheridge v. Gordon Constr. Co., 62 Wash. 256, 113 Pac. 639; Engkeling v. Spokane, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481; Jobe v. Spokane Gas & Fuel Co., 131 Pac. 235, just decided.

[6] This is the almost-universal rule where the servant is proceeding upon a direct order from the master or the master's representative. In such cases the servant only assumes

the risk when the danger is open, obvious, and apparent alike to man and master, equally appreciated by both, and is so imminent and certain of disastrous consequences as to make it incumbent upon the servant as an ordinarily prudent man to either quit work or be held to assume the risk. "The rule of the prudent man" becomes the determinative principle. *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. Rep. 1058; *De Mase v. O. R. & Nav. Co.*, 40 Wash. 108, 82 Pac. 170; *Goldthorpe v. Clark-Nickerson Lbr. Co.*, 31 Wash. 467, 71 Pac. 1091; *Dean v. O. R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842; *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Nelson v. Ballard Lumber Co.*, 60 Wash. 690, 111 Pac. 882; *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *Anustasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342; *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819; *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Chesson v. Roper Lumber Co.*, 118 N. C. 59, 23 S. E. 925; *Bunker Hill, etc., Co. v. Jones*, 130 Fed. 813, 65 C. C. A. 363.

[7] In view of these principles, it seems plain that the question of assumption of risk was one for the jury. The respondent, if his testimony and that of his witnesses is to be believed, had seen this work performed as he attempted to perform it on the day in question for some time without disastrous consequences. He was a man, so far as the record shows, of no particular knowledge as to the tensile strength of the rods upon which the forms hung when loosened and shoved out from the face of the pier. He was ordered to do the work, and proceeded to do it in the manner which he and his witnesses claim was usual. Moreover, the evidence shows without contradiction that he did not know that only three of the rods passing through the forms in question were imbedded in the concrete. There was no evidence that his prior work either by reason of its nature or location was such as to lead him to observe that fact. The evidence shows that this was the first time that any of the forms had been so placed as to leave any of the rods outside of the concrete when poured. His position upon the form was such that he could only see the projecting ends of the rods, and there is absolutely no evidence that he knew or was warned of the fact that any of the rods were not imbedded in the concrete as usual. This element of the danger, which the jury might well have found was the efficient factor in the catastrophe, was not open, obvious, or apparent to the respondent, though well known to the appellant's foreman. Whether with such knowledge as he had he acted as a reasonably prudent man in obeying the foreman's order to descend upon the form, loosen it from the concrete and attempt to shove it out upon the rods, was a question of fact for the jury. It cannot be said, in view

of the conflicting evidence, that as a matter of law he assumed the risk consequent upon obedience.

8. Was the respondent guilty of contributory negligence? We think that a fair preponderance of the evidence shows that he was doing the work in hand at the time of the accident in the manner which had been usual throughout the work to that time. The evidence, as we have seen, was conflicting as to whether or not any direction was given by the foreman to attach the block and tackle to the form, or to tie it with ropes to the form above. Whether the respondent was guilty of contributory negligence in obeying the order is determinable upon the same principles as those determining the question of assumption of risk. If in so doing he acted as an ordinarily prudent man would have acted under the same conditions, he was not guilty of contributory negligence. *Knudsen v. Moe Bros.*, 66 Wash. 118, 119 Pac. 27; *Rogers v. Valk*, 131 Pac. 231, just decided; *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189. The question was one for the jury.

Several assignments of error are based upon certain instructions given by the court, and the refusal to give certain instructions requested by the appellant. We have carefully examined the instructions given, and find that they fully and clearly state the law as applied to the evidence. What we have said touching the evidence disposes of every question raised upon the instructions.

[8] 4. Finally, it is contended that the verdict was excessive. The respondent suffered a compound comminuted fracture of the left ankle. The fibula was broken into fragments, and several pieces of bone, including a part of the bone forming the ankle joint, were removed. The muscles of the calf of the right leg were torn away, and the right ankle was severely sprained. There was considerable sloughing of the muscles of the right leg which became gangrenous. Large portions of these muscles were removed, leaving a cavity sufficient to contain a man's hand. The large muscles of the leg are permanently impaired, and there is nothing known to medical science which will change the respondent's present condition. There was a fracture of the eighth rib on the right side, causing an adhesion of the serous membrane of the lung cavity to the outer surface of the lung, which greatly interferes with respondent's respiration, and makes him liable to frequent recurrences of a pleuritic condition, which is very painful. There were numerous other cuts, bruises, and sprains. Both of the physicians who testified as to respondent's condition stated unqualifiedly that his injuries are of a permanent nature. He was 31 years old at the time of the injury, and had a life expectancy of over 34 years. He has incurred a \$300 doctor's bill. While the verdict seems large, still in view of the evidence we cannot

say that it is so large as to indicate passion, prejudice, or other improper motive on the part of the jury in assessing it. We find no ground for reversal.

The judgment is affirmed.

MOUNT, FULLERTON, MAIN, and MORRIS, JJ., concur.

EILERS MUSIC HOUSE v. HOPKINS et al.
(Supreme Court of Washington. April 28, 1913.)

1. PRINCIPAL AND SURETY (§ 129*) — NOTICE OF DEFAULT—WAIVER BY SURETY.

A surety on a building contract, who, upon receiving formal notice of default by the principal, did not object thereto because not given within 30 days, as required in the bond, and notified the owner to complete the work at its expense, thereby waived the provision requiring notice of default within 30 days.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 366-372; Dec. Dig. § 129.*]

2. PRINCIPAL AND SURETY (§ 149*)—PROVISIONS OF CONTRACT—WAIVER.

Where the surety on a building contract had the suit upon its bond delayed at its request, it cannot afterwards complain that the suit was not brought within six months after the work was completed, as required by the contract, having waived that provision.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 414; Dec. Dig. § 149.*]

3. PRINCIPAL AND SURETY (§ 129*) — DISCHARGE OF SURETY—ESTOPPEL BY CONDUCT.

A surety on a building contract cannot complain that a certain sum was paid to the contractors by the principal after the contractors had defaulted, where it was paid to the receiver of the contractors by direction of the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 366-372; Dec. Dig. § 129.*]

4. INTEREST (§ 47*)—COMMENCEMENT OF ACTION.

Interest was properly allowed on the amount found due plaintiff from the time the action was filed, in an action on a bond for the construction of a building to be constructed for plaintiff.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 106-112; Dec. Dig. § 47.*]

Department 1. Appeal from Superior Court, Spokane County; Thos. E. Grady, Judge.

Action by the Eilers Music House against B. F. Hopkins and others. From a judgment for plaintiff, defendant Pacific Surety Company appeals. Affirmed.

Cannon, Ferris & Swan, of Spokane, for appellant. Belden & Losey, of Spokane, for respondent.

MOUNT, J. On June 27, 1910, the plaintiff and the defendants Hopkins & Feight entered into a contract by the terms of which the said defendants agreed to make certain excavations and remove an old building for the purpose of erecting a new building upon

a certain lot in Spokane, according to the plans and specifications agreed to, for the price of \$5,675. The work was to be completed on the 18th day of August, 1910. To secure the faithful performance of this contract, the contractors executed a bond, with the Pacific Surety Company as surety, in the sum of \$10,000. The contractors defaulted in their work. Subsequently the Surety Company was notified thereof and instructed the plaintiff to complete the work at the expense of the Surety Company. The surety bond provided "that the surety shall be immediately notified of any breach of said contract by said principal." It also provided that any suits brought against the surety to recover on said bond must be instituted within six months after the first breach, "and in no event shall any action be brought against the surety hereunder after the expiration of six months after the completion of the work under said contract." This action was brought to recover on the bond by reason of the breach of the contract. There was no appearance in the case on the part of Hopkins & Feight, contractors. The case proceeded to trial against the defendant Pacific Surety Company alone. The case was tried to the court without a jury. Findings of fact were made in favor of the plaintiff, and judgment was rendered against the defendant Pacific Surety Company in the sum of \$1,440.25, with interest from August 11, 1911, the date when the complaint was filed. The defendant Pacific Surety Company has appealed from that judgment.

It is apparently conceded that the agent of the Surety Company was notified on September 22, 1910, that the contractors had not completed the work. And on October 5, 1910, a formal notice was served upon the local agent of the Surety Company advising the company that the contractors had defaulted, and requiring the Surety Company to finish the work according to the contract. The Surety Company replied to this notice as follows: "We instruct you to complete at our expense. Pacific Surety Company, by H. W. Newton, Attorney in Fact." Newton was the general agent and attorney in fact representing the Surety Company in this state, and executed the bond in controversy as such agent. The suit was not brought upon the bond until August, 1911.

The court found: "That the defendant Pacific Surety Company waived the terms and conditions of said bond with reference to the retention of the 15 per cent. of the contract price, provided for in said bond, and also with reference to the giving notice in case of default, and, further, by its duly authorized, legal, and constituted agent, waived all the other terms and conditions of said bond relative to notice, retention of money, and time within which suit might be brought under said bond; that said waiver was communicated to the plaintiff, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff acted thereon; that the defendant Pacific Surety Company acted thereon; that the agent of the defendant Pacific Surety Company, H. W. Newton, was at all times authorized to waive the different provisions of said contract, and did waive the same, and the said waiver by the said H. W. Newton, as agent for said Pacific Surety Company, was ratified, approved, and acquiesced in by the defendant Pacific Surety Company."

It is argued by the appellant that there is no evidence to justify this finding of the court, and that under the case of *Ilse v. Aetna Indemnity Co.*, 69 Wash. 484, 125 Pac. 780, the court should have dismissed the action because notice of default was not given within 30 days, and also because the action was not brought within 6 months after the completion of the work.

While it is conceded that formal notice of default of the contractors was not given within 30 days, as provided for in the bond, the evidence is clear to the effect that when formal notice was given to the Surety Company the company made no objection on that account, but its general agent and the agent who issued the contract of indemnity notified the plaintiff to proceed to complete the work at the expense of the Surety Company.

[1] It is plain, we think, that this amounted to a waiver of that clause of the contract. In *Parsons v. Pacific Surety Co.*, 69 Wash. 595, 125 Pac. 954, and also in *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280, we held that failure to give this notice in this class of cases is only a defense, in so far as the surety has been damaged and prejudiced by such failure. There is no claim here that there was any prejudice on account of failure to give the notice. In *Ilse v. Aetna Indemnity Co.*, 69 Wash. 485, 125 Pac. 781, where there was a provision in the contract like the one under consideration, requiring suits to be instituted within six months after the completion of the work specified in the contract, where the suit was commenced more than three years after the completion of the work, we held that the court properly refused any relief. But we there said: "The authorities generally agree that it is competent for the parties to an indemnity bond to fix a period of limitation different from that provided by statute, and we think the better rule is that the limitation, if reasonable—and there is no reasonable excuse for delay in the commencement of the action—is binding upon the parties. * * * To determine whether the limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together."

[2] In this case, while the action was not brought within six months after the work was completed, there was evidence to the effect that the suit was delayed at the re-

quest of counsel for the Surety Company. The court heard this evidence and no doubt believed that state of facts. It follows, of course, that where there was a delay at the request of the Surety Company or its representatives it cannot be heard to say that the action was not brought within time. In other words, the court properly found, upon sufficient evidence, that there was a waiver of both these provisions of the contract by the Surety Company.

[3] Appellant argues that the court erroneously allowed \$700, which was paid to the contractors after they had defaulted. The evidence shows that the contractors were insolvent, and that a receiver had been appointed. This \$700 was paid to the receiver by direction of Mr. Newton, agent for the Pacific Surety Company; the Surety Company cannot now complain that it was wrongfully paid.

[4] Appellant also argues that the court erred in allowing interest on the amount found due to the plaintiff from the time the action was filed. Interest was properly allowed under the rule in *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

Finding no error, the judgment is affirmed.

CROW, C. J., and GOSE and PARKER, JJ., concur.

MATTHEWS et ux. v. CITY OF ELLENSBURG et al.

(Supreme Court of Washington. April 28, 1913.)

1. MUNICIPAL CORPORATIONS (§ 271*) — IMPROVEMENTS—WATERWORKS — PROCEEDINGS TO ESTABLISH.

Rem. & Bal. Code, §§ 8005, 8006, authorizing any city to construct and operate waterworks within or without its limits to furnish water to its inhabitants and others, and providing for the submission to the voters of the question of so doing, empower a city to provide for the construction of a water supply system, and of a water distributing system, as complete independent systems, and an ordinance providing for the acquisition of a supply system may provide for a submission of the question to the voters, and the mere fact that it provides for the construction of an independent distributing system by local assessment on property specially benefited does not affect the validity of the adoption by the voters of the proposal to acquire a supply system.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 726; Dec. Dig. § 271.*]

2. MUNICIPAL CORPORATIONS (§ 273*)—LOCAL IMPROVEMENTS — WATER DISTRIBUTING SYSTEM.

Under Laws 1911, c. 98, §§ 8, 19, providing that any local assessment may be initiated directly by the city council, by resolution declaring an intention to order the improvement, without submitting the question to the voters, a city may provide by resolution of its council for the construction of a water distributing system at the cost of the property specially

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

benefited, without submitting the question to the voters.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 739; Dec. Dig. § 279.*]

3. MUNICIPAL CORPORATIONS (§ 279*)—LOCAL IMPROVEMENTS—WATER DISTRIBUTING SYSTEM.

A city may, without evading the requirement of the statute to submit questions to the voters, provide for the construction of a water distributing system at the cost of property specially benefited, as a system independent of a water supply system, the question of the acquisition of which was submitted to the voters.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 739; Dec. Dig. § 279.*]

4. MUNICIPAL CORPORATIONS (§ 321*)—LOCAL IMPROVEMENTS—SPECIAL BENEFITS.

Under Laws 1911, c. 98, § 10, authorizing any city council to initiate local improvements and determine the property specially benefited thereby, the question whether a water distributing system constitutes a general benefit only, and is of no special benefit, can only be urged before the council on a hearing on the assessment roll for the cost of the work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 837-840; Dec. Dig. § 321.*]

5. MUNICIPAL CORPORATIONS (§ 331*)—LOCAL IMPROVEMENTS—CONTRACTS—BONDS.

Laws 1911, c. 98, §§ 46, 48, authorize the issuance of bonds for local improvements to the contractor for the improvement. A city offered its bonds for local improvements for sale, but received no bids. Calls were then made for bids for the performance of the work without specifying that the work would be paid for in bonds, but specifying that bids for the work must be made on the form prepared by the city engineer. The form provided that the work would be paid for in bonds issued against the revenue of the improvements. Bids were made on the forms furnished by the city engineer. *Held*, that the fact that the call for bids did not state that the work would be paid for in bonds was at most a mere irregularity, not affecting the validity of contracts for the work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 856, 857; Dec. Dig. § 331.*]

6. MUNICIPAL CORPORATIONS (§ 339*)—LOCAL IMPROVEMENTS—RESERVATION OF PART OF COST.

A city contracting for the construction of a local improvement may stipulate for a reservation of 15 per cent. of the estimate until 30 days after completion of the work, though an ordinance provides for a reservation of 25 per cent. of the estimate, since the power which provided for the reserve fund could waive it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 868, 870-873; Dec. Dig. § 339.*]

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by J. D. Matthews and wife against the City of Ellensburg and another. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Carroll B. Graves, of Seattle, for appellants. Ballinger, Battle, Hulbert & Shorts, of Seattle, and Jay A. Whitfield and E. E. Wager, both of Ellensburg, for respondents.

MOUNT, J. This action was brought by the plaintiffs as taxpayers to prevent the delivery of certain bonds to the defendant International Contract Company by the city of Ellensburg, and also to enjoin the International Contract Company from proceeding under a contract for the construction of certain waterworks for the city. Upon issues joined the case was tried to the court without a jury and resulted in a dismissal. Plaintiffs have appealed from that judgment.

The facts are not disputed and are, in substance, as follows:

The city of Ellensburg is a city of the third class. The city and its inhabitants are supplied with water for fire, domestic, and other purposes by a waterworks system operated by a private corporation under a franchise from the city. On August 7, 1911, the city passed ordinance No. 549, which specified and adopted a system and plan for the construction of a water supply by the city. It declared the estimated cost of the plan and provided that the system to be constructed should be paid for by bonds payable, principal and interest, from the revenues of the system. The ordinance also provided for a submission of the system and plan, together with the method of payment, for ratification or rejection to the qualified voters of the city at a special election to be held on September 5, 1911. The plan provided that a well or wells should be put down on certain property described in the ordinance, a pumping station and certain pumps and other machinery, and a reservoir to be constructed on lands described, a pole line to transmit electric power to operate said pumping plant from the municipal plant, and a main pipe line from the pumping station to said reservoir and to the city. The ordinance estimated the cost of the plant at \$100,000, the money to be derived by the sale of special bonds issued against the earnings of the plant. The ordinance also contained the following: "It is proposed that said above-described waterworks plant be connected with distributing system located within the limits of said city, which shall be constructed by said city by local assessment upon the property specially benefited thereby, or by such other method as the city may adopt."

On August 11, 1911, the city council passed a resolution declaring the intention of said city to construct a water distributing system within the limits of the city, the cost and expense of which was to be borne by the property specially benefited. Thereafter, on September 5, 1911, the waterworks plan as proposed by ordinance No. 549 was submitted to the voters, and the same was approved by the necessary vote. Thereafter, on October 16, 1911, the city passed an ordinance, No. 558, which provided for the construction of the water distributing system in accordance with the resolution of August 11, 1911,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and provided for the payment therefor by bonds at the cost and expense of the property specially benefited thereby by special assessment against the property within the district to the amount of \$50,000, the estimated cost thereof. After the approval of ordinance No. 549, which provided for the waterworks plant and system without the city, but did not include the distributing system, the city council instructed the clerk to advertise for the sale of both the special water bonds and local improvement district bonds. The clerk on October 28, 1911, published notices calling for bids for the purchase of the water bonds and the local improvement bonds separately. No bids were received for either of these issues. Thereafter, on November 29, 1911, the city clerk, under the direction of the city council, again published notice offering for sale the special bonds under ordinance No. 549, and calling for bids for such bonds; and at the same time the clerk also published notice offering for sale the local improvement bonds to be issued under ordinance No. 558, and also calling for bids for the performance of the work in constructing a reservoir, pumping plant, wells, etc., as provided for in ordinance No. 549 and for the water distributing system under ordinance No. 558. This notice did not specify that the work of construction of the waterworks plant and the distributing system would be paid for in bonds, but it did specify that all bids for work must be made on a form prepared by the city engineer. This form provided that the work on the distributing system within the city would be paid for in bonds issued to the contractor upon the special assessment fund and that the work on the water supply plant outside the city would be paid for in bonds issued against the revenues of the system. Thereafter, bids were received upon forms furnished by the city engineer, and each bidder agreed to take said bonds at par in payment for the work. Bids were made for each piece of work separately, to be paid for in bonds as stated. The bid of the defendant International Contract Company was the lowest bid for the construction of the pumping plant outside the city, and also the lowest bid for the construction of the distributing plant inside the city, and well within the estimates. The contract was awarded to the International Contract Company, and said company, upon the execution of the contract, began work. Whereupon the plaintiffs brought this action to prevent the delivery of the bonds, and to enjoin the city and the other defendants from proceeding with the construction work under the contract.

The appellants argue that the court erred in dismissing the action for several reasons which we shall notice in their order.

[1] I. It is contended that, because the proposed work was not an addition to or betterment of existing waterworks and did not specify a plan for a completed system

and declare the estimated cost and submit such plan for the ratification of the qualified voters, the city was without authority to proceed with the work. In short, as we understand appellants' position, it is that the city was authorized only to adopt a complete system for obtaining and delivering water to the consumers.

It will be noticed that the city attempted to and did by ordinance No. 549 adopt a plan with all the necessary requirements for obtaining a water supply. That ordinance did not provide for a distributing system within the city. Counsel for appellants maintain that the supply and distributing systems constitute the whole of the waterworks and that the city could not adopt one without the other. We are of the opinion that this result does not necessarily follow. The statute (section 8005, Rem. & Bal. Code) provides: "Any incorporated city or town within the state be, and is hereby, authorized to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate waterworks, within or without its limits, for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with an ample supply of water for all uses and purposes, public and private. * * *" The next section provides: "Whenever the city council * * * of any such city or town shall deem it advisable that the city or town * * * shall purchase, acquire or construct any public utility mentioned in section 8005, * * * the common council * * * shall provide therefor by ordinance, which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof as near as may be, and the same shall be submitted * * * to the qualified voters."

By the first section above quoted it is clear that a city is authorized to construct and maintain waterworks without the limits of the city for the purpose of furnishing such town and the inhabitants thereof with a supply of water. While it is no doubt necessary that the water supply shall be distributed to users in different parts of the city, it does not necessarily follow that the city in adopting a plan and system for such supply must at the same time construct a distributing system. It may do so as a matter of course, and of necessity some distributing system must at some time be furnished; but, before the distributing system is furnished, it is proper that the supply shall be provided for, and the city in this case by the ordinance and the plans for the supply system did not undertake to adopt or provide for a distributing system. It is true the ordinance which adopted the supply system also stated that it was further proposed that a supply plant would be connected with a distributing system located within the limits of the city which is to be constructed by said city by local assessment upon the property specially benefited thereby.

But that clause in the ordinance was for the information of the voters and was not necessary to the validity of the supply system which was provided for. The supply system was to be a completed system within itself for that purpose, and the distributing system was to be provided for in another method entirely consistent with the powers and duties of the city. It is true that we said in *State ex rel. Craig v. Town of Newport*, 70 Wash. —, 126 Pac. 637: "We find no warrant for holding that a council may, by mere resolution, do piecemeal what it may not do as an entirety. If it could adopt and purchase or lease a source of supply without plan or submission, it could, with equal show of reason, carry out as separate acts in the same way each detail of a new water system, and the statute would be nugatory." But that was said in reference to a case where we held that the city could not adopt a plan by mere resolution, or purchase a source of supply without submission to a vote of the people of the city. It does not apply to a case where the city may do a work as an entirety, or to a case where the plan has been adopted by a vote of the people. We are of the opinion that the city was justified under the statutes and ordinance above quoted in adopting and treating the water supply as a completed part of the system, and that it was not necessary in order to be valid that the whole system for obtaining the supply and distribution of the water should be made at the same time. To hold otherwise would be to say that a part of a distributing system could not be constructed without the whole thereof, when it is common knowledge that large areas of any city do not require a distributing system for water, because such areas are unoccupied. We think it was the intention of the Legislature to authorize cities to construct their water plants in a businesslike way as the same may be found necessary by the city, and that a part of an entire contemplated system might be completed at one time and the other parts built as necessities require.

[2] II. It is argued that the resolution creating the local improvement district passed by the city council on August 11, 1911, was in excess of the powers of the city council, for the reason that it was passed before the special election of September 5, 1911. We think there is no merit in this contention, because the distributing system was adopted by a resolution of the city council and was independent of the plan which was submitted to the voters. In other words, the vote of the people on the supply plan did not necessarily control the jurisdiction of the city council to order the local improvement. The local improvement was for the purpose of furnishing water directly to the property benefited, while the supply system was a general benefit to the whole city. The statute (Laws of 1911, § 8,

p. 443) provides that any local improvement may be initiated directly with the city or town council by a resolution declaring its intention to order such improvement. No submission to the voters is necessary, and the action and decision of the council on such question is final and conclusive. Section 19, p. 451, *Id.*

[3, 4] III. Appellants next contend that the initiation of the local improvement district was a part of the proposed water system, and was an evasion of the requirement to submit that portion of the plan and its estimated cost to the vote of the people; that the system constitutes a general benefit to the community at large and cannot possibly be of any special benefit to the city by reason of the fact that a private water system is already in use; that the owners of real estate within the city receive no benefit other than the general public received.

It is no doubt true that the distributing system proposed to be constructed upon the improvement district plan will be used in connection with the water supply system. But as we have seen above, these two works may be constructed separately and paid for in the manner provided for in the contracts. It was understood by all the voters of the city who had informed themselves of the proposed plan as submitted for a water supply that a distributing system would thereafter be constructed. So that the voters knew what was sought to be attained, and they consented thereto. We think it cannot be said that there was any evasion.

On the other points, to the effect that the distributing system constitutes a general benefit and is of no special benefit: Those questions can only be urged to the council on a hearing upon the assessment roll for the local improvement. Laws of 1911, p. 444, § 10.

[5] IV. Appellants further argue that the ordinances did not provide for the issuance of bonds in payment of the work, and that there was no notice to contractors that the work was to be paid for in bonds.

As we have seen above, the bonds were offered for sale and no bids were received therefor. Calls were then made for bids, and bidders were notified that bids would be made upon blank forms furnished by the engineer. And bids were made upon these forms, which provided that payment may be made by delivering bonds at par. The act of 1911 by which these improvements were authorized provides for the issuance of bonds, and that the same may be issued to the contractor constructing the improvement. Sections 46 and 48, Laws of 1911, pp. 471, 472. It is immaterial that notice to the contractors did not state that the work upon which bids were asked would be paid for in bonds, as the notices provided that blank forms for bids furnished by the engineer only could be used; these blank forms did provide for payment in bonds. At

most, this was a mere irregularity which did not affect the validity of the contracts. *Kneeland v. Furlong*, 20 Wis. 437; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.

[6] V. Lastly, it is contended by the appellants that the contract which the city finally made with the International Contract Company was not in conformity with ordinance No. 557 relating to local improvements, because that ordinance provides that a reserve fund of 25 per cent. of the estimate shall be withheld for a period of 30 days after final completion of the improvement, while the contract provides for a reserve fund of only 15 per cent. *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29, is cited to sustain this position. That was a case where the charter required a certain amount to be withheld, and the city council, of course, was bound by the provisions of the charter; while in this case the reserve fund of 25 per cent. was provided for by ordinance. The power which provided for the reserve fund of course could waive it. This reserve was for the benefit of the city, and the city was authorized, of course, to waive that provision if it saw fit to do so, which it apparently did in this case. In any event, this provision of the ordinance applied only to the improvement district and not to the water supply contract.

We find no error in the judgment. It is therefore affirmed.

CROW, C. J., and PARKER and GOSE, JJ., concur.

HEATH v. SEATTLE TAXICAB CO.

(Supreme Court of Washington. April 28, 1913.)

1. APPEAL AND ERROR (§ 1066*)—INSTRUCTION—HARMLESS ERROR.

In an action for injuries from being struck by a taxicab, an instruction, erroneous in that it assumed that the street where the accident occurred was frequented at night by pedestrians, when there was no evidence thereof, was harmless, where it clearly conveyed to the ordinary mind merely an idea that such care should be exercised in the management of a taxicab as the locality and time as proven would suggest as necessary to avoid accidents.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

2. MUNICIPAL CORPORATIONS (§ 703*)—SPEED ORDINANCE—CONSTRUCTION—"PAVING."

It was a violation of the speed ordinance, limiting automobiles to 12 miles per hour on paved streets, to drive an automobile at a greater speed over a planked street; the term "paving" including any substance on a street forming an artificial roadway or wearing surface.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5239, 5240; vol. 8, p. 7749.]

3. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTION.

In an action for personal injuries from being struck by an automobile, an instruction in-

correctly defining the speed limit as fixed by ordinance at the place of the accident was harmless, where plaintiff testified that the driver was running 35 or 40 miles an hour and deliberately ran into him when he signaled for a stop, and the sole issue was whether a car belonging to defendant company, and driven by its driver, struck and injured plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. MUNICIPAL CORPORATIONS (§ 189*)—SPEED ORDINANCE—ENFORCEMENT—DUTY OF OFFICER.

It is the duty of a policeman charged with enforcing speed regulations to stop and place under arrest the driver of a taxicab who is violating the speed ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 487, 523, 524; Dec. Dig. § 189.*]

5. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where, in an action for injuries from being struck by an automobile, the sole issue was whether an automobile belonging to the defendant company struck plaintiff, and not the speed at which the automobile which struck him was being driven, an instruction which assumed that plaintiff was standing at a street intersection, whereas evidence showed he was three or four feet therefrom, was not erroneous, though the speed ordinance of the city prescribed a different speed limit at street intersections.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

In an action for personal injuries from being struck by an automobile, an instruction that if defendant's driver was acquitted of a charge of driving into plaintiff "he cannot again be arrested and be tried for that same offense" was harmless, though the quoted words were unnecessary, where the same instruction stated that the driver's acquittal or nonacquittal was immaterial to the issues in the case at bar.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

7. DAMAGES (§ 60*)—PERSONAL INJURIES—REDUCTION BY PENSION.

That a policeman, injured by being struck by a taxicab of the defendant company, was partly reimbursed for his injuries from a pension fund, kept up in part by dues received from him, could not inure to defendant's benefit, so as to lessen its pecuniary liability for the negligence of its driver.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 115, 116; Dec. Dig. § 60.*]

8. DAMAGES (§ 131*)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

A recovery of \$4,500 for partial dislocation of the right shoulder, leaving it lame and painful at the time of trial, and an injury to the right knee and to the back was excessive above \$3,000, where it was not shown that any of the injuries were permanent.

[Ed. Note.—For other cases, see Damages Cent. Dig. §§ 357-367, 370; Dec. Dig. § 131.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by A. E. Heath against the Seattle Taxicab Company, a corporation. From judgment for plaintiff, defendant appeals. Remanded, with directions.

See, also, 69 Wash. 69, 124 Pac. 217.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Brightman & Tennant, of Seattle, for appellant. Longfellow & Fitzpatrick, of Seattle, for respondent.

ELLIS, J. This is an action to recover damages for personal injuries claimed to have been suffered by the plaintiff by being struck by a taxicab, belonging to the defendant, through the negligence of defendant's driver. The substance of the plaintiff's testimony was as follows: On February 11, 1911, the plaintiff was acting as a police officer of the city of Seattle. His hours were from 8 p. m. until 4 a. m., and his territory included Fremont, a suburb of Seattle. About 3 o'clock in the morning of that day he saw a taxicab approaching Fremont from the south on Westlake avenue at a very high rate of speed. He stopped the cab, and the driver got out and informed him that he was taking a doctor and a nurse on an urgent call to a confinement case in the northern part of the city. The doctor also got out and confirmed the driver's statement. The plaintiff, after informing them that they had no right to drive so rapidly anyway, allowed the cab to proceed, first taking the number of the cab. The plaintiff then went to a restaurant for a cup of coffee, and leaving there at 3:28 a. m. walked one block east on Ewing street to the intersection of Fremont avenue and Ewing street, at which place he arrived at about 3:30 a. m. Upon reaching the corner of Fremont avenue and Ewing street, he saw a cab coming south on Fremont avenue at a high rate of speed. When the cab was within about 75 feet of him, he stepped into the street on Fremont avenue and signaled the cab to stop, intending to arrest the driver. Instead of stopping the driver of the cab increased its speed, running against the plaintiff, causing the injuries complained of. The plaintiff was struck while standing about six feet from the sidewalk on Fremont avenue and three or four feet north of the intersection of Fremont avenue and Ewing street. He testified that when the cab was from 20 to 40 feet from him he recognized the driver as one William Woelke, the same driver he had stopped going north about half an hour before.

On behalf of the defendant, the driver, Woelke, the doctor, and the nurse testified that they were stopped by the plaintiff, while going north through Fremont to an urgent call at the home of one A. E. Anderson; their testimony agreeing in all material respects with that of the plaintiff as to his incident. They testified that they arrived at the Anderson residence a 3:10 a. m., just as the child was born; the driver being paid by Anderson and leaving in from two to five minutes thereafter. The driver testified that he left the Anderson residence at 3:15, and drove from there to Fremont at the rate of about 18 or 20 miles an hour; that he passed through Fremont, going south at about 3:25 a. m.; that he saw no one and did not

run into or injure the plaintiff. The distance from the Anderson residence to the corner of Fremont avenue and Ewing street, as Woelke testified was travelled by the cab, which was the usual route used by all automobiles, is, by measurement calculated by speedometer, 2.7 miles. Woelke also testified that the cab on smooth, level road could be run at a speed of between 40 and 45 miles an hour. There was much other testimony on both sides, but it was of an expert, circumstantial, and impeaching nature. It will be unnecessary to discuss it.

The jury returned a verdict in favor of the plaintiff in the sum of \$4,500. The defendant's motion for a new trial was overruled. Judgment was entered on the verdict, from which defendant prosecutes this appeal.

[1] Of the grounds urged for reversal, all but one relate to the giving and refusal to give certain instructions. The court gave the following instruction: "One driving a taxicab upon the streets of a city frequented, both by day and night, by pedestrians and traffic must use reasonable caution and reasonable care in handling such machine, and such reasonable care should be exercised in the management of the taxicab so as to anticipate such collisions as the nature of the machine and the locality and time suggest as liable to occur, in the absence of such precautions, care, and watchfulness. The driver of a taxicab under such circumstances is held to that degree of care which is commensurate with the dangers naturally incident to its use." It is urged that by this instruction the court assumed that the streets at the place of the accident were frequented, both by day and night, by pedestrians and traffic; there being no evidence to support this assumption. While it is true that there was no evidence as to the extent to which the streets in question were used by pedestrians in the nighttime, there was evidence to the effect that this particular street was much used by automobiles at all times, as it was the main route from the city proper to the country club and certain roadhouses located beyond Fremont. The only point and purpose of this instruction, and the meaning which it would naturally convey to the ordinary mind, is that such care should be exercised in the management of a taxicab as the locality and time would suggest as necessary to avoid accidents. While the instruction is faulty in the particular mentioned, its purpose is so plain that the fault mentioned could hardly be prejudicial, especially in view of the controlling issue of fact discussed under the next objection.

[2,3] The court instructed the jury on the question of lawful speed as follows: "The ordinance of the city of Seattle regulates the speed of automobiles and taxicabs at the place this accident is alleged to have occurred, and that they be run at a speed not to exceed 12 miles per hour, and that in crossing at the intersection of Fremont ave-

nue and Ewing street, in said city, the speed be not to exceed 8 miles per hour, and if, from the evidence, you find that the driver of said taxicab, at the time and place mentioned in the complaint, ran his cab at a greater rate of speed than that allowed by the said ordinance, he was guilty of negligence." It is argued that this instruction is faulty, in that it fixes the maximum rate of speed at 12 miles an hour, whereas in this locality it is claimed that the speed ordinance of the city of Seattle places the maximum at 15 miles an hour; and that it is further faulty, in that it fixes the rate of speed allowed at the intersection of Fremont avenue and Ewing street at 8 miles an hour, whereas the ordinance makes no distinction as to street intersections and other parts of the street in that locality. The speed ordinance of the city, which was in force at the time of the accident, is in evidence. Section 16 of that ordinance prescribes the maximum speed of riding or driving horses, and delimits a district of the city, which we shall designate for convenience as the low-speed district. Section 17 of the ordinance is as follows: "No person shall ride, drive or propel any automobile, auticycle or other motor vehicle, except as specified in the above rule, at a greater rate of speed than eight (8) miles per hour along, over or through any public place bounded and described in the above rule, nor at a greater rate of speed than twelve (12) miles per hour along, on, through, or over any paved street outside of said above described district, or at a greater rate of speed than fifteen (15) miles per hour along, on, through or over any public place within the limits of the city of Seattle, or to pass or cross any street intersection, or round any corner within that certain district in the above rule first described and bounded, at a greater rate of speed than four (4) miles per hour when running on a downgrade, or at a greater rate of speed than eight (8) miles per hour on an upgrade."

It is admitted that Fremont avenue was planked at the place in question; but the appellant argues that a planked street is not a paved street, and therefore the maximum rate of speed fixed by the ordinance is 15 miles an hour, instead of 12, as given in the instruction. We cannot agree with this contention. "Paving" is a generic term, and may include, and when not otherwise limited must be held to include, paving of any kind, whether of brick, stone, asphalt, wood, or planking. Counsel has cited several ordinances in which the words "paving" and "planking" are used; but these ordinances relate to different kinds of paving, and are not intended to define paving generally. We think the term "paving" when used in its generic sense, as it was evidently intended in this ordinance, must be held to include the placing of any substance on a street so as to form an artificial roadway or wearing surface, which changes the natural condition

or surface of the street. 30 Cyc. 1160; Ross v. Gates, 183 Mo. 339, 81 S. W. 1107; Buell v. Ball, 20 Iowa, 282; Burlington, etc., R. Co. v. Spearman, 12 Iowa, 112; McNair v. Ostrander, 1 Wash. 110, 116, 23 Pac. 414. We hold, therefore, that the maximum rate of speed fixed by the ordinance at the place in question is 12 miles an hour.

It is equally plain, however, that the last part of the instruction does not comply with the ordinance. The maximum rate of eight miles an hour on an up-grade at street intersections, as fixed by the ordinance, refers only to the low-grade district, as outlined in section 16 of the ordinance. But it does not follow that the error was so prejudicial as to constitute grounds for a reversal. From our statement of the evidence it will be seen that the controlling issue of fact was sharply drawn as to whether or not the appellant's taxicab struck the respondent at all. The testimony of the respondent was positive that it was the appellant's taxicab, driven by Woelke. Woelke's testimony was equally positive that he passed the point in question about five minutes before the time fixed by the respondent as the time when the accident occurred, and that he saw no one and did not strike the respondent. The respondent testified that the automobile which struck him was running 35 or 40 miles an hour, and that the driver deliberately ran into him when signaled to stop. The driver testified that in returning from the Anderson residence he ran the cab at the rate of 18 to 20 miles an hour. If, therefore, he hit the respondent, as the jury evidently found he did, then he was negligent, in that he was confessedly exceeding the maximum speed limit. The incorrect definition of the speed limit in the instruction given could not have prejudiced the appellant, but rather the respondent, who, on the driver's admission, was entitled to have the instructions limited to the single controverted question of fact (save that of damages): Did the car in question, while being driven by this driver, at about the time and place specified, strike and injure the respondent? If it did not, there was no cause of action. If it did, there was no defense, save as to the amount of recovery. *Suell v. Jones*, 49 Wash. 583, 586, 587, 96 Pac. 4.

[4] The court also instructed the jury to the effect that if it was found from the evidence that a part of the plaintiff's duties as policeman was to see that the speed regulations were properly observed, and that if the defendant's driver was exceeding the speed limit established by the ordinance, then it was the duty of the plaintiff to stop the defendant's driver and place him under arrest. It is argued that this instruction is erroneous, because it refers to the speed ordinance of the city, which was incorrectly interpreted in the instruction last above quoted. In view of our finding that the last

above quoted instruction, though erroneous, was not prejudicial, it follows that there was no prejudice in the giving of this instruction. Moreover, the instruction last complained of, as an independent statement of the law, is unobjectionable.

[5] The court instructed the jury as follows: "And if you further find that the plaintiff did not exceed the demands, on this particular occasion, in complying with his duties, as a police officer of Seattle, by occupying the position at the intersection of Fremont avenue and Ewing street, as alleged in the complaint, and you further find that plaintiff has proved the other material allegations which I have told you it was necessary for him to prove before he can recover, then you should find for the plaintiff. But if you find that the defendant did not own the said taxicab, or that plaintiff has not proved the material allegations which I have told you it was necessary for him to prove before he can recover in this case, then your verdict should be for the defendant." It is claimed that this instruction is erroneous, in that it assumes that the respondent was at the time of the accident occupying a position at the intersection of Fremont avenue and Ewing street, as alleged in the complaint; whereas the evidence shows that he was three or four feet north of that intersection. This is hypercritical. If a difference of legal speed as between crossings and other parts of the street had been material, the position of respondent was so near the crossing as to make the lawful speed at crossings as applicable to his position as exactly at the crossing, since it is manifest that any effort to observe a requirement of reduced speed at the crossings would have had its effect in diminished speed before the position of the respondent within three or four feet of the crossing could have been reached. In any event, since the issue of fact, sharply drawn as to whether or not the appellant's automobile struck the respondent at all, was the controlling issue of fact in the case, so far as the accident is concerned, the question of respondent's position was of little materiality, provided he had a right to be in the street at all, which, of course, cannot be questioned. We find no error in this instruction.

[6] The court gave this instruction: "If you find from the evidence that defendant's driver, one Wm. Woelke, was arrested and submitted to a trial upon a criminal charge of having hit Officer E. A. Heath, the plaintiff herein, on February 11, 1911, while driving a machine of the Seattle Taxicab Co., and was acquitted of the charge and discharged from custody, then he cannot again be arrested and be tried for that same offense; but you are further instructed that his acquittal or nonacquittal, as the case may be, must be given no weight or consideration by you in passing upon the issues in

this cause, and must not be permitted to influence you either for or against plaintiff, or for or against defendant, in this trial." The appellant makes a lengthy argument to show that this instruction was erroneous, in that the driver, Woelke, having been arrested and tried in the justice court for a misdemeanor in driving at an unlawful speed, was still liable to arrest and trial for assault in the second degree in assaulting an officer with intent to prevent arrest, or of assault in the first degree in assaulting the officer by means likely to produce death. Without entering into a discussion of this collateral question, it will suffice to say that this instruction was obviously intended to inform the jury that acquittal of a criminal charge upon the same state of facts as alleged as grounds for damages in a civil action would be immaterial to the issues in the civil action. The reference to another prosecution was unnecessary, but it was not prejudicial, since the jury were plainly told that the acquittal or nonacquittal must not be permitted to influence the decision one way or another. The jury having been thus plainly told that the matter was immaterial, it can hardly be assumed that the possibility of prosecution for a different offense, founded upon the same state of facts, even had it been included in the instruction, would have influenced the verdict. We find no reversible error in this instruction.

[7] It is next argued that the court committed error in refusing to give the following instruction requested by the appellant: "The plaintiff in this case, in his complaint, asks for \$14,000 general damages, and in addition thereto the sum of \$300 for loss of time and wages, and \$225 for expenses incurred for hospital and medical services, and for the sum of \$50 for additional medical services. I instruct you that if you believe from the evidence that plaintiff was reimbursed for his lost wages out of the police pension fund of the city of Seattle and was reimbursed, wholly or in part, for his hospital and medical bills, then the plaintiff is not entitled to recover the sums for which he has been reimbursed out of said fund, and you shall allow plaintiff only such sum or sums as he actually lost by reason of loss of time and wages and hospital and medical services." The Police Pension Act (Laws of 1909, page 59), after providing that certain license fees, money received from sales of unclaimed property, and the proceeds of certain fines shall go to make up the pension fund, further provides that the treasurer of any incorporated city, subject to the provisions of the act, shall retain from the monthly pay of each policeman a sum equal to 1½ per cent. of the monthly pay of such officer, and pay the same directly into the pension fund. The plain purpose of the act is to create a fund for the benefit of the policeman, into which he pays 1½ per cent. of his monthly salary as the consideration for participa-

tion in its benefits. It is in its essence municipal insurance, for which a consideration is paid. We can see no difference in principle between this and ordinary accident insurance, so far as the question here involved is concerned. The fact that a person, injured by another's negligence, having accident insurance, for which he has paid, is reimbursed by the insurance company for his loss of time and expenses caused by the injury cannot preclude him from maintaining an action for these same items against the person causing the injury. It would be contrary to public policy and shocking to the sense of justice to hold that the proceeds of insurance paid for by the injured person for his own benefit, or that of his widow and children, should inure to the benefit of and grant immunity to the person whose negligence, willful or otherwise, injured him or caused his death. 2 Shearman & Redfield on Negligence (5th Ed.) § 765; *Harding v. Town of Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Coulter v. Pine Township*, 164 Pa. 543, 30 Atl. 490; *Sherlock v. Alling, Adm'r*, 44 Ind. 184, 199; *Althorf, Adm'r, v. Wolfe*, 22 N. Y. 355. The same is true of a pension paid to the widow from a fund not contributed to by the person causing a wrongful death. *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472. The situation here presented is distinctly different from that found in *Nelson v. Western Steam Navigation Co.*, 52 Wash. 177, 100 Pac. 325. There the plaintiff, claiming to have been injured by the negligence of the steamship company, was held not entitled to recover for his hospital and physician's fees, which were paid from the seamen's fund. That fund is created under a federal law by payments made by the various steamship companies, and is not contributed to by the seamen. It should therefore inure to protect the steamship company from paying again items of expense which have already been paid from the fund, in which the steamship company has a direct and pecuniary interest. The difference is plain. The instruction requested was properly refused.

[8] Finally, it is contended that the verdict is excessive. The evidence shows that the respondent suffered a partial dislocation of the right shoulder, an injury to the right knee, and that his back was severely bruised. From the injury to the knee he has completely recovered. The chief remaining result of the injury is that caused by the dislocation of the shoulder. He was injured at 3:30 o'clock in the nighttime, and hung from the side of the elevated planked roadway at the place of the injury until between 4 and 5 o'clock in the morning in an unconscious condition. The injury was doubtless a most painful one, and entailed at the time most severe pain and suffering, and still entails considerable pain and inconvenience. The respondent has lost weight, but that was not attributed to the injury by any physi-

cian who testified, but rather to a subsequently developed bilious attack. While his shoulder was at the time of the trial still lame and painful when his arm was raised, and there was a marked limitation of the motion of the right arm, none of the three physicians, who had examined him and at one time or another treated him, testified that the injury would prove permanent. All of them either gave the opinion that it would not be permanent, or left that unmistakable inference. On the whole, we think that the recovery was excessive, and that it should be reduced to \$3,000.

The case is therefore remanded, with direction to vacate the judgment on return of the remittitur, and if respondent, within 20 days, in writing, remit from the verdict the sum of \$1,500, that the court enter judgment for \$3,000 against appellant, and also against the surety on the supersedeas bond; otherwise a new trial shall be granted.

The appellant may recover its costs.

MOUNT, MAIN, FULLERTON, and MORRIS, JJ., concur.

IN RE JEFFS' ESTATE.

(Supreme Court of Washington. April 28, 1913.)

WILLS (§ 166*)—PROBATE—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—EVIDENCE.

On an application to probate three alleged wills executed by testatrix, evidence held to sustain a finding that testatrix's mind was so weakened from either mental or physical infirmities that she did not at any time subsequent to the death of her husband, and after the execution of her first will, have sufficient intelligence to understand the nature and effect of such transactions, or else, understanding them, had lost the mental power to resist the importunities of those who sought to profit by her situation, and hence an order admitting the first will to probate and rejecting the others was proper.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Application to probate certain wills executed by Mary Jeffs. From a decree admitting the will which was first in point of time to probate, proponents of the other two wills appeal. Affirmed.

Kerr & McCord, Walter S. Fulton, Kenneth Mackintosh, all of Seattle, Bates, Peer & Peterson, of Tacoma, for appellant. Bogle, Graves, Merritt & Bogle, of Seattle, for respondent.

MORRIS, J. This is an appeal from a decree establishing and admitting to probate the last will of the deceased. Mary Jeffs died in November, 1911. Prior to her death she had executed four different wills, making different dispositions of her estate. Three of these wills were offered for probate, and upon a consolidated hearing the court ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mitted to probate the will which was first in time. Proponents of the other two wills have appealed.

In discussing these various wills, and in giving the reasons for the conclusion we have reached, we shall not attempt to refer to all the matters discussed by counsel for these various proponents. No open-minded man can read the record submitted on this appeal without reaching the same conclusion as the court below, that the only will speaking the free and uncontrolled mind of Mary Jeffs was the one admitted to probate. Without attempting to cover the matter in detail, it will be necessary to refer to the circumstances under which these four wills were made, and go somewhat into the history of the deceased. Richard Jeffs was a pioneer rancher in the White River valley. He was apparently a man of some force of character and business acumen, and at the time of his death in 1908 had accumulated a large property of the probable value of nearly \$300,000. In his youth and shortly after his advent into this new country he married an Indian woman, and, unlike some of the pioneers who did likewise, he did not put her aside with the coming of wealth and prosperity, but maintained his marital relation up to the time of his death. This Indian woman was Mary Jeffs, the deceased. Several children were born of this marriage, but all had died prior to July, 1907. So far as the record discloses, Richard Jeffs had no relatives, and after the death of his youngest son he sought to originate some plan whereby this large community estate should become a beneficial factor to future generations. In this wish it is evident he was joined by his wife, who, while not differing from the average woman of her race, leaned upon the strong character of her husband, and was upheld and encouraged by him, until the husband's wish became her own as to the beneficial use of their property. That this desire had obtained a strong hold on both Richard and Mary Jeffs, and was the result of much thought, is apparent from the fact that as early as 1893 they executed wills with provisions for an orphans' home contingent upon the prior death of the youngest son without issue. This son died in 1901, and, after his death, Richard Jeffs sought the advice of counsel as to the best way to accomplish the mutual desire of himself and wife as to the disposition of the property for the use and benefit of an orphanage. The matter was finally determined to their mutual satisfaction, and in July, 1907, two wills were drawn, each providing for the same orphanage, creating the same trust, nominating the same trustees, and providing for the joining of the two estates after the death of both husband and wife in one trust fund, the proceeds of which were to be used in the construction and maintenance of a home for orphan children resident in King county, "or in case King county is ever divided, then

resident in the county in which the city of Seattle is situated," to be forever known as "The Jeffs Orphans' Home." Mary Jeffs' chief interest seemed to be centered in the idea that this home would not only be a memorial to herself and husband, but would be a monument to the memory of her youngest son Alex. While these two wills were drawn at the same time they were executed on different days. Richard Jeffs executed his will on July 18, 1907. The will of Mary Jeffs was delivered to her on the same day, but the attorney who drew the wills insisted that before she execute it she should have a clear understanding of its provisions; for this reason it was left at the home on the day the husband executed his will, in order that he might convey to her an explicit and thorough understanding of its terms, and two days later the three persons who had witnessed the execution of the husband's will appeared at the home and witnessed the execution of the wife's will. That at the time of its execution Mary Jeffs had as clear and comprehensive an understanding of the provisions of this will as it was possible with her limited knowledge to convey to her cannot be doubted. Richard Jeffs died the following February, and from that time Mary Jeffs, who was then nearly 70 years of age, became as variable as a leaf in the wind. In the language of respondents' brief: "She was left derelict upon an uncharted sea, and drifted with every current and was blown about by every adverse wind which she encountered." She seemed in the death of her husband to have lost the prop of her declining years, and weakened materially in both mind and body. She became more or less addicted to the use of intoxicants, and rapidly descended from her former condition until she became a weak, vacillating, and decrepit old woman, giving heed to any plan as to the disposition of her property that might be suggested to her. With her mental powers so weakened as to furnish her no guide in the disposition of her affairs, she readily yielded herself to the wishes of those about her, one day adopting one suggestion as the result of a visit from one set of friends or relations, the next day agreeing with others upon a different disposition; again importuning old friends of her husband to aid her in extricating herself from her entanglements, and beseeching them to assist her in remaining steadfast to the original purpose of joining her estate with that of her husband in the erection and maintenance of the memorial orphanage.

On March 7, 1908, and within a month after the death of her husband, Henry Sicaide, who had married her daughter then deceased, obtained a will from her in which, save for a few small legacies aggregating \$3,000 to relatives, she left him her entire estate. This will was produced and is filed as an exhibit in this record, although no one seem-

ed willing to stand sponsor for it and ask for its probate. In this will she refers at length to the will of July 18, 1907, and repudiates it as having been made without a full comprehension and realization of its provisions. On May 12, 1909, she executed a deed to all her property to this same Henry Sicade, conveying property approximately of the value of \$150,000, without any apparent consideration. On September 17, 1910, she repudiated this will and deed in which Sicade had been the chief beneficiary, and employed James Hart and Jay C. Allen as attorneys to commence a suit to obtain a reconveyance of the lands embraced in the deed, reciting that the deed had been obtained by fraud and misrepresentation, agreeing to grant to Hart and Allen an undivided one-half of all the property reconveyed to her as compensation for their legal services. On September 22, 1910, she executes her third will, in which she bequeaths \$5,000 to the sister to whom she had bequeathed \$500 in the Sicade will, makes no mention of the nieces to whom she had bequeathed \$500 each in the Sicade will, and for the first time mentions a friend Greta Lund, who had been staying with her for some time prior, to whom she bequeathed \$5,000 and the entire residue of her estate. She devises to James Hart, Jay C. Allen, and R. V. Ankeny, in trust, the income of the trust estate, to be united with that arising from the estate of Richard Jeffs in the maintenance of the Jeffs Orphans' Home. On September 28, 1910, a few days subsequent to the making of the Hart and Allen will and the making of the contract to divide her estate with them in consideration of their services in obtaining a reconveyance of the property conveyed to Sicade, which conveyance she recites was through the fraud and misrepresentation of Sicade, she is visited by a number of old settlers to whom she recites her troubles, and, repudiating her action of the previous week, she affirms her intention of abandoning the Sicade suit, and on the same day enters into an agreement with Sicade in which she recites that there had been ample consideration for her deed to him, and that she in all things confirmed and ratified the same, and providing further that he should pay her the net proceeds of the property during her life, and at her death convey about 43 acres of the land to Ella Steve, a niece, now mentioned for the first time as the recipient of her bounty, and within two years after her death pay to her sister \$5,000 and \$500 to each of three nieces now mentioned for the first time. On October 31st following, Hart and Greta Lund again visit her, and she makes an affidavit entitled in the suit against Sicade to recover back her property, in which she recites the never-ending importunities of Sicade and his wife and how, yielding to these importunities, she had made the second will and agreement of Sep-

tember 28th, and again returns to her repudiation of Sicade. The next chapter in the history of this greatly perplexed old woman is written at Tacoma, where, after having been visited by attorneys representing friends and relatives who seek to save her from other designing friends and relatives, she on March 28, 1911, appears at the office of Bates, Peer & Peterson and executes a fourth will, in which she gives three-fourths of her estate to her sister Elizabeth Milroy, with remainder, if any, at the death of Elizabeth Milroy to a niece, Ella Steve. The remaining one-fourth is divided among four nieces, share and share alike. Pending the first visit of these attorneys to Mary Jeffs and the making of this fourth will, these attorneys filed a petition in the superior court of King county in which Elizabeth Milroy, as petitioner, prayed the court for the appointment of a guardian for the person and estate of Mary Jeffs, reciting in the petition that Mary Jeffs was "childish and in such a condition of health and mind that she is easily influenced and persuaded, and is by reason thereof unable and incompetent to manage her estate and business affairs." The hearing of this petition was set for March 30th, and on that day the superior court of King county entered its decree declaring Mary Jeffs mentally incompetent to care for and manage her affairs, and appointing James Bothwell and Jerry Meeker her guardians. It is significant that March 30th, was two days subsequent to the day on which Mary Jeffs appeared at Tacoma and executed her fourth will.

Reference might be made to the testimony of witnesses, some of whom Mary Jeffs sent for and besought their aid, as we have before referred to, and to whom, after all these various happenings, she reiterated that it was her wish, when freed from the importuning and beseeching of her friends, that her property should go as intended by her husband and herself at the time they executed the wills of July, 1907. But it does not seem necessary to recite other facts to justify the conclusion that either Mary Jeffs' mind was weakened below the point of testamentary capacity, or that she was for some mental or physical reason so susceptible to influence that her desire and wish was always the desire and wish of the last one to converse with her. It is too plain for argument that her mind was in such a weakened condition from either mental or physical infirmities that she did not have at any time subsequent to the death of her husband sufficient intelligence to understand fully the nature and effect of these various transactions, or else, understanding them, had lost the mental power to resist the importunities of those who sought to profit from her situation. Either conclusion is sufficient to justify the judgment of the lower court that the only will that could be held to have been

the free and voluntary act of Mary Jeffs was the one of July 18, 1907. *Hattie v. Potter*, 54 Wash. 170, 102 Pac. 1023.

The judgment is sustained.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

ATWOOD et al. v. SICADE et al.
(Supreme Court of Washington. April 28, 1913.)

ATTORNEY AND CLIENT (§ 140*)—COMPENSATION FOR SERVICES.

Where attorneys rendered valuable services under an invalid contract of employment to obtain a rescission of a deed given by their client, and obtained a settlement on the basis of a conveyance by the grantee of three-fourths of the property to trustees, who agreed to pay the attorneys such sum as should be allowed in a proceeding to determine the allowance, the attorneys are entitled to a reasonable compensation from the trustees.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 336-349; Dec. Dig. § 140.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by John C. Atwood and others, as executors of Mary Jeffs, deceased, against Henry C. Sicade and others, in which James Hart and another file a cross-complaint. From a judgment denying relief on the cross-complaint, the cross-complainants and Henry Steve and Ella Steve appeal. Affirmed.

Kerr & McCord and Arthur E. Griffin, all of Seattle, for appellants. Bogle, Graves, Merritt & Bogle, of Seattle, for respondents.

MORRIS, J. This appeal was presented at the same time as the appeal in the probate proceeding involving the several purported wills of Mary Jeffs, deceased, just decided. In re Estate of Mary Jeffs, Deceased, 131 Pac. 847.

The two matters involved in this appeal are the enforcement of the contract with Hart and Allen for one-half the value of the property conveyed by Mary Jeffs to Henry C. Sicade as compensation for their legal services in obtaining a rescission of that deed upon the ground of fraud, and the agreement entered into on September 28, 1910, between Mary Jeffs and Henry Sicade, whereby provision was made that as a part of that settlement Sicade should convey the 43-acre piece to Ella Steve. In our discussion of this appeal we refer to the facts set out in the former opinion. They may, in so far as material, be accepted as the facts in this case. After obtaining their contract, Hart and Allen commenced the action against Sicade. This case passed through the usual preliminaries, and was set for trial on February 15, 1911. On February 14th Mary Jeffs, Henry Sicade, and others met at the office of W. H. Bogle, one of the trustees un-

der the will of Richard Jeffs, and a settlement of their differences was sought. Mr. Allen was called in after the negotiations had proceeded somewhat, and shown the proposed contract of settlement under which it was proposed the Sicades should convey one-half of the property to the trustees of the Jeffs Orphans' Home and retain the remainder. To this Mr. Allen objected, and the negotiations were renewed, resulting in a settlement upon the basis of Sicade conveying three-fourths of the property to the trustees and retaining the balance. It was further provided that the Sicade suit should be dismissed, and that whatever attorney's fees should be allowed or established in favor of Hart and Allen should be paid by the trustees. One phase of this agreement has already been dealt with by this court in *State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905, in which, referring to this agreement as to the payment of these attorney's fees, it is said: "The language does not mean that the attorney's fees are to be established in the Jeffs suit. Clearly, however, it does mean that the trustees will pay the attorney's fees allowed them for their services to their client Mary Jeffs in her suit against the Sicades, when determined in an action brought for that purpose." Hart and Allen then filed a cross-complaint in this action, in which they sought to recover attorney's fees based upon the value of the property, conveyed by Sicade and amounting to \$43,125. Upon the trial they insisted upon the fee being awarded upon the basis of their contract, and refused to permit the court to award such a fee as it might regard reasonable. The court, being of the opinion that the contract could not be upheld, refused to recognize its validity, and Hart and Allen have appealed.

We have already said all we care to say about this contract in the previous case; we do not regard it as the contract of one competent to contract. These attorneys did, however, perform valuable services in the commencement of the action against Sicade and in preparing it for trial. It does not seem to us problematical what the outcome of that suit would have been had it proceeded to trial. No court under the circumstances would have sustained the Sicade deed. The services of Mr. Allen were also valuable in obtaining the settlement from Sicade upon the basis of a reconveyance of three-fourths of the property, instead of one-half as first proposed. That settlement is not before us for review as to the amount of property obtained from Sicade, and hence it is not proper for us to here speak our mind concerning it. The trustees, however, there obligated themselves to pay these attorneys such a sum as should be allowed them in some proceedings brought to determine that allowance and this obligation must be kept.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

That sum should be a reasonable sum, and fully commensurate with the value of the services performed. What that sum shall be is not for us in the first instance to determine. We do not, however, believe it is the sum of \$43,125 as here demanded.

As to the appeal of Ella Steve, reference has already been made in the other opinion to the contract with Sicade under which the deed to this 43 acres is claimed. We there said enough to indicate our opinion that it cannot be sustained. Certainly both of these contracts cannot be sustained, for they are as opposed to each other as two contracts can be. In the contract with Hart and Allen on September 22d Mary Jeffs repudiates the Sicade deed as obtained by fraud and misrepresentation. On September 28th, six days later, she repudiates the Hart and Allen contract, affirms the Sicade deed, and abandons the suit against him. On October 31st she again attacks the validity of the Sicade deed, disaffirms the contract of September 28th, and returns to the Hart and Allen contract. Which contract shall we enforce, and which shall be said to be the act of one wholly competent to contract? If this question were to be decided by the parties to this appeal, doubtless they would answer as best serves their interests. But our answer is neither.

The judgment of the lower court is affirmed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

MCCONAUGHY v. JUVENAL et al.

(Supreme Court of Washington. April 28, 1913.)

1. INSURANCE (§ 60*)—GUARANTY—ESTOPPEL.

Where a mutual fire insurance company wrote a large amount of insurance on the faith of a guaranty contract, the subscribers to such guaranty were estopped to deny their liability thereunder, on the ground that it was invalid, for fire losses falling within its terms.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 78-83; Dec. Dig. § 60.*]

2. BILLS AND NOTES (§ 92*)—CONSIDERATION—VALIDITY.

Where certain officers and persons interested in an insolvent fire insurance company, pursuant to a demand of the state insurance commissioner that the company reorganize or reinsure in some other company and give security that one of these things would be done as a condition to the continuance of the company's license, gave their personal notes for a certain sum, and where no insurance was subsequently written on the faith of these notes, the notes were without valid consideration and did not become assets of the company; the state insurance commissioner having no authority to permit a continuance of the business on such security.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. § 92.*]

3. INSURANCE (§ 60*)—GUARANTY OBLIGATION.—RELEASE OF GUARANTOR.

An insurance company was without power to release a subscriber to a guaranty contract created for the payment of fire losses, where there was a large amount of outstanding insurance written upon the faith of such guaranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 78-83; Dec. Dig. § 60.*]

Department 2. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by Frank. McConaughy, receiver of the Inland Fire Insurance Company, against E. T. Juvenal and others. From judgment for plaintiff, defendants appeal. Affirmed.

Wm. E. Richardson, of Spokane, for appellants. Rader & Barker, of Walla Walla, for respondent.

ELLIS, J. The receiver of the Inland Fire Insurance Company brought this action against the defendants upon a written instrument, designated as a guaranty fund contract. That instrument is as follows: "This agreement made this 25 day of April, 1907, between the Inland Fire Insurance Company, party of the first part, and the subscribers hereto, as parties of the second part, witnesseth: That whereas the party of the first part is a mutual fire insurance company organized under the laws of the state of Washington and the parties of the second part are members thereof and interested in its future success and stability as a fire insurance company. Now therefore it is agreed by and between the parties hereto. (1) That each of the second parties bind himself, his heirs, administrators, successors and assigns to contribute and pay to the first party the sum of money hereto subscribed whenever by reason of extraordinary losses or for any other reason the said sum of money shall be required for the use of said first party, and the said second parties each agree to pay his pro rata share of any amount that shall be required of the whole amount that shall be subscribed hereto whenever for the reasons aforesaid it shall be necessary to pay the same for the use of the said first party. (2) It is further agreed that each of the subscribers hereto is severally liable only for the amount subscribed hereto and shall in no event be liable for any other amount than the amount subscribed or for the pro rata share thereof that may be required and called for by the said first party. (3) The said first party further agrees that no demand shall be made upon any of the parties of the second part for the sums subscribed by them or any part thereof except in the event that the said sum demanded is necessary to pay losses and the said company has no other available means of raising the funds necessary to pay losses and necessary expenditures. (4) It is further

agreed that in case any of the second parties hereto shall fail, neglect or refuse to contribute his pro rata share of any call or assessment made upon him in accordance with the terms of this agreement after sixty (60) days written notice thereof signed by the secretary of the first party then and in that event all the rights and privileges of the said second party in and to the guarantee fund certificate hereto provided shall cease and determine and said guarantee fund certificate shall without further notice to said certificate holder be canceled and a new certificate may thereupon be issued to any person selected by the board of trustees who shall agree to the terms and sign this agreement as one of the second parties hereto. (5) The said first party further agrees that it will set apart for the use of the subscribers hereto an amount equal to 50 per cent. of the net profits of the said first party's business to indemnify and pay said subscribers for the risk hereby assumed. Such estimate and payment to be made on or before the first day of January in each year. (6) It is further agreed that a part of the consideration for this agreement is the personal honesty and responsibility of each of the second parties hereto and the said first party will not recognize any transfer of the guarantee fund certificates herein provided for except by the consent of its board of trustees regularly entered upon its minutes. (7) The parties of the second part upon signing this agreement shall each receive a certificate setting forth the amount subscribed by him and referring to this agreement and the by-laws of the first party which certificate shall be signed by the president and attested by the secretary and shall have affixed thereto the corporate seal of the first party."

The defendants, excepting George D. Needy, admitted the execution of this contract, but denied liability upon it. The defendant Needy also denied liability, and in addition thereto pleaded a release for a valuable consideration from any liability under the agreement, and set up a counterclaim against the insurance company founded upon certain promissory notes and an open account. The cause was tried to the court without a jury. The court's findings, so far as we deem material, were in substance as follows: That the Inland Fire Insurance Company had been organized as a mutual fire insurance company under the laws of the state of Washington prior to April 25, 1907, and at the time when it passed into the hands of a receiver was doing a general fire insurance business in this and other states; that on the 7th day of May, 1908, it was adjudged insolvent by the superior court of Walla Walla county, and the plaintiff was appointed and qualified as its receiver, and thereafter secured authority from the court to bring this action; that on the 25th day of April, 1907, the defendants and others executed

and delivered to the insurance company the guaranty fund contract, each signing for the sum of \$5,000; that when that instrument was executed it was understood by the defendants that it was to be held out and used by the insurance company as an inducement to the public to take insurance in the company; that it was so advertised by the company through its officers, agents, and other persons interested therein, which fact was known to the defendants; that the defendants at the time of signing the contract intended thereby to become, and to have it understood by all persons who might thereafter insure in the company and become, policy holders therein, that the defendants had thereby become sureties of the company severally for the payment of fire losses of such policy holders not exceeding the amounts by the defendants severally subscribed, and in proportion that the sum subscribed bore to the aggregate sum of \$100,000, and intended, by the advertisement of the fact that such guaranty had been created and provided, to induce policy holders to insure their properties in the company; that such insurance was effected by the policy holders in reliance upon the guaranty fund agreement; that policy holders have sustained losses in the aggregate sum of \$7,930.44; that their claims therefor have been adjusted, approved, and allowed by the company and its receiver, and are valid subsisting claims against the company in the hands of its receiver, and are wholly unpaid; that the plaintiff as receiver has no available funds with which to pay these fire losses and no available means of raising such funds, other than the guaranty fund agreement. The court also found that the agreement was accepted and acted upon by the company, and that practically all of the insurance on the books of the company when it ceased business had been written after the execution of that instrument. Judgment was rendered against each defendant, respectively, in the sum of \$396.50, for the use and benefit, pro rata, of the policy holders whose claims for fire losses had been adjusted and allowed. We have examined the record with much care, and cannot say that these findings are not sustained by a fair preponderance of the evidence. If therefore these findings are sufficient to sustain the judgment, it must be affirmed.

[1] The appellants earnestly insist that no cause of action was either pleaded or proved because the guaranty fund agreement was without legal consideration and void. It is argued that the company, being a mutual fire insurance company, could make no corporate profits and the agreement to set apart 50 per cent. of the net profits to indemnify the subscribers to the guaranty fund, for the risk assumed, was therefore impossible of performance. We find it unnecessary to decide whether this position is sound or other-

wise, since the court found, upon what we conceive to be ample evidence, facts which in equity should estop the appellants from questioning the validity of the agreement. The agreement was made for the purpose of giving to the company an appearance of financial backing and stability which it otherwise would not have had. That it was so used by the officers and agents of the company throughout practically all of the solvent existence of the corporation is established by evidence so convincing as to leave little room for doubt. It is fairly apparent from the evidence that the various agents of the company were instructed to and did exploit this guaranty fund as an aid in writing insurance. That it was featured on the stationery of the company, and that the words "\$100,000 Guaranty Fund" appeared in conspicuous red letters on the back of its policies, was uncontradicted. That the subscribers to the agreement did not know and acquiesce in this purpose and these uses of it surpasses belief. Its purpose was apparent upon its face, and it can hardly be conceived that business men who would subscribe such an instrument would not retain sufficient interest in its fate to learn that it was extensively advertised as an inducement for business. Its success as a business getter was demonstrated by the fact that between April 25, 1907, the date of its execution, and October 11, 1907, about \$2,500,000 of insurance, being practically all of the business ever done by the company, was written. On plainest principles of equity these men should now be estopped to deny their liability for fire losses falling within the terms of their undertaking.

[2] It is also contended that there were certain notes belonging to the company which the receiver had made no effort to collect, and that since by the terms of the contract the available assets of the company must be first resorted to, there could be no liability upon the contract until these notes were collected and the proceeds exhausted. The history of these notes makes it evident that they were without consideration, were never assets of the company, and should have been returned to their makers. A few days before the company was declared insolvent, and long after it was in fact so, the state insurance commissioner notified the officers of the company that it would have to cease writing insurance unless it reorganized upon a stock basis or reinsured in some other company, and demanded security that one of these things would be done as a condition to a continuance of the company's license. Thereupon, certain officers of the company and persons interested therein deposited with the insurance commissioner their personal notes aggregating the sum of \$15,000. It is obvious that the insurance commissioner had no authority to permit a continuance

of business on the security of these notes, and that they never in fact had that effect or resulted in any benefit to the company. No insurance was ever written because of or on the faith of these notes, and in fact within a day or two after they were executed and deposited the company was declared insolvent and the receiver appointed. They were without valid consideration and were never intended as nor became assets of the company.

[3] The contention of the appellant Needy that he was released from the guaranty agreement by the company cannot be sustained. It is true that the board by resolution sought to release him on October 11, 1907, but that was after practically all of the policies ever written by the company had been taken out. The guaranty fund contract having been represented as behind these policies, the company had no power to release any of the signers of the contract or to otherwise impair the fund as against losses covered by these policies, which had or might thereafter accrue. For the same reason his alleged counterclaim, however good it might have been as against general creditors of the company, could not be asserted as against the beneficiaries of this guaranty fund contract. The same estoppel which prevents him from denying the validity of the contract also prevents him from asserting the release or counterclaim. The guaranty fund was not created as a security for general liabilities of the company, but for the payment of fire losses.

It is suggested that the appellant Kirk was, after trial and before the entry of the judgment in this action, discharged as a bankrupt, and that the judgment against him is therefore illegal. There is nothing in the record before us to indicate such a discharge, nor anything showing that such a discharge was ever called to the attention of the trial court.

The judgment is affirmed.

MOUNT, FULLERTON, MAIN, and MORRIS, JJ., concur.

CITY OF SPOKANE v. LEMON.

(Supreme Court of Washington. April 28, 1913.)

1. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—VALIDITY—TITLES.

An ordinance making it a misdemeanor to keep more than a certain number of horses in a barn without a license, entitled "An ordinance regulating the construction, * * * maintenance, use, * * * and equipment of buildings," is not invalid under Spokane Charter, art. 3, § 13, requiring the subject of every ordinance to be set out clearly in the title, since the title of the act is sufficient to include the provision mentioned; it being unnecessary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the title to be an index to the contents of the act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.*]

2. MUNICIPAL CORPORATIONS (§ 48*)—ORDINANCES—REPEAL BY CHARTER.

Spokane Ordinance No. A-4658, regulating the construction and use of buildings, and providing that no permits for the erection of stables of a certain size shall be issued, unless authorized by the board of public works after a hearing, was not repealed by the adoption of a new city charter which changed the form of city government from a mayor and council to a commission form of government consisting of five commissioners, for sections 22 and 23 of the charter provided that the powers not otherwise provided for should be distributed among five departments, one of which was the department of public works, and that the commissioner in charge of each department should have control of all the affairs and property which belonged to his department, while sections 119 and 120 declared that every ordinance in force at the time of the adoption of the charter should continue until amended or repealed, and that the government and offices existing prior to the adoption of the charter should continue until the election and qualification of officers first elected; it thus appearing that the commissioner of public works was substituted for the old board of public works, which was abolished.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

3. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—PROSECUTIONS—DEFENSES.

In a prosecution for violating a municipal ordinance regulating the use of stables, it is no defense that the stable was not in violation of law before the adoption of the ordinance; it appearing that it had been maintained in violation of such law thereafter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

Department 1. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

Charles Lemon was convicted in the municipal court of violating an ordinance of the city of Spokane, and being again convicted in the superior court, to which he appealed, he again appeals. Affirmed.

John M. Gleeson and B. M. Branford, both of Spokane, for appellant. H. M. Stephens, Wm. E. Richardson, and Arthur L. Hooper, all of Spokane, for respondent.

MOUNT, J. The defendant was convicted in the municipal court of the city of Spokane under a complaint charging him with a misdemeanor committed by using a building as a stable for more than four animals within the city without a permit therefor. He appealed from the municipal court to the superior court of Spokane county, where upon a trial before a jury he was again convicted. The superior court sentenced him to pay a fine of \$10 and costs. He appeals from that judgment.

The appellant alleges here that the court erred in overruling his objection to any evi-

dence being heard; in denying his motion for an instructed verdict and a motion for judgment non obstante veredicto; and in refusing to give certain instructions. The basis for the objection to the testimony and the motion for an instructed verdict and for judgment non obstante is the contention that the ordinance under which the defendant was prosecuted is void.

It appears that in the year 1909, the city of Spokane enacted an ordinance (No. A-4658) entitled, "An ordinance regulating the construction, enlargement, raising, alteration, repair, removal, maintenance, use, area, height, and equipment of buildings; regulating the character and use of materials in and for buildings; providing for the issuance of permits therefor, and for the condemnation of buildings dangerous to property or persons, within the limits of the city of Spokane; providing a penalty for violation thereof; and repealing all ordinances and parts of ordinances in conflict herewith." This ordinance contains 367 sections. Section 364, subd. 1, of this ordinance, provided: "That no permit for the erection or alteration of a building to be used as a stable for more than five head of stock shall be issued unless the same be authorized by the board of public works after a hearing as hereinafter provided." The section then provided for a written application to be filed with the building inspector, a notice to and report of the health officer and chief of the fire department, and notice of hearing of objections before the board of public works, and upon such hearing, if it appear that the use of such building will not be injurious or dangerous or a public nuisance, the board of public works is authorized to issue a permit for the use of such building as a stable for more than five head of stock. Thereafter, in January, 1911, the city council of the city of Spokane passed Ordinance No. A-5855, the title of which was as follows: "An ordinance amending section 364 of Ordinance No. A-4658 entitled, 'An ordinance regulating the construction, enlargement, raising, alteration, repair, removal, maintenance, use, area, height, and equipment of buildings; regulating the character and use of materials in and for buildings; providing for the issuance of permits therefor, and for the condemnation of buildings dangerous to property or persons, within the limits of the city of Spokane; providing a penalty for the violation thereof, and repealing all ordinances and parts of ordinances in conflict herewith,' passed the city council October 13th, 1909." This amendment was substantially the same as section 364 of the original ordinance, except as to the number of horses and except as to details in giving notice and hearing. Thereafter, in March, 1911, the city of Spokane adopted a freeholder's charter, which changed the form of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the city government from a mayor and council to a commission form of government consisting of five commissioners. Section 22 of the city charter provides that "the executive and administrative powers, authority and duties not otherwise provided for herein, shall be distributed among five departments as follows: (a) Department of public affairs. (b) Department of finance. (c) Department of public safety. (d) Department of public works. (e) Department of public utilities." The charter also provides that the council shall designate one member to be commissioner in charge of each department. That the commissioner in charge of each department shall have the control of all the affairs and property which belong to his department. Section 23, City Charter. The charter also provides that "every ordinance and resolution in force at the time of the adoption of this charter, except in so far as it is inconsistent with this charter, shall continue in force until amended or repealed" (section 119, City Charter), and that "the government and offices existing prior to the adoption of this charter, shall continue until the election and qualification of officers first elected under this charter at the general election in March, 1911" (section 120, City Charter). No provision, except as above stated, was made for the continuance of the officers theretofore known as the board of public works.

The defendant constructed a barn and used the same for a stable for more than four horses without applying for or receiving a permit. In November, 1911, while the defendant was so using his barn, the city commissioners of Spokane passed Ordinance No. C-494, the title of which is as follows: "An ordinance amending section 1 of ordinance No. A-5855 entitled, 'An ordinance amending section 364 of Ordinance No. A-4658, entitled, An ordinance regulating the construction, enlargement, raising, alteration, repair, removal, maintenance, use, area, height and equipment of buildings; regulating the character and use of materials in and for buildings; providing for the issuance of permits therefor, and for the condemnation of buildings, dangerous to property or persons, within the limits of the city of Spokane; providing a penalty for the violation thereof, and repealing all ordinances and parts of ordinances in conflict herewith, passed the city council October 13th, 1909,' passed by the city council January 3rd, 1911, and declaring an emergency." This amendment is substantially the same as Amendment No. A-5855 above referred to, except that it provides for a hearing before the commissioners sitting as a council instead of a hearing before the board of public works, as hereinbefore stated.

The appellant insists, first, that this last ordinance is void because it amends the previous ordinance by reference to title

merely; and, second, that the title itself is not sufficient to suggest the subject legislated upon. The section as amended was set out in full. It was not therefore an amendment by reference to the title merely.

[1] The new city charter in force at the time provides: "The subject of every ordinance shall be set out clearly in the title thereof." Section 13, art. 3, City Charter of Spokane. The subject of the ordinance appears to be set out clearly in the title. It states in both the amending titles and in the original title that it is an ordinance regulating the use of buildings within the city limits of the city of Spokane. And that is, in fact, the subject which was legislated upon in the original ordinance, in the first amendment, and in the second amendment by the city commissioners sitting as a council. We have many times held under our constitutional provision that the title of a legislative act is sufficient if it contains well-chosen words suggestive of the subject treated, that it need not be an index to the contents of the act, and is not required to go into details. *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728, and cases there cited.

[2] The appellant next contends that the ordinance as amended by Ordinance No. A-5855 was repealed by the charter, and therefore became inoperative, and not subject to amendment. As we have seen above, the charter adopted after the first amendment of the ordinance expressly saved ordinances which were in force at the time of its adoption, except in so far as inconsistent with the charter. Section 119, City Charter. It is claimed, however, that the board of public works ceased upon the election of officers under the new charter. It is true that officers of the board ceased at that time; but the law was in effect as it had been previously, and a new officer, viz., the commissioner of public works, was by the terms of the new charter substituted and placed in charge of all the affairs of that department. The amendment which was passed after the new charter became effective had the effect of substituting the council instead of the commissioner of public works for hearings upon questions affecting the use of buildings.

Appellant argues that the case of *State ex rel. Rose v. Hindley*, 67 Wash. 240, 121 Pac. 447, is authority for his position that the board of public works and building inspector were abolished by the new charter. In that case we held that, the new charter having made no provisions for certain employes, such officers were dispensed with. But in this case, as we have seen, the board of public works was superseded by an officer expressly provided for in the charter; and that case, therefore, has no bearing upon this. The ordinance is clearly valid.

[3] It is next argued by the appellant that the court erred in refusing to instruct the jury as follows: " * * * That if they be-

lieve from the evidence in this case that J. W. Wilson and Charles Lemon were running and operating a livery or a sale stable where more than four head of horses were kept previous to the hour of 2 o'clock p. m. on the 28th day of November, 1911, that you should find said defendants and each of them not guilty of the misdemeanor charged in this case"—upon the ground that, if the appellant was using the building for a stable for more than four head of horses at the time the amended ordinance was passed, he might continue to so use it, for the reason that the ordinance was not retroactive. In the first place, we understand from the record and the briefs that the appellant was using the premises as a stable in violation of the ordinance which was in force at the time he began to use it as a stable for more than four head of horses, and, secondly, he continued to use it as such unlawfully after the amended ordinance was passed. Complaint was made on December 27, 1911, charging that the defendant violated the ordinance on the 13th day of December, 1911, which was one month after the passage of the last ordinance. There is therefore no merit in the contention that the ordinance was being enforced retroactively, or that the appellant was lawfully using the building at the time he was arrested.

We find no error in the record; the judgment is affirmed.

CROW, C. J., and GOSE and PARKER, JJ., concur.

CITY OF SPOKANE v. WILSON.

(Supreme Court of Washington. April 28, 1913.)

Department 1. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

J. W. Wilson was convicted in the municipal court of violating an ordinance of the city of Spokane, and from a judgment of conviction in the district court whence he appealed he again appeals. Affirmed.

John M. Gleeson and B. M. Branford, both of Spokane, for appellant. H. M. Stephens, Wm. E. Richardson, and Arthur L. Hooper, all of Spokane, for respondent.

PER CURIAM. The facts in this case are identical with the facts in *City of Spokane v. Charles Lemon* (No. 10,745) 181 Pac. 853, and for the reasons there stated the judgment is affirmed.

NORTH COAST R. CO. v. GENTRY et ux. (Supreme Court of Washington. April 28, 1913.)

1. EMINENT DOMAIN (§ 244*) — CONDEMNATION—TIME TITLE PASSES.

Rem. & Bal. Code, § 927, provides that "at the time of rendering judgment for damages, * * * if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court * * * shall also enter a judgment * * *

of appropriation of the land" condemned, "thereby vesting the legal title to the same in the corporation seeking to appropriate such land." Section 929 provides that, upon the entry of judgment, the condemnor may pay the damages assessed and costs by depositing the same with the clerk of the superior court, and that, upon such payment into court, the condemnor shall be discharged from liability for the land, unless upon appeal a larger amount of damages be recovered, provided that, in case of appeal to the Supreme Court, the money paid into the superior court shall remain in its custody until final determination in the Supreme Court. Section 931 provides that the appeal shall bring before the Supreme Court the propriety and justice of the amount of the damages, and section 932 provides that the construction of any railway, surface tramway, etc., shall not be delayed by the prosecution of the appeal of any party to condemnation proceedings, provided that the corporation execute a bond conditioned that the persons executing the same shall pay whatever amount may be required by the judgment. *Held*, that the title which vested in the condemnor upon payment of the money into court and the procuring of a decree of appropriation was not divested by an appeal from the award to the Supreme Court.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 630-636; Dec. Dig. § 244.*]

2. EMINENT DOMAIN (§ 246*)—ABANDONMENT OF PROCEEDINGS.

In the absence of statute, the effect of condemnation proceedings is simply to fix the price for which the condemnor can have the property, and the proceedings may be abandoned, even after judgment of appropriation, without incurring any liability to pay the damages awarded.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 647-657; Dec. Dig. § 246.*]

3. EMINENT DOMAIN (§ 246*)—ABANDONMENT OF PROCEEDINGS.

In view of Rem. & Bal. Code, § 929, providing that, in cases of appeal in condemnation proceedings, the amount paid into the superior court shall remain in that court until final determination of the appeal, the payment of money into court suspends the right to abandon the proceedings pending appeal, so that an attempted withdrawal of the money in violation of the statute could not operate as an abandonment.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 647-657; Dec. Dig. § 246.*]

4. EMINENT DOMAIN (§ 263*)—APPEAL—REVERSAL—PROCEEDINGS ON RETRIAL.

The retrial of a case in condemnation proceedings, upon remand after reversal on an appeal involving the propriety and justice of the amount of damages, is confined to that same issue, though the retrial is de novo.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 687; Dec. Dig. § 263.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the North Coast Railroad Company against Jesse Gentry and wife. On plaintiff's motion an order was entered requiring defendants to pay into court a sum sufficient to liquidate taxes upon property condemned by plaintiff. From this order defendants appeal. Order reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Merritt, Oswald & Merritt, of Spokane, for appellants. W. W. Cotton, of Portland, Or., and Hamblen & Gilbert, of Spokane, for respondent.

ELLIS, J. The respondent commenced this action on December 23, 1908, to condemn certain real estate situated in the city of Spokane, the legal title to which was at that time in the Northwestern & Pacific Hypotheek Bank. The appellants held a contract to purchase the property, upon which there was a balance owing to the bank. The order of public use and necessity was regularly entered, and in March, 1909, the cause was tried to a jury, which returned a verdict assessing the damages at \$85,000. Thereupon the respondent paid to the clerk of the court the sum of \$85,111.05, covering the award and costs, and procured the entry of a decree and judgment for the amount of the verdict and \$111.05 costs, and decreeing that the land described "be, and the same is hereby, appropriated to the use of the petitioner, the North Coast Railroad Company, a corporation, and the legal title is hereby vested in said corporation." The appellants here, as defendants in the original action, appealed from the award made in the original decree. This court reversed that judgment and remanded the cause for a new trial upon the issue of damages. *North Coast Railroad Company v. Gentry*, 58 Wash. 82, 107 Pac. 1060. After the appellants had given notice of that appeal, the respondent withdrew the amount so deposited, less the costs. There is nothing in the record to indicate that the appellants had notice of, knew of, or in any manner acquiesced in the withdrawal of this money from the registry of the court. Pending that appeal, the appellants completed payment for the land and received a deed from the bank, so that the appellants alone are now interested. Pending that appeal, the respondent did not enter into any bond to obtain possession of the property as provided by Rem. & Bal. Code, § 932, and during that appeal, and until the entering of a second judgment, the appellants, so far as the record shows, remained in possession of the property. In October, 1910, a second trial was had on the issue of damages, in which the jury assessed the damages at \$96,868.75. A judgment and final decree of condemnation was entered on November 18, 1910, and on the same day the full amount of that judgment and costs, amounting to \$97,192.25, was paid into court by the respondent, and was by the clerk of court paid over to the appellants' attorneys, and the second judgment was satisfied of record. Between the first and second trials general taxes for the year 1909 accrued and became a lien against the property in the sum of \$597.72, with interest thereon at the rate of 15 per cent. per annum from June 1, 1910. On May 26, 1911, respondent filed a petition setting up the foregoing facts, ex-

cept that it made no reference to the first trial or the payment of the amount of the judgment therein to the clerk, nor its withdrawal by the respondent. The petition prayed for an order requiring the appellants to answer and show cause why they should not be required to pay into the registry of the court a sum sufficient to liquidate these taxes, and that upon final hearing an order be made to that effect, and for general relief. The appellants appeared and filed an affidavit setting forth the facts substantially as above stated, which affidavit was not controverted by the respondent. A hearing was had upon the petition and affidavit, and the court on December 7, 1911, entered an order requiring the appellants to pay the clerk the sum of \$597.72, with interest from June 1, 1910, at the rate of 15 per cent. This appeal is from that order.

Both parties concede that the taxes must be paid by the party in whom the title was when the lien of the taxes attached. The appellants contend that the first decree of appropriation vested the legal title of the real estate in the respondent for corporate purposes; that by the appeal the propriety and justness of the amount of damages was the sole question in issue; that respondent had no right to withdraw the money paid to the clerk; and that its withdrawal in no manner divested the title acquired by the first decree. The respondent makes the counter contention that the condemnation could have been abandoned at any time prior to the entry of the last judgment and payment of damages thereby awarded to the parties entitled thereto, and that therefore no title passed by the first decree of appropriation.

[1] The exact question here presented has never been determined by this court. It must be solved by reference to the statute governing the exercise of the right of eminent domain. That statute (we cite Rem. & Bal. Code by section number), so far as here material, is as follows:

"Sec. 927. At the time of rendering judgment for damages, whether upon default or trial, if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes."

Section 929, after providing upon the entry of the judgment the condemnor may pay the damages assessed and costs by depositing the same with the clerk of the superior court, to be paid out under the direction of the court or judge thereof, and declaring that, upon such payment into court, the condemnor shall be relieved and discharged from all liability for the land or property taken, un-

less upon appeal a larger amount of damages be recovered, continues: "And in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal: Provided, that in case of an appeal to the Supreme Court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of such court until the final determination of the proceedings by the said Supreme Court."

Section 931 gives a right of appeal from the judgment for damages, declares that "such appeal shall bring before the Supreme Court the propriety and justness of the amount of damages," and provides that no bond shall be required of the person interested in the property sought to be appropriated, but that, if the condemnor is appellant, it shall give a bond like that prescribed in the following section.

The next section is as follows: "Sec. 932. The construction of any railway surface tramway, elevated cable tramway, or canal, or the prosecution of any works or improvements by any corporation as aforesaid shall not be hindered, delayed or prevented by the prosecution of the appeal of any party to the proceedings: Provided, the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy."

The respondent paid into court the amount of the original judgment and costs and procured a decree of appropriation. Under the positive terms of the statute (section 927), it thereby became vested with the legal title for its corporate purposes. The language can mean nothing else. It is too plain for construction. The appeal from the award did not ipso facto divest that title, since under section 929 the money paid into court could not be withdrawn pending the appeal, and under section 931 the only thing reviewable upon the appeal was the propriety and justness of the amount of damages. Neither of these sections implies a divesting of the title, but rather the converse, since by the first the money paid is retained for distribution, and by the second the condemnor is relieved from further liability to the condemnee on account of the property, except for any increase of damages recovered by reason of the appeal and the costs. That the title is not divested by the appeal is made plain by the next section which we have quoted in full. Section 932. By giving the bond therein required conditioned for the payment of any judgment rendered in the appellate court, or any order of that court in relation to the matter in controversy, the condemnor may take possession of the property

and use it for corporate purposes pending the appeal. There is no intimation that this bond vests the title. It merely makes the title, already vested by the decree of appropriation and payment in compliance with section 927, available in possession. Where the appeal is by the condemnee and possession is not taken by the condemnor under its title, the possession by the condemnee, so long as the money paid remains in court, is sufficient security for the payment of any added recovery or the performance of any order in his favor resulting from the appeal. It is plain, therefore, that the title which vested in the respondent by the original decree of appropriation and payment of the original award could be divested, if at all, in the absence of a reconveyance, only by an abandonment of the condemnation.

[2] The general rule as to the right of abandonment, in the absence of statutory obstacles, is unquestionably that stated in *Lewis on Eminent Domain* (3d Ed.) § 955, as follows: "The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded." Our statute does not in express terms define or fix the limits of the right of abandonment, but in the main leaves the question open to be decided upon general principles. There is, however, one provision of the statute which by necessary implication limits the right of abandonment.

[3] Section 929 provides that in case of appeal the money which has been paid into the superior court shall remain in court until final determination of the appeal. The plain inference is that the payment of the money suspends the right of abandonment pending the appeal. The respondent's withdrawal of the money was in direct violation of the terms of this section. It did not and could not operate as an abandonment. The money remains in court as earnest that the condemnation will not be abandoned pending the appeal. By its deposit there was an election to take and retain, pending the appeal, the title vested by the terms of section 927. Under a similar provision in a statute of Nebraska, which did not undertake to declare when rights should become vested, as ours does, the Supreme Court of that state held that a condemning railroad company could not, after an appeal to the district court and judgment upon an award of the commissioner appointed to assess the damages, abandon the location and avoid payment. *Drath v. Burlington, etc., R. R. Co.*, 15 Neb. 387, 18 N. W. 717. If in the case before us on the original appeal there had been an affirmation of the original judgment for damag-

es, the right of abandonment so suspended by payment of the award into court would have been forever lost and the respondent's title would have related to the date of the original judgment and decree of appropriation, not to the date of affirmance. Without doubt the respondent would have then taken the land subject to the taxes which accrued pending the appeal. In such a case it would be absurd to say that it could charge these taxes against the appellants, or against the fund in court representing the value of the land, merely because it did not see fit to take possession and give the statutory bond to pay any additional damages that might have been awarded by reason of the appeal. It may be that the respondent, on reversal of the original judgment, might have abandoned the condemnation and then withdrawn the money paid, less the costs, without entering upon a new trial to assess the damages, and it may be that, even after entering upon a new trial and the rendition of an increased award therein, it might still have abandoned the proceedings, withdrawn the original payment, and refused to pay the additional award, since the statutory inhibition against such withdrawal is only pending the appeal. And again it may be that, by pursuing either of these courses, the respondent could have divested itself of the title and burdens of ownership. But it is not necessary to decide, and we do not decide, either of these questions, since the respondent did neither of these things. On the contrary, it entered upon the new trial; it paid the additional award; it did not attempt to abandon the proceeding. It cannot now claim that the legal title which became vested in it by the first decree of appropriation and payment of the first award, as declared by the statute, was ever divested by a potential right of abandonment which was never asserted. The entry of a second decree of appropriation was an idle thing. The title had vested by the first decree. The only issue involved in the appeal was "the propriety and justness of the amount of damages." The cause was remanded for a retrial of that simple issue.

[4] While the retrial is a trial de novo, it is confined to that single issue. Meanwhile, failing a bond, the appellants, though divested of the legal title, retained possession as security for any added award.

The cases cited by the respondent are not pertinent. In *Seavey v. Seattle*, 17 Wash. 361, 49 Pac. 517, the appeal was by the city from a judgment entered at the instance of the landowner. The award could only be paid by assessments against the property benefited. No money had been paid into court. No title was vested in the city. There had been an actual abandonment of the condemnation. In *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305, no money was paid into court; no decree of appropri-

ation had been entered; no title had vested in the condemnor. That there had been an actual abandonment was not controverted. In *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853, a materialman's lien was filed after the suit in condemnation was brought. The lien claimant was not a party to the proceeding. The materialman had contributed a part of the res condemned. His materials had become a part of the value of the entire property found in the award. When that award was paid into court, the lien of course followed the fund. Moreover, and the distinction is vital both in law and equity, the lien in equity related back to the furnishing of the materials and antedated the passing of title by decree of appropriation and payment of the award. The decision would have been different had the materials been furnished and the lien filed after the decree of appropriation and payment. Here the taxes accrued and became a lien almost a year after the title had passed.

The order appealed from is reversed.

MOUNT, FULLERTON, MAIN, and MORRIS, JJ., concur.

HUNTLEY v. BOARD OF TRUSTEES OF CITY OF AUBURN et al. (Sac. 2,017.)

(Supreme Court of California. April 12, 1913.)

1. MUNICIPAL CORPORATIONS (§ 974*)—TAXATION—RAISING ASSESSMENTS—JURISDICTION.

A proper notice to taxpayers is a jurisdictional prerequisite to the right of the board of trustees of a city sitting as a board of equalization to proceed in the matter of the raising of assessments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083-2086; Dec. Dig. § 974.*]

2. MUNICIPAL CORPORATIONS (§ 974*)—RAISING ASSESSMENTS—NOTICE—SUFFICIENCY.

Where the trustees of a city sitting as a board of equalization, under an ordinance providing for the raising of assessments and declaring that the clerk must notify all persons interested, at least ten days before the action taken, of the day fixed when the matter would be investigated, attempted to raise the petitioner's assessment, a notice to the petitioner that the assessment of his property had been raised by the board of equalization, which would be in session on the 25th of the month to adjust all assessments where cause was shown, is insufficient to support the action of the board, even though the assessment was not raised until the day fixed in the notice for the hearing of complaints and the minutes of the board showed that it was intended to be a notice to show cause why the assessments should not be raised, as the minutes cannot control the validity of the notice which, on its face, states that the action has already been taken without giving notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083-2086; Dec. Dig. § 974.*]

Shaw, Angellotti, and Sloss, JJ., dissenting.

In Bank. Petition by L. Huntley to review proceedings by the Board of Trustees of the City of Auburn and others, sitting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as a Board of Equalization. A judgment denying the writ was affirmed in the District Court of Appeal, and petitioner sued out a writ of review. Assessment annulled.

Meredith & Landis, of Sacramento, for petitioner. A. C. Lowell and W. B. Lardner, City Atty., both of Auburn, for respondents.

HENSHAW, J. A writ of review was sued out in the District Court of Appeal of the Third Appellate District, under which writ it was sought to have declared null and void an order of the trustees of the city of Auburn, a municipality of the sixth class, sitting as a board of equalization, increasing the assessment of real property of the petitioner over and above the valuation placed thereon by the assessor of the city. From the decision given by the Court of Appeal a hearing before this court was ordered.

Admittedly the order was made and the assessment of petitioner's property was increased 500 per cent. over and above the assessment made by the city assessor to the city's board of equalization. The charter of the city of Auburn is found in the municipal corporation act. St. 1883, p. 93. By section 877 of that act it is made the duty of the city assessor to make his assessment, verify his list under oath, and deposit it with the city clerk on or before the first Monday of August in each year. In the case at bar the verified petition asserts that this duty was performed by the city assessor and this is admitted. By section 872 of the municipal corporation act it is declared that the board of trustees, sitting as a local board of equalization, "may of their own motion raise any assessment upon notice to the party whose assessment is to be raised." Ordinance No. 6 of the city of Auburn provides, in section 28, as follows: "During the session of the board, it may direct the assessor to assess any taxable property that has escaped assessment; or to add to the amount, number or quantity of property, when a false or incomplete list has been rendered and to make and enter new assessments (at the same time cancelling previous entries) when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax. But the clerk must notify all persons interested by letter deposited in the postoffice or express, postpaid, and addressed to the person interested, at least ten days before action taken, of the day fixed, when the matter will be investigated." The petition also charges that the board of trustees of the city of Auburn sitting as a board of equalization "did on or about the 7th day of September, 1911, raise or attempt to raise and increase the said valuation placed by said city assessor upon said property of the said petitioner." The petition further avers that no notice

was given of the intent or proposal of the board of equalization to raise the assessment upon petitioner's property, other than a notice dated September 11, 1911, after the assessment had actually been raised, which notice was addressed to petitioner, deposited in the mail, and is in the following form: "The assessment of your property has been raised by the city board of equalization as follows: (Here follows description of property, amount of original assessment in numbers and the amount to which the assessment has been raised in numbers.) The board of equalization will be in session at eight p. m., September 25, 1911, at the city offices, to adjust all assessments where cause is shown. By order of the city trustees, L. F. Morgan, City Clerk." These allegations are established.

So plain is the law that upon these undisputed facts there would seem to be but one solution to the inquiry, namely, that the board of equalization had exceeded its powers in arbitrarily increasing the assessment upon petitioner's property without notice to him in advance of their proposed action, as required by section 872 of the municipal corporation act and section 28 of ordinance No. 6 of the city. But respondent asks this court to hold that this increase in the assessment amounted to nothing more than an authorization of certain changes in the assessment as originally prepared by the city assessor and presented to the board of equalization; that by these changes in the assessment roll the board of equalization did not on the 7th day of September, as declared in the notice, and in its record, increase the assessment, but that the board at this time merely approved the changes in the assessment roll which theretofore it had authorized the city assessor to make; that the notice above quoted, mailed upon September 11th, stating that the city board of equalization *had* raised the assessment on the property, is to be construed as a notification merely that the board *proposed* to raise the assessment and would hear evidence upon the matter pro and con on September 25, 1911.

From the record, it is argued, it appears that in fact the board did not raise the assessment upon September 7th, as the notice to this petitioner declares was done, but did fix a time for a future meeting "in order," so runs the record, "to give all the above taxpayers a chance to show cause, why their assessment should not be raised to the figures given"; that further, by the record it is disclosed that upon the days appointed certain taxpayers (though not this petitioner) did appear; and that, finally, at the conclusion of the meeting on September 25th, the day on which the petitioner had been invited to appear and show cause, and after all the taxpayers who had appeared had been heard, a motion was carried that "the assessments be fixed by the board as

adopted at said meetings." And, finally, upon October 9th, the record shows that a motion was made and carried "that the assessed valuations be accepted as they now stood after the changes made by the board." From all this, as has been said, it is argued that this court should hold that the assessments were not in fact raised until after notice and an opportunity of hearing given to petitioner. But all these references to the record of the board beg the whole and sole question in the case. That question is: Was the notice given to this petitioner sufficient in law?

[1] That a proper notice is a jurisdictional prerequisite to the right of the board of equalization to proceed at all in the matter of the raising of assessments is well established. *Allison R. M. Co. v. County of Nevada*, 104 Cal. 161, 37 Pac. 875; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 325, 32 Pac. 312.

[2] It is wandering far away from the question to argue that the minutes thus show that the board had not in fact raised the assessment, but merely contemplated making such raises after notice. These minutes indicated nothing to this petitioner, who knew nothing of them, and was not charged with any notice or knowledge of them. His rights, we repeat, are to be measured solely by the sufficiency of the notice which was sent to him, and under that notice, and as the first and controlling declaration of that notice, he was told, not that the board contemplated raising the assessment, but that the assessment had already been raised. To say that the subsequent declaration, to the effect that the board would give him an opportunity to show cause why the "raise" should not again be "lowered," forced this petitioner to construe the notice as declaring that the assessment had not been raised, but might be if he did not show cause to the contrary, does plain violence to the plain meaning of plain language. If a court, without obtaining jurisdiction of the person of a defendant—even a justice's court where liberality in pleadings is indulged—should notify him that judgment had been rendered against him, but that upon a certain day he might appear and show cause why the judgment should not be vacated, we would have this very matter presented by a parallel which would be unimpeachable. Would any one say he would be obliged to pay any attention to such a notice, or that it could be distorted to mean that if he did not appear a judgment would be entered against him, or that he could be charged with notice of what the justice's docket actually did contain?

It is further argued that mere informalities in the record of the proceedings for assessment of taxes "if the jurisdiction or power exists" are not sufficient to invalidate them. This is very true. But this attack goes not to an informality in the record of

the proceedings as was the case in the authorities cited, but it goes to the very jurisdiction of the board to do the thing; its jurisdiction to raise the assessment being entirely dependent in law upon a timely and proper notice of the board's intent so to do. Thus in *La Grange, etc., v. Carter*, 142 Cal. 562, 76 Pac. 241, the notice was given and properly given, and was a notice "to show cause why his assessment upon particular property described should not be raised from the assessment stated to a much larger sum specified, due notice of the hearing of which was given." The attack there made was not upon the notice, but it was upon the sufficiency of the record in the minutes after notice and hearing, and the holding was simply that the imperfection in the order entered upon the minutes was not fatal to the action of the board in raising the assessment.

In *Savings & Loan Society v. San Francisco*, 146 Cal. 679, 80 Pac. 1088, there was once more no question of the sufficiency of the notice. There the party had been cited before the board of equalization by a timely and proper notice to show cause why its assessment should not be increased. The plaintiff was before the board, and the proposed changes in the assessment were submitted to it, and it failed to show cause why the amended assessment should not be adopted and its assessment thereby increased. There the taxpayer had received the notice, had appeared, and the question which this court considered and decided was whether, having so received its notice and having so appeared, the changes which the board made were justified. The same is true of *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 325, 32 Pac. 312. The notice in that case, addressed to the plaintiff, was as follows: "You are hereby notified to appear before the board of equalization of the city of Los Angeles on Wednesday, the twelfth day of August, 1891, at ten o'clock a. m., in the council chamber in the city hall, and show cause why your assessment on solvent credits should not be increased from \$2,774 to \$275,000."

To work out from these cases, and the notices set forth in them, a judicial determination that the notice here given shows a compliance with the law, involves reasoning to follow which we confess our utter inability.

The true rule governing the form of the notice to the taxpayer and of the proceedings under it is that laid down in *Spring Valley W. Works v. Schottler*, 62 Cal. 103. In the *Spring Valley Case* the notice was attacked for the shortness of time allowed the property owner in which to appear in response to it. In *Allison, etc., v. Nevada County*, 104 Cal. 161, 37 Pac. 875, the notice was in the following form: "A. E. Davis, owner of the Allison Ranch mine, in Grass Valley township, is hereby cited to appear and show cause why

the assessment on said mine should not be raised from \$12,000 to \$25,000." The argument was made that the notice was not given to the proper person, as it was not shown by the record of the board that Davis, who appeared in response to the motion, was in fact the owner of the mine. But in answering this it is said that liberality is allowed to boards of equalization in the keeping of their records and minutes, and they may have taken proof aliunde that Davis was the president, secretary, or managing agent of the owner and appeared on the owner's behalf. Then is quoted the language of *Spring Valley W. Works v. Schottler*, supra, as follows: "In our opinion (as intimated in *Patton v. Green*, 13 Cal. 330) such tribunals as the boards of supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein, and if, under a rule or an order of such boards, a party has notice of the intended action of a board of supervisors sitting as a board of equalization, in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the board, we will hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board." It thus appears that where the question of notice has been directly under review it has been the decision of this court: First, that the notice is jurisdictional to the right of the board to proceed; second, that it must be a notice "of the intended action of the board"; and, third, that in the absence of a controlling statute fixing the time of notice the property owner must be given time to have and must have a full and fair hearing.

Again, we repeat that a notice to a property owner that the board has, in advance of notice to him, already acted and, in advance of notice to him, has already raised the assessment upon his property, is not a permissible notice under our law.

Wherefore it follows that as the notice to this petitioner was insufficient to authorize the board of equalization of the city of Auburn to increase petitioner's assessment, the increase of the assessment is invalid and is annulled.

We concur: BEATTY, C. J.; LORIGAN, J.; MELVIN, J.

SHAW, J. (dissenting). I dissent from the judgment annulling the order for increase of the petitioner's assessment. The claim is that the increase was made by the board of equalization without giving him any notice thereof as required by section 872 of the municipal corporation act and without affording him any hearing on the question.

Upon the filing of the petition in the District Court of Appeal an order was made for the issuance of an alternative writ of review,

requiring the respondents to show cause on a day stated why the alternative writ should not be made final. The respondents filed in that court an answer to the application and also a return containing a copy of the record of the proceedings of the board of equalization which are sought to be reviewed. We cannot take the failure in the answer to the original application to deny averments therein as an admission of the facts not denied. The application and answer served their purpose when they resulted in the making of a return of the record sought to be reviewed. The only matters we can consider here are the record included in the return, and such evidence as may properly be introduced upon the question of the jurisdiction of the tribunal whose proceedings are under review. The inquiry is confined to the question of its jurisdiction and power to act in the matter. The evidence to be considered is the evidence which was introduced before the tribunal in question, and such evidence should be included in the return either as originally filed or as amended under the order of the reviewing court. The rule is that, where the record speaks, its statements are conclusive, but if it is silent on any point, the evidence shown by the return to have been taken by such tribunal on the subject may be considered, but evidence dehors the record is not admissible to contradict it. These propositions are settled by the following decisions: *People ex. rel. Whitney v. Board*, 14 Cal. 500; *Hoffmann v. Superior Court*, 79 Cal. 476, 21 Pac. 862; *De Pedrorena v. Superior Court*, 80 Cal. 145, 22 Pac. 71; *Borchard v. Board*, 144 Cal. 14, 77 Pac. 708; *Los Angeles v. Young*, 118 Cal. 298, 50 Pac. 534, 62 Am. St. Rep. 234; *Schwarz v. Superior Court*, 111 Cal. 112, 43 Pac. 580; *Reynolds v. County Court*, 47 Cal. 605; *Imperial W. Co. v. Board*, 162 Cal. 22, 120 Pac. 780; *Roe v. Superior Court*, 60 Cal. 93; 4 Ency. of Pl. & Pr. 277, 286; 6 Cyc. 822.

The board met as a board of equalization on August 21, 1911. Notice of that meeting was duly given by a general notice published in a newspaper. On that day the board instructed the assessor and tax collector to prepare an abstract of the city assessment roll for the use of the board. Thereafter, the board adjourned from time to time until September 7, 1911. The minutes of the last-named date contain the following statement: "The following raises in the assessment roll for the year 1911 were approved by the board." Then follows a list giving the property assessed, the names of the owners respectively, the amount of the original assessment, and the amount of the raise, naming about 200 taxpayers. The minutes then proceed as follows: "The board then decided to meet at 8:00 p. m. Thursday, Sept. 21, 1911; Friday, Sept. 22, 1911, and Monday, Sept. 25, 1911, in order to give all the above taxpayers a chance to show cause why their assessment

should not be raised to the figures given. The city clerk was instructed to send notices to all the above-named property owners, showing the amount their respective assessments were raised to and what the raise was on. The clerk was instructed to divide the cards so that about an equal number would be instructed to appear on each of the above mentioned dates." Thereupon the clerk issued and mailed the notices to the petitioner as follows: "Notice to Taxpayers. Auburn, California, September 11, 1911. The assessment on your property has been raised by the city board of equalization, as follows: L. Huntley: (Here is inserted a description of the lots, the amount of the original assessment of each lot, and the amount to which each was raised.) The board of equalization will be in session at 8 p. m., Sept. 25, 1911, at the city offices to adjust all assessments where cause is shown. [Signed] L. F. Morgan, City Clerk. By order of the city trustees." The petitioner did not appear on September 25, 1911, or at all, before the board although it is conceded that he received the notice in time to have appeared and objected. The board heard objections from some 43 taxpayers of the city, and, after several adjournments and the making of a number of reductions in proposed "raises," the hearings were concluded on October 9th, at which time the minutes show that the following occurred: "Trustee Davis moved that the assessed valuations be accepted as they now stood after the changes made by the board. The motion was seconded by Trustee Predom and carried unanimously."

It is a general rule, even in the absence of a statute, that mere informalities in the record of proceedings for the assessment of taxes, if the jurisdiction or power exists, are not sufficient to invalidate them. *La Grange, etc., Co. v. Carter*, 142 Cal. 562, 78 Pac. 241. Where the board or officer has power to do the act, the language in which the action is recorded will not be construed strictly for the purpose of holding the proceedings invalid. The court should endeavor by a view of the entire proceedings to ascertain to a common certainty what was done by such board, and if, with reasonable certainty, it appears that it was acting within its powers and regularly according to law, the proceedings will not be invalidated merely because the words used to describe the acts are not strictly and technically correct, or not as accurately expressive of the intent as other words which might have been used if the orders had been drawn by one well versed in the use of language. As was said in the case just cited, if the courts were to adopt a strict rule of construction, with respect to boards of equalization and other inferior tribunals, "and hold them to exact and apt expressions framed in proper legal terms and set aside all acts not so expressed, it would result in nullifying most of the acts

of such boards." In that case an order stating that the assessment of the company, naming it, "stand as raised," but not otherwise describing the property or stating the amount to which it was raised, or declaring that it was raised, was held sufficient, when explained by reference to a preliminary order to show cause, in which the description and proposed increase were set forth. In *Savings & Loan Soc. v. San Francisco*, 146 Cal. 679, 80 Pac. 1089, it was said that a notice to a taxpayer to show cause why its "assessment" should not be increased was sufficient to authorize the board to add other property thereto. In *Farmers' etc., Bank v. Board*, 97 Cal. 322, 32 Pac. 312, a notice to "show cause why your assessment on solvent credits should not be increased from \$2,774 to \$275,000" was held to authorize the addition of other property to the assessment, as well as an increase of the valuation of that already listed.

Measured by the rules established by these decisions, I think the proceedings of the board and the notice given show a compliance with the provision of the municipal corporation act authorizing a board of equalization to raise an assessment upon notice to the property owner. It is evident from the entire record that the "raises," so called, originally made by the board, were not intended as the final action of the board, but were made provisionally until a hearing could be had, and for the purpose of stating the amount as a proposal to the taxpayer which he could submit to or appear and object to, as he might desire. After the raises were approved by the board on September 7th, it proceeded to fix the times and place when and where the taxpayers were to be given, as the minutes state "a chance to show cause why their assessments should not be raised to the figures given." The clerk was directed to send notices accordingly. This plainly indicates that the "raises" previously made were not then finally adopted by the board, but were only proposed increases to which the taxpayers should have an opportunity to object, but which were not to become final, if at all, until after any objections made should be duly considered and either allowed or overruled. There can be no doubt that the actual proceedings and intent of the board were in all respects in accordance with the statute.

The real objection is that the notice sent to the respective property owners did not sufficiently inform them of the facts. But this objection disregards the aforesaid rules applying to proceedings of this character. The notice clearly informed the property owner that he would have an opportunity to object to the proposed assessment at the time and place stated. While the opening clause declares that the assessment "has been raised," the concluding clause informed him that the board would be in session at

the time stated, "to adjust all assessments where cause is shown." This clearly means that he would have an opportunity to then and there show cause why the assessment should not be raised to the figure named, and to make any objection which he might have to make thereto and that the same would be adjusted after hearing and considering such objections. While it did not expressly declare that the increase was only a proposed increase, it did not declare that it was final, and it did advise him that he would have the opportunity to be heard and give evidence to prevent his assessment from being raised to the figure stated. He could not reasonably have believed otherwise. In fact, the assessment was not finally approved until after the time when he might have appeared and objected. He did not choose to attend at the time specified or to make any showing. The notice was in ample time to enable him to appear if he so desired and was sufficient to inform him that he might have done so. Having neglected to appear, I think the sound rule is that he should be bound by the order.

The objection that no evidence was taken goes to the proposition that the board did not take evidence aside from the knowledge of its members, as to the value of the property. This is an inquiry into the merits of the decision upon which the order was based and not as to the jurisdiction therefor. The rule is settled that in certiorari the reviewing court will not consider the merits of the judgment or order reviewed. See cases first above cited; also, *Winter v. Fitzpatrick*, 35 Cal. 272; *Central Pac. R. R. v. Placer County*, 43 Cal. 367; *Quinchard v. Board*, 113 Cal. 668, 45 Pac. 856. The statute empowers the board to raise assessments "of its own motion," and it does not require that the evidence of value shall be recited in its orders. In *Farmers' Bank, etc. v. Board*, supra, the court said that, where there is jurisdiction of the person and subject-matter, the sufficiency of the evidence on the merits is not open to question. I am of the opinion that the record shows no defect sufficient to justify a judgment annulling it.

We concur: ANGELLOTTI, J.; SLOSS, J.

VALLEJO FERRY CO. v. SOLANO AQUATIC CLUB. (Sac. 2,054.)

(Supreme Court of California. April 4, 1913.
Rehearing Denied May 8, 1913.)

1. APPEAL AND ERROR (§ 920*)—TEMPORARY INJUNCTION PENDENTE LITE—REVIEW.

The court on appeal from an order granting a temporary injunction pendente lite must presume that the trial court accepted in support of the injunction, the facts deducible from the complaint and affidavits.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.*]

2. MUNICIPAL CORPORATIONS (§ 285*)—FERRY FRANCHISE—POWER TO GRANT.

The city of Vallejo has authority under its charter to grant a ferry franchise whose termini are within the geographical limits of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 757; Dec. Dig. § 285.*]

3. MUNICIPAL CORPORATIONS (§ 285*)—FERRY FRANCHISE—POWER TO GRANT.

The limitation on the power of the city of Vallejo to grant ferry franchises whose termini shall be within the limits of the city is not violated by the granting of a ferry franchise across a navigable stream within the city limits to Mare Island within the geographical limits of the city, but acquired and owned by the United States, with the consent of the state of California, for military and naval purposes, and over which by virtue of Const. U. S. art. 1, § 8, the United States is exercising exclusive jurisdiction, and the fact that the United States may forbid the ferryboats from landing on the island does not affect the validity of the franchise, but only goes to its value.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 757; Dec. Dig. § 285.*]

4. FERRIES (§ 16*)—FRANCHISES—EXCLUSIVE-NESS.

An exclusive franchise within the limitation of Pol. Code, § 2853, forbidding the erection and operation of a second ferry within one mile above or below a regularly established ferry unless public convenience renders necessary a second ferry, does not invade private rights nor bestow special privileges, nor interfere with the free right of navigation; since ferries are established primarily for the convenience of the people.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 38-40; Dec. Dig. § 16.*]

5. FERRIES (§ 11*)—FRANCHISES—POWER TO GRANT.

The authority to grant ferry franchises is within the undelegated powers reserved to the states, and a ferry franchise granted under a state statute is not invalid because one of its termini is on United States land acquired and used with the consent of the state for military and naval purposes, on the ground that, if ferries are to be operated to and from the land of the United States, they can be operated only by the authority of the United States, though the United States has the power to move its own troops, employes, materials, and munitions when and howsoever it may please, and may prohibit landings on its territory set aside for military and naval purposes.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 11-17; Dec. Dig. § 11.*]

6. FERRIES (§ 16*)—FRANCHISES—REVOCABLE PERMIT.

Where the United States owning and using land for military and naval purposes contracted with the owner of a ferry franchise granted by the state whereby it recognized the validity of the franchise, a revocable permit to a nonprofit co-operative corporation formed by government employes on the land to land its launches at the government floats without interfering with the government use of the floats is not a license to the corporation paramount to any franchise granted by the state, especially where the United States stated that it would revoke the permit if declared to be inconsistent with its contract with the owner of the franchise, and an interference with the franchise.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 38-40; Dec. Dig. § 16.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. FERRIES (§ 11*)—FRANCHISES—VALIDITY—RIGHT TO QUESTION.

A nonprofit co-operative corporation formed by United States employes at Mare Island to transport by ferry the employes and others becoming members of the corporation to and from the island may not attack the validity of a franchise granted by a municipality under state statute to operate a ferry across a navigable stream with Mare Island as one of its termini, on the ground that the franchise is inconsistent with the exclusive jurisdiction which the United States exercises over Mare Island, when the invasion has been invited and encouraged by the government, which for many years by contract with the owner of the franchise has bound the owner to operate the ferry, and where the convenience of the public demands the operation thereof.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 11-17; Dec. Dig. § 11.*]

8. FERRIES (§ 16*)—FRANCHISES—EXCLUSIVE-NESS.

An exclusive franchise to operate a ferry, having Mare Island as one of its termini, granted under state authority, does not exclude from its operation the agents and employes of the government in case the franchise tends in the slightest way to impede the work of the government, and the employes not acting under authority of the government, nor under the compulsion of any duty owed to it, may not operate an illegal ferry.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 38-40; Dec. Dig. § 16.*]

9. FERRIES (§ 19*)—FRANCHISES—INTERFERENCE.

The rule that a man may transport in his own boat his family, goods, and servants, notwithstanding the existence of a ferry franchise, is based on the fact that the transportation by the owner of a boat constitutes such slight interference with the franchise rights as to amount to *damnum absque injuria*, but no concert of action nor community of interest is sufficient to warrant such an invasion and employes of a single employer may not form a nonprofit co-operative corporation to operate a boat for their transportation.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

10. FERRIES (§ 10*)—"FERRY FRANCHISE"—WHAT IS.

A "ferry franchise" is a grant by the state or its authorized subdivisions to a named person, empowering him to continue an interrupted land highway over interrupting waters, and a ferry franchise is in no sense a grant of a monopoly, though it is exclusive, and a grant to operate a ferry is primarily made for the benefit of the state, and only secondarily for the benefit of the grantee of the franchise, and the grant is accompanied by exactions as to the services to be performed, the conveniences attending them, and the tolls that may be collected.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 9, 10; Dec. Dig. § 10.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2751-2753.]

11. FERRIES (§ 19*)—FRANCHISES—WRONGFUL INTERFERENCE.

The United States may in the exercise of its inherent powers of sovereignty transport its employes, notwithstanding the existence of any exclusive ferry franchise, but its employes may not combine and form a nonprofit co-operative corporation to maintain a ferry, and thereby interfere with an existing ferry franchise.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

12. INJUNCTION (§ 101*) — ILLEGAL COMBINATIONS.

The maxim that what a man may do many may do in combination is not universally true; and it is only those acts which work no invasion of rights when done in combination that may be so done.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

13. FERRIES (§ 11*)—FRANCHISES—JURISDICTION.

The point of departure is the basis and home of a ferry, and the fact that one terminus is in a foreign jurisdiction does not take it out of the jurisdiction of the authority which granted it, and the right of the state under the laws of which a ferry franchise has been granted to control a nonprofit co-operative corporation formed by employes of the government for violating the franchise can be legally met only by showing that the corporation is operating by authority of an equal or paramount power.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 11-17; Dec. Dig. § 11.*]

14. FERRIES (§ 19*)—FRANCHISES—INFRINGEMENT—EQUITABLE RELIEF.

An injunction in a suit by the holder of a franchise granted under state authority to operate a ferry with a terminus on Mare Island, owned and used by the United States for military and naval purposes, to restrain a domestic nonprofit co-operative corporation formed by government employes at Mare Island from interfering with the franchise, which restrains the corporation from conducting a ferry from any point on Mare Island which is within one mile of plaintiff's ferry terminal thereon to any point within the city of Vallejo, which is within one mile of plaintiff's terminal therein, forbids an unlawful interference with the franchise which the state has granted, and the government alone may complain that the injunction is an invasion of a federal right.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

15. FERRIES (§ 19*)—TEMPORARY INJUNCTION—INVALIDITY IN PART.

A clause in a temporary injunction pendente lite which forbids a domestic corporation formed by government employes at Mare Island from conducting a ferry from any point on Mare Island within one mile of the terminal of a ferry operated under a franchise to any point within the city of Vallejo, which is within one mile of the ferry terminal therein, if beyond the power of the court, may be stricken from the judgment, and the judgment allowed to stand.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

16. FERRIES (§ 19*)—FRANCHISES—UNLAWFUL INTERFERENCE.

The employes of the government at Mare Island may not be allowed to depart therefrom and go into the state with their ferry business in violation of the laws of the state granting to one a franchise to operate a ferry with one terminus on Mare Island.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

17. FERRIES (§ 19*)—FRANCHISES—UNLAWFUL INTERFERENCE.

Where defendant in a suit to restrain interference with a ferry franchise did not claim that he maintained a ferry beyond a mile in either direction from plaintiff's ferry slip, a clause in a temporary injunction pendente lite which prohibited defendant from operating a ferry was not objectionable as interfering with the rights of defendant to maintain a ferry.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

18. FERRIES (§ 19*)—FRANCHISES—INFRINGEMENT—EQUITABLE RELIEF.

Injunction is the appropriate remedy to restrain unlawful interference with a franchise granted under state authority to operate a ferry, one terminus of which is on Mare Island, owned and used by the government for military and naval purposes.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

19. FERRIES (§ 19*)—FRANCHISES—INFRINGEMENT—LACHES.

The holder of a ferry franchise promptly sued to restrain defendants actually engaged in the ferriage of members of a club from interference with the franchise. Defendants gave up the business when an injunction was granted, and the members of the club first hired boats and boatmen, and subsequently organized a nonprofit co-operative corporation to continue the ferriage business, and the holder of the franchise brought action against the corporation to restrain it from interfering with the franchise. The members of the club were virtually the parties interested in the first action. *Held*, that the holder of the franchise was not guilty of laches, and the corporation could not defeat the suit against it on that ground.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 46-59; Dec. Dig. § 19.*]

In Bank. Appeal from the Superior Court of Solano County; John F. Ellison, Judge.

Action by the Vallejo Ferry Company against the Solano Aquatic Club. From the order granting plaintiff an injunction pendente lite, defendant appeals. Affirmed.

John J. Barrett and Lent & Humphrey, all of San Francisco, for respondent.

HENSHAW, J. This is an appeal from an order granting a temporary injunction pendente lite. Plaintiff is operating and asserting the right to operate a ferry between the city of Vallejo and territory owned by the United States government abutting upon navigable waters of Napa creek and known as Mare Island. The defendant is a nonprofit co-operative corporation. The complaint charges that this defendant, without franchise or other right or warrant in law, is engaged in the ferriage business between Vallejo and Mare Island, thus illegally interfering with the rights of plaintiff and injuring its business. So much by way of outline of the nature of the litigation.

[1] The facts deducible from the complaint and from the affidavits, which facts it must be presumed the court accepted in support of the preliminary injunction which it granted, are the following: The city of Vallejo is situated at the northerly end of San Pablo Bay and near to that bay's junction with the Straits of Carquinez. Within the corporate territorial limits of Vallejo lies Mare Island. Stats. 1871-2, p. 566. Mare Island was acquired by the United States, with the consent of the state of California, "for the purpose of erecting and maintaining thereon such arsenals, magazines, docks, dockyards and other military and naval structures as may be required for the use of the United

States government." Stats. 1854, p. 48. Mare Island lies westerly of the city of Vallejo proper, and is separated from it by a tide water creek or estuary known as Napa creek. This creek is navigable in law and in fact, and across it the ferryboats of plaintiff and the launches of defendant ply. As early as 1865 and 1866 the state of California, acting in conjunction with the federal authorities at Mare Island, authorized the establishment of a steam ferry between Vallejo and Mare Island. Stats. 1865-66, p. 147. Ever since that time such a ferry has been maintained. Respondent holds a franchise bought at public auction from the city of Vallejo in 1896, for which it paid a large sum of money. The ordinance authorizing the franchise grant imposed upon respondent a fixed schedule of tolls, a rigid standard of equipment, and detailed specifications touching the service to be rendered. The performance of these duties is secured to the city by an annual bond in the sum of \$20,000, and, further, respondent pays an annual license tax to the city. Moreover, respondent is operating its ferry system under a contract with the United States government. This contract, first entered into with the predecessors of respondent, has been continuously renewed by the United States government, and is in force at the present time. The ferry plant of respondent, its boats, their equipment, the terminals, and the service are all maintained pursuant to rigid requirements exacted of respondent both by the municipal authorities and by its contract with the government. One of its two boats has a carrying capacity of about 2,000 persons per trip and cost \$80,000. The other has a carrying capacity of about 1,000 persons and cost \$30,000. It has maintained ferry slips, approaches, waiting rooms, warehouses; in short, a complete equipment for the convenient transportation of passengers and freight between the designated points. Moreover, so far as the government of the United States is concerned, respondent is under bond to comply with its contract. That contract includes a schedule requiring a given number of trips to be made upon week days and upon Sundays "at such times as the commandant may designate." It is required by the government to be prepared to carry and to carry freight, teams, and passengers. Amongst other exactions by the government of this respondent are the following: That upon any and every trip there shall be carried free upon the boats of respondent all United States naval officers attached to or performing duties at the navy yards, with their families and the servants of officers; all officers attached to United States vessels temporarily or permanently established at the navy yard with their families; all enlisted men in the service of the United States on duty at the navy yard or on board any United States vessel temporarily or permanently at the navy yard; all mail

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

carriers, messengers, "and employes who may be sent on duty, such employes to be provided with proper passes," and "in case of alarm of fire at the navy yard, the yard workmen and the members of the Vallejo fire companies with their apparatus." Other provisions of the contract require the prompt, continuous, and uninterrupted performance of the service, with heavy penalties provided for neglect or failure. The ferry terminus upon the Mare Island side is assigned to respondent by the United States government.

It appears that there was upon the Mare Island side and upon the Vallejo side, quite independent of the ferry berths or slips of this respondent, a raft or float used for the convenient landing of men from the government boats and launches. It appears further that these launches, under government control and upon government business, crossed Napa creek, back and forth between Mare Island and Vallejo, and for a time carried free of charge such of the government clerks or draughtsmen as could or did take passage on them. This privilege in time became a burden, and the naval authorities of Mare Island, of their own initiative, revoked the privilege in the month of January, 1909, and refused this right of passage to all civilian employes of the Mare Island navy yard. It was thought by some of the employes that this action upon the part of the naval authorities was instigated by respondent to force them to use its ferry service, and reprisals were commenced. One Forbes H. Brown, then chairman of the classified civil service employes of Mare Island, and president of appellant herein, filed a complaint and charges with the Secretary of the Navy, asserting that the respondent's franchise was invalid and had been fraudulently procured, charging the unsoundness and unseaworthiness of respondent's boats, complaining of its rates, asserting that they were exorbitant, accusing it of evasion of its taxes, and asking that the contract existing between the government and this respondent be vacated upon the charges made, and for the further reason that the contract itself was unjust and extortionate. This resulted in an examination by the naval department and a refutation of the complaint and charges so made. As to the unsoundness and unseaworthiness of the boats, response was made by Bolles and Bulger, local inspectors of hulls, to the effect that "the insinuations made by the writer thereof in relation to the equipment of your boat are without any foundation of fact," and, if the writer "will swear to complaint setting forth that these boats are not equipped and inspected according to the steamboat inspection laws, the matter will be properly taken up with him." Application was also made by the dissatisfied employes to the commandant of the navy yard for a vacation of his order refusing them permission longer to ride free on the government launches. This was refused.

These employes, then declining to patronize respondent's boats, gave their patronage to Lang & McPherson, who instituted a launch service between Vallejo and Mare Island. Respondent then began a suit similar to this to enjoin this unauthorized ferry service, and the result of that litigation was an injunction against Lang & McPherson. The appeal to this court will be found reported in 161 Cal. 672, 120 Pac. 421. Lang & McPherson, notwithstanding the injunction, continued in this ferry business, and were cited in contempt. They contested the contempt proceedings, which resulted in a judgment finding them guilty. Application was made to the Court of Appeals to prohibit the enforcement of the contempt judgment and the application was denied. *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908. Thereafter, on assurance from Lang & McPherson that they would discontinue their ferry operations, the proceedings were dropped. The appellant was then organized as a corporation, the nucleus and basis of its membership, if indeed not its principal membership, consisting of the dissatisfied employes of the government at Mare Island. Application was made to the Attorney General of the state, supported by argument and brief, for permission to use the state's name in an action of quo warranto, to have it determined that respondent's franchise is invalid and void. This was not granted. Respondent then instituted this action, with the result above indicated.

Something of the origin and history of appellant corporation has been outlined in the foregoing statement. The following remains to be added: While it is insisted that the defendant organization is one exclusively of the employes of a single employer who have combined for their own convenience and have secured for themselves their own transportation facilities, which they use in the performance of their duties in going to and from their work, this contention makes plain that the purpose for which the corporation is organized, as declared by its charter and by-laws, is a sham; that, while it is organized for the avowed purpose of promoting and indulging in aquatic sports, it is in reality nothing more nor less than a ferry corporation, which is operating without a franchise and seeks to hide the true purpose of its organization. Moreover, while it is said that the membership consists exclusively of government employes, and while for the purpose of this consideration this may be conceded to be a fact, it is nevertheless true that the by-laws do not limit the membership to such persons, but expressly throw the membership open to the general public, making no other requirement of an applicant than "good character and industrious habits." Furthermore, the by-laws declare that the membership shall not be limited, but "shall depend upon the facilities available, the same to be increased in the discretion of the board of

directors." This, so far as concerns the ferry business of appellant, can mean nothing more than that the corporation will take into its so-called membership as many individuals as it can transport, and will increase its membership with its transportation facilities. Finally, it should be stated that defendant is not operating under any ferry license from the state or its mandatories, or from the United States or any of its agencies. It runs its launches at its pleasure, owing responsibility to no one and denying responsibility to any one. It has a revocable permit from the commandant of Mare Island to land its launches at the government float upon either side of Napa creek, under its assurance to the government that it will not interfere with the government's own use of these floats. The authorities of Mare Island declare that this permit will be at once revoked if it shall be held by the courts of the state that it operates to injure the franchise of respondent. The membership of defendant has steadily increased until it now numbers more than a thousand men. These men are not of the soldiers, sailors, marines, or other enlisted men of the United States government, but are its civil employes working at Mare Island and living in Vallejo—men whose employment may terminate at their own instance or at the instance of the government at any moment—men, to take whose places, in case of vacancy, there is a waiting list exceeding 2,000. The by-laws make mention of initiation fee and monthly dues, declaring that the amounts shall be regulated by resolution of the organization. They provide that the board of directors "may purchase the equity" of a retiring member, and that "the equity shall be proportionate to the term of membership." In practice this means nothing more than that the dues for the use of the ferry service of defendant are \$1.50 per month. If he becomes a member not at the first of the month, but upon some day in the month, the board of directors may reduce this \$1.50 proportionately for the fraction of the month. Thus, where a member obtained employment and acquired membership in the club upon December 13th, he was given a receipt for "\$1.00, covering initiation Solano Aquatic Club," which receipt entitled him "to the privileges of the club for the balance of the current month." The dues are payable upon the 1st of the month, and the "purchase of the equity" of a retiring member apparently means that the board of directors, if he shall sever his connection with the club before the end of the month for which he has paid his dues, may pay him back a proportionate share of the \$1.50 which he has paid for the full month. The ferry charge for a monthly commutation ticket entitling the holder to practically unlimited use of respondent's ferry is \$2. The serious interference by appellant with the ferry business of respondent is not only evident, but it is declared that re-

spondent cannot live up to its contracts, and that no ferry or ferry service can be maintained between Vallejo proper and Mare Island unless it be freed from such interference and injury and be recognized as exclusive.

Appellant's attacks upon this appeal may be grouped for convenience under certain heads.

(1) An attack upon the validity and upon the scope of respondent's franchise.

(2) The assertion of the right in appellant to do precisely what it is doing, regardless of the validity of respondent's franchise.

(3) An attack upon the terms of the restraining order as exceeding all warrant in law.

(4) The asserted laches of respondent which forbids the granting of the temporary injunction, even if under every other consideration it were permissible to grant it.

[2-4] 1. Many of the grounds of attack upon the validity of respondent's franchise were urged upon the attention of this court in the case of Vallejo Ferry Co. v. Lang & McPherson, 161 Cal. 672, 120 Pac. 421. No occasion arises for repeating the reasons there given and the holding there made to the effect that the city of Vallejo did have the power to grant the franchise in question, and that the Vallejo Ferry Company was operating under authority of law by virtue of that franchise. The limitation upon the power of the city of Vallejo to grant ferry franchises, whose termini shall be within the limits of the city, is not abused nor violated by reason of the fact that the Mare Island terminus is upon land over which the United States admittedly exercises exclusive jurisdiction. Const. U. S. art. 1, § 8. Mare Island is still within the corporate geographical and territorial limits of the city of Vallejo, just as completely and in the same sense as the United States military reservation, the Presidio, is within the corporate limits of the city and county of San Francisco. Crook et al. v. Old Point Comfort Hotel Co. (C. C.) 54 Fed. 604. Still more, the franchise enjoyed by respondent is an exclusive franchise within the meaning of the law, and especially within the limitation of the Political Code, § 2853, which forbids the erection and operation of a second toll bridge or ferry within one mile above or below a regularly established toll bridge or ferry, unless public convenience renders necessary the franchise for a second bridge or ferry. There is in this no invasion of private rights, no bestowal of monopolistic, special privileges, no interference with the free right of navigation. Ferries are established primarily for the convenience of the people. It is the duty of the government, which has thus invited private capital to aid in the comforts and conveniences of its citizens, to safeguard the rights which it had bestowed, and to see that the enjoyment of those rights is coextensive with the grant of them. *Norris v. Farmers'*

& Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535; *Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381; *Patterson v. Wollmann*, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536. Nor does the fact that the Mare Island terminus of this ferry is upon territory owned by and subject to the jurisdiction of the United States in the least militate against the validity or legality of the franchise itself, whatever effect it may have upon the value of the franchise. It may be conceded or declared that the United States government would have power to forbid the ferryboats of respondent from landing upon the island, but this would in no wise affect the legality of the franchise. In the parallel case of *People v. Babcock*, 11 Wend. (N. Y.) 590, Babcock was brought before a justice of the peace, charged with having violated the statutes of New York regulating ferries by transporting to Canada across the navigable waters of the Niagara river persons and goods for profit and hire, without having obtained a license. Says the court: "So far as jurisdiction is concerned, it is as complete over this river to the center thereof as over any other stream within the county. The privilege of the license may not be as valuable to the grantee by not extending across the river; but, as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place." Such is the great current of authority. See *Conway et al. v. Taylor's Ex'r*, 1 Black, 603, 17 L. Ed. 191; *Haeussler et al. v. City of St. Louis*, 205 Mo. 656, 103 S. W. 1034; *N. Y. Central v. Board of Chosen Freeholders*, 76 N. J. Law, 664, 74 Atl. 954, 16 Ann. Cas. 858; *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419; *Cable v. Craig*, 94 Mo. App. 675, 69 S. W. 49; *Nixon et al. v. Reid et al.*, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315; *Helm v. City of Grayville*, 224 Ill. 274, 79 N. E. 689; *State v. Faudre*, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104; *Columbia Delaware Bridge v. Geisse*, 38 N. J. Law, 39; 12 Am. & Eng. Ency. of Law (2d Ed.) 1901. If it be conceived—though to this we do not agree—that the language of the Supreme Court of Oregon in *Hackett v. Wilson*, 12 Or. 25, 6 Pac. 652, is in opposition to this otherwise uniform current of authority, it must suffice to say that the Oregon decision does not commend itself to our judgment.

[5] No weight attaches to the final argument of appellant under this proposition to the effect that "if ferries are to be operated at all to and from islands used as forts or navy yards, they can be operated by authority of the federal government, and the federal government is the exclusive judge of the necessity to grant the privilege. It has absolute control over the landing of persons and property on its territory, and over all departures therefrom. It has licensed appel-

lant, and that license is paramount to any franchise which the state could grant." No question here arises or we think could ever arise, over the right and power of the federal government to move its own troops, employes, material, and munitions when and howsoever it may please, and no question can arise over the power of the United States government to control, restrict, or even prohibit landings upon its territory segregated and set aside for purposes of war or defense. But all this is beside the proposition for which appellant contends. And, as to this, it is to be remembered that the government of the United States does not even assert the power to grant ferry franchises. Its highest court has said (*Conway v. Taylor's Ex'r*, supra): "There has been now nearly three-fourths of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the states have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states respectively' we think too clear to admit of doubt." So much for the asserted right of the federal government to issue a ferry franchise. As to the privilege "of operating a ferry having one of its termini upon the government reservation at Mare Island," it has heretofore been said and shown that not only has the privilege been extended to this respondent, but the government itself has entered into a solemn contract with respondent, binding both to the performance of designated duties, and that this contract has been in force for over 40 years.

[6] And, as to the final declaration that the United States government "has licensed appellant and that this license is paramount to any franchise which the state could grant," the facts as above set forth are that the United States has given a revocable permit to appellant to land its launches at the government floats at times and under circumstances which will not interfere with the government use of those floats, and has stated that it will revoke this if it be declared to be inconsistent with its contract with the respondent and an interference with respondent's ferry franchise. It seems scarcely logical to evolve a paramount license out of such a revocable permit.

[7] Nor is it perceived that there is any better foundation for appellant's next argument, to the effect that to recognize the franchises of respondent, with the right therein accorded to exact tolls from the people in the employ of or having business dealings with the government authorities at Mare Island, is inconsistent with the exclusive jurisdiction which the government exercises over Mare Island, and would be to countenance an interference with that ju-

isdiction which would tend to impair, if not to destroy, the effective use of Mare Island for governmental purposes; and that the dictates of high public policy forbid such a pronouncement of the law, which is wholly inconsistent with the free and effective use of this naval and military reservation. For the obvious answer to this is twofold: First, it is not made to appear that the appellant has been made the protector of the United States government against attacks upon its sovereignty and sovereign powers; and, second, if the recognition of this franchise be such an invasion of governmental rights, it is an invasion invited and encouraged by the government itself, which for 46 years by contract with respondent has bound the latter to do these very things. Indeed, it may be added that the dictates of public policy urge most strongly in the opposite direction. The convenience of the public, which is the fundamental ground and reason for granting a ferry franchise, the control of the granting power over the exercise of the franchise, the convenience and safety of the public which result, are all present in this case, as in every case of a ferry operating under sanction of law. This particular ferry is not alone a convenience to the general public, but a convenience to the United States government, and it is so recognized. Consider for a moment the effect upon the public welfare, both of the state of California and of the United States, if respondent should be forced to go out of business because of a holding that any person may engage in ferriage between Vallejo and Mare Island. Is it to be thought for a moment that such a ruling would be to the interest of the state, of the nation, and of their citizens? Is it not manifest that it is even of greater consequence to the national government than to the state that an orderly ferry service should be maintained? Indeed, as is well said in *Patterson v. Wollmann*, supra: "There is nothing in the history of the English nation or of the American people which warrants the conclusion that this practice of granting exclusive ferry franchises has resulted in imposing intolerable burdens upon the public, or has led to other than beneficial results."

[8] To the final proposition advanced by appellant under this head, to the effect that, even if the franchise be held to be valid in its scope, it must be limited so as to exclude from its operation those persons who are "agents or employes of the federal government if such a franchise would tend in the slightest way to impede the work of the government," are cited such cases as *In re Thomas*, 87 Fed. 453, 31 C. C. A. 80, where a state oleomargarine law was construed to have no application to a soldiers' home, *Pundt v. Pendleton* (D. C.) 167 Fed. 997, where it was held that general road laws warranting arrest and imprisonment for failure to do road work had no application to a

teamster employed on a military reservation, and *In re Waite* (D. C.) 81 Fed. 359, where petitioner sued out a writ of habeas corpus seeking his discharge from a criminal conviction by a state court for violation of a state statute, the crime arising out of his execution of his duties as an officer of the United States. These cases were all decided upon the familiar and unimpeachable principle that a state cannot be permitted to assert jurisdiction over one acting under the authority of the United States for acts by him done in furtherance of the duty he owes to the federal government. But it is a far cry to seek to extend and apply this principle so as to permit employes of the United States government, not acting under authority of the United States, nor under the compulsion of any duty owed to the United States, to operate an illegal ferry. The protection which the United States government accords to its officers and agents in the performance of the duties exacted by the government of them, making them amenable in the performance of those duties, to the federal law alone, would not, we think, be held to stay the hand of the state if a letter carrier, returning to his home, should slay his wife, notwithstanding the fact that, by the action of the state authorities, the operations of the federal government might to a certain measure be obstructed.

[9] 2. Support for appellant's asserted right to do what it is doing, regardless of the validity of respondent's franchise, is sought to be found in the principle that, notwithstanding the existence of a bridge or ferry franchise, (1) a man may, in his own boat, transport his family, his goods, and his servants; (2) that the members of the corporation are all employes of one employer, the United States government; that the United States government has the right to transport its officers, soldiers, agents, and employes in such manner as it sees fit, and that this same right rests with these employes. As to the first of the propositions, the courts have with promptness and severity frowned down upon any extension of the common-law rule permitting a man, regardless of the existence of a ferry franchise, to transport himself and his household, including his servants. The courts have held that the ancient rule was and is based upon the fact that such transportation by the owner of a boat would constitute such slight interference with the franchise rights as to amount to *damnum absque injuria* (*Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 589), but that an extension of the rule manifestly would lead to unwarranted injurious results. No concert of action nor community of interest has been held sufficient to warrant such an invasion of franchise rights. This was early held in this state in the leading case of *Norris v. Farmers' & Teamsters' Co.*, 6 Cal. 590, 65 Am. Dec. 535, and even earlier, in the case of *Hanson v. Webb*, 3 Cal. 236. *Norris v. Farm-*

ers' & Teamsters' Co., saving for the circumstance that the operators of the unlicensed ferry were not employes of a single employer, is very similar in its facts to the case at bar. The Farmers' & Teamsters' Company declared itself to be a joint-stock company, of which only the members had the privilege of using the ferry. They never used their ferry to carry over any person for pay or toll, nor allowed the ferry to be used as a free ferry. Its use was limited to the members of the company, who by subscribing \$1 became entitled to the use of the ferry for one month, and their membership and membership rights had to be continued by a like payment month by month. By virtue of this payment the member became a stockholder and the owner of an undivided interest in the ferry property. The trial court granted an injunction, and its judgment was sustained by this court in an opinion which discusses with elaboration, care, and thoroughness the principles of law involved, with an exposure of the sham of appellant's pretensions. To like effect is *Warren v. Tanner*, 56 S. W. 167, 49 L. R. A. 454, where 60-odd persons combined and established for the "private use" of themselves and their families a ferry, the operation of which was enjoined. To the same effect are *Hatten v. Turman*, 123 Ky. 844, 97 S. W. 770; *Chiapella v. Brown*, 14 La. Ann. 189; *Blanchard v. Abraham*, 115 La. 989, 40 South. 379; *Shemwell v. Finley*, 88 Ark. 330, 114 S. W. 705; *Weld v. Chapman*, 2 Iowa, 524; *Dinner v. Humberstone*, 26 Canada Sup. Court Rep. 252. In all of these cases will be found the same effort to extend the rule under various forms of subterfuge and evasion. The second proposition advanced under this head is twofold in its argument, the one being that, because the United States government as an employer would have the right to transport its employes, the employes have the same right to provide for their own transportation. The other is that the right of each employe to row himself in his own boat is unquestioned, and that what one man may do the many may do in combination.

[10] In discussing this second proposition, it is, perhaps, well to recall precisely what a ferry franchise is and what are its effects upon the general public. A ferry franchise emanating from the supreme power of the state or its authorized mandatories is a grant to a named person empowering him to continue an interrupted land highway over the interrupting waters. As the care and control of the highways are vested in the sovereignty, so also is this right to say who shall purvey for the public in the matter of the water highway. It is in no sense the grant of a monopoly, even when it is an exclusive franchise, as is clearly set forth by Mr. Justice Story in the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U. S. 420, 9 L. Ed. 773. Says that eminent justice: "No sound lawyer will,

I presume, assert that the grant of a right to erect a bridge over a navigable stream is a grant of a common right. Before such grant, had all the citizens of the state a right to erect bridges over navigable streams? Certainly they had not, and therefore the grant was no restriction of any common right. It was neither a monopoly, nor in a legal sense had it any tendency to a monopoly. It took from no citizen what he possessed before, and had no tendency to take it from him. It took, indeed, from the Legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly than the grant of the public stock or funds of the state for a valuable consideration." These grants are primarily made for the benefit of the state, only secondarily for the benefit of the grantee of the franchise. They are accompanied by exactions as to the service to be performed, the times thereof, the conveniences attending them, and they are further accompanied by regulatory measures affecting charges and tolls. In return for this, and to the end that this public service may be maintained according to the exacted standard, it becomes the manifest duty of the state to see that the rights of the owner of the franchise are not interfered with. It puts upon the public no compulsion to use the ferry, but it forbids to the public or to any considerable part of it, the right which before the existence of the ferry franchise they were entitled to enjoy, namely, the right by combination, co-operation, and association to conduct their own ferriage. Thus it would not be regarded as an unwarranted infringement of a ferry franchise for a man to transport across the stream, within the territorial limits of the franchise right, himself, his family, his goods, and his servants. It is this last-mentioned doctrine whose application is sought to be extended to the extreme length of justifying appellant's conduct. The doctrine itself is an ancient one. It has arisen and has been applied in many cases, and the foundation of it has been said to rest in the ancient right of a man so to use his own boat. But it has always been the owner's right, the master's right in pursuit of his own private business or pleasure, to which the doctrine has been applied. Thus in *Ives v. Calvin*, 3 Upper Canada Queen's Bench Reports, 464, the action was against Calvin for the violation of a ferry franchise, and it was held that by virtue of the common law and by virtue of a provincial statute a person was at liberty to use his boat for carrying backward and forward his own household and servants, or the laborers in his employment. It there appeared that a ferry franchise had been granted between Kingston and Garden Island; that defendant lived upon Garden Island, where he carried on a large business in loading and unloading vessels and in building and repairing;

that he employed a great number of men, and used his own boats to carry his own material and his own men back and forth. It is there declared with reference to the defendant's rights that "if defendant were precluded from using his own boats, and were compelled to avail himself of the plaintiff's ferry on all occasions, he would be exposed to an unreasonable, if not intolerable, burden." This case, relied upon by appellant, would be pertinent to the consideration if by this action it were sought to restrain the United States government from moving at will its own men and munitions. In *Dinner v. Humberstone*, supra, however, the Supreme Court of Canada rigidly suppressed an effort such as was here made whereby an association sought to operate a ferry upon the familiar plea that it was but a private association not open to the public, not dealing with the public, and therefore not creating any legal interference with plaintiff's franchise.

[11] Appellant's assertion that, because an employer may so transport his employés, the employés may make provision for their own transportation, is without foundation in any adjudicated case, and is entirely beyond the reason of the rule which upholds the conduct of the employer. It is because he is the employer that he may move, for purposes of his own convenience, or even profit, his own people in his own boats. Of course, in the case of the United States government, itself a sovereign power, the right does not rest alone upon so narrow a ground. It would be one of its inherent powers of sovereignty beyond question. But certainly it would not be contended that the inherent powers of sovereignty could be exercised by any one or any number of the employés of the government, and therefore the whole proposition, so far as this appellant is concerned, must rest upon the employés' right to do what the employer may do. The unwarranted assertion is made by appellant that to deny this right to the employés is to favor the rich against the poor, the employer against the employés. In truth, in logic, and in law every right that is open to the employer is possessed by the employé. The employé may, as may the employer, in his own boat and for his own purpose of pleasure or convenience, move himself, his family, his household goods, and his servants. This is as much his right as it is the employer's, and the employer's right is no whit greater. To assert, as is here done, that the employés may *in combination to any number and to any extent* procure boats, run a regular service, and thus, without warrant of law, operate a ferry, is to say that the employés possess greater rights than does the employer, rights which would ever be denied the employer. The employés do not seek to exercise the same right. They seek to combine. Would a combination of the employers of

Vallejo to move their goods and people by ferriage in the boats owned by the combination be countenanced? The attempt has been made in many diverse forms, and has never been allowed. Yet, if the argument of appellant upon this proposition is sound, it should have been allowed, and there could then be no logical reason for denying the same right, both to all or any number of employers, and to all or any number of employés under different employers. In fact, if community of interest be thus made the sole basis for the act proposed to be done, the same reasoning would authorize the inhabitants of a city or any considerable number of them to do the same thing. As little warrant is there for the application of the second proposition, namely, that because each employé has the right to row himself in his own boat for pleasure, convenience, or economy, the employés may associate for that purpose, since what one man may do many may do in combination.

[12] The maxim is one of frequent application, and, when properly understood, is unimpeachable. But, like many another of such convenient phrases of the law, it has its well-defined limits. It is not always nor universally true that what one man may do, many may do in combination. It is only those acts which work no invasion of rights when done in combination that may be so done. One man may go to the theater, or a party of 20 may go, and necessarily no harm to one's rights or privileges is here involved. But, upon the other hand, one man may set the price of his goods at a given figure and be quite within his rights, whereas, if the merchants of the town agree by combination to set this same figure, not only is the wrong apparent, but it is one forbidden by law. So here the one man rowing his boat within the limits of the ferry franchise exercises a personal right and his act as to the ferry company is *damnum absque injuria*. Let 1,000 or 2,000 men in combination propose to buy boats and operate them for their common use and convenience, then the right of one man, which he may unquestionably exercise alone, has by combination been converted into an unwarranted ferry system for the many.

[13] 3. Under this head it is pointed out that the injunction forbids the appellant from conducting a ferry "from any point on said Mare Island which is within one mile of plaintiff's ferry terminal on said Mare Island, to any point within the said city of Vallejo which is within one mile of plaintiff's ferry terminal in the said city of Vallejo." And still further the judgment enjoins the appellant "from maintaining or operating under the guise of the Solano Aquatic Club or otherwise a ferry between said city of Vallejo and said Mare Island." As to the first of these quotations, it is said it is wholly beyond the power of the state court to

control the conduct of appellant's members while upon the federal territory of Mare Island, and it is argued from this not only that the judgment must be reversed, but that appellants have the unquestioned right, without interference from state authority, to embark in any manner they see fit under the license of the federal government from the Mare Island side, and, having this right, which goes with them at least upon the navigable waters, they must have an equal right to land upon the government float on the Vallejo side, which government float, in argument, is treated as having all the dignity and exclusiveness of a government battleship. It has heretofore been pointed out that a ferry franchise is good, regardless of whether or not it can be enforced on the further side of the water course (*Sisterville Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107, 59 L. R. A. 513), and that the point of departure is the basis and home of the ferry (*State v. Faudre*, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104), and the fact that one terminus is in another and foreign jurisdiction does not take it out of the jurisdiction of the authority which granted it (*Nixon et al. v. Reid*, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 815; *N. Y. Central v. Board of Chosen Freeholders*, 76 N. J. Law, 664, 74 Atl. 954, 16 Ann. Cas. 858). If the outer terminal is beyond the jurisdiction of the granting power, it may affect the value of the franchise, but not its legality. *Conway et al. v. Taylor's Ex'rs*, 1 Black, 603, 17 L. Ed. 191; *Columbia-Delaware Bridge Co. v. Geisse*, 38 N. J. Law, 39. Under these principles, the right of the state to control appellant for the violation of a franchise granted by it can be legally met only by a showing that the appellant is himself operating by authority of an equal or paramount power; as in a case where navigable waters divide two states, each state has the unquestioned authority to grant a ferry franchise, and each state has the right to restrain an unwarranted invasion of the franchise rights so granted. The value of the franchise will depend upon the ability to secure recognition and a terminus in the foreign territory.

[14] Respondent is operating by virtue of such a franchise, and has obtained full recognition and terminal rights from the foreign authority. The foreign authority has granted no franchise to any other person or corporation to operate a ferry from its shores. It has, we repeat, but given a revocable permit to certain of its employes to use one of its floats. The language in the injunction objected to, construed as an attempt to impose the jurisdiction of the state upon the federal territory of Mare Island, is, of course, without warrant and in excess of the law. But it is equally subject to another construction, and that is that the state operating by injunction upon its own creation, the Solano Aquatic Club, or upon its members, its cit-

izens, forbids an unlawful interference with the franchise which it has granted, and, if it be thought that its language so doing is an invasion of a federal right, the government alone, and not these wrongdoers, will be heard to complain.

[15] And, finally, it may be said that the clause, if considered wholly beyond the power of the court, may be stricken from the judgment and the judgment be allowed to stand.

[16] We perceive no force to the contention that, even if the employes be allowed to depart from Mare Island without interference of the state, they may go with their ferry business into the state in violation of its laws. This certainly they cannot do.

[17] The second quotation might be an interference with its rights of which appellant could justly complain, if appellant were maintaining under franchise a ferry beyond a mile in either direction from respondent's ferry slip. But it does not claim nor pretend that it is so doing.

[18] Finally, in view of our uniform decisions, from *Norris v. Farmers' & Teamsters' Co.*, 6 Cal., to *Vallejo Ferry Co. v. Lang & McPherson*, 161 Cal. 672, 120 Pac. 421, where an injunction was granted to protect the identical franchise which the same plaintiff is here exercising, it seems unnecessary to enter into any detailed discussion to show that injunction is the appropriate remedy, and that it is not the less appropriate because one of the terminals of the ferry is without the jurisdiction of the authority granting the franchise. *Cable et al. v. Craig*, 94 Mo. App. 675, 69 S. W. 49.

[19] 4. By the statement of facts and the history of the litigation heretofore given it is, we think, made sufficiently plain that this respondent has not slept upon its rights, but has vigorously prosecuted them, and has been guilty of no laches so far as this appellant is concerned which would justify a court in equity in withholding the relief demanded. There is much to support respondent's argument in this regard that the case of *Vallejo Ferry Co. v. Lang & McPherson* was treated by all the parties as being a test case to decide the right of the employes to conduct their ferry. It will be remembered that *Lang & McPherson* were actually engaged in the ferriage of these members of the Solano Aquatic Club, and when, under injunction, *Lang & McPherson* gave up their business, these employes first hired boats and boatmen, and subsequently organized this corporation to continue the same ferriage business. Moreover, it appears from the record that in the petition for rehearing before this court in the *Lang & McPherson* Case it is explicitly declared that these employes, the members of appellant corporation were virtually the parties in interest in the *Lang & McPherson* Case and vitally concerned with the outcome of the litigation. It is not possible to perceive, therefore, how

it can be successfully charged against respondent that it in any way lulled this appellant or its members into a false and fancied security.

For these reasons and under the construction of the injunction pendente lite which has been herein given, the order appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.

VALLEJO FERRY CO. v. SOLANO AQUATIC CLUB. (Sac. 2,065.)

(Supreme Court of California. April 4, 1913.
Rehearing Denied May 3, 1913.)

In Bank. Appeal from Superior Court, Solano County; John F. Ellison, Judge.

Action by the Vallejo Ferry Company against the Solano Aquatic Club. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles S. Wheeler, of San Francisco, for appellant. John J. Barrett and Lent & Humphrey, all of San Francisco, for respondent.

PER CURIAM. This appeal, being from the same order and raising the same questions as the appeal Sac. No. 2,054, 131 Pac. 864, this day decided, and by stipulation having been consolidated for decision with appeal Sac. No. 2,064, is hereby denied, and the order appealed from is affirmed.

SOLANO AQUATIC CLUB v. SUPERIOR COURT OF SOLANO COUNTY et al. (S. F. 6,334.)

(Supreme Court of California. April 4, 1913.)

INJUNCTION (§ 230*)—WHAT CONSTITUTES—SEPARATE OFFENSES.

Under Code Civ. Proc. § 1200, declaring disobedience of any lawful judgment, order, or process to be a contempt, each separate act of disobedience is a contempt, and, where petitioner was enjoined from operating its ferry service, the operation on three separate days, although continuous, constituted separate contempts which might be separately punished.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

In Bank. Certiorari by the Solano Aquatic Club against the Superior Court of Solano County in the State of California to review orders adjudicating petitioner to be in contempt. Petition denied.

Charles S. Wheeler, of San Francisco, for petitioner. John J. Barrett and Lent & Humphrey, all of San Francisco, for respondents.

HENSHAW, J. Certiorari to review three several orders of the superior court of the county of Solano, adjudicating petitioner, the Solano Aquatic Club, to be in contempt for continuing to operate its ferry service upon three separate days, after notice that a temporary restraining order prohibiting it from so doing had theretofore been issued from the court.

The violation of the temporary injunction is not questioned. The principal contention is that the restraining order itself is void. The reasons advanced are those which have been considered and decided adversely to petitioner's contention in the case of Vallejo Ferry Company v. Solano Aquatic Club, Sac. No. 2,054, 131 Pac. 864, this day decided.

The only other proposition which merits consideration is the contention of petitioner that, though its acts were continuous and covered violations upon separate days, the court had the power to punish only for a single contempt. Manifestly, if such be the law, the petitioner here could suffer punishment for one act and then be free to operate its ferry not only until final determination on the appeal from the order granting the temporary injunction, but until final determination of the appeal from the permanent injunction, should such an injunction follow upon the conclusion of the trial. But such is not the law. Disobedience of any lawful judgment, order, or process of the court is a contempt (Code Civ. Proc. § 1200), and every separate act of disobedience is a separate contempt. Golden Gate Consolidated Hydraulic Mining Co. v. Superior Court of Yuba County, 65 Cal. 187, 3 Pac. 628. In that case, in violation of an injunction, the petitioner for a writ of review had been found guilty of three separate acts of contempt in operating its mine and permitting its debris to flow into the Yuba River. Says this court: "The court found the defendant guilty of three separate contempts in disobeying the restraining order on three several days. This it was authorized to do. Each act violative of the injunction was a separate contempt." Reference also may be made to *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459, *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372, and 9 Cyc. 58.

The judgments in contempt were therefore within the jurisdiction of the court to pronounce, and this writ of review is accordingly discharged.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.

DIAMOND MATCH CO. et al. v. SILBERSTEIN. (Sac. 1,976.)

(Supreme Court of California. April 9, 1913.
Rehearing Denied May 9, 1913.)

1. MECHANICS' LIENS (§ 113*) — CLAIMS AGAINST CONTRACTOR—NOTICE TO BUILDING OWNER—DUTY TO WITHHOLD PAYMENTS.

Under Code Civ. Proc. § 1184, providing "on a notice being given," one for whom a building is being constructed by a materialman or laborer of the value of material or labor furnished or to be furnished, or done or to be done, by him to or for the contractor, the owner shall withhold from the contractor sufficient money due or that may become due the contractor to answer such claim and any lien

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

therefor, the owner must withhold such amount from the first moneys that would otherwise be payable the contractor; and his failure to do so cannot affect the rights of others later giving him like notices.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 148; Dec. Dig. § 113.*]

2. MECHANICS' LIENS (§ 115*)—NOTICE OF CLAIMS—PREMATURE PAYMENTS TO CONTRACTOR.

Prematurely making a payment which, under a building contract, was to be made to the contractor on completion of the building, could not avail the owner to defeat either those established liens or those who, under Code Civ. Proc. § 1184, served timely notices on the owner to withhold from the contractor money to answer their claims for labor and material.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

3. MECHANICS' LIENS (§ 113*)—NOTICE OF CLAIMS—PAYMENTS TO CONTRACTOR—STATUS AND CONTRACT.

The provision of a building contract for certain payments to the contractor as the work progresses is subordinate to Code Civ. Proc. § 1184, requiring the owner on notice of claims for work and material to withhold from the first moneys due to the contractor enough to answer such claims.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 148; Dec. Dig. § 113.*]

4. MECHANICS' LIENS (§ 113*)—NOTICE OF CLAIMS—NECESSITY OF ESTABLISHING LIENS.

Under Code Civ. Proc. § 1184, providing that, on notice of claims against a building contractor for labor and material being served on the owner of the building, he shall withhold from the first moneys due to the contractor enough to answer such claims, the notice serves as an equitable garnishment; and it is not necessary to liability of the owner for the claims that liens be established therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 148; Dec. Dig. § 113.*]

5. MECHANICS' LIENS (§ 161*)—NOTICE OF CLAIMS—INTEREST.

Claimants for labor and material done for and furnished a building contractor, having served notices of their claims on the owner of the building, requiring him, under Code Civ. Proc. § 1184, to withhold from the first moneys due the contractor enough to answer the claims, may recover of the owner interest on their claims from the time provided by the contract for the final payment to the contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 280-283, 606; Dec. Dig. § 161.*]

6. MECHANICS' LIENS (§ 291*)—NOTICE OF CLAIMS—JUDGMENT.

Judgment for one who has not established a mechanic's lien, but has merely served notice of claims against the contractor, thereby requiring the owner of the building, under Code Civ. Proc. § 1184, to withhold from the first moneys due the contractor enough to answer the claim, should not be for payment thereof out of the proceeds of sale of the property, ordered to satisfy the liens; his remedy being by execution levy.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.*]

Department 2. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by the Diamond Match Company and others against H. Silberstein. Judgment for plaintiffs. Defendant appeals. Modified.

Park Henshaw, of Chico (Knight & Hegerty, of San Francisco, of counsel), for appellant. F. C. Lusk, of Chico, A. F. Jones and George F. Jones, both of Oroville, Guy R. Kennedy and Richard White, both of Chico, Walter Linforth, of San Francisco, Lon Bond, of Chico, and Jos. P. Lucey, of San Francisco, for respondents A. F. Jones and others.

HENSHAW, J. This is a consolidated action under the mechanics' lien law to enforce liens for material and labor against land and the building thereon owned by defendant and appellant Silberstein. From the judgment and from the order denying his motion for a new trial Silberstein appeals.

Defendant had entered into a valid contract with an original contractor, the Burnight-Kennedy Company, for the erection of a building upon his land for the contract price of \$41,500. By the terms of the contract progress payments in the sum of \$2,000 each, representing 75 per cent. of the work done, were to be made from time to time upon the architect's certificate. Thus, under the terms of the contract, there would be due to the contractor upon the completion of its work a payment of \$3,100 and 36 days after completion the sum of \$10,400. The contractor, however, did not complete its work, but abandoned it, after having received all the progress payments contemplated by the contract and \$2,000 of the \$3,100 completion payment. The owner took possession on March 21, 1910, and finished the building under the terms of the contract at a cost of \$885.81. The building was actually completed on April 14, 1910, and notice of completion was filed on April 15, 1910.

Touching the liens and personal judgments awarded against his property and himself, appellant contends that the progress payments which he had made were justifiable, being called for by his contract; that, the contract between himself and his contractor being admittedly valid, there remains in his hands subject to the demands of the claimants \$10,400, the final payment, and \$214.69, the balance of the completion payment after deducting the \$2,000 which he had paid the contractor and the \$885.81 which he had expended in finishing the building, making a total available for the demands of the claimants of \$10,614.69. For this, and this alone, appellant contends that he is liable.

By respondents it is shown that the Diamond Match Company served upon appellant the notice to withhold under section 1184, Code of Civil Procedure. This notice was served upon September 15, 1909, and was for the sum of \$5,617.10. After the service of this notice appellant paid to his contractor many thousand dollars in excess of this sum. Wygant & Collins served a like notice on December 26, 1909, to withhold the sum of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

\$1,751.20. Thereafter the appellant paid to his contractor the sum of \$4,000. The Chico Construction Company served its similar notice on January 4, 1910, to withhold \$205.40, and thereafter the appellant paid to his contractor the sum of \$2,000. W. W. Montague & Co. served its notice to withhold \$1,774.04 upon February 10, 1910. Other similar notices were served before the date of completion, but those here enumerated are all that it is necessary to mention in exposition of the legal questions involved. The principal of these questions concerns the construction of section 1184 of the Code of Civil Procedure which section at all the times covered by this litigation provided as follows: "Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by the authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done, or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. * * * Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter."

[1] Appellant's argument as to the meaning of this section may be illustrated as follows: Under the notice of the Diamond Match Company it became the duty of the appellant to withhold \$5,617.10, but he had the right to withhold this sum out of money "that may become due" the contractor. He was under no duty or compulsion to withhold it out of the first moneys due or to become due. Therefore he was justified in making all the subsequent payments to his contractor which he did make down to the time and point when, excepting the final payment of \$10,400, there should be due to the contractor only the sum of \$5,617.10. It should be considered that this is what the appellant did and that this \$5,617.10 would represent the full amount of the completion payment of \$3,100 and something over \$2,000 of the last progress payments. In contemplation of law, therefore, so argues appellant, he is to be considered as having withheld this \$5,617.10 to meet the demand of the Diamond Match Company, wherefore there was no money under his control due or to become due to the contractor upon the

dates of the services of the subsequent notices upon him. In fact, as has been said, the appellant did not so withhold these moneys at all but he insists that in contemplation of law he is to be treated as having withheld them out of these last payments, and the effect is to render nugatory the subsequent notices to withhold. Such, however, is not the meaning of section 1184, Code of Civil Procedure, and such a construction under most obvious considerations would result in "confusion worse confounded." It is the clear duty of the owner under service of such a notice to withhold from the moneys due, or from the first moneys that may become due, a sum sufficient to protect him against the demand of the notice. If he does not do this, he becomes justly liable under later notices to withhold which may be served upon him. No materialman is charged with knowledge that another materialman has served the owner with such notice to withhold, still less with knowledge that the owner contemplates withholding the funds out of the last payments that may become due the contractor. The materialman reading the contract and learning from the terms of it that moneys are to become due serves his notice and is entitled to rely upon the fact that sufficient of these later payments will be withheld to meet his claim. Of course, if all of those payments have, in fact, been absorbed under the demands of the earlier notices, the owner would be entitled to show that fact. But he can do this only under the construction here set forth, namely, that from the time of the service of each notice upon him he has withheld out of the moneys due, or first to become due, funds to meet the previous demands.

[2] It is to be borne in mind that the contractor did not complete the building, and that therefore the completion payment of \$3,100 never became due and the premature payment of \$2,000 of it to the contractor could not avail the owner to defeat either those whose claims of lien were established or those who served timely and proper notices to withhold. Thus, in contemplation of law, there was in the hands of the owner on the completion of the building by him a sum to meet the demands of notice servers and lien claimants composed of the following items:

Amount of Diamond Match Company's claim under its notice.....	\$ 5,617 10
Amount of Wygant & Collins' claim under its notice.....	1,751 20
Amount of Chico Construction Company's claim under its notice....	205 40
The completion payment of \$3,100, less \$885.31, spent by the owner in finishing the building.....	2,214 69
Final payment	10,400 00

[3] That appellant did not in fact have this sum of money because he had paid a large part of it to the contractor does not exonerate him from liability. The terms of his contract providing for progress payments,

the terms of which he invokes for his justification, are subordinate to the valid provisions of the law, and under those valid provisions, after the service of these notices upon him, he paid these moneys at his peril. As to the completion payment, the \$2,000 of it which he paid before it became due, was likewise a payment made at his own peril. Appellant seems to argue upon the authority of such cases as *Stimson Mill Company v. Braun*, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116, *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815, and *Latson v. Nelson*, 11 Pac. Coast Law J. 589, that the requirements of section 1184, Code of Civil Procedure, are illegal as interfering with the right of contract, but the validity of these provisions has been too often upheld to be open now to question. The cases upon which appellant relies were merely to the effect that certain other and discarded requirements of the mechanics' lien law, such as the requirement compelling the owner to file a bond, were invalid. The cases do not remotely touch the construction of section 1184. The cases, however, which do uphold its validity, are numerous and amongst them may be cited *Russ Lumber Company v. Garrettson*, 87 Cal. 594, 25 Pac. 747; *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438; *Bianchi v. Hughes*, 124 Cal. 24, 56 Pac. 610; *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585, 58 Pac. 187; *Weldon v. Superior Court*, 138 Cal. 427, 71 Pac. 502; *Hampton v. Christensen*, 148 Cal. 739, 84 Pac. 204. In the last cited case it is said: "It became the duty of the owner upon service of this notice to withhold sufficient funds to pay the claim of the Lumber Company, together with the attorney fees in the sum of \$100 and estimated costs, and his subsequent payment, after service of that notice, even though legal and within the contemplation of the contract, cannot be held to affect so much of the fund as was thus set apart by the force of this notice operating in the nature of a garnishment."

[4] The nature and effect of such a notice will be found fully discussed in the foregoing cases. The notice serves as an "equitable garnishment." It is a form of "equitable subrogation regulated by statute." It is an "equitable assignment of the amounts due or thereafter becoming due the contractor under the contract, and entitles the persons serving the notice to receive so much of said amounts as would satisfy their claims." *Butler v. Ny Chung*, 160 Cal. 435, 117 Pac. 512, Ann. Cas. 1913A, 940. The right to a recovery of the money so garnished by the notice does not depend upon the establishment of a lien. It "is a cumulative remedy." *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438.

Such being the law, we may come to the consideration of certain of the specific judgments which are attacked. Four thousand

dollars, it has been said, was paid by the owner to the contractor after service upon him of Wygant & Collins' notice. Wygant & Collins were denied a lien because of the premature filing of their lien claim upon April 6, 1910, but their notice to withhold was timely. The owner admittedly paid a large sum of money in excess of their demand after receipt of the notice, and he cannot, as has been said, succeed in his endeavor to have these subsequent payments treated as having been withheld for the benefit of the Diamond Match Company. And, finally, as Wygant & Collins' right of recovery does not depend upon the establishment of their lien, a personal judgment in their favor was proper. W. W. Montague & Co. was denied a lien for failure to file their lien claim in time; it having been filed on June 22, 1910. But their notice to withhold was served before the completion payment became due and when, in contemplation of law, there was in the hands of the owner over and above the amounts covered by the previous notices, sufficient to meet this demand. The argument which appellant advances to the effect that premature payments could only be availed of by those establishing their liens is not supported by our adjudications. *Sweeny v. Meyer*, 124 Cal. 512, 57 Pac. 479; *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512. It follows, therefore, that Montague & Co. was entitled to the personal judgment which was given.

[5] Respondents were entitled to interest and the interest awarded began to run from May 20, 1910, 36 days after the completion of the building. This award was proper. *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Knowles v. Baldwin*, 125 Cal. 224, 57 Pac. 988; *Macomber v. Bigelow*, 126 Cal. 15, 58 Pac. 312. This appellant is not injured by any award of interest given the nonappealing contractor beginning to run at an earlier date.

[6] Objection is made to the judgment in favor of Wygant & Collins and W. W. Montague & Co., in that, while these plaintiffs were denied a lien, the judgment provides that they shall be paid out of the money arising from the sale of the property, and that this is, in effect, the ordering of the foreclosure of a lien and the sale of the property in violence of law. In this perhaps appellant is technically correct, but it does not appear from the judgment that the property was ordered sold to meet the judgment awarded Wygant & Collins and Montague & Co. The provision is merely that, when sold, they shall be paid out of the proceeds. The judgment in favor of Wygant & Collins and Montague & Co. will be modified in this respect, and they will be relegated to the usual remedies of execution levy. In all other respects the judgment is affirmed, and respondents will recover their costs on this appeal.

We concur: MELVIN, J.; LORIGAN, J.

THOMPSON v. AMERICAN FRUIT CO.
(Civ. 1,175.)

(District Court of Appeal, First District, California. Feb. 28, 1913.)

APPEAL AND ERROR (§§ 612, 616*)—AUTHENTICATION—BILL OF EXCEPTIONS.

By Supreme Court rule 29 (119 P. xiv), on appeals from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating them in the bill of exceptions, and under the alternative method of appeal prescribed by Code Civ. Proc. § 941b, relating to notice of appeal, and section 953a, providing for an appeal on the record instead of a bill of exceptions, which record, except on appeals from the judgment roll, shall be authenticated by the trial judge, the authentication should show what papers and evidence were used on the motion culminating in the order appealed from, and hence the clerk's certificate of the record is not sufficient to perfect an appeal by either method of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701, 2714-2718; Dec. Dig. §§ 612, 616.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Henry Thompson against the American Fruit Company. From an order granting a motion to vacate a judgment rendered and entered upon the default of defendant, plaintiff appeals. Dismissed.

Henry Thompson, of San Francisco, for appellant. Wilbur G. Ziegler, of San Francisco, for respondent.

LENNON, P. J. This purports to be an appeal from an order granting a motion to vacate a judgment rendered and entered upon the default of the defendant.

The appeal cannot be considered for the reason that it has not been prepared in the manner nor perfected to the extent required by law.

The record before us consists of a copy of the following pleadings, papers, and orders in the case, viz.: (1) The plaintiff's complaint; (2) the summons and the sheriff's return thereon; (3) the judgment; (4) plaintiff's affidavit in support of motion for judgment on default; (5) defendant's notice of motion to vacate judgment; (6) order vacating judgment; and (7) notice of appeal. Appended to all of these is the certificate of the county clerk that they are full, true, and correct copies of the originals in the action. This record, however, is not in any manner or form authenticated by the certificate of the judge of the lower court before whom the matter was heard and determined.

Prior to the adoption of the alternative method of appeal provided for in chapter 1, part 2, title 13, of the Code of Civil Procedure, no express provision was to be found in the code law requiring the pleadings, papers, evidence, etc., used and had upon the hearing and determination of a motion made in the superior court, to be, upon ap-

peal to this court from an order granting or denying the motion, identified and authenticated by the certificate of the judge of the lower court as having been so used. The present and past rules of the Supreme Court, however, covered this omission of the statutory law by providing that "in all cases appealed from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another method of authentication is provided by law." Supreme Court rule No. 29 (119 Pac. xiv).

The alternative method of appeal previously mentioned provides a procedure for preparing a record upon appeal from any appealable order of the superior court, which record when prepared performs the functions of a bill of exceptions. Such record, however, is required to be authenticated in essentially the same manner as is required for the settlement and allowance of a bill of exceptions. While the authentication required by this new method of preparing records upon appeal has been held not to apply to the judgment roll upon which an appeal may be taken, it has been declared to be an essential of all other records upon appeal which are designed to take the place of a bill of exceptions. *Christenson L. Co. v. Seawell*, 157 Cal. 405, 108 Pac. 276; *Knoch v. Halzlip* (Sup.) 124 Pac. 997.

Although the clerk's certificate in the present case declares that the record brought here is composed of true copies of the original pleadings, papers, motions, and orders filed, made and entered in the court below, this is not an authentication of the record sufficient to perfect the appeal under the original or alternative method of appeal. Under either method the authentication should show what papers and evidence were actually used and had upon the hearing of the motion which culminated in the order appealed from. This the clerk could not do. It was not for him but for the judge who determined the motion to certify the papers and evidence upon which the order appealed from was made. *Harrison v. Cousins*, 16 Cal. App. 515, 117 Pac. 564; *Knox v. Schrag*, 18 Cal. App. 220, 122 Pac. 969; *Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 118, 118 Pac. 528; *Credit Clearance Bureau v. Weary*, etc., 18 Cal. App. 467, 123 Pac. 548; *Walsh v. Hutchings*, 60 Cal. 228.

If it was appellant's purpose to present his appeal to this court under the original method of appeal, he should have prepared and presented to the judge of the lower court for settlement a bill of exceptions, showing the papers, evidence, pleadings, and proceedings used and had upon the making of the order appealed from. That this was not his purpose, however, is apparent from the record before us, which does not purport to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be an authenticated bill of exceptions as required by the rule of the Supreme Court. Apparently it was the purpose of appellant to take his appeal under the alternative method; but he failed to prepare and perfect the record in the manner and to the extent required by the code provisions creating that method. After filing his notice of appeal under the provisions of section 941b, Code of Civil Procedure, the appellant neglected to do any of the things required by section 953a of the same Code. In order to avail himself of the alternative method of appeal, it was incumbent upon appellant, in addition to giving the notice of appeal, to file with the clerk a request for a transcript as provided by the section last mentioned, which would have consisted of copies of the moving papers, the evidence taken upon the hearing of the motion, and the rulings of the court thereon. Upon the completion of such a transcript, it would have been the duty of the judge of the lower court to examine the same and certify its correctness to this court. *Hibernia Sav. & L. Soc. v. Doran*, supra.

Inasmuch as we have not before us under either method of appeal a duly authenticated record of the proceedings had in the lower court upon the making of the order appealed from, we are precluded from considering the matter upon its merits. The appeal is dismissed.

We concur: HALL, J.; MURPHEY, Judge pro tem.

POUCHAN v. GODEAU. (Civ. 1,193.)

(District Court of Appeal, First District, California. March 5, 1913.)

1. APPEAL AND ERROR (§ 612*)—RECORD—AUTHENTICATION—NECESSITY.

An appeal from an order fixing costs can be perfected only by the trial judge authenticating the record as required by Code Civ. Proc. § 953a, or by Supreme Court Rule 29 (144 Cal. lli, 78 Pac. xii), and the appeal will be dismissed where the record contains papers designated as "transcript" stipulated by counsel to be a true copy of the material papers on appeal, and a certificate of the clerk that the papers are correct copies of the originals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.*]

2. LABEL AND SLANDER (§ 129*)—COSTS—STATUTORY PROVISIONS.

The costs imposed by Libel and Slander Act, § 7 (St. 1871-72, p. 534), providing that in case plaintiff recovers judgment he shall be allowed as costs \$100 counsel fees in addition to other costs, are penal and are not part of the costs denominated as such, and may only be taxed in the statutory amount after final judgment, though ordinary costs of a first trial of an action tried a second time may ultimately be taxed in favor of the prevailing party.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 379; Dec. Dig. § 129.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Germain Pouchan against Julius S. Godeau. From an order fixing costs, plaintiff appeals. Dismissed.

Costello & Costello, of San Francisco (A. W. Brouillet, of San Francisco, of counsel), for appellant. Samuel M. Shortridge, of San Francisco, for respondent.

MURPHEY, Judge Pro Tem. This is an appeal from an order of the superior court of the city and county of San Francisco fixing costs. After this case was once tried in the superior court, resulting in a verdict for appellant, a new trial was granted, whereupon issue was again joined before a jury and again resulted in a verdict in appellant's favor. After the second trial appellant seasonably and regularly filed and served a statement of his costs and disbursements incurred in both trials, and included therein an item of \$200 on account of attorney fees, claiming such under section 7 of the Libel and Slander Act (Stats. 1871-72, p. 534), that section providing that "in case plaintiff recovers judgment, he shall be allowed as costs one hundred (\$100) dollars, to cover counsel fees, in addition to the other costs."

[1] Respondent insists that the appeal must be dismissed for the reason that appellant has failed either to bring up any authenticated bill of exceptions in pursuance of rule 29 of the Supreme Court (144 Cal. lli, 78 Pac. xii), or any record such as is contemplated by sections 953a, 953b, and 953c of the Code of Civil Procedure.

The record before us contains certain papers designated as "Transcript," which is stipulated by counsel to be "a true and correct copy of the material papers on appeal, * * * and that the same shall constitute the record on appeal herein, and that the appeal herein shall be heard thereon"; and also a certificate of the clerk of the superior court that the papers contained in the transcript are true and correct copies of the originals of such papers on file in his office.

Neither this certificate by the clerk nor the stipulation can take the place of a judge's certificate required by section 953a, Code of Civil Procedure, because the law provides that a judge alone can certify as to what evidence was received and what proceedings had at the hearing before him. Neither parties litigant nor counsel can confer original or appellate jurisdiction on this court by stipulation or consent.

In *Credit Clearance Bureau v. Weary & Alford Co.*, 18 Cal. App. 467, 123 Pac. 548, this court said: "To perfect such an appeal it was necessary for the appellant to adopt either the method prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure, or that prescribed by rule xxix of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Supreme Court (144 Cal. 111, 78 Pac. 111). If either of such methods had been pursued, the record would have been examined and authenticated by the trial judge—the person who knew what papers were used upon the hearing of the motion.”

As was said in *Walsh v. Hutchings*, 60 Cal. 228, “It is not for the clerk to determine what papers or evidence the court acted upon.”

In *Harrison v. Cousins*, 16 Cal. App. 515, 117 Pac. 564, the judge of the superior court attached this certificate: “I * * * do hereby certify that upon the hearing of the motion of H. D. Cousins, one of the defendants in the above-entitled action, * * * the only papers considered were the complaint in said action, the affidavit of merits of H. D. Cousins, with four exhibits, A, B, C, and D, said Cousins’ notice of motion for a change of venue, and the demurrer of H. W. Hutton, * * * and that I granted the order changing the venue in said action; that true and correct copies of the above-named papers * * * are set out in the foregoing transcript.” The record also contained a certificate of the clerk of the superior court certifying the correctness of the copies of the papers contained in the transcript. This court held that the record did not constitute an authenticated bill of exceptions under rule 29 of the Supreme Court, *supra*; nor did it contain any record that would measure up to the requirements of section 953a of the Code of Civil Procedure, and cites *Ramsbottom v. Fitzgerald*, 128 Cal. 75, 60 Pac. 522; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Muzzy v. McEwen Lumber Co.*, 154 Cal. 686, 98 Pac. 1062.

In *Manuel v. Flynn*, 5 Cal. App. 819, 90 Pac. 463, this court refused to consider certain affidavits found in the transcript together with the following stipulation: “That the foregoing printed pages shall constitute the transcript on appeal in the above-entitled cause, and that the appeal may be heard thereon,” and “that the papers therein mentioned are correct copies of the originals on file, etc.” The court said: “It is not clear that the stipulation includes the affidavits mentioned. But whether it does or not, we think that under the rules of this court and the decisions, the affidavits, not being in a bill of exceptions and therefore not authenticated as required by rule xxix of this court, cannot be considered on this appeal.” And the court finally concludes: “Certainly, where, as here, there is nothing more than the mere stipulation of the attorneys showing that they have been so used, could not authorize their consideration upon appeal. Moreover, it does not thereby or otherwise appear that they constituted all the affidavits and papers used on the hearing.”

The situation in the case at bar is identical with the situation above set out.

In *Melde v. Reynolds*, 120 Cal. 236, 52 Pac. 491, the Supreme Court refused to consider affidavits indorsed by the trial court over the signature of the judge as having been used upon the hearing of a motion for a new trial; the court holding that they had not been incorporated in a bill of exceptions and authenticated as required by rule 29 of that court.

It follows that the appeal must be dismissed. We arrive at this conclusion with less hesitancy for the reason that we are satisfied that on principle, supported by authority, the conclusion of the trial court was correct on the merits.

[2] The costs provided in this class of cases are penal in their character and are not part of the costs denominated as such, and should only be taxed in the statutory amount after final judgment. *Singer v. Fidelity & Deposit Co. of Md.*, 96 Md. 221, 54 Atl. 63.

The authorities cited by appellant are not applicable to the situation presented by the record in this case. There can be no doubt, and it is conceded, that the ordinary costs of a first trial of an action tried a second time, either because of the granting of a new trial or on reversal of the judgment, may ultimately be taxed in favor of the prevailing party.

The appeal is dismissed.

We concur: LENNON, P. J.; HALL, J.

BEACH v. WAITE et al. (Civ. 965.)

(District Court of Appeal, Second District, California. Feb. 25, 1913. Rehearing Denied by Supreme Court April 26, 1913.)

1. MORTGAGES (§ 283*)—TRANSFER BY MORTGAGOR.

The grantee of mortgaged lands who agrees to pay the indebtedness becomes the principal debtor of the mortgagee with the mortgagor as surety.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 756-758; Dec. Dig. § 283.*]

2. MORTGAGES (§ 417*) — ASSIGNMENT OF MORTGAGOR.

A mortgagor who has conveyed the mortgaged land may afterwards purchase, and take an assignment of the mortgage, and foreclose it against his own grantee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

3. MORTGAGES (§ 267*)—ASSIGNMENT—FRAUD.

The fact that a mortgagor, after conveying the land, took an assignment of the mortgage in the name of the attorney employed by the mortgagee to foreclose, was not fraudulent on the part of the mortgagor as to his grantee; the assignment having provided that the assignor would see that the foreclosure was prosecuted to a conclusion.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 694, 695, 697-709; Dec. Dig. § 267.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by S. E. Beach against M. P. Waite and another. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. D. Boyer, of Oakland, for appellant. Anderson & Anderson, of Los Angeles, and Alfred Slemmon, of Bakersfield, for respondents.

JAMES, J. On February 7, 1908, M. P. Waite, one of the defendants in this action, executed his promissory note for \$1,500 in favor of Norvin R. Strobbridge and Selma S. Strobbridge, which note was made payable six months after date, with interest at the rate of 8 per cent. per annum, and which provided for the payment of attorney's fees in the event of suit. To secure the payment of this note a mortgage was given covering certain lots of land in the county of Kern. On February 20th Waite sold this land to one Mullen, the deed of conveyance containing a recital that the land was subject to the Strobbridge mortgage which the vendee assumed and agreed to discharge. On August 18, 1908, the mortgage debt not having been paid, action was brought by the mortgagees to obtain judgment of foreclosure and for any deficiency that might result upon sale of the property. On the 18th of August, 1908, notice of the bringing of this action was duly recorded in Kern county. Waite's grantee, Mullen, who, with Waite, was made a party defendant in the foreclosure action and being a necessary party thereto, could not be found within the state of California, and service of summons was ordered to be made upon him by publication, and personal service was also made at Brooklyn in the city of New York. The proceedings had under which service was made upon Mullen were all regular and in due form. Judgment in the foreclosure action was entered on June 24, 1909, and thereafter sale of the mortgaged premises was made to one Henry Ruettgers for an amount sufficient to satisfy the mortgage debt, together with attorney's fees and necessary costs. On July 10, 1909, Mullen gave a quitclaim deed of his interest in the land to Elizabeth Schwartz, who, in turn, on the same day, executed to plaintiff herein a deed in like form. Defendant Kaye is an attorney at law, and was employed by the Strobbridges to represent them in the action of foreclosure, and he did appear in that action and conducted the proceedings to their conclusion. It appears from the evidence that defendant Waite, the mortgagor, was desirous of avoiding possible liability on account of the mortgage indebtedness which had been assumed by his grantee, and after the action of foreclosure was brought, and before judgment he negotiated with the Strobbridges regarding a settlement of the matter. It was finally agreed by the Strobbridges to accept from Waite \$1,500, being the principal amount

of the mortgage debt, and the Strobbridges, in consideration of that payment being made to them, executed a written assignment, whereby they assigned all of their interest in the mortgage debt and their claims arising out of the same to the defendant Kaye for the benefit of Waite, their mortgagor. This instrument of assignment over the signatures of the two Strobbridges contained the following provision: "And we agree to carry to completion and final judgment and sale the action heretofore commenced for the foreclosure of said mortgage and to pay all costs of court that may be incurred in said action, together with attorney's fees, which fees shall not exceed \$75." No substitution of parties was made in the foreclosure action, and that suit progressed to judgment with the names of the Strobbridges as plaintiffs. The facts as we have recited them in the foregoing are gathered from the undisputed evidence as set forth in the statement which forms a part of the record on this appeal. Plaintiff Beach, being the grantee named in the quitclaim deed from Elizabeth Schwartz, brought this action to recover damages in the sum of \$2,000, which he alleged he had suffered by reason of an alleged abuse of the process of the court in the county of Kern. It was set forth in his complaint as ground thereof that Kaye and Waite, conspiring to cheat and defraud the plaintiff, caused execution sale upon the judgment of foreclosure to be made, which judgment plaintiff alleged to be false and fraudulent and a sham. The whole theory of plaintiff's case may be summarized in the contention that, when Waite made settlement with the Strobbridges of the mortgage debt, the lien of the mortgage was thereby extinguished, and that no judgment of foreclosure could thereafter be legally rendered to affect the interest of a subsequent purchaser, such as the plaintiff was shown to be. Upon the trial of the action the superior court determined all of the essential issues in favor of the defendants, and judgment was rendered accordingly. Plaintiff took an appeal from that judgment, and also from an order denying his motion for a new trial.

[1] We think that the trial court correctly determined the issues upon the evidence submitted and which we have already stated in substantial substance. It has been held that, where a grantee of a mortgagor takes real property subject to a mortgage and agrees to pay such indebtedness, he becomes in law the principal debtor of the mortgagee, and the mortgagor his surety. This proposition admits of no dispute, as it is well settled by the decisions of several cases by our Supreme Court, of which we need only cite *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868.

[2] Neither can it be questioned but that a mortgagor, under the conditions last stated, may purchase and take an assignment of the mortgage to himself and foreclose the same

against his grantee. We quote from Jones on Mortgages, § 768: "If a purchaser who has assumed a mortgage debt omits to pay it when due, the grantor may take an assignment of the mortgage to himself, foreclose the same, and sue for the deficiency. * * * And so a mortgagor, who has sold subject to the mortgage debt, upon being compelled to pay it, is subrogated to the benefit of the security, without any formal assignment of it to him. He thereby becomes an equitable assignee of it, and may enforce it against the property."

[3] And so defendant Waite, when he made settlement with the Strobbridges and took an assignment of the mortgage for his own benefit, acted in a perfectly legal and proper way to secure himself as against his defaulting grantee. No fraud was committed because the assignment in form was made in favor of Mr. Kaye, the attorney, and there was a very good reason why the assignment was so made to run; the Strobbridges by their contract of assignment agreed to see that the action was prosecuted to a conclusion, and Mr. Kaye was the attorney who had charge of the litigation. It was no more than natural, at least no criticism could be predicated upon such act, that Waite should have selected the attorney to hold his interest in the subject-matter of the foreclosure action until that suit was finally determined and settlement secured. A close and critical scanning of the record fails to disclose to our minds any ground upon which to base a charge of dishonest or dishonorable conduct against either of the defendants here sued. Furthermore, there is express statutory authority for the continuing of an action in the name of the original party after a transfer of interest therein, it being provided: "In case of * * * transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." Code Civ. Proc. § 885. Plaintiff herein took the quitclaim deed to the property charged with knowledge of the existence of the record mortgage held by the Strobbridges, and charged with the knowledge given him by the recording of the lis pendens of an action pending to foreclose that mortgage; and charged with the knowledge that his predecessor in interest, Mullen, had assumed and agreed to pay the mortgage debt. If he had been permitted to succeed in this action, the result would be that his property would be relieved of the mortgage incumbrance without his having given consideration therefor. Equitable considerations, if they were entitled to be weighed in this action, would give little standing to plaintiff's suit. We have shown, however, that under the evidence the defendants incurred no liability on account of any act of theirs taken in connection

with the mortgage transaction and the sale of the mortgaged property.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

A. WIDEMANN CO. v. DIGGES. (Civ. 1,147.)

(District Court of Appeal, First District, California. Feb. 28, 1913. Rehearing Denied by Supreme Court April 29, 1913.)

1. SALES (§ 353*)—ACTION FOR DAMAGES—ALLEGATION OF NONPAYMENT OR BREACH—"FAIL."

A complaint, alleging the execution of a contract for the sale of barley, that defendant failed and refused to accept the barley and to pay the purchase price or any part thereof, for which reason the seller was compelled to sell it to another person, sufficiently alleged the fact of nonpayment; the word "fail" meaning to leave unperformed; to omit; to neglect.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995-1004; Dec. Dig. § 353.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2644, 2645.]

2. PLEADING (§ 433*) — DEFECTS — CURE BY JUDGMENT.

Where the allegations in an action for breach of contract to buy grain did not entirely fail to plead nonpayment, such defect, if any, in the absence of special demurrer, was cured by judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

3. PLEADING (§ 208*)—DEFECTS IN COMPLAINT—WAIVER BY FAILURE TO DEMUR—ASSIGNMENT OF CONTRACT.

In the absence of a demurrer specifically objecting that the complaint, in an action for breach of contract to purchase, did not allege that complainant at the commencement of the action was the owner of the claim assigned to and sued upon by him, the point would not be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. § 208.*]

4. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—DEFECT IN PLEADING.

Where a defective allegation of tender by the seller did not result in any substantial injury to the buyer in his defense of the seller's action, error, if any, in overruling a demurrer on that particular ground was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4105; Dec. Dig. § 1040; Pleading, Cent. Dig. § 567.]

5. SALES (§ 153*)—PERFORMANCE OF CONTRACT—TENDER OF DELIVERY.

The seller of barley for delivery between April 15th and September 1st, at a warehouse from which the freight rate did not exceed \$3 per ton, stored the grain in such a warehouse and gave negotiable warehouse receipts to his agent, with instructions to deliver them to the buyer upon payment of the purchase price, but the agent could not find the buyer at his home and left at his residence a written notice of the place of delivery and a duplicate notice at the post office, addressed to him. The notice left at his residence was received there by him on the morning of September 1st on his return. Held, that under Civ. Code, § 1858b, which makes the transfer of negotiable warehouse receipts a symbolic delivery of goods and a trans-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fer of the title, the seller had made a timely tender of delivery or offer to perform.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 358-366; Dec. Dig. § 153.*]

6. SALES (§ 168*)—PERFORMANCE OF CONTRACT—NOTICE OF PLACE OF DELIVERY.

A seller of grain to be delivered within a certain time at warehouses not designated by the contract was bound to give reasonable notice, in advance, of the time and place at which delivery would be made; and a notice two days before the expiration of the time was sufficient to afford a reasonable opportunity for inspection before acceptance and payment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.*]

7. SALES (§ 176*)—PERFORMANCE OF CONTRACT—NOTICE OF PLACE OF DELIVERY.

Under the express provisions of Civ. Code, §§ 1511, 1512, a buyer, through whose fault a notification of delivery was not received until after the time limited by the contract, could not complain.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by the A. Widemann Company against R. M. Digges. Judgment for plaintiff, and defendant appeals. Affirmed.

Seidenberg & Davis, of San Francisco, for appellant. Zabala & Bardin, of Salinas, for respondent.

LENNON, P. J. This action was for damages for defendant's alleged breach of a contract expressed in writing, as follows:

"King City, Cal., April 15, 1910.

"I have this day bought of E. A. Eaton five hundred tons barley, grading A No. 1 feed, San Francisco Merchants' Exchange standard, and agree to pay to said E. A. Eaton the sum of one dollar per cental for all of said barley delivered at any Salinas Valley warehouse where freight rate to San Francisco does not exceed \$3.00 per ton. Payment to be made immediately upon delivery. Delivery to be made at any time between this date and September 1st, 1910; and have this day paid one dollar on account of this purchase.

"[Signed] R. M. Digges.

"E. A. Eaton."

"King City, Cal. April 15, 1910.

"I have this day sold to Robert Digges 500 tons barley grading A 1 feed, Merchants' Exchange standard, to be delivered at any time between this date and September 1st, 1910, for one dollar per cental net to me. Delivery at any S. P. Milling Company warehouse in the Salinas Valley where freight rate to San Francisco does not exceed \$3.00 per ton.

"[Signed] E. A. Eaton."

The defendant demurred to the complaint generally upon the ground of the insufficiency of the facts stated to constitute a cause of action, and in addition specified 14 particulars in which it was claimed that the complaint was uncertain and ambiguous. Upon

the overruling of the demurrer the defendant answered by denying all of the material allegations of the complaint, and upon the issues thus raised the case was tried with a jury. Upon a verdict rendered in favor of the plaintiff judgment was entered against the defendant in the sum of \$1,957.55, from which, and from an order denying a new trial, the defendant has appealed upon the judgment roll and a bill of exceptions.

Plaintiff's complaint, after alleging in effect the execution of the foregoing contract, averred that between the 15th day of April and the 1st day of September, 1910, said E. A. Eaton, being able and willing to perform his part of the contract, tendered to said R. M. Digges the said grain, and performed each and every act required of him in the manner and at the time prescribed by the agreement; that said R. M. Digges failed and refused to pay the said E. A. Eaton the purchase price of said grain or any part thereof; that because of the refusal and failure of said R. M. Digges to accept said grain and pay said E. A. Eaton therefor he was compelled to sell the same to another person for the sum of \$8,041.37, which was the highest and best price obtainable for said grain; that if the defendant had purchased the grain as he agreed to do said E. A. Eaton would have received therefor the sum of \$10,000; that on the 22d day of September, 1910, said E. A. Eaton duly assigned and transferred to plaintiff his claim and demand for the damages resulting to him by reason of the defendant's breach of the contract.

[1] The defendant insists that his demurrer should have been sustained, because plaintiff's complaint does not in so many words allege that the defendant did not pay the purchase price of the grain contracted for. This contention is based upon the general rule of pleading which requires that the plaintiff, in an action based simply upon the breach of a contract to pay money, should allege or show that the contract in suit has actually been breached by a failure to pay. This rule is founded upon the theory that the gist of the action is the failure to pay, and therefore must be alleged.

In the attempted application of this rule to the plaintiff's pleading in the present case, counsel for the defendant cites to us a long line of decisions commencing with *Frisch v. Caler*, 21 Cal. 71, wherein it has been repeatedly held that the allegation that the defendant "has refused and still refuses to pay" is but a conclusion of the pleader and wholly insufficient as an allegation of nonpayment.

That the defendant " * * * refused to pay * * * the purchase price of said grain or any part thereof" is the allegation quoted and complained of by counsel for the defendant in the present case. It may be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that this allegation, as quoted, would not survive the test of the rule declared in the cases cited. This quotation, however, omits a material part of the allegation of the complaint upon the subject of nonpayment which, when read in conjunction with other allegations of the complaint, may be fairly said to show and support the fact of nonpayment. The entire allegation of the plaintiff's complaint which purports to plead the fact of nonpayment reads as follows: "That said R. M. Digges failed and refused to accept said grain and to perform his agreement, and refused to pay said E. A. Eaton the purchase price of said grain or any part thereof." In addition to the foregoing the plaintiff's complaint alleged "that because of the refusal and failure of said R. M. Digges to accept said grain and to pay said E. A. Eaton therefor the agreed price said E. A. Eaton was compelled to sell said grain to another person." It will thus be seen that the sum and substance of all the allegations of the plaintiff's complaint is that defendant not only refused, but failed, to pay "the purchase price of said grain or any part thereof." To fail means to leave unperformed; to omit; to neglect (*Bouv. Law Dic.*); and therefore the allegation that the defendant failed to pay was a direct allegation of nonpayment.

If ever there was any doubt in the mind of the defendant as to whether or not he was charged with nonpayment of the purchase price of the grain, that doubt must have been dispelled by a consideration of other allegations of the complaint, which show that the grain, because of his failure to pay, was sold and delivered to another person.

Upon a careful perusal of the cases cited and relied upon by counsel for the defendant, it will be observed that in some of them the defect in pleading the fact of nonpayment was pointed out by special demurrer (*Roberts v. Treadwell*, 50 Cal. 520; *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. 882; *Richards v. Travelers' Ins. Co.*, 80 Cal. 506, 22 Pac. 939; *Hurley v. Ryan*, 119 Cal. 72, 51 Pac. 20; *Hawley v. Brownstone*, 123 Cal. 643, 56 Pac. 468); and in many, if not all, of them it will be found that the conclusion of the pleader was not aided and reinforced, as happened in the present case, by other allegations showing and supporting, either directly or indirectly, the fact of nonpayment (*Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678; *Richards v. Travelers' Ins. Co.*, supra; *Hurley v. Ryan*, supra).

[2] In short, it cannot be said in the present case that the complaint as a whole shows a total failure to plead the fact of nonpayment; and therefore the defect, if any, in the plaintiff's allegation of that fact was, in the absence of a special demurrer, cured by the judgment. *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772.

[3] The defendant makes the further point that the complaint is fatally defective, because it is not alleged therein that the plaintiff was the owner at the commencement of the action of the claim assigned to and sued on by him. In the absence of a demurrer specifically upon this objection, the point will not be considered. *Irish v. Sunderhaus*, 122 Cal. 308, 54 Pac. 1113; *Krieger v. Feeny*, 14 Cal. App. 538, 112 Pac. 901.

[4] The defendant's demurrer, among other things, specified that the plaintiff's complaint was uncertain in this: That it did not allege the precise date upon which the grain was tendered to the defendant. The allegation of the complaint in this behalf is to the effect that such tender was made between April 15 and September 1, 1910. Assuming that the defendant was entitled to have the date of the alleged tender stated with greater particularity, it does not appear that the failure to do so resulted in any substantial injury or disadvantage to the defendant in the preparation and presentation of his pleading and evidence in defense of the action. This being so, it must be held, after judgment rendered upon the facts, that the error, if any, in overruling the demurrer in the particular stated was harmless. *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. 424; *Krieger v. Feeny*, supra.

[5] The sufficiency of the evidence to support the verdict and judgment is disputed by the defendant. The contention in this instance is that the plaintiff's evidence failed to show that the grain contracted for had actually been delivered to the defendant before the expiration of the time expressed in the contract. The evidence adduced upon the trial on the subject of delivery is, in substance, as follows: In due season, subsequent to the execution of the contract in controversy, plaintiff's assignor procured 500 tons of barley of the grade called for, and stored the same in separate lots in several warehouses located at different points in the Salinas valley. In the month of July plaintiff's assignor notified defendant that the grain was ready for delivery, and tendered him the warehouse receipts therefor. The defendant, however, refused to accept said grain at this time, claiming that he was not compelled to do so by the terms of the contract until the last day of August, 1910. Thereafter plaintiff's assignor, apparently for the purpose of avoiding any future controversy arising out of a construction of the contract, assembled and stored the 500 tons of grain in a warehouse at San Lucas, in the Salinas valley, Monterey county, from which point the freight rate to San Francisco was \$3 per ton. The assembling of the grain at San Lucas was completed on the 29th day of August, 1910, whereupon plaintiff's assignor gave negotiable warehouse receipts for the grain to a Mr. Walker, with instructions to deliver them to the defendant upon the payment of the purchase price of the grain.

Walker made diligent inquiry and search for the defendant, but at this time he could not be found at his home in King City, nor elsewhere in Monterey county, because of his absence in San Francisco. Being unable to locate the defendant in person, plaintiff's assignor immediately caused a written and signed notice to be left with the person in charge of the defendant's residence, wherein he was notified that the grain contracted for was in the warehouse of the Southern Pacific Milling Company at San Lucas; that negotiable warehouse receipts, properly indorsed, covering the amount and grade of grain called for were in the possession of C. E. Walker of King City, the home of the defendant; that upon payment of the purchase price of the grain these warehouse receipts would be delivered to him or to his order. This notice concluded with the clause that "the grade of barley is the same as purchased by you, and you will find everything just as our agreement required." At the same time that this notice was left at the house of the defendant a duplicate thereof, addressed to him, was deposited in the United States post office at King City, and in due course of mail was received by him. The defendant returned from San Francisco to his home in King City about 9 o'clock on the night of August 31, 1910, and on the following morning the above-mentioned notice was handed to him by his sister-in-law, who had received it from the plaintiff's assignor. Under these circumstances it is idle to contend that the plaintiff's assignor made neither a timely tender of delivery nor a valid offer to perform. The transfer of negotiable warehouse receipts is a symbolical delivery of the goods called for by them, and passes the title thereto as effectually as if an actual delivery had been made. Civ. Code, § 1858b.

[8, 7] It will not be disputed that the defendant was entitled to an opportunity to inspect the grain before accepting the same and paying the price therefor. This, however, he was invited to do by the very terms of the notice which was left at his residence and also mailed to him. Inasmuch as the contract in controversy failed to designate the particular warehouse in which the grain was to be assembled, it must be conceded that the defendant was entitled to notice of the time and place at which delivery would be made a reasonable time in advance thereof. It may also be conceded that the giving of such notice prior to the expiration of the time limited in the contract was essential to a proper performance of the contract. Such notice, however, was, we think, given within the time limited in the contract, and sufficiently in advance of the day fixed for delivery to have afforded the defendant a reasonable opportunity for inspection before acceptance and payment. Under defendant's own construction of the contract he was not com-

pelled to accept delivery until the very last day mentioned therein. Acquiescing in this construction plaintiff's assignor fixed August 31, 1910, as the date upon which delivery would be made, and some two or three days prior thereto diligently and in good faith sought the defendant for the purpose of making a tender of delivery and giving notice of the time and place fixed therefor. Failing to find the defendant, plaintiff's assignor employed the only means available to him for making a tender of delivery and giving the notice required. Whether the defendant's absence from his home was intentional or otherwise is of no consequence. In either event plaintiff's assignor was justified in employing the method he did of notifying defendant of the time and place fixed for delivery and making tender thereof. That such tender and notification was not received until after the expiration of the time limited by the contract was the fault of the defendant and not the neglect of plaintiff's assignor, and therefore the defendant will not be heard to complain. Civil Code, §§ 1511, 1512.

Complaint is made of certain rulings of the trial court upon the admission and rejection of evidence. In response to these it will suffice for us to say that we have considered the points made in this behalf, and upon an examination of the record find that they are not well taken.

It is insisted that the trial court instructed the jury that "there is only one tender, and that is August 31, 1910." This contention is not warranted by the record. The language quoted was not contained in any charge to the jury, but is to be found in the trial court's remarks in ruling upon an objection. That it was not intended for or considered by the jury is plainly apparent; and when read in connection with all that was said by the trial court it is equally clear that the court was not expressing an opinion upon any question of fact in issue in the case.

We are satisfied that the defendant's requested instructions were properly refused, and that upon the whole the case was fairly tried and justly determined.

The judgment and order appealed from are affirmed.

We concur: MURPHEY, Judge pro tem.; HALL, J.

DEAN v. HAWES. (Civ. 1,133.)

(District Court of Appeal, First District, California. Feb. 28, 1913.)

1. VENDOR AND PURCHASER (§ 323*)—OPTION TO RECONVEY—TENDER—NECESSITY—USELESS ACT.

Where, in an action for breach of defendant's contract to accept a reconveyance of certain land which he conveyed to plaintiff, the evidence showed that within the time specified plaintiff notified defendant orally and in writ-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing that she accepted the option to reconvey and offered to make a deed, on defendant complying with the conditions of the option, which he uniformly refused to do and finally confessed financial inability to do, plaintiff was not required to make an actual tender of a sufficient deed of reconveyance in order to put defendant in default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 948-950; Dec. Dig. § 323.*]

2. VENDOR AND PURCHASER (§ 329*) — CONTRACT TO ACCEPT RECONVEYANCE—BREACH—DAMAGES—EVIDENCE.

In an action for breach of a contract to accept a reconveyance of certain land, evidence of the value of the land to plaintiff was insufficient to sustain a recovery of damages, under Civ. Code, § 3307, providing that the detriment caused by the breach of an agreement to purchase real property is the excess, if any, of the amount which would have been due to the seller under the contract over the value of the land to him, since under such section the measure of damages is the difference between the contract price and the market value of the land at the time of the breach, and not the difference between the contract price and what plaintiff may think the land is worth to him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 952; Dec. Dig. § 329.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Henrietta S. Dean against George W. Hawes. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

George W. Hawes, in pro. per. (Frank T. Poore, of San Francisco, of counsel), for appellant. Charles B. Younger, of Santa Cruz, for respondent.

LENNON, P. J. In this action the plaintiff sued for and, upon the verdict of a jury, procured a judgment against the defendant in the sum of \$600 as damages for the alleged breach of an agreement to purchase real estate. The defendant has appealed from the judgment, and from an order denying a new trial, upon the judgment roll and a statement of the case, which purports to show all of the evidence taken upon the trial.

The plaintiff's cause of action as pleaded is founded substantially upon the following facts: The defendant, in consideration of the sum of \$800, executed to plaintiff a deed, dated October 31, 1908, purporting to convey to plaintiff the defendant's undivided one-half interest in certain real property situate in the county of Santa Cruz. The plaintiff has ever since been the owner in fee of the interest so conveyed to her, free and clear of all incumbrances. Contemporaneously with the execution of the deed referred to the defendant made and delivered to plaintiff the following memorandum of agreement:

"Santa Cruz, Cal., October 31, 1908.

"This is to certify that I have this day sold to Henrietta S. Dean a one-half interest in a certain tract of land. Now, therefore, should she so desire I hereby agree to

take the land back, allowing her ten per cent. on the investment, at any time after one year and within two years from this date. The party owning the other half-interest is W. H. Lamb; the amount is six acres." [Signed] George W. Hawes."

On November 1, 1909, the plaintiff accepted the option of reconveying to the defendant the land described in the defendant's deed and memorandum of agreement of October 31, 1908, by so informing the defendant, and at the same time offered to make a deed of the property to defendant upon the payment of the sum of \$800, the original and agreed purchase price of the property, plus the sum of \$80, which was the 10 per cent. profit provided for in the defendant's memorandum of agreement. Thereafter and from time to time the plaintiff offered upon the conditions stated to execute such deed to the defendant, but he declined and refused to accept plaintiff's offer, and finally repudiated the entire transaction.

The value to the plaintiff of the land sold to her was alleged at no time to be in excess of the sum of \$500; and because of this the plaintiff claimed that she was damaged by the defendant's breach of his agreement to purchase.

The defendant's answer, in effect, admitted the execution of the deed and the memorandum of agreement in connection therewith, but practically denied every other material allegation of the complaint.

At the outset defendant contends that the plaintiff's complaint shows that the transaction in suit was intended as a mortgage, and that the action was one to foreclose a mortgage, rather than one for damages in breach of contract. In support of this contention the defendant insists that the plaintiff's complaint and proof proceeded upon the theory that the deed from the defendant to plaintiff was intended as a mortgage.

The complaint speaks for itself, and obviously it is not susceptible of the construction contended for by the defendant; and the evidence upon the whole case shows that the action was defended, tried, and determined upon the theory that it was one solely for damages arising out of the breach of a contract.

[1] The sufficiency of the evidence to support the verdict and judgment is challenged in several particulars; but only two of the specifications of insufficiency are worthy of notice. The first involves the point that the defendant was never in default, because, as it is alleged, the plaintiff's evidence does not show a tender to the defendant of a good and sufficient deed of reconveyance within two years of the date of the original deed to the plaintiff. Conceding this to be so, the plaintiff's evidence, on the other hand, shows that upon the expiration of one year, and within two years from the date of the agreement in question, she notified the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant orally and in writing that she accepted the option to reconvey, and at the same time offered to make a deed to the defendant upon his compliance with the conditions of the option. The plaintiff's evidence further shows that from time to time thereafter she made repeated demands upon the defendant to fulfill his contract, but in each instance he refused because of his confessed financial inability to do so, and finally repudiated the entire transaction. It is very apparent from the conduct and attitude of the defendant (who, by the way, is an attorney at law and was the legal adviser of the plaintiff at the time of the transaction) that he never intended at any time prior to the commencement of the action to perform his contract with the plaintiff, and that if a deed from the plaintiff had been made and tendered to him by the plaintiff within the time specified in the contract it would not have been accepted. In brief, it is clear from the plaintiff's testimony that the tender of a deed to the defendant would have been an idle and a useless act, and under such circumstances it was unnecessary to make such tender in order to put the defendant in default.

[2] The second specification of the insufficiency of the evidence to support the verdict and judgment presents the point that the plaintiff wholly failed in her proof upon the issue of damages.

This point is well taken and necessitates a reversal of the judgment. The plaintiff's case was rested upon her testimony alone. Upon the subject of the value of the property at the time of the defendant's alleged breach of his contract, she testified literally and substantially as follows: On direct examination: "Question: What was the value of the property to you that Mr. Hawes has conveyed to you and does not want to take back? Answer: I really don't know how to answer the question. It is really not worth any money value to me. It was the money I wanted instead of land. * * * Question: The land, then, to you is of no value? Answer: I don't just hardly know how to answer it. I have it as security do you mean? Question: In other words, the land itself you don't want to own? Answer: No; I don't want the land at all. Question: You don't want to have the land at all? Answer: No. Question: In this complaint it is alleged that the value does not exceed \$500 to you. Is that so or not? Answer: No; it is not." Upon cross-examination: "I don't know what the cash value of the property is, nor what it was on October 31, 1908. * * * I don't know what the value of the property between October 31, 1909, and October 31, 1910, was. I said the property was not worth to exceed \$500 to me. Question: * * * Within two years after the 31st of October, 1908, what was this property worth to you? Answer: I don't know; I did not make an estimate; I wanted the money.

Question: You don't know? Answer: No; I am not a real estate man, and I don't know. Question: You don't know? Answer: No, sir."

Aside from repetitions and volunteer statements of the witness, which latter were foreign to the question of value, the foregoing constitutes the entire testimony upon which the plaintiff depended for proof of the damage alleged to have been sustained by her because of the defendant's breach of the contract sued upon. And opposed to this was the evidence of the defendant, who testified positively that at the time of the execution of the deed from the defendant to plaintiff and at all times thereafter the property described therein was worth not less than \$1,000. In addition several other witnesses were called for the defendant, who testified that they knew the property and its value. They testified in effect that the property was worth from \$350 to \$400 per acre at the time of its sale to the plaintiff and at all times thereafter. Finally, upon behalf of the defendant, W. H. Lamb, "the party owning the other one-half interest," testified that he knew the property and its value; that it consisted of six acres, which on October 31, 1908, and at all times thereafter was worth \$300 per acre. In other words, the uncontradicted evidence produced on behalf of the defendant was to the effect that the value of the three acres sold to plaintiff was at the time of the execution of the deed from defendant to plaintiff and at all times thereafter from \$900 to \$1,200.

The measure of damages in actions of this character is to be found in section 3307 of the Civil Code, which declares that "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value to him."

In the presentation of the plaintiff's case her counsel evidently proceeded upon the theory that the Code section just cited measures the damage for the breach of a contract to purchase real estate by the vendor's individual and whimsical notion of the value of the property to him, in utter disregard of the price which it would bring in the open market. The trial court, as indicated by its rulings upon the admission of evidence and in its charge to the jury, apparently acquiesced in this construction of the Code section under consideration, and literally limited the damage caused by the breach of a contract to purchase real estate to the excess "over the value to him" with whom the contract was made, of the amount which would have been due upon performance of the contract.

That this construction of the Code section in question was never contemplated by the Legislature is manifest from the obvious injustice and absurdity following its applica-

tion in the present case, wherein and whereby the plaintiff, in effect, was permitted to retain the ownership of land worth from \$900 to \$1,200, and at the same time was awarded damages in the sum of \$500 for the breach of a contract to purchase the same land. Liberally construed in accordance with its spirit and the plain purpose of its enactment, the rule enunciated in that section means that in actions for damages for the breach of a contract such as is pleaded here the sum recoverable as compensation for the breach is the difference between the contract price and the market value of the land at the time of the breach. This in effect, was the construction placed upon said section in the case of *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, where it is said that "the general rule of damages on failure of the vendee to take the property purchased and pay for the same would be the actual loss sustained by the vendor thereby, which would ordinarily be the difference between the actual contract price and the actual value of the land at the time of the breach if the property shall have declined in value."

Tested by this construction of the rule, the plaintiff's case utterly failed to show that she was damaged by the breach complained of, as found by the jury, in the sum of \$500, or in any other sum. Hers was the only testimony introduced upon her case to support the allegation and issue of damage; but as has been shown, she did not even pretend to know what the actual value of the property was at any time, and her entire testimony upon this phase of the case was directed solely to the question as to what the value of the property was to her individually, and excluded all consideration of the price for which it could be sold in the open market. Clearly such testimony did not meet the requirements of the rule stated, nor respond in any degree to the issue of damages. It must therefore be held that the plaintiff's case as presented and submitted to the jury was totally lacking in evidence upon a vital issue of the case; and in view of the positive testimony of the witnesses for the defendant upon the subject of value there is no escape from the conclusion that the verdict and judgment are not only not supported by the evidence, but are clearly contrary thereto. This phase of the case is disposed of by counsel for the plaintiff by the bald statement that the evidence upon the whole case is in substantial conflict; and that inasmuch as the jury, and the trial court upon a motion for a new trial, each saw fit to accept the testimony of the plaintiff rather than that of the witnesses for the defense, the judgment is not open to attack upon the ground of the insufficiency of the evidence to support it. In this connection it is urged that the jury and the trial court were justifi-

fied in rejecting the testimony of the witnesses for the defense, because, as it is claimed, their estimates of the value of the property were obviously inflated. The record before us does not justify the latter contention, nor does it appear that the testimony of the witnesses for the defense were so inherently improbable as to be unworthy of belief; and therefore it should not have been absolutely ignored either by the jury or the trial court.

However that may be, the record shows, as we have already indicated a case, not of conflicting evidence, but rather one wherein there is a total lack of evidence to support the cause of action pleaded and relied upon for a judgment, and assuming, without conceding, that the jury was justified in rejecting the proof presented upon behalf of the defendant, the fact remains nevertheless that the plaintiff wholly failed in her proof upon the issue of damage; and therefore, upon the facts of the case as presented, she should have been nonsuited, or the jury directed to bring in a verdict for the defendant.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HALL, J.; MURPHEY, J., pro tem.

WILLIAMS v. POMONA VALLEY HOSPITAL ASS'N.

(Civ. 1,264.)

(District Court of Appeal, Second District, California. Feb. 28, 1913. Rehearing Denied by Supreme Court April 29, 1913.)

1. HOSPITALS (§ 8*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CONFORMITY TO PLEADINGS—"MANNER."

In a patient's action against the proprietor of a hospital for injuries alleged to have been caused by the act of a nurse in placing hot-water bags on or about plaintiff's feet in such a careless and negligent manner that his feet were burned and scalded, instructions that plaintiff could recover only if the burns were the proximate result of the manner of placing the hot-water bag, and not if they resulted because it was too hot, and that the fact that his feet were burned was not evidence of negligence, but that whether the nurse was negligent must be determined by the circumstances as they existed when she applied the hot-water bag and not by what afterwards happened, were erroneous and gave too restricted a construction to the complaint, since the word "manner" means the way of doing anything, and construing the complaint liberally so as to work substantial justice as required by Code Civ. Proc. § 452, included the subsequent observation and examination for the purpose of ascertaining the effect of the application of the hot-water bag.

[Ed. Note.—For other cases, see *Hospitals*, Cent. Dig. § 14; Dec. Dig. § 8.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4333-4337.]

2. HOSPITALS (§ 7*)—LIABILITY FOR INJURIES.

It was as much the duty of a nurse in a hospital dealing with an unconscious patient unable to care for himself in applying hot-water

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bags to observe the effect of such application as to test the temperature of the water before applying.

[Ed. Note.—For other cases, see *Hospitals*, Cent. Dig. § 13; Dec. Dig. § 7.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. A. C. Williams against the Pomona Valley Hospital Association. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

H. A. Barclay, of Los Angeles, for appellant. Edwin A. Meserve, of Los Angeles (Paul H. McPherrin, of Los Angeles, of counsel), for respondent.

ALLEN, P. J. This action was one to recover on account of personal injuries occasioned by reason of alleged negligence on defendant's part. The complaint alleges plaintiff's entrance as a patient in defendant's hospital; that, while in said hospital and unconscious, a servant of defendant placed hot-water bags on or about plaintiff's feet in such a careless and negligent manner that plaintiff's feet were badly burned and scalded, from which he suffered damages. The answer admits the allegations of the complaint, other than the averment of negligence, the extent of the injuries claimed, and the expenditure the basis of special damages. The case was heard by a jury and resulted in a verdict for defendant and judgment accordingly, from which judgment, and an order denying a new trial, plaintiff appeals.

[1] The errors assigned by appellant are numerous; the principal one, and the error which, to our minds, is most prominent, arises from the action of the court in giving the following instructions:

"(20) Plaintiff has confined his allegations of negligence and carelessness to the manner of the placing of the hot-water bag on or about plaintiff's feet, and, in order to find for the plaintiff, it must have been shown to you by a preponderance of the evidence in this case: First, that the hot-water bottle was placed on or about plaintiff's feet in a careless and negligent manner; and, second, that the burns resulted from, and were the direct and proximate result of, the manner of the placing of the hot-water bag or bottle."

"(21) Plaintiff, in his complaint, has not charged that any employé of the defendant was negligent or careless in placing at his feet a hot-water bag that was too hot or that would cause burns by reason of being too hot. The allegations of the complaint on which plaintiff must recover, if at all, being that the employés of defendant were negligent and careless in the manner of placing the hot-water bag on or about plaintiff's feet. If, therefore, you find from the evidence in this case that the hot-water bottle in question was not placed at plaintiff's feet in a

careless or negligent manner, you must find for the defendant and render a verdict in favor of the defendant in this case."

The court gave the further instruction: "The fact that plaintiff's feet were burned is not a fact or circumstance to be taken into consideration by you in determining the question of whether or not Miss Melone was guilty of negligence in applying the hot-water bottle to plaintiff's feet. The burning of plaintiff's feet was a subsequent event. In other words, you are to determine the question of whether or not she was negligent, by the circumstances as they existed at the time she applied the hot-water bottle, and not by what afterwards happened."

These and other instructions tending in the same direction could have had no other effect than to have instructed the jury that when the nurse applied the hot-water bottle to the feet of plaintiff, exercising ordinary care in the manner in which the same was placed, she was absolved from all further care or attention in relation to the patient as regards the effect produced by the application of the hot-water bottle. We are of opinion that the court gave too restricted a construction of the averments of the complaint. The word "manner," in the connection under consideration, means the way of doing anything. The use of the term "manner" in the complaint should be taken to comprehend the way the act was performed, having in view the condition of the patient and the character of the remedies applied. To place a hot-water bottle of such high temperature upon the feet of an unconscious man as would burn or scald the feet cannot be said to be a proper way of doing such a thing; and a pleading which refers to the manner as having produced the injury should, under section 452 of the Code of Civil Procedure, be given such a liberal construction as would work substantial justice between the parties. To give it the construction adopted by the trial court that the subsequent effect of the application in producing burns and scalds was not to be considered, eliminated, in our opinion, from the consideration of the jury one of the vital and principal questions presented.

[2] The duty of a nurse, and assuming that a nurse must only exercise the ordinary care which a trained and skilled nurse would be required to use, is a continuous duty. Dealing, as she was, with an unconscious patient, unable to care for himself, it was her duty to observe the effect upon the patient of the application of the remedy as much as it was to test its temperature in the first instance. The powers of resistance, the condition of the patient, must of necessity have much to do with the application of remedies, either by a physician or a nurse, and this duty could only be observed by constant and unremitting care and attention, which is just as obligatory upon the nurse as is the duty

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of applying the remedy directed by the physician in charge. It is obvious, from an examination of the record, that the jury considered it their duty, under the charge of the court, to ignore all want of attention upon the part of the nurse, all continuous and subsequent observation and examination after she had applied the bottle, and we think that the language of the instructions would justify such a conclusion upon the part of the jury. There were instructions given relative to the degree of care which a nurse was required to exercise. These were in general terms; but, when the court came to the concrete case of presenting to the jury the question of the care which the nurse should exercise, it sought to restrict that care and that attention to the moment of time when she was applying the remedy and excluding all subsequent care and attention. We think this was clearly error and so prejudicial in its nature as to warrant a reversal of the judgment and of the order denying a new trial.

As we have before said, there are numerous specifications of error, but it is unnecessary, in our opinion, to notice the remainder, for the reason that upon a new trial it is not to be apprehended that the same questions will again be presented.

Judgment and order reversed.

We concur: JAMES, J.; SHAW, J.

SMITH v. SMITH. (Civ. 1,285.)

(District Court of Appeal, Second District, California. March 5, 1913. Rehearing Denied April 4, 1913.)

1. DEDICATION (§ 17*)—SALE OF LAND BY REFERENCE TO MAP.

Where an owner of lots in selling land showed the purchasers a map upon which a strip on which they abutted was designated as an alleyway and represented to the purchasers that it was an alleyway, which representations were acted upon, this established the strip as an alleyway as to such purchasers.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 31, 32, 48, 49; Dec. Dig. § 17.*]

2. EASEMENTS (§ 5*)—PRESCRIPTION—PAYMENT OF TAXES.

Where it was shown that a strip of land upon which lots abutted was used by the lot owners for more than five years as an alleyway under a claim of right and adversely, a prescriptive title thereto was established without showing the payment of taxes thereon where it was not shown that any were levied, since Code Civ. Proc. § 325, providing that adverse possession shall not be considered established unless the parties claiming title by adverse possession shall have paid all taxes levied and assessed on the land only requires the payment of taxes levied and assessed, and it would be presumed that the easement attached to the abutting lots was assessed as a part thereof.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 13, 20-22, 26; Dec. Dig. § 5.*]

3. EASEMENTS (§ 21*)—RIGHT AS AGAINST PURCHASER OF SERVIENT ESTATE.

Where an owner of lots sold them under such circumstances as to give the purchasers

an easement in an alleyway and subsequently conveyed the alleyway to certain of the purchasers, they acquired only the naked legal title subject to the easements, and that only could be assessed for taxes as against them; and hence a purchaser of the alleyway at a tax sale acquired only the legal title subject to the easements, and could not interfere with the easements.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 59; Dec. Dig. § 21;* Vendor and Purchaser, Cent. Dig. § 547.]

4. EASEMENTS (§ 61*)—ENJOINING OBSTRUCTION.

Lot owners having private easements in an alleyway on which the lots abutted could maintain an action to restrain the owner of the legal title from obstructing such alleyway under Code Civ. Proc. § 731, providing that an action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance, and that, by the judgment, the nuisance may be enjoined or abated.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by G. W. Smith against J. H. Smith. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Walter J. Horgan, of Los Angeles, for appellant. Stutsman & Stutsman, of Los Angeles, for respondent.

ALLEN, P. J. The action was one to restrain the defendant from obstructing an alleyway and for a mandatory order requiring the removal of the obstructions placed therein by defendant. Findings and judgment for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

The facts found by the court and supported by the uncontradicted evidence are: In 1886 one Safford was the owner of a tract of land in Los Angeles city; that thereafter he subdivided said tract into lots, and sold the same to various parties, representing to each at the time of the sale that a strip of ground 18 feet in width, extending through said tract and upon which all of the lots so sold abutted, was an alleyway laid out for the use and benefit of said abutting owners. The record shows that Safford at the time of the respective sales showed to the purchasers a map upon which was delineated this alleyway. The purchasers used the said alleyway as a means of ingress and egress to the property, as did the general public, for more than five years. Thereafter, in 1887, Safford undertook by a deed to convey to some of the parties, owners of the abutting lots, the strip so used as an alley. Others owning an interest in abutting lots were not made grantees therein. No answer of defendant appears in the record. There was, however, admitted in evidence upon the hearing of the cause certain tax deeds showing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he alleyway to have been sold to the state for delinquent taxes in the year 1897, and subsequently by the state conveyed to the defendant. Also, there was offered in evidence a judgment roll showing that at some date not appearing the title of defendant to said alleyway was quieted as to some of the abutting owners, but not as to plaintiff. The court sustained an objection to the introduction of such judgment roll.

[1] We see no merit in the appeal. The production of a map by Safford to the purchasers of the various lots showing the alley, and his representations to said purchasers that said strip was an alleyway, and which representations were acted upon, were sufficient as to such parties to establish said strip as an alleyway. *Prescott v. Edwards*, 17 Cal. 304, 49 Pac. 178, 59 Am. St. Rep. 86.

[2] In addition, the long-continued use of the strip as such alleyway under claim of right and adversely was sufficient to establish a prescriptive title. No taxes being shown to have been assessed, it was not incumbent upon plaintiff to show payment hereof. *Baldwin v. Temple*, 101 Cal. 403, 35 Pac. 1008, and authorities cited. It is only the payment of taxes levied and assessed which, by section 325 of the Code of Civil Procedure, is made a condition for acquiring title by adverse possession. The easement in the alleyway being attached to the abutting property and forming a part thereof, it will be presumed, nothing to the contrary appearing, that the same and the value hereof was included in the taxes assessed against the lots.

[3] The only title which Safford by his deed made in 1887 could convey to the tenants in common therein named as grantees was the naked legal title, subject to the easement. No merger resulted from such deed, and all that could be assessed as taxes against these tenants in common and their land were the taxes and assessments against the naked legal title, and that title was all that was conveyed by the tax deeds in evidence. The holder of such title could not interfere with the easement rights of plaintiff.

[4] This action was maintainable under section 731 of the Code of Civil Procedure. We see no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

CHANDLER v. ROBINETT. (Civ. 1,154.) District Court of Appeal, First District, California. Feb. 27, 1913. Rehearing Denied March 20, 1913.)

EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—SHOWING BASIS OF CHARGE.

Debit entries not showing for what made, but merely referring to pages of another book,

unsupported by testimony of one knowing of the transactions culminating therein, are inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

2. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—SPECIFIC CHARGES.

A debit entry in a book merely to "Bal." is inadmissible, as charges must be specific and not lumped.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

3. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—TIME OF ENTRIES.

A debit entry in a book to "Bal." violates the rule that to be admissible it must be contemporaneous with the transaction to which it refers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

4. EVIDENCE (§ 354*)—ACCOUNTS—AIDED BY ORAL TESTIMONY.

Entries in a book account not such as to make them admissible, and so meager as not to be a sufficient account of any transaction, are not aided by testimony of one having no knowledge of the transactions that the account was a true and correct account of the transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

5. ACCOUNT STATED (§ 19*)—SUFFICIENCY OF EVIDENCE.

That the account admitted in evidence had become an account stated is not shown by one's testimony that he presented defendant with "an itemized bill of the whole account, a similar bill to what is here," and that defendant never disputed it; he also testifying that it was not a copy of the account admitted in evidence, and not testifying what was the balance shown by the account that was presented.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.*]

6. NAMES (§ 18*)—EVIDENCE.

An assignment to plaintiff from "Matthew Harris" is sufficiently shown by a written assignment signed "M. Harris," and proof that the signature was that of "Matt. A. Harris."

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 4, 17; Dec. Dig. § 18.*]

7. CORPORATIONS (§ 432*)—EVIDENCE (§ 471*)—CONTRACTS.

To prove a sale by a corporation it must be shown it was made on its behalf by some one having authority to so act for it; and testimony that it "sold" its account, without any testimony as to who represented it in the transaction, involves conclusions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.* Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.* Witnesses, Cent. Dig. § 835.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by El. S. Chandler against Thomas W. Robinett. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

W. C. Cavitt, of San Francisco, for appellant. Charles S. Peery and R. H. McGowan, both of San Francisco, for respondent.

HALL, J. Plaintiff recovered judgment against defendant for the sum of \$1,035.38, and in due time defendant appealed from the judgment, and also from the order denying his motion for a new trial. Both appeals are before this court upon one transcript.

The action was brought to recover an alleged indebtedness to the McCloud River Lumber Company, a corporation, in the sum of \$1,035.38 as a balance due and unpaid upon an open book account for lumber sold and delivered to defendant by said corporation. It was alleged that the said corporation, prior to the commencement of this action, sold, assigned, and transferred said account and obligation to one Matthew Harris, and that he subsequently, and before the commencement of this action, sold and assigned said account to plaintiff. The complaint was unverified, and the defendant pleaded a general denial, and also specifically denied each allegation of the complaint. The case was tried before a jury.

Plaintiff called one J. H. Williams, who testified that he was an accountant and was employed by the McCloud River Company at the time said company had some transactions with defendant. Counsel for plaintiff then asked this question, "Q. Have you the book in which you made the entry?" The witness answered, "I have the cards of the entry." Counsel for plaintiff then asked, "You have the cards; you have the card system of books?" and the witness answered, "Yes." Counsel then said: "I show you a copy of the bill of particulars. What does your account there show as to the amount of lumber sent; that is, the amount in value and the payments?" This was objected to by the defendant and the objection overruled, but the question was not answered. Thereupon counsel for plaintiff said: "We offer in evidence the account of Thomas Robinson with the McCloud River Lumber Company, consisting of two pages, and ask that they be marked, fastened together, and marked 'Plaintiff's Exhibit A.'" To this counsel for defendant objected upon the ground "that it is incompetent, irrelevant, and immaterial, not showing part of what account or what book it is, or whether it is a book belonging to the corporation or any other persons interested in this suit; that it is not identified; that there has been no foundation laid for it; and that it is hearsay testimony and no part of the *res gestæ*." The objection was overruled, defendant excepting, and the account was introduced in evidence and marked "Plaintiff's Exhibit A." The account, as it is set forth in the record, consists of 96 debit charges commencing January 1, 1905, and ending April 13, 1906, and aggregating the sum of \$1,735.38. There are credits to the amount of \$700, leaving a balance of \$1,035.38 on the debit side of the account, for which sum the jury rendered a verdict for plaintiff.

[1] There is nothing upon the account to show what the debit charges were for. In the first column are dates. In the next, under the word "folio," are numbers, probably representing the pages of some book of original entry, and in the next column, under the word "debits," are numbers presumably representing dollars and cents. The first charge is simply to "Bal." 357.46, and of course is but a summation of some previous entries. There is not one word in the evidence to show that the witness had any personal knowledge of any of the transactions culminating in the various debit entries, and no witness was examined who did have such knowledge. Such entries are purely hearsay, and, unless proved by other competent evidence to be correct, are not admissible in evidence. *San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999; *Chaffee v. United States*, 18 Wall. 516, 21 L. Ed. 906; *Connecticut Mut. Life Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. Ed. 294; *Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486; *Dodge v. Morrow*, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; *Carlton v. Carey*, 83 Minn. 232, 86 N. W. 85; *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. Law, 189, 35 Atl. 915; *Dykman v. Northbridge*, 80 Hun, 258, 30 N. Y. Supp. 164; *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314, 12 C. C. A. 129; *Gould v. Conway*, 59 Barb. (N. Y.) 355.

The entries must be of such a character as to show to a reasonable certainty what articles or things are the basis of the charge. *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565. There is not a word in the account admitted in evidence to show for what the charges were made, and no effort was made to supply the defect by other proof.

[2, 3] Charges must be specific, and lumped accounts are inadmissible. *Williams v. Abercrombie*, 1 Dud. (Ga.) 252; *Earle v. Sawyer*, 6 Cush. (Mass.) 142; *Henshaw v. Davis*, 5 Cush. (Mass.) 145; *McKnight v. Newell*, 207 Pa. 562, 57 Atl. 39; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Lance v. McKenzie*, 2 Bailey (S. C.) 449.

The first entry of "Bal. 357.46" was a gross violation of this rule. *Buckner v. Meredith*, 1 Brewst. (Pa.) 306. It was also a violation of the rule that the entry must be contemporaneous with the transaction to which it relates and part of the *res gestæ*. *Severance & Smith v. Lombardo*, 17 Cal. 57. The court erred in admitting the account in evidence over the objection of defendant.

[4] The fact that the witness testified (also over the objection of defendant) that the account was "a true and correct account of the transaction" does not help the matter. He had no personal knowledge of the transactions, and the entries in the account were so meager as not to be a sufficient account of any transaction.

[5] It is undoubtedly true (as is pointed

out in *S. F. Teaming Co. v. Gray*, supra) that it is frequently quite difficult to supply evidence as to the items of an account covering many transactions. Most merchants, however, render statements of account at frequent intervals to their customers. If such an account is admitted to be true by the debtor, or is not disputed within a reasonable time, it becomes an account stated. The facts establishing an account stated may be proved as an admission of the correctness of the open book account, and thus lay a foundation for the introduction of the account against the debtor. In the record before us one witness, McGowan, did, after the ruling complained of, testify that he presented defendant with "an itemized bill of the whole account, a similar bill to what is here," and that he never disputed the bill in any way. His testimony, however, does not measure up to the requirement of showing that the account he delivered was a copy of the account admitted in evidence; indeed, he testified that it was not, and he did not testify at all to the balance shown by such account. His testimony falls short of curing the error in admitting the account in evidence.

[6] Appellant also contends that the evidence to support the allegations as to the assignments is insufficient. A written assignment to plaintiff, signed "M. Harris," was produced by plaintiff, and the signature of "M. Harris" was proved to be the signature of "Matt. A. Harris." "Matt." is manifestly an abbreviation for Matthew, and the evidence sufficiently shows an assignment to plaintiff from Matthew Harris.

[7] Testimony was also given that the corporation "sold" its accounts to Matthew A. Harris. The witness did not testify as to who represented the corporation in such sale, nor when it occurred. The court permitted the witnesses to testify as to the ultimate fact, and such evidence probably involved conclusions of the witnesses both as to fact and law. To properly prove a sale by a corporation it should be shown that the sale was made upon behalf of the corporation by some one who had authority to so act for the corporation. *Read v. Buffum*, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131.

As the appellant had full opportunity to probe the circumstances of the sale, but did not avail himself of such opportunity, it is doubtful whether he should now be allowed to complain of the method of proof permitted by the court. We do not think it necessary to express an opinion upon this matter, for it is evident that, if the sale was in fact made by some one who had authority to act for the corporation, such fact and sale may, upon a retrial, be shown in such a way as to obviate the objections urged by appellant upon this score.

For the error in overruling appellant's ob-

jection to the account, the judgment and order must be reversed, and it is so ordered.

We concur: LENNON, P. J.; MURPHEY, Judge pro tem.

REYNOLDS et al. v. PLANADA DEVELOPMENT CO. (Civ. 1,093.)

(District Court of Appeal, Third District, California. March 6, 1913.)

APPEAL AND ERROR (§ 627*)—DISMISSAL FOR FAILURE TO FILE TRANSCRIPT.

Under Supreme Court rule 2 (119 Pac. ix), requiring the appellant in a civil action, within 40 days after the appeal is perfected, to serve and file the transcript of the record, but providing that when such party has given notice of motion for a new trial before perfecting the appeal the time shall not begin to run until such motion has been decided or the proceeding therefor dismissed, and rule 5 (119 Pac. x), providing that if the transcript of the record be not filed within the time prescribed the appeal may be dismissed on motion, but that if the transcript, though not filed within the time prescribed, be on file when notice of such motion is given that fact shall be a sufficient answer to the motion, where notice of appeal was given July 8th, the proper undertaking filed July 12th, notice of intention to move for a new trial served and filed July 1st, and notice of the order denying such motion served November 5th, and on the hearing of a motion to dismiss the appeal on February 10th no transcript was on file, the appeal would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.*]

Appeal from Superior Court, Merced County.

Action by P. N. Reynolds and others, co-partners doing business as P. N. Reynolds & Co., against the Planada Development Company. From a judgment for plaintiffs, defendant appeals. On motion to dismiss appeal. Appeal dismissed.

W. R. Bacon, of San Francisco, for appellant. Henry Brickley, L. J. Schino, and F. W. Henderson, all of Merced, for respondents.

PER CURIAM. This is a motion to dismiss the appeal from the judgment, on the ground that appellant has failed to file its transcript on appeal within the time allowed by law and the rules of the Supreme Court. Notice of the appeal was given on the 8th day of July, 1912, and on the 12th day of said month the proper undertaking was filed. On the 1st day of said month a notice of intention to move for a new trial was served and filed, and thereafter, on September 10, 1912, a proposed statement on motion for a new trial was settled and allowed, and, the matter coming on regularly for hearing, the said motion for a new trial was denied on October 28, 1912. On the 5th day of November following appellant was served with a notice of the order denying said motion. No stipulation was made by the parties extending the time in which to file the transcript,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and appellant has not requested the clerk of the court below to make or to certify to a correct transcript of the record in said cause. The notice of the motion to dismiss the appeal was served on the 24th day of January, 1913, and came on regularly for hearing on the 10th day of February following, and at that time no transcript was on file in this court, and no reason was urged by appellant why the motion to dismiss the appeal should not be granted.

Under the foregoing statement, it is clear that, by virtue of rules 2 and 5 of the Supreme Court (119 Pac. ix, x), the motion herein made should prevail, and it is therefore ordered that the appeal be dismissed.

FORREST v. KNOX et al. (Civ. 1,193.)

(District Court of Appeal, First District, California. March 5, 1913.)

1. JUDGMENT (§ 159*)—DEFAULT—VACATING—SUFFICIENCY OF AFFIDAVIT.

An affidavit supporting a motion to vacate a default judgment for plaintiff, which stated that "I have fully and fairly stated the case of the defendants in this action," instead of the "facts of the case," was wholly insufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 310, 312, 313; Dec. Dig. § 159.*]

2. JUDGMENT (§ 159*)—VACATION OF DEFAULT—MOTION—AFFIDAVITS—NOTICE OF FILING.

An affidavit cannot be considered in support of a motion to vacate a default judgment, where no notice of the filing of the affidavit was given to the adverse party or his attorney until the motion was granted contrary to Code Civ. Proc. § 1010, and the affidavit was not referred to in the notice of the motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 310, 312, 313; Dec. Dig. § 159.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Edwin Forrest against E. J. Knox and others. From a judgment granting defendants' motion to vacate a default judgment, plaintiff appeals. Reversed.

Fred L. Dreher, of San Francisco, for appellant.

HALL, J. This is an appeal by plaintiff from an order made by the court granting a motion of defendants to vacate and set aside a default judgment regularly entered against defendants after personal service of summons. The appeal comes to this court upon a bill of exceptions duly settled, but though appellant filed his points and authorities July 9, 1912, respondents have filed no reply thereto, and made no appearance in this court at the calling of the case on the last calendar (January, 1913).

[1] The order cannot be sustained, but must be reversed. The notice of motion stated that it would be made upon the affidavit of E. J. Knox, one of the defendants, and the records and papers in the action. The

Knox affidavit sets out facts upon which is predicated a claim of excusable neglect and inadvertence. This affidavit and the other papers in the action were read upon the hearing of the motion, and the same was thereupon submitted. The affidavit of said Knox was wholly insufficient as an affidavit of merits in that it stated that "I have fully and fairly stated the case of the defendants in this action," etc., instead of the facts of the case. *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Cooper-Power v. Hanlon*, 7 Cal. App. 724, 95 Pac. 678; *Jensen v. Dorr*, 9 Cal. App. 18, 98 Pac. 45.

[2] After the submission of the motion, defendants, without notice to plaintiff and without his knowledge, obtained permission from the court to file the affidavit of Anton Dos Reis in support of said motion. No notice of the filing of said last-mentioned affidavit was given to plaintiff or his attorney until after the granting of the motion, and said affidavit was in no way referred to in the notice of the motion. Under these circumstances the affidavit of said Dos Reis cannot be considered in support of the motion. Code Civ. Proc. § 1010.

The order vacating and setting aside the judgment and default is reversed.

We concur: LENNON, P. J.; MURPHEY, Judge pro tem.

REARDON v. RICHMOND LAND CO.

(Civ. 1,169.)

(District Court of Appeal, First District, California. Feb. 28, 1913.)

1. APPEAL AND ERROR (§ 837*)—REVIEW—DENIAL OF NONSUIT.

In determining whether the evidence supported the findings and judgment for plaintiff, the evidence developed on defendant's case would be considered, although defendant moved for a nonsuit at the close of plaintiff's case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.*]

2. CORPORATIONS (§ 432*)—ACTIONS ON CONTRACT—EVIDENCE OF AUTHORITY.

In an action for services in auditing the books of a company, where it appeared that they were rendered to and accepted by the corporation with the knowledge and consent of its president, apparently in the ordinary course and conduct of its business, this was sufficient evidence of the president's authority to contract for the services without showing that he was authorized by resolution of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

3. TRIAL (§ 84*)—EXPERTS—COMPETENCY—WAIVER OF OBJECTION.

Where expert testimony was objected to on the ground that no foundation had been laid and that it was immaterial, irrelevant, and incompetent, but no objection was made to the competency of the witness, his qualifications to testify as an expert were conceded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-213, 220-222; Dec. Dig. § 84.*]

4. EVIDENCE (§ 553*)—EXPERT TESTIMONY—FACTS FORMING BASIS OF OPINION.

That the opinion of an expert was not founded upon all the facts of the case went to its weight rather than to its competency and materiality.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

5. EVIDENCE (§ 473*)—FACTS OR CONCLUSIONS.

In an action on a contract, where a witness had narrated the facts and circumstances of the transaction as he understood them, a question calling for his conclusion as to whether or not the contract was entered into was properly excluded; it being for the court and not for the witness to determine whether the transaction constituted a contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 473.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John S. Reardon against the Richmond Land Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Denson, Cooley & Denson, of San Francisco, for appellant. Cullinan & Hickey, of San Francisco, for respondent.

LENNON, P. J. The plaintiff in this action sued for and obtained judgment against the defendant in the sum of \$700, which was found by the trial court to be the reasonable value of services rendered by the plaintiff in auditing the books of the defendant. These services were alleged to have been rendered at the special instance and request of the defendant. This allegation was also found by the trial court to be true. In support of its appeal from the judgment and from an order denying a new trial, the defendant insists that its motion for nonsuit should have been granted, and at the same time assails the sufficiency of the evidence to support the finding that the services sued for were rendered at the special instance and request of the defendant.

[1] The plaintiff's evidence on this phase of the case is largely circumstantial; but, when considered in its entirety, it is sufficient, we think, to warrant the inference that the plaintiff performed the services in suit with the knowledge and tacit consent of the defendant. In addition to this, the record reveals some evidence which tended to show that the plaintiff was to be compensated for his services by the defendant. Although the latter evidence was developed through the cross-examination of the president of the defendant, it may nevertheless be considered in conjunction with the evidence of the plaintiff for the purpose of ascertaining whether or not the evidence supports the findings and judgment. This being so, it is

obvious that the evidence upon the whole case is amply sufficient to support the finding complained of. Assuming, without conceding, that the defendant's motion for nonsuit should have been granted at the close of the plaintiff's case, the error, if any, in this behalf was cured by the evidence developed upon the defendant's case which inured to the plaintiff's benefit and perfected the proof of his case. *Russell v. Pacific Can Co.*, 116 Cal. 527, 48 Pac. 616.

[2] In addition to the foregoing, the point is made that the plaintiff's evidence failed to show that the president of the defendant was authorized by resolution of its board of directors to contract for the services of plaintiff. There is no merit in this contention. The services sued for were rendered to and accepted by the defendant with the knowledge and consent of its president, apparently in the ordinary course and conduct of its business. This was sufficient evidence of the authority of the president of the corporation to contract for the services in question. *Crowley v. Genesee Mining Co.*, 55 Cal. 273.

[3, 4] Error is assigned upon a ruling of the trial court admitting, over the objection of the defendant, the testimony of a public accountant, who gave his opinion, based upon a hypothetical question, of the reasonable value of the plaintiff's services. This testimony was objected to upon the ground that no foundation had been laid for it and that it was immaterial, irrelevant, and incompetent. This objection was properly overruled. No objection was made to the competency of the witness, and therefore it was conceded that he was an expert upon the value of the services of an accountant. The point now made that his opinion was not founded upon all of the facts of the case goes to the weight of his evidence rather than to its competency and materiality.

[5] The remaining assignment of error, based upon another ruling of the trial court, is equally without merit. The ruling complained of sustained an objection to a question which clearly called for the conclusion of the witness as to whether or not the contract sued on had been entered into by the plaintiff and defendant. The witness under examination had narrated the facts and circumstances of the transaction as he understood them; and then it was for the court, and not the witness, to say whether or not such transaction constituted the contract sued on.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; MURPHEY, Judge pro tem.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**GOODWIN v. CENTRAL BROADWAY
BLDG. CO. (Civ. 1268.)**

(District Court of Appeal, Second District, California, March 5, 1913.)

**1. CORPORATIONS (§ 426*)—EMPLOYMENT OF
ATTORNEY BY PRESIDENT—LIABILITY.**

Under Civ. Code, § 1589, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known to the person accepting, a corporation which accepts and receives the benefits of legal services rendered by an attorney under an employment made by the president without authority from the board of directors is liable for the reasonable value of the services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426;* Principal and Agent, Cent. Dig. § 663.]

**2. APPEAL AND ERROR (§ 1011*)—FINDINGS—
CONCLUSIVENESS.**

A finding on conflicting evidence is binding on an appellate court, when reviewing the question of the sufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Willbur, Judge.

Action by Henry P. Goodwin against the Central Broadway Building Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Albert M. Norton and Wellborn & Wellborn, all of Los Angeles, for appellant. Edwin A. Meserve, of Los Angeles, for respondent.

ALLEN, P. J. The action is by an assignee to recover the value of certain legal services alleged to have been rendered by plaintiff's assignor to defendant at defendant's special instance and request. The answer denied the averments of the complaint. The court found that defendant employed plaintiff's assignor as an attorney to perform legal services; that the same were performed, were of the value of \$2,000 and remained unpaid, and that the assignment to plaintiff was regular. Judgment followed in plaintiff's favor, from which, and a subsequent order denying a new trial, defendant appeals.

[1] The transcript discloses evidence upon plaintiff's part tending to show these facts: Defendant corporation was the owner of certain real estate in the city of Los Angeles. A proceeding was instituted by the city of Los Angeles to open an alley, which affected defendant's premises. One Isaac Norton was defendant's president and employed plaintiff's assignor to appear as an attorney, and contest such proceedings. Authority from the board of directors in this regard is not

shown. Norton as president was present at the trial during all of the proceedings and assisted therein. While the proceedings resulted in an order to open the alley, it also appears that an award of compensation and damages satisfactory to defendant was made. Thereafter proceedings were instituted to vacate the award and dismiss the proceedings. In this matter plaintiff's assignor appeared and acted for defendant at the instance and request of defendant's president, who was also shown to have been present during all of the proceedings. The proceedings were dismissed. Whether we consider the large awards satisfactory to the corporation defendant or the subsequent dismissal of the proceedings through which the corporation's original contention was sustained, the effect is that the corporation accepted and received the benefits of the action and of the attorney's services. Section 1589 of the Civil Code provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." The Supreme Court of California in construing this section has said, in *Gribble v. Columbus Brewing Co.*, 100 Cal. 71, 84 Pac. 529: "And where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals." As to the requisite notice sufficient under the section above referred to, it is said in *Balfour v. Fresno Canal, etc., Co.*, 123 Cal. 397, 55 Pac. 1063: "The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. * * * The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so." Approved in *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 597, 77 Pac. 1113.

[2] The evidence presented by the record as to the employment is conflicting. The learned trial judge accepted as true plaintiff's testimony, and under the established rule this is binding upon an appellate court when reviewing the question of the sufficiency of the evidence to support the findings. This action is not brought upon a special contract, as was the case of *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634, and other authorities cited by appellant, and the rule discussed in such cases with reference to a special contract alleged is not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

here involved; this action being upon a quantum meruit.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

LUCHEY v. STACK-GIBBS LUMBER CO.

(Supreme Court of Idaho. April 12, 1918.)

1. MASTER AND SERVANT (§ 185*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER.

Plaintiff was employed by the appellant lumber company, and was engaged in constructing a bridge of poles for a turn-out, and while so engaged was struck and injured by a tree felled by other employes. No warning was given by the choppers who felled the tree. Plaintiff was not a boss, and had no control over the choppers. *Held*, that the negligence of the choppers to give the proper signal was not the neglect and carelessness of a fellow servant, but was the neglect of a duty devolving upon the employer, for which it was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. MASTER AND SERVANT (§ 141*)—HAZARDOUS EMPLOYMENT—DUTY OF MASTER.

It is a general rule of law that, when a master is engaged in a complex and hazardous business, he must promulgate and adopt such rules and regulations for the conduct of the business and the government of his servants as will afford reasonable protection to them, and such duty is a positive obligation imposed upon the master and he is liable for the negligent performance thereof, whether he undertakes the performance personally or delegates it to another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

3. MASTER AND SERVANT (§§ 133, 185*)—INJURY TO SERVANT—DUTY OF MASTER—NON-ASSIGNABLE DUTY.

Where the place in which the servant is required to work is inherently dangerous, and signals are required by order of the master or by common custom for the protection of the employes, and are relied upon by the employes as a means of saving themselves from harm, it becomes the absolute duty of the master to give them, and the failure to do so, though the failure be the neglect of an employe, renders the master liable to a servant who is injured in consequence of such neglect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 268, 385-421; Dec. Dig. §§ 133, 185.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Patrick Lucey against the Stack-Gibbs Lumber Company, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Frank T. Post, of Spokane, Wash., and Jas. A. Wayne, of Wallace, for appellant. John P. Gray, of Coeur d'Alene, Therrett Towles, of Wallace, and Frank M. McCarthy, of Coeur d'Alene, for respondent.

SULLIVAN, J. This action was brought to recover for personal injuries alleged to have been sustained by reason of the care-

lessness in felling a tree which struck the plaintiff and broke his leg while he was in the employ of appellant. The cause was tried by the court with a jury, and the jury returned a verdict in favor of the plaintiff in the sum of \$2,999. Thereupon a motion for judgment was made by the appellant non obstante veredicto, which was overruled by the court, and a motion for a new trial was also denied. The appeal is from the judgment and said two orders.

The appellant is a corporation engaged in logging and lumbering in the state of Idaho. It is alleged in the complaint that the respondent was employed at what was known as camp No. 1 of the appellant company as a laborer blowing out stumps, and on the 23d of August, 1911, was directed to cease work at that camp, and was transferred to another camp known as camp No. 2, and directed by the appellant, together with another man, to build a bridge across a small stream; that the superintendence and control of the work of building said bridge or turn-out with other work done by the appellant was under the direction of a foreman, and that said foreman was in direct charge of the work of building said bridge; that it was the duty of plaintiff as a laborer to do such work in such place and in such manner as the foreman directed; that the duties of the foreman were to do whatever was necessary to determine whether the places where the employes were working were reasonably safe, and to direct the performance of said work in such a manner as was necessary to keep the same safe; that on August 25, 1911, the plaintiff was directed to go to work upon a bridge and to construct same in the manner directed by the foreman, and while the plaintiff was engaged in said service, deeply engrossed in his work, the appellant caused a large tree, about 12 inches in diameter and about 60 feet in length, to be cut and felled so that the same struck the plaintiff and injured him; that the tree was cut and felled by an employe of the appellant working on the hill above where plaintiff was working; that no notice or warning was given that the tree was about to be felled or was falling until it fell and struck plaintiff; that plaintiff was deeply engrossed in his work with his back in the direction in which the appellant was cutting the tree; that the plaintiff was unaware of the fact that the tree was being cut where the same might fall on him; that it was the duty of the appellant to give the plaintiff warning of the falling of a tree in order that he might seek a place of safety and thus protect himself; that no warning whatever was given, and that no notice was given the plaintiff that the tree was about to be cut; that the employe who cut the tree was working under the direction and control of the foreman; that it was carelessness and negligence on the

part of appellant to allow plaintiff to become engrossed in his work and at the same time direct another man to go on the hillside above him and cut a tree and permit the same to be felled without giving plaintiff any notice or warning so as to permit him to escape to a place of safety and avoid danger when the tree was felled; that by reason of the injuries so received the plaintiff suffered a double compound fracture of both bones of his right leg between the ankle and the knee and was severely injured, and from which he was still suffering at the time of the trial.

The appellant answered, denying practically all of the allegations of the complaint that would make appellant liable, and pleaded affirmatively contributory negligence and negligence of a fellow servant and assumption of risk.

The evidence in the case was quite brief. The plaintiff testified that he had been working in camp No. 1 under a boss named Mullen; that on August 23, 1911, Mullen told him to go to camp No. 2, which was under the charge of a boss named Radigan; that at camp No. 1 he had been engaged in blowing out stumps and clearing a right of way as a common laborer at \$2.75 per day; that Mullen told him to go up to camp No. 2 and work there two or three days as they were short-handed there, and to report to Radigan; that on the morning of August 23d, Radigan and plaintiff walked up the gulch, and Radigan told him to work on the skid road; that he told plaintiff to lay poles 3 feet apart, and bury them in the ground, and let about 3 inches stick over so that a sleigh could slide along on the top; that he kept at that work in the forenoon, and in the afternoon Radigan came along and told him to build a bridge about 30 feet long and 12 feet wide, so that teams could switch out and pass each other; that Radigan told him he would have the timber brought to him; that he was getting \$2.75 a day, the same as at camp No. 1; that Radigan selected the work that he was to do; that Radigan was supposed to go around and tell the men what to do; that he was the only foreman in the camp; that he hired and discharged men and signed their checks; that the timbers for the bridge were felled and carried to the bridge by an Austrian and another man who were working under the supervision of Radigan, the names of whom plaintiff did not know; that the bridge was being built in a little gulch with a little creek in it, and there was a stringer on each side of the creek about 30 feet long; plaintiff and his partner were covering the bridge, plaintiff working on one end chopping a notch, and his partner doing the same on the other end, when plaintiff was struck by a falling tree; that the two men who were getting the timber had been felling it up the gulch a way and bringing the timber down, for a day and

a half; that at the time of the injury plaintiff was working on the stringer where Radigan told him to work; that the tree that fell on him came to the right of him; that he did not see any men chopping a tree, and did not know that any men were chopping a tree prior to the time it fell; that he had no warning of the falling tree; that the men "never hollered at all"; that prior to the falling of the tree on him he had never seen the two men cutting a tree near him; that there were men working all around him in the woods, some skidding logs and others chopping; that every man was supposed to holler "Timber!" and give a man a chance to get out of the way when a tree was being felled, and that that had been his experience in the camps of the Stack-Gibbs Lumber Company; that he did not remember of ever hearing the foreman of the camp instruct the men to give that kind of a warning or any kind of a warning; that a man was supposed to holler and give a man a chance to get out of the way; that there were skidding teams climbing the hills all the time; that while he was notching the log on the bridge he did not see the men cutting the tree as they were to the right of him; that he did not know they were in there; that he thought they were up the gulch further; that they had been working up the gulch further; that they had been carrying the logs down on their shoulders to him; that at the time he went to work neither the foreman nor any other person advised him that they were going to cut any timber around close to where he was working; as a result of the tree striking him, his leg was severely broken; he was laid up in bed seven months, and it was still swollen at the time of the trial; that his hospital bill was \$350, of which he had paid \$80, all the money he had; that prior to the accident he had been in good health; that he was 51 years of age; that prior to the time the tree fell there was no warning whatever given him that a tree would fall.

Charley Sanders, an employé of the defendant at the time of the accident, testified that he was working on the skidway something like 100 feet from where plaintiff was working on the bridge; that there were other men working up there swamping and doing other work, and others chopping timber; that when a tree was about to fall the men were supposed to holler "Timber!" and give the men a chance to get away; that the practice of giving warning in that way had been followed during all of the time they had been in the camp; that the men were chopping, swamping, and cutting about 200 feet further up than he was; that he saw the tree fall that struck plaintiff; that he did not hear any warning or notice given that the tree was to be felled; that he saw the tree fall and heard some one holler, some one groaning, and went down there with his

cant hook and saw plaintiff and another man lying on the road; that he thought the man who hollered was the man who was hurt with plaintiff; that the tree was about the size of an ordinary telephone pole, about 100 feet long; that as the tree struck the ground it was broken into pieces; that he then went down to the camp to get help; that he could hear chopping all around him where he was working; that the skidway was up about 100 feet above where plaintiff was working; that he had seen the two men cutting timbers for the bridge that day; that the men who were cutting the timbers for the bridge and carrying them to plaintiff had been working that day farther up the draw from the camp and beyond where he was working—farther away from plaintiff than he was.

The physician who treated the respondent testified to the injuries and their permanency.

The testimony of the appellant was directed to the establishment of the proposition that the respondent was in charge of the work of constructing the bridge, and that those who cut the tree that caused the injury were working under his direction. The walking boss of the appellant testified that he had general charge of the camps of the appellant, and that there were from 40 to 60 men working in each camp; that each camp had a foreman; that he talked with respondent about going to camp No. 2 to build a scoot road, and look after that work. On cross-examination he testified that the foreman Radigan's duties were to show the men where he wanted them to work and tell them what to do; that he was the man who picked out the work, directed the men what to do, and how to do it; that the respondent was a common laborer at camp No. 1, and that he was sent to camp No. 2 to look after the building of the scoot road and a bridge; that the witness had never told respondent that he had been promoted to be a boss; that he told him what he wanted him to do up there; that he told him to report to Radigan, and that Radigan would show him what to do.

Radigan, the foreman at camp No. 2, testified that respondent came there to go to work, and testified as follows: "Q. What conversation did you have with Mr. Lucey about this work? A. I showed him the work I wanted him to do, and showed him what I wanted him to do it with; I also gave him the men I wanted to work with him. Q. What did you tell him he was to do? A. I told him—I first took him and showed him the place in the road to fix, and then took him and showed him a turn-out place I wanted built first, I believe, and put him to work at it." He further testified that he told the respondent that the men were to help him, and that respondent was to direct them in their work; that at that time there were about 55 men working in that camp. Radigan further testified that he had been along there several times that day; that he noticed

the men were cutting the timbers for respondent on the hillside above him; that he noticed them several times in different places on both sides of the gulch in the vicinity of 100 feet; that on the day of the accident they were working about 150 feet from respondent. On cross-examination he testified as follows: "Q. I will ask you how you happened to know where these men were cutting timber around Lucey? A. It was my business to know where they were; every time I went through the woods I would also find out where they were. Q. They were working under you? A. Yes, sir. Q. It was your business to see that they were attending to their work? A. Yes, sir." Radigan also testified that he was the foreman; that the skidding crew did not have a boss; that there was one other boss in that camp, namely, the respondent; that he did not notify the respondent that he had been promoted to be a boss; that he did not know whether respondent knew he was a boss or not.

It clearly appears that Radigan took the respondent up there, and told him what he wanted him to do, and how he wanted it done, and that he told the other men what he wanted them to do, and did not inform respondent that he had been made a boss or that he had charge of any men.

In rebuttal respondent testified that a man by the name of Mullen was the man who sent him up there to construct the bridge; that the witness Garvison never spoke to him about it, and no one ever told him that he was to have charge of anything or of any men.

The jury rendered a verdict in favor of the respondent for the sum of \$2,999.

Four errors are assigned as the basis for the reversal of the judgment: (1) That the trial court erred in denying appellant's motion for a nonsuit; (2) that the court erred in denying appellant's motion for a directed verdict; (3) that the court erred in denying appellant's motion for a judgment non obstante veredicto; (4) that the court erred in denying appellant's motion for a new trial.

[1] It is first contended that the respondent was an experienced woodsman, and had had many years' experience in logging camps, and he testified that it was the custom or rule in the camps of the appellant company to give notice or warning to the men when a tree was about to fall, and that since it was the custom or rule of the appellant company that the men felling trees, before the tree falls, must "holler" or cry out the word "Timber!" in order to give the men a chance to get out of the way; that, if the servant neglects to give the signal or warning on felling a tree, such neglect is the fault of a fellow servant, and the employer is not liable for any damage resulting therefrom. The question then is directly presented whether those who felled the tree were fellow servants of the respondent, and whether their neglect to give the signal or warning requir-

ed to be given on the falling of a tree was the neglect or carelessness of a fellow servant for which the employer was not liable.

[2] We think the general rule of law is that, when a master is engaged in a complex or hazardous business, he must promulgate and adopt such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection to them, and that it is the duty of the master to use reasonable care to see that the rules adopted by him for the safety of his servants are complied with, and, if he fails to do so, he will be responsible for injuries resulting from failure of compliance.

In *Potlatch Lumber Co. v. Anderson* (C. C. A.) 199 Fed. 742, which is a case quite similar to the one under consideration, after stating the duties of the corporation substantially as above set forth, the court said: "Nor was it disputed that the duties just specified are positive obligations imposed upon the master by law, and that he is liable for the negligent performance of such duties, whether he undertakes their performance personally, or delegates them to another." The court also held that it would be unreasonable to expect a man in a crew of "swampers" to do his work of cutting down brush, and at the same time protect himself against the danger of trees falling on him cut by men in another crew near by, unless the men cutting the trees, or some one knowing the danger, would give him warning. The fact that the appellant company had adopted rules in regard to giving warning would indicate that there was a necessity for such rules and their enforcement. The respondent was employed to construct a certain bridge or turn-out. The appellant undertook to furnish him the poles or timber for that purpose, and the evidence shows that he had no supervision or control over those who felled the timber and delivered it to him for use in constructing the bridge.

In *Cunningham v. Adna Mill Co.* (Wash.) 127 Pac. 850, the court held that fallers in a logging camp are not fellow servants of the members of a crew engaged in hauling logs from the woods, where they are left by the fallers, and that the employer failing to have proper warning given before fallers of trees cause them to fall across the haulback line, where plaintiff, a member of the hauling crew, is exposed to unexpected danger, is guilty of actionable negligence. In that case the negligence upon which the action was predicated was the failure to give a signal or warning to the person injured that a tree was about to fall. In the course of that decision the court said: "The evidence shows that respondent and the fallers were working in separate places, at a different character of employment, and that they were not in view of each other. This being true, the failure of the master to see that a proper

warning or signal was given before the fallers, whom respondent could not see, caused a large tree to fall across the haulback line constituted negligence, as it necessarily exposed respondent to a sudden and unexpected danger. Under such circumstances, it was the nondelegable duty of the master to see that a signal or warning was given." As touching upon the question here involved, see *Belleville Stone Co. of New Jersey v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834, which is a well-constructed case. In the course of the decision the court said: "We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but as the defendant's responsibility extended beyond the selection of an agent, and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent." Substantially the same doctrine is laid down in *Ondis' Adm'r v. Great A. & P. Tea Co.*, 82 N. J. Law, 511, 81 Atl. 856. That was a case in which there was neglect in giving a warning, and it was held that neglect to give the warning was legally imputed to the employer, as the servants he required to give the warning were not to be regarded in law as fellow servants engaged in a common employment. This doctrine is also recognized in *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292. In that case it was the foreman's duty to give the warning, but, as we view it, that would make no difference, as the faller of the tree and respondent were not fellow servants in regard to the duty of giving the warning or signal. See, also, *Kempfert v. Gas Traction Co.* (Minn.) 139 N. W. 145.

[3] In a very recent decision from Minnesota—*Elenduck v. Crookston Lumber Co.*, 140 N. W. 125—the court recognized that where signals are employed in the general work of the master, and are used solely in directing the movement of machinery or instrumentalities connected with the employment, the signals are mere details of the work, and the failure on the part of servants to give them does not charge the master with liability, and held as follows: "But where the place of work is inherently dangerous, and signals are required by orders of the master, or by common custom, for the protection of the employes and to provide and to maintain for them the safety of their place of work, and are relied upon by the employes as a means of saving themselves from harm, it becomes the absolute duty of the master to give them, and a failure to do so, though the failure be the neglect of a servant engaged in the common employment, renders the master liable to a servant who is

injured in consequence of the neglect. This principle of the law of master and servant is thoroughly settled in this state." And further on in the opinion the court, commenting on the case of *Anderson v. Coal Co.*, 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624, said: "Counsel's criticisms of the decision in that case are not sound. They apparently overlook the essential element made the foundation of that decision, namely, the dangerous character of the work, and the necessity of signals for the protection of employes."

In *Anderson v. Coal Co.*, supra, the court said: "The rules of law as to how far the master may delegate his duty to his servant appear in a measure to have been rather rendered uncertain than to have been definitely determined by the mass of decision on this subject. The opinion has been frequently expressed as in *Brabbitts v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289-299: 'It would be monstrous to allow [the master] to relieve himself from all liability for a breach of that duty [to the servant] by simply charging one of [his] inferior officers or servants with its performance.' This principle has been reiterated times without number by the Wisconsin court and by almost every court in the country. * * * In point of fact the view these and allied authorities have taken is in large measure a necessary product of the transition in judicial opinion as to what is the criterion by which it shall be determined who is and who is not a fellow servant. The decisions of courts of other states that, under given circumstances, one servant is a fellow servant of another, are not controlling on this court, unless the criterion by which the relationship is determined is the same as in this jurisdiction, namely, that a fellow servant is one to whom the master has not intrusted the performance of some absolutely nonassignable duty of the master. The federal courts, having originally announced the test of superior servant, or the doctrine of control, then rejected it, and adopted the separate department theory. It has been quite generally thought that this theory has been, in turn, largely abandoned and the current test of a vice principal adopted. But in *Peters v. George*, 154 Fed. 634, 83 C. C. A. 408, Judge Gray said that under the modern rule of the federal courts the theory of vice principal as determining the liability of a master has been largely discarded, and that which is to be considered as merely and solely the negligence of a fellow servant turns rather on the character of the act than on the relation of the employes to each other." In *Bartonshill Coal Co. v. Reid*, 3 Marq. H. L. Cases 266, 283, Lord Cranworth said: The master is "bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business." More

specifically: "No duty required of * * * [the master] for the safety and protection of his servants can be transferred so as to exonerate him from such liability."

If the rule were that an employer can avoid all liability simply by delegating the authority to a servant to give warning of a falling tree, it would be a very easy rule for the employer to follow to avoid liability, should the servant fail to give the warning and another servant be injured thereby. It is the duty of the master to furnish a reasonably safe place for the servant to work; and, if it requires warning and signals to protect a servant from injury from falling trees cut by other servants, it is the master's duty to see to it that the proper signals are given, and, if the injury is caused by the failure to give the signals, the master is liable. His liability or responsibility extends beyond the selection of a servant or agent to give the signal, and includes the signal itself, and, if the servant neglects to give it, the master must answer for such negligence, as the authority to a servant to give a signal is nondelegable and the failure to give it is imputed to the master and the servant employed to give it is not the fellow servant of the injured employe so far as the giving or failure to give the signal is concerned. The master cannot instruct a servant to do or perform a nonassignable or nondelegable duty and escape liability if the servant neglects to perform such duty, in case injury results to the employe.

We think under the evidence in this case and the law applicable thereto the appellant was liable for the injuries to the respondent. We therefore conclude that the court did not err in denying appellant's motion for a nonsuit, its motion for a directed verdict, its application for a judgment non obstante veredicto, nor in denying its motion for a new trial.

The judgment is therefore affirmed, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

CHARVOZ v. SALT LAKE CITY.

(Supreme Court of Utah. April 28, 1913.)

1. NEGLIGENCE (§ 39*) — "ATTRACTIVE NUISANCES."

A thing may be attractive to children and inherently dangerous without being an attractive nuisance, within the doctrine of the turntable cases, which requires that the thing be in an unprotected condition, as well as attractive and dangerous.¹

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. § 89.*]

¹ *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 223, 14 Ann. Cas. 1004; *Smalley v. Railroad*, 34 Utah, 447, 448, 98 Pac. 311.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. NEGLIGENCE (§ 134*)—ACTIONS—SUFFICIENCY OF EVIDENCE—ATTRACTIVENESS OF NUISANCES.

Evidence, in an action against a city for the death of a child by being drowned in a stream conducted through a ditch by the city, *held* not to sustain a finding that the child was attracted by the warm water in the ditch.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

3. NEGLIGENCE (§ 134*)—ACTIONS—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

Evidence, in an action against a city for the death of a young child by falling into warm mineral water conducted into a ditch by the city, *held* not to sustain a finding that the attractiveness of the water was the proximate cause of the child's death.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

4. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE.

To bring a case within the doctrine of the turntable cases, the attractiveness of the alleged nuisance must have been the proximate cause of the injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

5. NEGLIGENCE (§ 39*) — ATTRACTIVE NUISANCE.

A small stream of warm mineral water conducted into a ditch and through a culvert by a city, after it had been used for bathing and medicinal purposes, would not constitute an attractive nuisance, so as to make the city liable for a child's death therein, under the doctrine of the turntable cases.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 55; Dec. Dig. § 39.*]

6. EVIDENCE (§ 10*)—JUDICIAL NOTICE.

The Supreme Court will take judicial notice of the fact that there are many miles of small streams that flow in ditches or flumes in the state which may be more or less attractive to children.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 9-14; Dec. Dig. § 10.*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Maurice A. Charvoz against Salt Lake City. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to grant a new trial.

H. J. Dininny, City Atty., and Aaron Myers, Asst. City Atty., both of Salt Lake City, for appellant. M. E. Wilson, of Salt Lake City, for respondent.

FRICK, J. This is an action brought by respondent, as parent, to recover damages for the death of an infant child, whose death, it is alleged, was caused through the negligence of the appellant, a municipal corporation. After stating the necessary matters of inducement, the acts of negligence relied on are alleged in the complaint as follows: "That the said city further owned, controlled, and maintained at the intersection of Eighth North and Third West streets a certain culvert conveying a stream of hot sulphur water, which stream was likewise owned, controlled, and negligently maintained by the above-named city along the north side

of Eighth North between Second West and the west side of Third West street; that the said stream of water was from 10 inches to a foot in depth, and was negligently left by said city open and uncovered, and that the same was attractive to children, and should have been covered; and that the said culvert through which the stream of water was conducted by the said city was negligently left without any guards or other protection or means to prevent a person of the deceased's description from passing into said culvert."

It is then further alleged that on the 26th day of October, 1910, the infant child of respondent, of the age of upwards of 17 months, fell into the "stream" of water, aforesaid, and was drowned, and that by reason of her death respondent was damaged, etc.

The appellant filed an answer to the complaint, in which it denied substantially all the material allegations, and as an affirmative defense pleaded contributory negligence on the part of both the respondent and the mother of the child, who was its custodian.

A trial upon these issues to a jury resulted in a verdict in favor of respondent for the sum of \$1,000. The court entered judgment upon the verdict, and appellant presents the record to this court on appeal and asks us to reverse the judgment.

The evidence upon which the verdict of the jury and judgment are based is, in substance, as follows:

The respondent with his family, consisting of a wife and five children, ranging in age from 9 years, the oldest, down to 17 months and a few days, the youngest, the latter being the child in question, for several years lived on West Eighth North street, near Third West street, in Salt Lake City. His house was on the north side of the street, facing south. In front of the house, in the street, from 6 to 8 feet from the sidewalk, at the point where the gutters are customarily and usually placed in the streets of Salt Lake City, there was a ditch about 1 foot deep and about 18 inches wide, in which there was constantly flowing a stream of warm water which came from what is known as the warm springs, which are situated on the east side of North Second West street, and, as near as we can get at the exact distance from the record, respondent's house is between 600 and 800 feet in a northwesterly direction from said springs, and the place where the child was found dead, as herein-after stated, is about 100 or 125 feet farther therefrom. The water of the springs comes out of the earth at a temperature of about 112 degrees Fahr., and where it leaves the bathhouse on its way into the ditch in question, running in front of respondent's house, the water has a temperature of from 103 to 105 degrees Fahr. Excepting where the wa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ter flows across Second West street, it flows in an open ditch after it leaves the warm springs, and is necessarily somewhat cooler when it passes respondent's house. The water is what is known as white sulphur water, and it is used for bathing purposes and leased by the city to others. Some people drink the water, and a very large number bathe in it, and many of the bathers remain in the water, respondent said, who worked in the bathing establishment, from "three to four hours at a time." The amount of water flowing from the warm springs into the ditch is about 1.7 or 1.8 second feet, making a stream of water from 6 to 8 inches deep and about 18 inches wide. The banks of the ditch and the depth thereof are somewhat irregular, so that the water at places is deeper than at others. When the weather is cool or cold, some steam or vapor arises from the water. The fall of the ditch varies; the greatest fall being in front of respondent's dwelling, where it is about $3\frac{1}{2}$ per cent, and less than that above and below that point.

On October 26, 1910, about three minutes before 12 o'clock, noon, the wife of respondent and mother of the deceased child, named Ruth, was at or near the front door inside of her house, combing the hair of one of Ruth's little sisters. At that time Ruth was immediately in front of the house on the sidewalk leading from the front door to the sidewalk in the street running east and west in front of the lot, playing with a little boy and girl, both older than she. A few minutes after 12 o'clock the mother missed Ruth and at once started to look for her. She saw the little boy and girl with whom Ruth had been playing going in an easterly direction, and the mother started westerly, going to Third West street, which was about 100 or 125 feet west of her house, and from there she went a little ways north and looked and called for Ruth, but did not see her, when she retraced her steps southerly, and in approaching the ditch she saw the child lying in the water at the west end of the culvert spoken of in the complaint, which was placed across the ditch or stream at the point where the sidewalk running north and south on Third West street would run if it were extended in a southerly direction. When the mother found the child, it seemed lifeless, and although a doctor was sent for immediately to St. Mark's Hospital, which was about a block distant from where the child was found, all efforts to revive the child failed.

The mother testified that the child "had never been near the ditch before"; that it feared the ditch. Indeed, the mother testified that all of her children feared the ditch, and none ever fell into it. Respondent testified that several families lived along the street where the ditch in question is located; that the children would play in the street and on the sidewalk, which is about eight

feet distant from the ditch, but when he was asked if any of those children ever played "in close proximity to the stream" he left the question unanswered. There is no evidence that any child or children ever fell into the ditch, or in the water running therein, or that any of them were actually attracted by the water flowing in the ditch at any time. A lady, who lived about 300 or 400 feet in a northwesterly direction from respondent's house on Third West street, stated the time of the day when the mother found the child in the ditch, as aforesaid, to have been a little later than the mother stated it to have been. This lady also testified that little Ruth was quick and active on her feet; that she at times would go to the lady's house alone. Both the respondent and his wife also said that the little girl was very active on her feet.

Upon substantially the foregoing evidence the respondent rested, and appellant's counsel interposed a motion for a nonsuit upon various grounds, but principally that there was no evidence of negligence. The motion was denied. The appellant then introduced some evidence, but it is not necessary to refer to it, except to state that from it it appeared that by actual measurement the amount of water flowing in the ditch from the warm springs was constant, and would be increased only now and then temporarily by reason of storms; that the volume of water passing through or under the culvert where the child was found was 4 inches deep and 20 inches wide; that the greatest velocity of the stream was about $5\frac{1}{2}$ feet per second, but at the culvert it was considerably less, because there was much less fall at that point; that there were about 500 miles of similar ditches in Salt Lake City; and that the culvert where the child was found was precisely the same in size and structure as were all such culverts on the line of sidewalks crossing the gutters or ditches. These facts were all practically conceded by respondent's counsel.

After introducing the foregoing evidence, in connection with other evidence, which it is immaterial to refer to, appellant also rested, and requested the court to direct the jury to return a verdict in favor of appellant upon the grounds specifically set forth in the motion, the gist of which is that respondent had failed to make a case for the jury.

The district court, in passing upon the motion to direct a verdict, in part, said: "I ruled upon the nonsuit as I did for the reason that the Supreme Court [this court] has decided in the Brown Case [Brown v. Salt Lake City, 33 Utah, 222 (93 Pac. 570, 14 L. R. A. [N. S.] 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004)] that certain things maintained by the city were attractive to children of immature years, and were dangerous in themselves, therefore coming within what is commonly called the turntable cases and cases

that have followed those cases. Then they [this court] proceeded to say that turntable cases ought not to be confined to dangerous machinery alone, but to anything that is attractive. It seems to me, from reading the facts and language of the Supreme Court in that case, that a stronger case is made out in this case, bringing it within the turntable cases, than in the Brown Case." The court then proceeds to say that warm water flowing in a ditch is more attractive to children than a dark tunnel would be, such as was the thing complained of in the Brown Case. Proceeding further the court says: "The Supreme Court in that case [Brown Case] said, under the undisputed facts of that case, if they were the triers of the fact, they would have found there was no negligence. I hardly know just what they meant by that." The court, in addressing counsel, further said: "I will say this, gentlemen, it is a very close case, and I would not be surprised at all if the Supreme Court would view this case as not coming within the theory laid down [in the Brown Case], but it seems to me it does." The court then said: "Attractiveness—I think that is the only question to submit to the jury." The court therefore submitted the questions to the jury whether the water flowing in the ditch was attractive and dangerous to small children, whether the deceased child was attracted by the water, and whether her death was caused as a result of having been lured or attracted by the water in said ditch, and further directed the jury to find what, if any, damages the respondent sustained, if they found for him.

The principal reason urged by appellant's counsel why the judgment should be reversed is that the district court erred in refusing to direct the jury to return a verdict in favor of appellant, for the reason that there is no evidence in support of the material allegations of the complaint. By referring to the reasons given by the district court why it refused to direct a verdict, it becomes clear that the court's refusal was based upon what it contended this court, in the opinion deciding *Brown v. Salt Lake City*, supra, had said. We confess that we are unable to find anything that is said or intimated in the Brown Case which justifies the conclusion reached by the district court. Nor is there anything that we omitted to say in the Brown Case that in any way sustains the district court's conclusion. Of course, if we had said what the district court says we did, namely, that the doctrine of the so-called turntable cases applies to "anything that is attractive" and is inherently dangerous to children of immature judgment, then the court might, perhaps, have been justified in ruling as it did. We, however, not only did not say, either directly or indirectly, that "anything" that is inherently dangerous and attractive or alluring to children of immature judgment comes within the

doctrine of the turntable cases, but we took special pains to avoid a misunderstanding by saying precisely the contrary. In the Brown Case we pointed out that the decisions relating to the principle involved in the turntable cases were somewhat at variance with respect to what facts bring a particular case within the doctrine. After giving the subject careful consideration, we there classified the cases and adopted the rule laid down by Mr. Chief Justice Beatty in the case of *Peters v. Bowman*, 115 Cal. 856, 47 Pac. 113, 598, 56 Am. St. Rep. 106. In order to avoid any misapprehension with respect to just how far we adopted what the California Supreme Court, in speaking through Mr. Chief Justice Beatty, had said, we copied the language of the eminent jurist and said that the limitations of the doctrine pointed out by him were, in our judgment, proper limitations; and hence we adopted them as the rule of this court. As another precaution we, in the Brown Case, 33 Utah, 239, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004, pointed out that many things may be really attractive or alluring to young children and may be inherently dangerous to them, but notwithstanding that fact the doctrine of the turntable cases could not be applied thereto. On page 240 of 33 Utah (93 Pac. 570, 14 L. R. A. [N. S.] 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004) we again affirmatively adopted the doctrine as laid down by Mr. Chief Justice Beatty, and then proceeded to apply the principle involved in that doctrine to the facts of the case in hand. We need not repeat the language there used, since it speaks just as much for itself there as it would if we repeated it here, and we have no desire at this time to depart in the least degree from the rule as laid down in the Brown Case.

In referring to that portion of the opinion in the Brown Case where we refused to interfere with the finding of the jury that the tunnel there in question was attractive and dangerous to the boys, the district court says: "I hardly know what they meant by that." Whatever faults may be attributed to the decision in the Brown Case, it certainly is free from the fault of being unintelligible, and especially with respect to the point now under consideration. The district court intimates that, inasmuch as the evidence in the Brown Case was practically undisputed, we therefore should have determined the liability of the city as a matter of law. With respect to that matter we gave specific reasons why we refused to interfere with the findings of the jury. Those reasons may not be convincing to all, but the language in which they are couched certainly is not obscure, and for that reason, if no other, we shall not repeat it here. It must suffice to say that, inasmuch as the boys, for about three years, had been per-

mitted to make a playground and a resort of the tunnel, over the protests of the residents in the vicinity in which it was located to the city council, and as the tunnel was not necessarily dangerous at the entrance, or unless the boys went down to where the stream of water flowed into it, we simply held that under all the circumstances it was a question for the jury to say whether the city, through its council, should be charged with notice that the boys, in following their natural boyish propensities, might expose themselves to the dangers which were lurking in the dark passageway at the point where the water, which caused the death of young Brown, entered the tunnel. We are still of the opinion that upon that question, in view of all the facts and circumstances, reasonable men could have arrived at different conclusions; and hence the question was one of fact, and not of law. Upon the question as to whether the tunnel was attractive to the boys, the evidence left no room for differing opinions; but upon the question whether it was also dangerous, and thus constituted an attractive nuisance within the doctrine of the turntable cases, reasonable men might well have differed, and for that reason we treated the latter question as one of fact. That is all there is to that portion of the Brown decision which the district court seemingly could not understand.

When the Supreme Court of the United States, in *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, decided that under the facts of that case the turntable was attractive and dangerous to children of immature judgment, and hence constituted an attractive nuisance, that court simply applied an old and well-established principle to new conditions. That court, of course, did not intend to, nor could it, lay down an inflexible rule whereby it could be determined in advance, as a matter of law, whether a particular case comes within the doctrine.

[1] As pointed out by this court both in the Brown Case and again in the case of *Smalley v. Railroad*, 34 Utah, 447, 448, 98 Pac. 311, a thing may be attractive or alluring to children and be inherently dangerous and yet not fall within the principle governing the turntable cases. Again, a thing may be attractive, but whether it is also dangerous may be a question of fact; or it may be both attractive and dangerous and yet not be the proximate cause of the injury complained of; or, although attractive and dangerous, it may nevertheless be common and natural and of a character that makes it impracticable to be guarded against. In all such cases the thing, whatever it may be, lacks the element which controls the doctrine of the turntable cases, namely, that to maintain it in an unprotected or unguarded condition constitutes it an attractive and dangerous nuisance. The well-considered cases in which the doctrine of the Stout Case is enforced all proceed upon the foregoing prin-

ciple. It is obvious, therefore, that courts cannot in advance lay down an inflexible rule by which all cases may be determined. Nor will all reasonable men always agree whether the facts of a particular case bring it within the doctrine or not.

[2] By applying the foregoing general principles to the case at bar, it at once becomes manifest that for several reasons the undisputed facts that control this case leave it far outside of the fundamental principles which controlled the Brown Case. What are those facts? The evidence is conclusive that neither the deceased child, nor any child, was attracted by the water flowing in the ditch in question. The child's mother testified that all of her children, including the deceased child, feared and kept away from the ditch. The respondent, when asked whether the children of the neighborhood were attracted to and played in "close proximity" to the ditch, left the question unanswered. The presumption or inference, therefore, that the deceased child, as well as the other children in the neighborhood, followed their natural childish propensities of playing in the stream of water is absolutely dissipated or overcome. There is, therefore, neither direct nor inferential evidence in support of the implied finding that the deceased child was attracted by the warm water flowing in the ditch.

[3, 4] Nor is there any evidence to support the finding of the jury, which is necessarily implied in the general verdict, that the attractiveness of the water was the proximate cause of the child's death. As we have seen, the evidence is directly to the contrary. That the attractiveness must be shown to have been the proximate cause is clearly illustrated by the Supreme Court of Illinois in a very recent case, decided December 17, 1912, entitled *McDermott v. Burke*, 256 Ill. page 407, 100 N. E. 170, where the court said: "Another essential condition to liability is that the attractive thing, or something inseparably connected with it, must be the proximate cause of the injury." Indeed, the district court recognized this rule and so charged the jury in this case; but, as we have seen, there is no evidence to support an affirmative finding upon that subject, and a charge upon a subject which requires an affirmative finding, without any supporting evidence, is necessarily erroneous. There is nothing in the evidence authorizing an inference that the child was induced to go to the stream by reason of the attractive character of the warm water. Nor is there any evidence with respect to what particular point along the stream she went, except what may be inferred from the fact that she was found at the west end of the culvert. All that the evidence discloses is that she was discovered in the lifeless condition before stated a short time after her presence was missed from in front of the house. It is a mere assumption, based upon no tangible

fact that the child fell into the stream at some other point than from the culvert where she was found. It is further assumed, without proof, that the force of the water in the stream carried her little body through the culvert; and hence it is said the culvert should have had some protecting guards to prevent a child from passing under or through it. In making these assumptions no allowance for an accidental fall into the stream, either from the culvert, or from any other point along it, is made. As the testimony shows, the child was quite active, and now and then had gone to a neighbor's house, which was farther from her home than was the culvert. In view of these facts it is not unnatural that she should have gone as far as the culvert in the short time she was missed. But, after all, whether the child was caused to fall into the stream by some independent force, whether she accidentally slipped and fell into it in attempting to pass over the culvert, or whether she saw something and in an attempt to reach it fell into the stream, are matters which are left to sheer conjecture. There is neither a fact, nor a series of facts, from which it can logically be inferred that the reason the child fell into the ditch or stream was attributable to its attractiveness, and for that reason was lured to it. The only fact to build upon is that the child, in some manner, got into the stream. How or where is, and perhaps always will be, unknown. Under the most liberal rule of permitting verdicts to stand when based upon mere inferences, this verdict cannot stand, because it is entirely based on conjecture.

This opinion might end at this point, were it not for the fact that the case must be remanded. In view of that fact, we feel it our duty to pass upon the principal question, namely, whether the stream in question, under the undisputed facts and inferences deducible therefrom, comes within the principles governing attractive and dangerous nuisances, as they are defined by this court in the Brown Case.

[8] We are clearly of the opinion that it does not. How is a stream of water which gushes forth from the mountain side, and in all probability has done so for centuries, a thing which falls within the doctrine illustrated in the Brown Case? There is absolutely nothing artificial about such a stream. The only thing that is artificial is the ditch in which the water flows, and if that had not been carved out by man the force of the water would soon have carved one out of the earth. This stream is therefore no more artificial than any other stream of water of similar size would be. It is contended, however, that its attractiveness and consequent danger lurk in the temperature of the water. Let it be conceded, for argument's sake, that warm water is more attractive to children, especially in certain seasons of the year, than cold water would be. Yet the question

still remains: At what temperature does water become or cease to be especially attractive to children? Is it at the temperature of 50, 60, 70, 80, 90, or more degrees F.? Is it not a matter of common knowledge that in the hottest portion of the year, when children are most likely to seek water, the natural inclination of all is to seek cool water, rather than hot or even warm water? Treating the subject, therefore, from the standpoint of common knowledge and experience, a stream of water of approximately the temperature of the surrounding atmosphere, or a little cooler perhaps, would, during the summer season, be more attractive to children than would be water any considerable number of degrees warmer than that. Moreover, any stream of water of the size of the one in question would be quite as attractive and alluring to children of tender age, as the one in question. This would also be so whether the stream was natural or what might be called an artificial one, or whether the water was running to waste, or was at some point, at either end of the ditch or along it, being used for some useful purpose.

[9] In view of this we are required to take judicial notice of the fact that there are perhaps thousands of miles of small streams that flow in ditches or flumes in the cities, towns, and country districts within the state of Utah which are quite as attractive and alluring to children as the stream in question. Such a stream is therefore a most common and natural thing, and not uncommon and novel. In referring to this question the Supreme Court of Arizona, in a recent case involving the doctrine governing attractive nuisances, said: "It is a matter of common knowledge that alluring and attractive flumes, such as the one in question in this case, carrying running water are extensively used in this territory not only by miners in the necessary and proper conduct of their business but by farmers in the necessary diversion and application of the public streams to a beneficial use upon their lands in the cultivation of their crops. Not only flumes, but irrigation ditches, large and small, similar in purpose, construction, and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity. There is no distinction that can properly be drawn for liability for injuries received by a child from any of such various means of diversion or use of water. Both as a matter of law and as a matter of public policy, we feel that the so-called 'turntable doctrine' should not be extended to cover such a case as is here presented." *Salladay v. Old Dominion, etc., Co.*, 12 Ariz. 129, 100 Pac. 442. That case was one where a child fell into a flume which

was carried across a lot where the children had habitually gathered and played before the flume was constructed, and continued to do so thereafter, and as it was claimed, were attracted by the flume. It appears from the record in the case at bar, as coming from a witness who was well qualified to testify upon the subject, that in Salt Lake City there were 500 miles of open ditches carrying water along the sides of the streets in a similar manner to that carried by the stream in question at the time of the accident. It is true that the stream in question is the only one carrying warm water; but, as we have pointed out, that fact standing alone cannot make the stream an exception. Other streams of water are, we doubt not, equally as attractive as the one in question, and in view of the common experience referred to may in certain seasons of the year perhaps be more so, since in this case the evidence is positive and conclusive that neither the deceased child, nor any other, was ever seen playing in or very near the stream. We doubt whether this could be truthfully said of any other open stream of similar size in Salt Lake City. If it were held to be negligence, therefore, for the city to maintain the stream in question uncovered, how could it be held that it was not equally negligent in permitting any other streams, whether larger or smaller, to remain uncovered? Neither can the fact that the city leases the warm springs for a consideration make any difference. The water is nevertheless applied to a useful and beneficial purpose. But if it were not so applied it still, in obedience to the force of gravity, would continue, as it always must have done in the past, to seek a lower level, and would flow just as it was flowing when the accident happened.

We remark that in carefully reading the district court's reasons for its rulings, as they appear in the record, we are forced to the conclusion that the court entirely misapprehended the controlling principle of the Brown Case, as well as of the cases upon which that case is based. It seems almost incredible that the district court found something in the Brown Case which he affected to believe differentiated it from all other cases upon the subject of attractive nuisances, and that in that case it was held that all that was necessary in order to bring a case within the principle governing attractive nuisances is to show that the thing complained of was attractive and inherently dangerous to children of immature judgment. It seems to us that if the court had read that case, and the California case which we undertook to follow, with any degree of care he must have arrived at a different conclusion.

The judgment is reversed, and the case is remanded to the district court, with direc-

tions to grant a new trial, and to proceed with the case in accordance with this opinion. Appellant to recover costs.

McCARTY, C. J., and STRAUP, J., concur.

WHITMORE v. UTAH FUEL CO. et al.

(Supreme Court of Utah. April 28, 1913.)

WATERS AND WATER COURSES (§ 86*)—DIVERSION—DAMAGES.

An appropriator and owner of all the water of a creek and of springs which fed the creek, who had conveyed it to his home ranch by a main and a branch pipe line, where it was used for irrigation of a garden and orchard, and for culinary, domestic, and stock-raising purposes, though having no market value because there were no sales by reason of its scarcity, in his action for a wrongful diversion was entitled to pecuniary damages measured upon a consideration of the different uses to which he had applied it, not including the value of the pipe line, rendered useless by the diversion, its value being represented in the enhanced value of the water by being carried therein in a continuous flow from the springs to the ranch, unimpaired in quantity or quality.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 82; Dec. Dig. § 86.*]

Appeal from District Court, Carbon County; Ferdinand Erickson, Judge.

Action by George C. Whitmore against the Utah Fuel Company and the Rio Grande Western Railway Company. Judgment for plaintiff, and he appeals. Remanded, with directions to vacate the judgment, and to reopen and retry the case on the issue of damages.

A. R. Barnes and E. V. Higgins, both of Salt Lake City, for appellant. Van Cott, Allison & Riter, M. P. Braffet, and E. A. Wedgwood, all of Salt Lake City, for respondents.

McCARTY, C. J. Respondents have filed a petition for a rehearing. We have given the questions presented careful consideration, and are of the opinion that the decision heretofore filed in the cause on this appeal should in some particulars be modified. In view of the fact that counsel, both for appellant and respondents, have filed briefs in which they have ably and elaborately discussed the questions presented, we have decided to make the necessary changes in the opinion without reopening the case for oral argument. The cause will be ruled and determined by this opinion only.

The complaint contains two causes of action. The case has been tried twice, and this is the second appeal taken by the plaintiff. The first trial resulted in favor of defendants, and a decree was entered dismissing plaintiff's complaint. This decree was appealed from, and the decision of the lower court was affirmed as to the second cause of action, but was reversed and remanded as to the first cause of action. Whitmore v.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Fuel Co., 26 Utah, 488, 73 Pac. 764. In the opinion remanding the cause this court said: "Plaintiff is entitled to recover from respondents whatever damages the evidence shows he has sustained which are the proximate and direct result of the diversion of the waters of the lower group of springs above referred to. It appears from the record that the source of supply of water for Grassy Trail creek has been destroyed, and that it would be impossible for the defendants to return the water to plaintiff; hence he is entitled to recover whatever the evidence shows to be the value thereof." The cause was remanded to the district court, with directions to enter judgment in favor of plaintiff for the amount of damages he had sustained by the diversion of the water. Proviso was made in the order for the reopening of the case, and the introduction by the parties of further evidence on this issue in the event that the lower court was unable to determine the amount of damages so sustained by the plaintiff from the evidence then before it. Pursuant to such order, the cause was reopened as to the first cause of action, and both plaintiff and defendants were permitted to introduce additional testimony. When the cause was called for the taking of further evidence, the plaintiff was permitted to file an amended complaint. In the complaint as amended plaintiff, so far as material here, alleges: That in the year 1884 he had completed the diversion and appropriation of all of the water of Grassy Trail creek in Sunnyside canyon, including all springs tributary to said creek, and was the owner thereof; that said water was appropriated, and used "for irrigation, culinary, domestic and stock-raising purposes"; that prior to 1884 he had acquired title to 320 acres of land which lies along the bed of the canyon through which said stream runs; that the water so diverted and appropriated was used by plaintiff to irrigate about 200 acres of the land mentioned, and for domestic, culinary, and stock-raising purposes; that in August, 1899, he constructed a 6-inch pipe line 3 miles in length capable of carrying all the water of said creek, and that he constructed a branch pipe line 1,400 feet in length from the main line, and thereby obtained water from springs that fed the original Grassy Trail creek; that in the year 1899 the Utah Fuel Company began prospecting for coal upon land, to which it claimed title, adjoining said Grassy Trail creek and later opened extensive coal mines therein and established a village at Sunnyside of 1,500 people thereon; that said village created a large demand for water, and that said company by running tunnels and making excavations underneath said branch pipe line prevented the water of said springs from entering into the pipe line, and forced the water to run out of its mine at a level below the pipe line, so that the same could never run therein or reach the lands and premises of plaintiff; that said

company also dug a well higher up the stream of Grassy Trail creek so as to obtain the water of the springs which were running out of the branch pipe line, and deprived the plaintiff of the use thereof; that by means of the well and the diversion of the water of said creek plaintiff is without water to irrigate his garden, his lucerne, and other vegetables, or to use for culinary, domestic, or stock-raising purposes; "that the country adjacent to said lands and said creek for many miles is extremely arid, and that there are no streams from the mountains or any source of supply of water other than said Grassy Trail creek within many miles thereof, except Price river, which is at an elevation much less than the lands of this plaintiff and of said Grassy Trail creek; that this plaintiff at the time of such appropriation was, and for many years had been, engaged in stock raising, and that he has been so engaged ever since said appropriation, and still is; that prior to 1899 this plaintiff had ranged his cattle in the valleys and on the mountains within range distance from his said lands; * * * that the said lands hereinbefore described were used as a home ranch for the conduct of his said stock-raising business;" that prior to the date last mentioned he had erected large and expensive corrals for the preservation of his stock and had built a dwelling house and bunk houses for the accommodation of his employes; that the value of said farm with the water rights appurtenant thereto, together with the enterprises connected therewith and dependent thereon, is at least \$200,000; that the defendants by means of the well aforesaid and the other acts of diversion hereinbefore mentioned have destroyed the water rights of the plaintiff, rendered his branch pipe line valueless, and ruined his farm, to his damage in the sum of \$20,000; that, if said defendants are permitted to divert said waters and to continue the said injury, plaintiff will be damaged thereby to the extent of \$150,000.

Plaintiff prayed "judgment that the court award proper compensation due to him for diversion of the water heretofore made or that shall be made prior to the time that a decree in this case shall enter judgment therefor in favor of the plaintiff, and in case it shall be found that said water, so diverted as hereinbefore alleged, cannot be returned to the pipe line of this plaintiff, and that this plaintiff is permanently deprived thereof by the wrongful acts of the said defendants, or either of them, that then and in that case the court award proper compensation to this plaintiff from the said defendants for the wrongs and injuries complained of, and render judgment against the said defendants, and each of them, for the damages caused thereby, as hereinbefore set out."

Defendants, in their answer, admitted the construction by plaintiff of the pipe lines mentioned, admitted that they and their

predecessors in interest had opened extensive coal mines near Grassy Trail creek, and that a considerable number of persons (employés of the defendants) live near said mines, but denied that they diverted or attempted to divert water from said creek in any way or for any purpose, denied that plaintiff's pipe line took water from springs that he had appropriated, and denied all other allegations of the complaint upon which plaintiff relies for a recovery. For a detailed statement of the facts out of which this controversy arose, we refer to the former opinion of this court in the case, reported in 26 Utah, 488, 73 Pac. 764.

Much evidence bearing on the amount of damages sustained by plaintiff, because of the diversion of the water of Grassy Trail creek by the defendants was introduced by both plaintiff and defendants. The court found that plaintiff had been damaged in the sum of \$3,475, and rendered judgment in his favor for that amount. The transcripts of the evidence taken at both hearings or trials are incorporated in and form a part of the bill of exceptions on this appeal.

Appellant in his assignment of errors assails the ruling of the court rejecting certain evidence offered by him on the question of damages, and in admitting certain evidence offered by defendants on that issue; and also challenges the findings of the court regarding the amount of damages suffered.

The findings on the question of damages, so far as material here, are as follows:

"(1) The defendants by the acts set forth in the original findings of fact (referring to the findings of fact made by the court on the first trial) * * * have diverted from the lower group of springs described in the pleadings herein a quantity of water equivalent to one-third of a cubic foot per second of time; that the said quantity of water was and is capable of irrigating 25 acres of plaintiff's land; * * * that the value of said water so diverted by defendants is \$1,875.

"(2) That prior to the diversion of the said water by the defendants the plaintiff had constructed a pipe line together with laterals for the purpose of conveying the said water to his land; * * * that by reason of the diversion of said water the said pipe line and laterals have been and are rendered entirely valueless; that the value of the pipe line and laterals was and is \$1,600."

Counsel for appellant earnestly contend that the finding of fact wherein the court holds that the quantity of water diverted by defendants from Grassy Trail creek was equivalent to one-third of a cubic foot per second of time is not only unsupported by, but is contrary to, the evidence. The contention made is that, the court, under the evidence, should have found that defendants diverted three-fourths of a second foot. The record in this case is voluminous. The testimony alone covers over 1,500 ordinary pages

of typewriting. While we shall make a few brief quotations from the testimony to clearly illustrate the questions involved, we shall not attempt to set out the evidence either in detail or in condensed form. We do not deem an extended statement of the evidence necessary to a clear understanding of the question presented. Appellant testified, but he is the only witness who so testified, that the volume of water diverted by respondents from Grassy Trail creek was from three-fourths to one second foot. The evidence, without conflict, shows that the carrying capacity of the branch pipe line through which the water in question flowed to appellant's ranch before the diversion complained of took place was .343 of a second foot, which is a trifle only in excess of one-third of a second foot. Independent, however, of the undisputed fact of the limited capacity of the pipe line, the great weight of the evidence tends to show that the amount of water diverted by respondents did not exceed the amount found by the court, and much evidence introduced by appellant tends to support the finding made by the court. Therefore this finding, in so far as it relates to the quantity or volume of the water diverted by respondents, must be upheld. In arriving at the amount of damages appellant is entitled to recover for the water diverted, the court first found—and there is evidence to support the finding—that the water diverted by respondents was capable of irrigating 25 acres of appellant's land, and then evidently adopted as the measure of damages the difference between the value of 25 acres of appellant's land with sufficient water to irrigate it and the value of the land without the water. And there is evidence in the record tending to show that the difference between the value of the land with and without water is \$75 per acre. In other words, damages awarded appellant for the loss of water was a sum which the court found to be equivalent to the depreciation in value of 25 acres of irrigated land by having the water taken permanently therefrom. The court in ruling on an objection interposed by respondents to evidence offered for the purpose of showing the value of water to appellant for any and all purposes announced the rule by which the amount of damage suffered by appellant should be determined as follows: "I can't think of any better theory or any better way of determining the damage sustained by plaintiff here than to find out what that land was actually worth at the time when he was deprived of this water, and then what it was worth after being deprived of that water." The cause was tried and determined upon the theory thus announced by the court.

The record shows that appellant was engaged in the business of raising cattle and horses, and that the farm or ranch in question was maintained and worked by him in connection with and auxiliary or subsidiary

to his principal and permanent business of raising live stock. Appellant ranged on an average of 4,000 head of cattle and from 400 to 500 horses upon the public domain in the vicinity of the ranch, and within a radius of from 8 to 20 miles thereof. He had about 200 acres of land inclosed by fence. Besides maintaining an orchard and garden, appellant raised large quantities of hay, grain, and other farm products on this land. The use made of the ranch and the crops raised thereon is well illustrated by appellant, who testified on that point as follows: "I used as the center or home ranch for conducting that business [stock raising] the farm at Sunnyside where this water [diverted by respondents] was applied. * * * I employed from six to nine men on that ranch and on the other ranch [summer ranch] taking care of the cattle. The men working on the other ranch lived on the farm at Sunnyside after the cattle came out of the hills in the fall. I also kept some stock around the house and premises on the Sunnyside ranch. I would winter there at the ranch at Sunnyside * * * cattle of all kinds and a great number of calves and thin cows and heifers and saddle horses, etc. The entire herd of my stock ranged in that vicinity when winter set in. The Durhams, thoroughbreds, and saddle horses would always come when the cold weather set in. The calves and thin cows we would gather and drive in, and we kept them there during the winter. We also kept at the ranch from 15 to 25 work horses, saddle horses, and stallions. We had to keep them up and feed them at the ranch all the time. * * * All the produce of the farm was used in feeding the stock and men. * * * In the winter we had only the water from the springs (the water in question). We had none from the canyon."

Prior to the alleged unlawful acts of respondents there was a continuous flow of pure potable water from the lower group of springs onto the ranch. This water was used by appellant for watering stock, culinary, and other domestic purposes, and during the irrigating season of each and every year was also used on the ranch for irrigating an orchard, garden, and farm products in general. Since the diversion of the water by respondents, appellant, in order to supply his ranch with water for watering stock, culinary, and other domestic purposes, has been and is compelled to pump water from a well into the main pipe line through which it is carried to his ranch. When the pump is not running, he is compelled to haul water for culinary and other domestic purposes from what is known as the Icelfander spring, which is situated over a hill and about one-half mile from his house and corals. It will thus be observed that the water in question is valuable to appellant for purposes other than irrigation. The court there-

fore erred in restricting the measure of damages to the value of the water for that purpose only.

It appears that the water has no fixed market value. Upon this point appellant testified in part as follows: "I know the conditions and demands for water up there. There have been no sales, but there is no other water out there, nor none come-at-able. It doesn't have a fixed market value in that canyon." Counsel for appellant in their brief say: "This water * * * could not possibly have had a fixed market value." Respondents concede this to be the case. The record also shows that appellant cannot from any source obtain an adequate supply of water to replace the water diverted by respondents.

As we have pointed out, appellant in his complaint specifies the different uses made of the water in question on his ranch and the damages caused by its diversion as follows: "And thereby the defendants have diverted the water of plaintiff in the creek, and the said plaintiff is deprived thereof, * * * and said plaintiff is without water to water his garden, his lucerne and other vegetables, or to use the same for culinary, domestic, or stock-raising purposes; * * * that the defendants * * * have destroyed the water rights of said plaintiff and ruined his farm. * * * That the value of the said farm, together with the enterprises connected therewith and dependent thereon, is \$200,000, * * * and that if the defendant is permitted to divert the said water and to continue the said injury the plaintiff will be injured thereby to the extent of \$150,000."

The evidence, without conflict, shows that the water was in fact used by appellant for the purposes alleged in his complaint. The court, in determining the amount of damage sustained by appellant because of the diversion of water by respondents, should have taken into consideration the different uses appellant made of the water on his ranch. This the court did not do, but, as hereinbefore stated, the court adopted as the measure of damages the difference in value of 25 acres of land with and without water. In their petition for a rehearing counsel for respondents with much earnestness contend that the pipe line (now useless as a conduit of water because of the diversion) is not a proper element of damages. While we, in effect, held in the first opinion announced and filed on this appeal that the pipe line, in view of the fact that it was rendered useless as a means of carrying water by the wrongful acts of respondents, is a proper element of damages, upon further reflection we are forced to the conclusion that appellant is not entitled to recover for the pipe line. The value of the pipe line is represented in the enhanced value of the water by being carried therein in a continuous and uninter-

rupted flow from the springs to the ranch undiminished in quantity and unimpaired in quality.

Numerous errors are assigned by appellant relating to the rejection of evidence offered by him on the question of damages, but we do not think, in view of what we have said, that the questions presented by these assignments will again arise; hence we do not deem it necessary to discuss them.

The cause is remanded, with directions to the trial court to modify its finding of fact No. 1 by striking that portion of it which reads as follows: "That the value of said water is \$1,875"—and to set aside the other findings of fact made and filed in the case; and to vacate the judgment, and to reopen the case for the taking of evidence on the question of damages, and to retry the case on that issue only in accordance with the views herein expressed. Cost of this appeal to be taxed against respondents.

FRICK, J. I concur. I think the appellant is entitled to recover the pecuniary value of the water of which respondents deprived him. That value is to be ascertained after considering the uses to which appellant applied the water, and whatever the money value of such uses was is, I think, the measure of damages. The fact that appellant used the water during certain seasons of the year for irrigation is one element, the fact that he used it during other seasons of the year to water his live stock is another element, and the fact that he also used it for other purposes is still another element. The money value of all these elements combined constitutes the amount appellant should receive. In this case it appears that the interference with appellant's source of water supply was caused by the respondents in the pursuit of some lawful enterprise. Under such circumstances neither punitive nor mere speculative damages should be allowed, but appellant's recovery should be strictly limited to the actual loss or damage he has sustained by reason of being deprived of the use of the water. Of course, if appellant can from some other source obtain the amount of water of which he was deprived for a sum less than the value thereof as aforesaid, he should be limited in his recovery to the cost of obtaining the water from some other source. Again, if the cost of obtaining the water from some other source is in excess of its value when applied to the purposes I have mentioned above, the appellant should nevertheless be limited to the value of the water, and not to the cost of obtaining the same from some other source. The primary object in view should be to allow appellant such a sum as will compensate him for his loss. No more; no less.

STRAUP, J. I concur in the judgment granting a new trial on the issue of dam-

ages. It, in effect, is conceded that the record shows the plaintiff to be the owner in and to the use of at least one-third of a second foot of water, or a quantity, as found, sufficient to irrigate 25 acres of land. The plaintiff had appropriated and acquired the water, and by means of a pipe line had conveyed it from springs to his land where he used it for irrigation, watering live stock, and for culinary purposes. The defendants wrongfully appropriated and diverted the waters at the springs, and converted them to their own use. It is conceded that the pipe line has no value except to carry the water from the springs to plaintiff's land. By the wrongful acts of the defendants the water cannot be returned to flow in the pipe line, and hence the plaintiff is permanently deprived of the water, and his pipe line is rendered wholly valueless. Now, what is the measure of damages? The trial court held the difference between the value of plaintiff's land with and without the water found to be \$1,875; and the value of the pipe line found to be \$1,600. I, too, think the court too much restricted the measure. But I think my Associates also too much restrict it. The water here is treated as personal property and the measure of damages as in an action of conversion, not as trespass to realty. What, then, is the measure? The loss and injury sustained by the plaintiff as the direct and proximate cause of the conversion. That ordinarily on conversion is the market value of the property converted. But here it is said and conceded that there was no market value. This, because of a scarcity of water in the vicinity, no water was bought and sold on the market; the plaintiff's water being about all the water there was for some miles around in an arid and mountainous country. He nevertheless is entitled to be made whole for the loss and injury sustained by him directly attributable to the defendants' wrongful acts. In ascertaining this it is proper to consider the use or uses the plaintiff had made of the water, but it should not be restricted alone to that. I think it also proper to consider whatever beneficial use the plaintiff could have made of the water and every purpose for which it could have been used, not some mere speculative or conjectural use or purpose, but one of reasonable certainty and practicability. That is, the plaintiff should be at liberty to show, if he can, any reasonable, practical, and beneficial use which naturally and ordinarily could have been made of the water. The water was his, and he had the right to use it, not only for the purposes for which he had used it, but also for other beneficial purposes for which it could have been used. It was just as valuable and beneficial to him to use it to supply the inhabitants of Sunnyside with water as it was to the defendants to take it and use it for that purpose.

So in estimating the value of the water I think the plaintiff should be permitted to show, not only the uses which he had made of the water, but also the uses which naturally and ordinarily could have been made of it.

Now, as to the pipe line. The wrongful acts of the defendants in taking the water and permanently depriving the plaintiff of it not only as a natural and proximate cause, but as an inevitable result, wholly destroyed the pipe line and rendered it useless and valueless. There is no doubt of that. The same wrongful acts of the defendants in converting the water in legal effect also constituted a conversion of the pipe line. Such loss and injury to the plaintiff is just as direct and proximate and just as great as though the defendants had torn up the pipe line and had either used it or had thrown it away. I see no reason why the plaintiff should not be compensated for such loss and injury as measured by the reasonable value of the pipe line at the time of the conversion.

MANDLER v. STARKS et al.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

EVIDENCE (§ 441*)—PAROL EVIDENCE—WRITTEN CONTRACT.

In an action of covenant, the deed governs, and parol evidence is inadmissible to show that at the time of the execution and delivery of the deed, containing a covenant against all "incumbrances of whatsoever nature," the grantee agreed to take the land subject to an outstanding lease, since such evidence would vary the covenant and exclude from the operation of its terms that which was not so before.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1785-1845, 2030-2047; Dec. Dig. § 441.*]

Error from District Court, Bryan County; Jas. R. Armstrong, Judge.

Action by Charles W. Mandler against Josephine Starks and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. C. Franklin and P. J. Carey, both of Muskogee, for plaintiff in error. Utterback, Hayes & MacDonald, of Durant, for defendants in error.

TURNER, J. On January 18, 1909, Chas. W. Mandler, plaintiff in error, sued Josephine Starks, defendant in error, and others in the district court of Bryan county. The petition substantially states that on July 27, 1908, defendant and her husband, for value, made, executed, and delivered to plaintiff a warranty deed to a certain tract of land situated in said county, in which they covenanted to warrant the title thereto, and that the same was "clear and discharged of and from all former grants,

charges, taxes, incumbrances of whatsoever nature." They further alleged a breach thereof to be that at that time there was outstanding upon said land a lease by the grantors to one J. L. Hull and also an oil and gas lease to the Saginaw Oil & Gas Company, both duly recorded; that thereafter, pursuant to agreement with the Starks and their codefendants, plaintiff deposited with defendant the First National Bank of Bennington, Okla., \$352.50, the balance of the purchase money which plaintiff would owe defendant if the land had been free and clear as warranted; that the same was deposited pursuant to agreement with said bank to be used in the extinguishment of said leases, but the same had never been done, and that the value of the premises, which are in possession of Hull who holds the same under said lease, is of the reasonable rental value of \$150 a year for the five years of his lease. Wherefore, plaintiff prayed \$600 damages and \$100 attorney's fee. All of the other defendants having been eliminated from the litigation, for answer Josephine Starks in effect pleaded a general denial, stood upon her deed, and prayed judgment against defendant for the \$352.50 deposited with the bank. After reply filed, there was trial to a jury and verdict and judgment for defendant, and plaintiff brings the case here. There is no dispute as to the facts. The deed recites that it was given on July 27, 1909, by defendant and her husband to the plaintiff for and "in consideration of the sum of \$1 and other valuable considerations," and contains the general covenant against incumbrances, *supra*.

It is conceded that the leases pleaded were outstanding against the property at the time of the execution and delivery of the deed, and that the amount paid for the land and tendered, as stated, was \$1,000. To escape liability defendant, over objection, was permitted to prove in substance that at the time of the execution of the deed she stated to plaintiff's agent that there was a lease on the land for five years, and for that reason did not want to sell it; and that, after replying that he did not know what to do about it, the agent consulted plaintiff over the telephone, and then said he would take the land. "I says, 'Understand, with the lease on it,' and he says, 'Yes,'" and that thereupon she signed the deed.

It is contended that whether or not the court erred in instructing the jury to return a verdict for defendant for \$352.50, with interest, turns upon the question of the admissibility of this evidence. On the part of plaintiff it is urged that the same was inadmissible, because, he says, the same varied the terms of the written warranty, in that it tended to show that he had agreed to take the land subject to said outstanding leases, as held by the court. On the other hand, while it is admitted that parol evidence is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not admissible to vary the terms of the covenant against incumbrances, yet it is urged that, as the deed recites the consideration to be "the sum of one dollar and other valuable considerations," this parol evidence was admissible to show the true consideration of the deed and involved no contradiction of the deed which evidenced upon its face that the "other considerations" rested in parol. As the covenant in the deed against incumbrances does not except these leases from the operation of its terms, to except them by parol evidence would be to permit such evidence to contradict the terms of the deed. In *Bever v. North*, 107 Ind. at page 546, § N. E. at page 578, the court, speaking to the rule that a grantor cannot contradict the terms of his deed by parol, said: "There is, it is true, an exception to this general rule, as well established as the rule itself, and that exception is that parol evidence is admissible to prove the true consideration of a deed, except, perhaps, where the deed itself states the consideration fully and specifically. *Hays v. Peck* [107 Ind. 389, 8 N. E. 274]; *McMill v. Gunn*, 43 Ind. 315; *Carver v. Louthain*, 38 Ind. 530; *Pitman v. Conner*, 27 Ind. 337; *Allen v. Lee*, 1 Ind. 58 [48 Am. Dec. 352]. But the exception to the general rule does not permit the introduction of parol evidence to defeat the operation of the deed by rendering nugatory the words of conveyance which it contains, and a grantor cannot, under the guise of proving the consideration of a deed, prove that it was not to operate as a conveyance. To allow this to be done would be to render ineffective one of the most important parts of the deed; it would, in truth, be to permit the utter destruction of the deed as an instrument of conveyance. This the law will not allow. The principle which governs this case was thus stated by the court in *Beach v. Packard*, 10 Vt. 96 [33 Am. Dec. 185]: 'Parol evidence cannot be admitted to vary, contradict, add to, or control a deed or written contract. The deed of bargain and sale, between these parties, had for its object the conveyance of certain land; and the extent of the land conveyed, the parties thereto, the estate conveyed thereby, and the covenants attending it, could not be affected by parol proof; and even the part, which relates to the consideration, or the payment thereof, could not be contradicted or varied by parol, so as in any way to affect the purpose of the deed; that is, its operation as a conveyance.'" Assuming the probative force of the evidence offered to be sufficient, if admissible, to prove that the vendor accepted the conveyance subject to the leases, the effect thereof, if admitted in evidence, would be no other than to prove that the parties to the deed, contemporary thereto, agreed in parol that these incumbrances should be excepted from the operation of the covenant. This we repeat would vary the terms of the deed, and for that reason was inadmissible. In

Johnson v. Elmen, 94 Tex. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845, the court said: "The cases in which the question of the admissibility of parol evidence to affect a covenant against incumbrances in a deed conveying land arises may be divided into three classes. In many cases it has been sought to show that one or more incumbrances were known to the covenantee, and to exclude such from the operation of the covenant. But it is held, certainly by the great weight of authority, that this cannot be done. * * * In other cases it has been held that parol evidence cannot be admitted to show merely that the parties orally agreed that a certain incumbrance should be excepted from the operation of the covenant. To admit such evidence is to violate the familiar rule that parol evidence is not admissible to vary the terms of a written contract. So far, the courts are in practical accord." 2 *Devlin on Real Estate*, § 914, says: "It is a well-settled rule that parol evidence is inadmissible to contradict a written contract. Accordingly, where it is intended by the parties that a certain incumbrance is to be excluded from the general operation of the covenant, such fact should be mentioned in the deed. When both parties are cognizant of incumbrances existing on the land to be conveyed, this covenant is frequently made and accepted. The grantor may intend to discharge them from the purchase money, or to remove them at some future period, and the purchaser has a right to rely on the language of the covenant. In some states parol evidence is admissible to show that the plaintiff at the time of the execution of the deed agreed himself to discharge the incumbrance. * * * But, while the rule is not universal, it is generally held that, aside from the question of fraud or mistake, parol evidence is not admissible to show that a covenant against incumbrances, where no exception is contained in the deed itself, was not intended by the parties to apply to a particular incumbrance. * * *"
Van Wagner v. Van Nostrand, 19 Iowa, 422, was an action by the plaintiff, the assignee of one Lawrence, against defendant on a covenant against incumbrances in a deed for real estate made by Van Nostrand to Lawrence. For breach thereof it was assigned, in substance, that at the date of the execution of the deed one Wennell was in possession of the premises as a tenant under an unexpired lease from defendant, and that he had so remained some months, during which time defendant received and collected rent therefor. For further breach it was assigned that during his tenancy, by agreement with defendant, the tenant built a stable thereon with the right to remove it; that the building was upon the premises at the date of the execution of the deed, and was removed by him during the life of the lease. After answer filed there was trial to the jury and judgment for de-

fendant. On review, after holding that a breach existed in the covenant against incumbrances contained in the deed, the court said: "According to the weight of authority, it is no less a breach if it be assumed that the plaintiff or covenantee knew at the time of the conveyance that the stable was the property of the tenant, and that the latter had the right of removal. For in an action of covenant the deed governs; and in such an action, by grantee against grantor, the latter cannot, in order to defeat the operation of the covenant, establish by parol the grantee's knowledge of an incumbrance or defect in the title, or by parol ingraft upon the deed exceptions and reservations not therein mentioned. *Wickersham v. Orr*, 9 Iowa, 253 [74 Am. Dec. 348]; *Harlow v. Thomas* (Strong Case) 15 Pick. [Mass.] 66, 1833, approving *Townsend v. Weld*, 8 Mass. 146, 1811; *Mott v. Palmer*, 1 N. Y. 574, per *Bronson, J.*; *Collingwood v. Irvin*, 3 Watts [Pa.] 306, 1834; 1 Greenl. Ev. 275; 2 Cox. & H. notes, Phil. Ev. 467; and see other authorities cited, and question discussed by *Rawle on Cov.* 149-154." In *Edwards v. Clark et al.*, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659, the first section of the syllabus reads: "An outstanding lease is a breach of a covenant in a deed of the property against 'all incumbrances whatever,' where no exception of such lease is stipulated for in the deed; it cannot be shown by parol that the lease was in fact regarded by the parties as no incumbrance." In *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391, in the syllabus it is said: "Where the grantor of a tract of land covenants against all incumbrances, it cannot be shown by parol that he did not warrant against a particular incumbrance; therefore, a plea averring the plaintiff had notice of the outstanding lease was no bar to the action, and a general demurrer thereto should have been sustained." And in the opinion: "On the question of the insufficiency of the defendant's plea, I think there can be no doubt. The contract is in writing. Parol evidence cannot be received to explain that the parties intended to add or subtract anything from it. It would be to make a new contract, where the grantee covenants against all incumbrances, to show by parol that he did not warrant against a particular incumbrance. And that, I suppose, is the inference to be drawn from the alleged notice. The very object of the covenant may have been to compel the seller to extinguish the incumbrance, that the purchaser might have the full possession and enjoyment of the premises. I am therefore of the opinion, the breach is well assigned in the declaration, that the defendant's plea is no bar, and that the demurrer should have been sustained." See, also, *McGehee v. Dwyer Ex'x*, etc., 22 Tex. 436; *Bigham et al. v. Bigham*, 57 Tex. 238; *Townsend v. Weld*, 8 Mass. 146;

Spurr v. Andrew, 6 Allen (Mass.) 420; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Long v. Moler*, 5 Ohio St. 272; and *Batchelder v. Sturges et al.*, 3 Cush. (Mass.) 201.

We are therefore of the opinion that, as the force of the evidence admitted rendered nugatory the covenant against incumbrances attending the conveyance and excepted from the operation of its terms the leases outstanding against the land at the time of its execution and delivery, the same was inadmissible, and for that reason the judgment of the trial court should be reversed.

In so holding we are not unmindful of those cases which hold that parol evidence is admissible to prove, where as here, the same is not fully stated, the true consideration of the deed, and, where such evidence does not contradict or vary the covenants contained in the deed, that the grantee himself agreed to discharge the incumbrance as part of the consideration for the land conveyed as in *Johnson v. Elmen*, supra, and cases cited. 11 Cyc. 1155. Of such it is sufficient to say that the law there announced has no application to the facts in this case, for the reason that here the leases are incapable of extinguishment by payment, and, besides, such evidence varies the covenant, and excludes from the operation of its terms that which was not so before. Upon the reformation of this deed we express no opinion.

Reversed. All the Justices concur, except WILLIAMS, J., not participating.

PYEATT v. PRUDENTIAL INS. CO.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

1. RECEIVERS (§ 29*)—APPOINTMENT—JURISDICTION.

Under Comp. Laws 1909, § 5772, the district judge at chambers is vested with jurisdiction to appoint a receiver in a cause pending in another county within his district.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 38-42, 409; Dec. Dig. § 29; *Judges, Cent. Dig. § 126.]

2. RECEIVERS (§ 35*)—APPOINTMENT—NOTICE—NECESSITY.

Where the petition for the appointment of a receiver fails to state facts sufficient to show that the delay which would result in giving notice of the application to the adverse party would defeat petitioner's rights or result in injury to him, it is error for the court to appoint a receiver without notice.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 54-60; Dec. Dig. § 35.*]

Error from District Court, Garvin County; R. McMillan, Judge.

Action by Alvin F. Pyeatt, etc., against the Prudential Insurance Company. A receiver was appointed, a motion to vacate such appointment denied, and plaintiff brings error. Reversed, with directions.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ennie, Hocker & Moore, of Purcell, for plaintiff in error. Wm. H. McNeal, of Oklahoma City, and C. M. Oakes, of Oswego, Mo., for defendant in error.

URNER, J. On February 13, 1911, Alvin Pyeatt, as guardian of five certain minor children named Cash, plaintiffs in error, sued the C. Estus, A. L. McDonald, the Prudential Life Insurance Company of Newark, N. J., T. H. Vaughn, A. P. Cash, and the Deming Investment Company, in the district court of Garvin county. The petition, alleging Pyeatt to be their present, and defendant A. P. Cash, to be their former, guardian, substantially states that on January 20, 1910, said minors were each the owner of an undivided one-fifth interest in certain lands (describing them) inherited from their mother Alice Cash, a duly enrolled member of the Choctaw Nation of three-fourths blood; that on said day said Cash as guardian aforesaid petitioned the county court of Garvin county for the sale of all said land for certain reasons therein set forth; that on February 18, 1910, the court entered a decree as prayed, pursuant to which said Cash undertook to sell said land to defendant A. L. McDonald for \$28,000 cash and reported the sale to said court, where the same was confirmed; that thereafter said Cash, pursuant thereto, executed to said McDonald a deed of conveyance thereto purporting to convey him all the right, title, and interest in said minors therein; that on the same day

McDonald executed to the defendant the C. Estus warranty deeds purporting to convey to her in fee simple all of his interest in said land, which said deeds were filed in escrow pending the payment to said Cash, as guardian, said sum of \$28,000; long prior to the execution of said deeds said Cash to McDonald and from McDonald to Estus she executed a mortgage thereon to defendant Prudential Life Insurance Company for \$15,000, and, at the same time, gave her for \$1,500 to the Deming Investment Company, all of which were thereafter duly recorded; that said court was without jurisdiction to order a sale of said land for certain reasons therein set forth; that the same was fraudulent and void for certain other reasons stated and prayed that the same be declared, together with certain other mortgages executed and delivered by the said Cash to the Deming Investment Company and defendant Vaughn as commission on the

After service of summons, in chambers before the court in Cleveland county, on March 18, 1911, came said Prudential Insurance Company and presented its petition in said cause. The court, by Judge McMillan, a judge of said court, and made known to the court in substance the facts thereof on August 25, 1910, for the consideration of \$15,000 paid by it to said Estus, she and her husband made, executed, and delivered to this defendant their promissory note payable in five years there-

after to this defendant and secured the same by a mortgage on said lands; that the same was duly filed for record and thereby became a first lien on said land and an equity therein to the extent of said sum; that thereafter plaintiff's petition was filed alleging said mortgage to be illegal and void and its lien of no force and effect and praying that the same be canceled; that after receiving said \$15,000 said Jennie C. Estus passed the same to the defendant A. L. McDonald, who deposited the same in the First National Bank of Maysville to the credit of defendant A. P. Cash, who was then guardian of the minor plaintiffs; that petitioner made said payment in good faith and claims to be an innocent purchaser for value to the extent of the interest conveyed by said mortgage; that about January 1st said Cash, then guardian, purchased from the defendant T. H. Vaughn out of the proceeds of said \$15,000 two certain promissory notes for \$1,919 each which are now under his control in his personal capacity; that about that time said Cash was discharged as guardian aforesaid and the plaintiff Pyeatt appointed his successor, whereupon said Cash paid over to him about \$8,000, a part of said \$15,000, as belonging to said minors, leaving in said bank the sum of \$150 only, and charges that the difference has been expended between them and no part of said \$15,000 has been tendered back to the petitioner. The petition further states that, in the event the court should find plaintiff entitled to recover and cancel said deeds and mortgages, petitioner would be entitled to a return of the \$15,000 which, it charges, Cash and Pyeatt, guardian, are threatening to dissipate, transfer, and place beyond the jurisdiction of the court and will do so to its irreparable injury; and prays that a receiver be appointed to take charge of said \$15,000 or its proceeds in the hands of either of the parties or both of them.

This petition was verified by the affidavit of attorney for the petitioner to that fact and that petitioner is a nonresident of the state and was absent therefrom; that he knew the contents of the petition and that the facts therein set forth were within his personal knowledge and true to the best of his knowledge and belief. The record further discloses that on the same day in acting thereupon without notice the court found the allegations of the petition to be true and appointed a receiver as prayed. On March 22, 1911, after notice, said Pyeatt, as guardian, filed in said cause his motion to vacate the order appointing the receiver, which was overruled. The order follows: "This cause coming on to be heard on the 1st day of May, 1911, on plaintiff's motion to vacate the appointment of the receiver, the hearing on said motion having on the 22d day of March, 1911, been continued from Norman, Okl., to this place and for this date, the court finds that said appointment was made without notice of the application having been given

the plaintiff, and made on the face of the application, without further evidence being offered, and the court being now fully advised in the premises doth hereby refuse to vacate the appointment of the receiver made at the city of Norman, in the county of Cleveland, in the state of Oklahoma, on the 18th day of March, 1911, and overrules said motion, and reaffirms his appointment made at said time." Plaintiff brings the case here. Insisting on the grounds set forth in his motion, he assigns: "First. The judge of the district court erred in taking jurisdiction, while absent from the county of Garvin, where the action was pending, of the application for appointment of a receiver. Second. The judge of the district court erred in granting the application for the appointment of a receiver, and in making the appointment of a receiver without notice to the plaintiff in error. Third. The court erred in overruling motion of plaintiff in error to vacate the appointment of the receiver, and in refusing to vacate the order of appointment."

[1] Precisely stated, the first contention is that, in the absence of the district judge from Garvin county, the county judge of that county alone had jurisdiction to appoint this receiver. Not so. Comp. Laws of Okl. 1909 reads: "Sec. 5772. A receiver may be appointed by the Supreme Court, the district court, or any judge of either, or in the absence of said judges from the county, by the probate judge"—in certain cases, naming them. This authority being conferred upon the district judge, in contradistinction to the district court, means such a judge at chambers, which may be held at any place in his district. It is evident, by insisting, as he does, that "in the absence of said judge from the county" means the county where this suit is pending at the time this receiver was appointed or Garvin county, plaintiff is in error. This for the reason that the statute not only fails so to state, but, on the other hand, means the county where the application is sought to be made, situate within the confines of the district of the judge to whom the same is made. As the county where this petition was presented and the order made was within those confines, the judge who made it was vested with jurisdiction so to do. See *Wenner v. Board of Education, etc.*, 25 Okl. 515, 106 Pac. 821; *Thompson et al. v. Cooksey et al.*, 25 Okl. 741, 108 Pac. 398; *Bash et al. v. Howald*, 27 Okl. 462, 112 Pac. 1125; *Delaware Co. ex rel. v. Hogan*, 33 Okl. 791, 127 Pac. 492.

[2] But the court erred in appointing the receiver without notice. While our statute nowhere requires such notice to be given, the settled practice in chancery does, and its omission was fatal to the appointment, which should have been set aside on motion.

Alderson on Receivers, § 121 et seq., announces the rule in the following language:

"There is no principle of the law of receiverships of greater wisdom and more firmly established than that requiring notice to be given to the defendant of the application for the appointment of a receiver to wrest from him the possession of his property."

In *Smith on Receiverships*, p. 14 et seq., it is said: "The court will not appoint a receiver until the defendant, or party in possession of the property, has been heard, or has had an opportunity to be heard in response to the application. It is a well-established principle in equity jurisprudence that the court will not encourage ex parte proceedings, and a departure from this principle requires a state of facts showing the greatest emergency." At page 16 the author lays down four exceptions to the rule requiring notice, which are as follows: "(1) Where the appointment of a receiver is prayed for as a measure of final relief; (2) where all the parties are before the court consenting to the appointment, or at least before the court in person or by attorney; (3) where the defendants or parties in interest have absconded, or are beyond the jurisdiction of the court, or cannot be found; (4) where there is imminent danger of loss, or great damage or irreparable injury or the gravest emergency."

The Supreme Court of Wisconsin, in *Davalaar v. Blue Mound Inv. Co.*, 110 Wis. 476, 86 N. W. 187, says: "The third ground of complaint is that the receiver was appointed without notice to the corporation, and no grounds are stated in the petition to justify such procedure without notice. The statute does not require notice. It permits procedure by petition or action. Whichever plan is adopted, the proceeding is in equity, and is governed by the rules and principles applicable to that branch of jurisprudence. High, Rec. par. 11, states the rule regarding notice as follows: 'Courts of equity are exceedingly averse to the exercise of their extraordinary jurisdiction by the appointment of receivers upon ex parte applications, and this practice is never tolerated except in cases of the gravest emergency, demanding the interference of the court to prevent irreparable injury. * * * Even in exceptional cases of great emergency, where the relief is demanded for the prevention of irremediable injury, the courts are extremely averse to interference ex parte, and will ordinarily entertain the application only after notice to the defendant, or after a rule to show cause.' At section 112 he further states that the rule of requiring notice would seem to be not a matter of discretion, but an inflexible one, which the courts are not at liberty to disregard. At section 113 he says: 'To warrant a court in entertaining an application for a receiver without notice, it must be clearly shown that the delay which would result from giving notice would defeat the rights of plaintiff, or would result in great

injury to him. And when the relief is sought upon an ex parte application, upon the grounds of extreme necessity, the particular facts and circumstances rendering summary proceedings necessary should be set forth in the application; and a mere statement of opinion as to such necessity, even though made under oath, will not justify a departure from the established rule requiring notice of the appointment.' See section 115. This rule is so well supported by authorities, and is so much in harmony with correct principles, that an extended discussion is not necessary. The proceeding is drastic. It takes away from the corporation all control of its property, and puts it in the hands of a stranger. Its right to do business ceases, and thereafter its affairs are to be administered and closed up under the direction of the court. Cases can well be imagined where great interests might be sacrificed by a proceeding without notice. Unless the emergency is so great and the loss to the applicant so imminent as to warrant procedure without notice, within the rule before stated, the court ought always to require notice to be given. No emergency existed in this case, and no reason is stated why notice should not have been given. It is not enough to say that the facts stated show that plaintiff would be entitled to such appointment upon notice, and that after a review of the situation the trial court has decided to allow the appointment to stand. Upon the petition presented, the plaintiff was not entitled to the relief sought except upon notice. That he failed to give, and the order appointing the receiver was improvidently made, and should have been set aside."

The same doctrine is reaffirmed in *Thompson et al. v. Tower Manufacturing Co.*, 87 Ala. 733, 6 South. 928, by the Supreme Court of Alabama, in the following language: "It should be a strong case of emergency and peril, well fortified by affidavits, to authorize the appointment of a receiver without notice to the other party. *Hughes v. Hatchett*, 55 Ala. 631; *Iron Works Co. v. Foster*, 54 Ala. 622."

Cook on Corporations (4th Ed.) p. 2016, says: "In regard to procedure in appointing a receiver, the rules for the most part are very flexible, but it requires an extraordinary case to justify a court in appointing a receiver without notice to the corporation and the opportunity to it to be heard."

See, also, *Elliott on Railroads*, § 556; 34 Cyc. 117; *Verplanck v. Merc.*, etc., Co., 2 Paige (N. Y.) 438; *Moritz et al. v. Miller et al.*, 87 Ala. 331, 6 South. 269; *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665, 17 South. 118; *Bank of Florence v. U. S. Mfg.*, etc., Co., 104 Ala. 297, 16 South. 110; *Wabash Ry. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. 823; *Chicago, etc., Ry. Co. v. Cason*, 133 Ind. 49, 32 N. E. 827; *Ruffner v. Mairs et al.*, 33 W. Va.

655, 11 S. E. 5; *Fredenhelm et al. v. Rohr et al.*, 87 Va. 764, 13 S. E. 193, 266; *Bristow v. Home Bldg. Co.*, 91 Va. 18, 20 S. E. 946, 947; *Blondheim v. Moore*, 11 Md. 365; *Merriam v. St. Louis, etc., Ry. Co.*, 136 Mo. 145, 36 S. W. 635; *Cook v. Detroit, etc., Ry. Co.*, 45 Mich. 453, 8 N. W. 74; *Turnbull v. Prentice Lmr. Co.*, 55 Mich. 387, 21 N. W. 378; *Barry v. Bridges*, 22 Mich. 201; *Arnold v. Bright et al.*, 41 Mich. 207, 2 N. W. 16; *Howe v. Jones*, 71 Iowa, 92, 32 N. W. 187; *Whitney v. Hanover Nat. Bk.*, 71 Miss. 1009, 15 South. 33, 23 L. R. A. 531; *Cleveland, etc., Ry. Co. v. Jewett*, 37 Ohio St. 649; *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342; *State ex rel. Thornton v. Second Judicial Dist. Ct.*, 20 Mont. 284, 50 Pac. 854; *Grandin v. La Barr*, 2 N. D. 206, 50 N. W. 151; *North American Land, etc., Co. v. Watkins*, 109 Fed. 106, 48 C. C. A. 254; *Larsen v. Winder*, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864; and *Mestier et al. v. Chevallier, etc., Co.*, 51 La. Ann. 142, 24 South. 799.

As the petition does not undertake to state facts sufficient to show, nor does it charge, that the delay which would result from giving notice would defeat the rights of petitioner or result in injury to him, the court erred in appointing the receiver without notice and in refusing to vacate the appointment on motion.

Reversed, with directions so to do. All the Justices concur.

LODWICK LUMBER CO. et al. v. E. A. BUTT LUMBER CO.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

1. SALES (§ 79*)—PLACE OF DELIVERY.

In the absence of any contrary provision in a contract of sale, the place of delivery is the place where the goods are located when sold, and that, too, whether they are actually or only potentially there.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

2. SALES (§ 345*)—ACTION FOR PRICE—EVIDENCE OF DELIVERY.

Where property is to be delivered at the place where it is located at the time it is sold, the seller, before he can recover his pay, is bound to prove delivery at that place.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 956-961; Dec. Dig. § 345.*]

3. SALES (§ 79*)—CONTRACT—PLACE OF DELIVERY.

Plaintiff, a lumber company with its mills at A., contracted to sell and deliver to defendants, a lumber company with its yards at W., a car of lumber. *Held*, the contract being silent upon the subject, that the place of delivery is upon the car at A.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

4. SALES (§ 79*)—CONTRACT—PERFORMANCE.

Where defendant, a lumber company with its yards at W., ordered of plaintiff, a lumber company with its mills at A., a car of lumber to be delivered at that place, *held*, that defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant was not bound to accept delivery of the lumber from another lumber company at another place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

Williams, J., dissenting.

Error from District Court, Garvin County; R. McMillan, Judge.

Action by the Lodwick Lumber Company and the Atlanta Lumber Company against the E. A. Butt Lumber Company, composed of E. A. Butt and I. A. Lewis. Judgment for defendant, and plaintiffs bring error. Affirmed.

Blanton & Andrews, of Pauls Valley, for plaintiffs in error. Geo. I. Jordan and J. B. Thompson, both of Pauls Valley, for defendant in error.

TURNER, J. On March 2, 1908, in the district court of Garvin county, the Lodwick Lumber Company, a corporation, sued E. A. Butt and I. A. Lewis, partners as E. A. Butt Lumber Company, for a sum certain, the agreed price of a car of lumber which defendants had refused to accept. Later, by leave of court, it filed a second amended petition, in which Atlanta Lumber Company joined as a party plaintiff. Said petition substantially states: That plaintiffs are corporations engaged in the manufacture and sale of lumber at certain points in Texas. That defendants are engaged in the sale of lumber in Wynnewood and Paoli, in Garvin county, Okla. That while so engaged defendants sent plaintiff Atlanta Lumber Company this telegram: "Wynnewood, I. T. 10—28—07. Atlanta Lbr. Co., Atlanta Tex. Quote car 12 inch No. 3 boards 27 rate, E. A. Butt Lbr. Co." To which Atlanta Lumber Company answered by telegram: "Oct. 29, 1907. To. E. A. Butt Lbr. Co., Wynnewood, I. T. 14.50 20 cent rate 12 inch No. 3. Atlanta Lbr. Co." And to which E. A. Butt Lumber Company replied: "Wynnewood, I. T. 10—30—07. Atlanta Lbr. Co., Atlanta, Tex. Ship car No. 3 boards to Paoli. Rush. E. A. Butt Lbr. Co." That by the words in the telegram, supra, which read, "14.50 20 cent rate," it was intended by the parties in interest that the lumber would be billed to defendants at the invoice price of \$14.50 per thousand, and that in settlement therefor defendants might deduct from said price 20 cents per hundredweight for all the lumber contained in the car. That the freight rates upon a car load shipment of lumber from Atlanta and Lodwick to Paoli were, at that time, and are the same. That pursuant to said contract the next day the Atlanta Lumber Company, at Atlanta, Tex., directed the Lodwick Lumber Company, at Lodwick, Tex., to ship to defendants the car of lumber so ordered. That acting thereon said company prepared the same for shipment and loaded it on board car at Lodwick and delivered it to the Texas Southern Railroad Company

for transportation to defendants at Paoli, then Indian Territory, as so directed, and also sent invoice and bill of lading. That said lumber was of the value of \$376.64, for which, under the terms of the contract, plaintiffs are entitled to recover \$220.04. And it prayed judgment for that amount.

For answer, after general denial, defendants, in effect, admitted the contract with Atlanta Lumber Company to be as alleged, and charged that, without its knowledge or consent, the Atlanta Lumber Company had turned over the order for the lumber to the Lodwick Lumber Company, its coplaintiff; that it had never at any time had a contract therefor with that company, and did not know that said order had been turned over to the Lodwick Lumber Company prior to its telegram to Atlanta Lumber Company canceling the order; that immediately upon receipt of the bill of lading therefor defendants returned the same to Lodwick Lumber Company and refused, and still refuse, to accept the lumber, on the ground that no contract existed between it and the Lodwick Company with reference thereto, and asks to be discharged, etc. After reply filed, in effect a general denial, there was trial to a jury and, at the close of plaintiff's testimony, a demurrer to the evidence, which was sustained, and judgment for defendant rendered and entered upon a directed verdict, and plaintiffs bring the case here, assigning that the court erred in sustaining the demurrer.

There is no conflict in the testimony. To maintain the issues on the part of plaintiffs, the Atlanta Lumber Company, after introducing in evidence the three telegrams set forth in the petition as constituting the contract, proved: That on the day of the sending of its answer quoting the price of the lumber, and before receiving defendants' telegram, supra, in reply thereto, it wrote to defendants at Wynnewood thus: "We are to-day in receipt of your telegram as follows: 'Quote car twelve inch boards, twenty cent rate.' We have quoted you as follows: 'Fourteen fifty twenty cent rate No. three. * * *'" That in reply to said telegram, and evidently before receiving said letter, defendants wired: "Ship car No. 3 boards to Paoli. Rush"—as stated, and on the next day wrote the Atlanta Lumber Company thus: "We wired you to ship 1x12 No. 3 boards to us at Paoli, I. T., as per price made in message. We are wanting an especial quick shipment on this car and will appreciate it if you will get it out quick." That on the same day the Atlanta Lumber Company wrote the Lodwick Lumber Company: "We are herewith inclosing you telegram ordering car of No. 3 boards for E. A. Butt Lbr. Co., Paoli, I. T. Our quotation was \$14.50 on 20c. rate, being \$16.25 on 27c. rate, which rate applies. You will invoice direct to E. A. Butt Lbr. Co. at Wynnewood,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and credit us with \$5.00. * * * (Have written them you held the order, and you would handle direct to them as quick as car could be had.)" Whereupon that company proceeded to load the car, and while so doing the Atlanta Company received from defendants a letter, dated November 4, 1907, which read, "Please cancel our order for No. 3 boards as we want a quick shipment and we asked for a price delivered on 27c. rate and suppose message was copied wrong to you," and at once telephoned the Lodwick Company, 45 miles away, to cancel the order, but which was not done, for the reason that by that time the car was loaded; whereupon, and upon being so informed, the Atlanta Company wired defendants, "Number three boards loaded car twenty one six fifty seven can't cancel," and on the same day wrote them: "We have yours of November 4th, requesting us to cancel your order for car of 12 foot boards. We immediately 'phoned the mill, and they advised us this order had already been loaded in car K. C. S. No. 21657. Therefore, we wired you giving car number, and advised we could not cancel, which we now beg to confirm. They will forward invoice & B—L promptly." The same day defendants wrote the Atlanta Company: "Your message recd. We had reordered car No. 3 boards but have asked the mill to cancel and if not shipped they of course will do so, but we will only accept this car delivered on 27c. rate at \$14.50 the price you quoted. As we asked prices by wire of several mills and all of them yours included delivered on a 27c. rate." The next day that company answered defendants thus: "We have yours of the 6th regarding car of No. 3 boards, and will state that we quoted you in our telegram on a 20c. basis and following it up by our letter. We also affirmed it on 20c. basis and not \$14.50 on 27c. rate. We refer you to our letter and telegram of October 29th, quoting you price. We mailed this order direct to the Lodwick Lbr. Co., on the same basis, and they 'phoned us yesterday, at the time we sent you telegram giving car number, that this car was loaded, and is no doubt now well on its way towards destination. We also wrote you on the 31st ult. that we had placed this car with the Lodwick Lbr. Co., Lodwick, Texas, and if you had occasion to refer to the order to write these people. We are sorry that we were unable to cancel the order, but as stated above." (There is a total lack of other evidence as to the existence or contents of said letter of the 31st ult.)

When defendants refused to accept and pay for the lumber, this suit was brought. When, on October 28, 1907, defendants wired the Atlanta Lumber Company, "Quote car 12 inch No. 3 boards 27 rate," the Atlanta Company should have wired back a quotation as requested, or not at all. Instead of so doing it wired, "\$14.50 20 cent rate 12 inch No. 3,"

and followed it up that same day with a letter reciting the message. As the 20-cent rate thus offered was \$1.75 higher to defendants on the 1,000 feet than the 27-cent rate inquired about, defendants need not have made the order; but when, before receiving the letter, they did by sending a reply to said message, which read: "Ship car No. 3 boards to Paoli. Rush"—the minds of those parties met in the contract of sale set forth in the petition as evidenced by the three telegrams. As there is neither allegation nor proof that the Atlanta Lumber Company, in making this contract, was acting for the Lodwick Lumber Company as its undisclosed principal, or that the contract when made was assigned by it to the latter company, the court did right to sustain a demurrer to the evidence, so far as the latter company is concerned. This for the reason that no privity is shown to exist between that plaintiff and defendants. Nor can the Atlanta Lumber Company recover on the contract alleged, for the reason that before it can recover it must plead and prove a delivery of the property at the place where the lumber was sold, which was Atlanta, on the Texas Pacific Railway, and not Lodwick, on the Texas Southern. 24 Am. & Eng. En. Law, 1069. This was a condition precedent to its right of recovery, and was, in effect, the holding of the court when he sustained a demurrer to the evidence.

[1] In *Drumm-Flato Comm. Co. v. R. C. Edmisson*, 17 Okl. 344, 87 Pac. 311, the court, in the syllabus, said: "Where a contract for the sale of personal property is silent as to the place of delivery, the law will presume that the property is to be delivered at the point where it is located at the time the contract is entered into."

In *Salmon v. Helena Box Co.*, 147 Fed. 408, 77 O. C. A. 586, Adams, Circuit Judge, said: "In the absence of any contrary provision found in the contract for delivery, the general rule fixing the place of delivery at the place where the goods are located when sold, must prevail"—citing *Benjamin on Sales*, § 682; *Hatch v. Oil Co.*, 100 U. S. 124, 134, 25 L. Ed. 554. The same is true where the place of delivery is prescribed in the contract.

[2] In *Hatch v. Oil Co.*, *supra*, after announcing the doctrine, *supra*, the court said: "Decided cases to that effect are numerous; but the rule is universal that if a place of delivery is prescribed as a part of the contract the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor obliged to make a tender elsewhere. *Story, Sales* (4th Ed.) § 308. Where, by the terms of the contract, the article is to be delivered at a particular place, the seller, before he can recover his pay, is bound to prove the delivery at that place. *Savage Manuf. Co. v. Armstrong*, 19 Me. 147."

[3] And so, whether the place of delivery

is prescribed in the contract or not, we hold that when defendant wired back quotations which were accepted by defendants by wire, thus: "Atlanta Lbr. Co., Atlanta, Texas. Ship Car No. 3 boards to Paoli. Rush"—the contract thus closed required the Atlanta Lumber Company to ship the lumber from its mills at that place, as the place of delivery, to defendants upon the car.

Salmon v. Helena Box Co., supra, was a suit at law by the Helena Box Company against Salmon & Co. to recover damages for the breach of an executory contract for the sale of lumber, and to recover a balance for lumber sold and delivered. There was no dispute as to the terms of the contract, which was in the shape of a letter addressed to the box company operating two mills at or near Helena, Ark. It read: "You may enter our order for the following cottonwood lumber: [Here follows a description of 4,000,000 feet of different grades and sizes of common commercial lumber and the agreed price for each kind.] All of the above on the Helena, Ark., rate of freight. [Here follows a description of 1,000,000 feet more of such lumber, and its price.] To be delivered on Cincinnati, Ohio, freight rate. * * * We can start shipping on the above at once, and understand that you will be in a position to ship us from 40 to 50 cars per month, in accordance with shipping directions. Shipments to be made in accordance with instructions, as given by us from time to time. [Signed] Hamilton H. Salmon & Co. Accepted: Helena Box Company, by H. W. Mosby, Secretary." The question at issue was, Which party had breached the contract? and the court instructed in the alternative on the measure of damages. Among other things, in passing upon the instructions involving that question, the court held in effect that, as no contrary provision was found in the contract, Helena was the place of delivery; that being the place where the lumber was located when sold. And this is the rule, whether the articles sold are actually or only potentially there.

[4] *Janney et al. v. Sleeper*, 30 Minn. 473, 16 N. W. 365, was an action to recover the price of glass alleged to have been sold and delivered to the defendant in Minneapolis. The defense was that the sale required delivery at Brainerd, and that the plaintiffs had failed to make delivery at that place. It appeared upon the trial that plaintiffs had shipped the glass to defendants by rail, and that it had been broken from Minneapolis to Brainerd. There was verdict for plaintiff, and defendant appealed. After declaring the burden of proof to be upon the defendant to show that by the terms of the contract the glass was to be delivered to him at Brainerd, and not in the car at Minneapolis, as understood by the plaintiffs, the court said: "If no place be designated by the contract, the general rule is that the articles sold are to

be delivered where they are at the time of the sale. The store of the merchant, the shop of the manufacturer, and the farm of the farmer, at which the commodities sold are deposited or kept, must be the place of delivery, when the contract is silent upon the subject; at least, when there are no circumstances showing that a different place was intended. This is a rule of construction predicated upon the presumed understanding of the parties when making the contract. *Benjamin on Sales*, §§ 1018, 1022; 2 *Chitty on Cont.* 1201, 1202; 2 *Kent*, 505; *Midlesex Co. v. Osgood*, 4 *Gray* [Mass.] 447; *Smith v. Gillett*, 50 *Ill.* 290; *Hamilton v. Calhoun*, 2 *Watts* [Pa.] 139; *Lobdell v. Hopkins*, 5 *Cow.* [N. Y.] 516; *Rice v. Churchill*, 2 *Denio* [N. Y.] 145; *Wilmouth v. Patton*, 2 *Bibb* (Ky.) 280; *Sousely v. Burns*, 10 *Bush* (Ky.) 87. This rule is not changed by the fact that plaintiffs did not have the goods on hand at their place of business at the time of the sale, but had to procure them elsewhere in order to fulfill their contract. Potentially and prospectively the goods were as if then situate in their store at Minneapolis. Hence, in the absence of any evidence as to the place of delivery, it would be presumed to be at Minneapolis. To overcome this presumption, some evidence would be required tending to show that some other place was agreed upon. This was, in effect, all that the language of the court implied when he instructed the jury that the burden of proof was upon defendant to show that the goods were to be delivered at Brainerd, and not Minneapolis." The reason for this is apparent; for title will pass to the purchaser if the property is delivered at the place designated in the contract, thereby enabling him to sue in damages for loss or injury thereto growing out of the negligence of the carrier. If attempted to be delivered elsewhere, title to him will not pass, and such right of action would be in the seller. Besides, delivery at the place designated in the contract would vest in the buyer an insurable interest; otherwise not. Hence the buyer has a right, with or without assigning a reason therefor, to insist upon this condition precedent to a right of recovery, as here; and without pleading and proving it defendant cannot recover.

In *Filley v. Pope et al.*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372, two citizens of New York, partners as *Thomas J. Pope & Bros.*, sued *Filley*, a citizen of Missouri, in damages upon a written contract of sale, whereby they sold him 500 tons of pig iron at so much per ton upon delivery of the iron to him in bond at New Orleans, iron to be shipped from Glasgow, Scotland; delivery and sale to be subject to ocean risks. The note and memorandum of sale was duly accepted and set forth in the petition. The petition alleged that, pursuant to the terms of the contract, the iron was shipped from

Glasgow to New Orleans, which, upon its arrival, they offered to deliver to defendant in bond at that port, and upon his refusal to receive it plaintiffs were forced to sell it at a loss. The answer admitted the contract and refusal to accept, but denied the other allegations of the petition, and alleged, among other things, as a ground for the refusal and in defense of the action that plaintiffs had failed to ship the iron from Glasgow. After reply filed there was trial, at which the evidence tended to prove that: "Immediately after making this contract, the plaintiffs, by telegraph, bought the iron of John Anderson of Glasgow, and requested him to ship it to New Orleans. The iron was then at the works of the Shott's Iron Company in Scotland, equidistant and equally accessible by railway from the ports of Glasgow on the west coast and of Leith on the east coast; and such iron was sometimes shipped from Glasgow and sometimes from Leith. Anderson at once made diligent inquiry and efforts to secure transportation from Glasgow, and from Leith, and from other Scotch ports, to New Orleans, but, owing to the great scarcity of ships at that time, could only secure one vessel, the barque Alpha, which was then discharging her cargo at Leith. This vessel he chartered on February 23, 1880, three days after the contract in question was made at St. Louis. No vessel or transportation could be obtained from Glasgow to New Orleans then or for weeks afterwards. The iron was sent down from the works of the Shott's Iron Company to Leith as fast as the barque could receive it. With all speed she discharged her cargo, took in the iron, and sailed from Leith for New Orleans, where she arrived about May 26th. The distance by sea was greater from Leith to New Orleans than from Glasgow to New Orleans. If the Alpha had come round to Glasgow and shipped the iron there, it would have taken from 6 to 26 days, according to the winds, and she would have had to take in ballast at Leith and discharge it at Glasgow, involving considerable delay and expense." Upon this state of facts the trial court, among other things, instructed the jury that the provision in the contract that the iron was to be shipped from Glasgow was not material, " * * * and that if the jury found that it was impossible for the plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a more expeditious way of getting the iron to New Orleans than waiting for a vessel from Glasgow would have been, then the plaintiffs were justified in shipping the iron from Leith instead of from Glasgow." But the supreme court held not so, and said: "The contract between these parties belongs to the same class as that sued on in the case, just decided, of *Norrington v. Wright* [115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366], and likewise

falls within the rule that in a mercantile contract a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. The provision in question in that case related to the time; in this it relates to the place of shipment. The thing sold and described in the contract is '500 tons No. 1 Shott's [Schotch] pig iron,' to be shipped 'from Glasgow as soon as possible.' It is not merely 500 tons of iron of a certain quality, nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality, to be shipped from the particular port of Glasgow as soon as possible." And, after saying that the court was bound to give effect to the terms of the contract which the parties had chosen for themselves, further said: "The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination. One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again, the buyer would have an insurable interest in the iron during the voyage by reason of the title which would accrue to him, under the contract, on arrival and delivery, and of the profits that he might make in case of a rise in the market. 3 Kent, Com. 276; *French v. Hope Ins. Co.*, 16 Pick. [Mass.] 397; *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420, 423." See, also, *Detroit So. R. v. Malcomson*, 144 Mich. 172, 107 N. W. 915, 115 Am. St. Rep. 390; *Danne-Miller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928; *Sousely v. Burns, Adm'r*, 73 Ky. (10 Bush) 87; *Tuttle-Chapman Coal Co. v. Cole-Dale Fuel Co.*, 136 Iowa, 382, 113 N. W. 827; *Lucas v. Nichols and Trustees*, 5 Gray (Mass.) 309; *Fairbanks, etc., Co. v. Midvale, etc., Co.*, 105 Mo. App. 644, 80 S. W. 13; *Miles v. Roberts*, 34 N. H. 245.

As a condition precedent to its right to recover, the Atlanta Lumber Company should have alleged that it had duly performed all the conditions precedent in the contract, or a waiver thereof (*St. Paul, etc., Ins. Co. v. Mittendorf et al.*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. [N. S.] 651), and thus given defendants an opportunity to controvert the

fact of delivery. Had such been pleaded, plaintiff, before it could have recovered its pay for this lumber, would have been bound to prove a delivery on board car at Atlanta. This allegation not being made, the petition was demurrable; but nevertheless defendants answered, which, construed with a view to substantial justice, claimed exemption from liability on the ground that it had no contract with the Lodwick Lumber Company, and hence refused to accept the lumber attempted to be delivered to them at Lodwick. It cannot in reason be said that defendants waived this condition precedent by their attempted cancellation of the order before they knew that the lumber would be attempted to be delivered at Lodwick. This for the reason that Atlanta Lumber Company, by failing to plead such waiver in excuse of its failure to deliver, thus making of such waiver an issuable fact, cannot insist upon it for the first time in this court, and in fact the same is not attempted.

International Money Box Co. v. Southern Trust & Deposit Co., 93 App. Div. 309, 87 N. Y. Supp. 881, was an action for goods sold and delivered under contract between the parties. It seems, as here, no waiver was pleaded, which would have made delivery needless. The trial court, upon failure to prove that plaintiff had sold and delivered to defendant the boxes in question, held that plaintiff could not recover, and dismissed the complaint. In affirming the judgment the court said: "With respect to delivery, it was incumbent upon the plaintiff to prove, either that the defendant had expressly repudiated the contract, which would have made a delivery needless and futile, or that a delivery was made in accordance with the terms of the contract. Upon the latter subject the contract provided that the delivery was to be made f. o. b. New York City, and the proof was that, without a request from the defendant, the plaintiff delivered to an express company at New York City the 400 boxes, with directions to deliver the same to the defendant at its place of business at Baltimore, Md.; the charges of carriage to be there collected. Such a tender we do not think was sufficient to pass the title of the boxes to defendant, because the plaintiff could not bind the defendant by tender at a place different than that specified in the contract; nor could it annex to the tender the burden or condition of paying the carrying charges. The failure, therefore, to prove a proper legal tender was fatal to plaintiff's right to recover upon this branch of the case." And further, in effect, that an answer to which a demurrer had been sustained could not be considered on appeal as an admission against defendant, especially where the same was not offered by plaintiff as an admission, and that hence the allegations therein contained were not proof of waiver of the tender of the

goods ordered, though the same recited that the order had been canceled before the time any delivery was attempted.

We are therefore of opinion that the court did right in sustaining the demurrer to the evidence as to the Lodwick Lumber Company for want of privity, and as to the Atlanta Lumber Company for the reason that it has failed to allege or prove that delivery was made in accordance with the terms of the contract, or that defendant had repudiated the same, which would have made delivery a vain thing.

Finding no error in the record, the judgment of the trial court is affirmed. All the Justices concur, except WILLIAMS, J., who dissents.

WATSON v. TAYLOR.

(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

1. RAPE (§ 65*)—CIVIL LIABILITY.

Rape of a female gives her a cause of action for damages against the perpetrator.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 106; Dec. Dig. § 65.*]

2. RAPE (§ 65*)—STATUTORY "RAPE"—DEFINITION.

"Rape," as defined by the second subdivision of section 2353, Comp. Laws 1909, is an act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female is over the age of 16 years and under the age of 18, and of previous chaste and virtuous character.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 106; Dec. Dig. § 65.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5919-5925; vol. 8, p. 7778.]

3. RAPE (§ 65*)—CIVIL LIABILITY—DEFENSE.

To show that such a female consented to the act or acts of sexual intercourse will not constitute a defense to a civil action to recover damages for an assault upon her committed in such manner and under such circumstances as to constitute rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 106; Dec. Dig. § 65.*]

4. APPEAL AND ERROR (§ 171*)—THEORY OF CASE.

The cause was submitted below upon the theory that, in order for the plaintiff to maintain her cause of action, it was necessary to satisfy the jury that if the defendant had sexual intercourse with her it was accompanied with intent on his part to effect that purpose in defiance of all resistance and without her consent. Held, that on appeal it must be reviewed upon the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

5. RAPE (§ 66*)—CIVIL ACTION—VERDICT—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to authorize the submission of the cause to the jury, and to sustain the verdict rendered thereon.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. § 66.*]

6. EVIDENCE (§ 188*)—CIVIL ACTION FOR RAPE—DEMONSTRATIVE EVIDENCE—EXHIBITION OF CHILD.

In an action for damages for rape, a child two and a half years of age alleged to be the

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fruit of the illicit intercourse may be exhibited to the jury by the plaintiff for the purpose of establishing the facts of birth and of prior unlawful intercourse.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 676; Dec. Dig. § 188.*]

Dunn, J., dissenting.

Error from District Court, Canadian County; John J. Carney, Judge.

Action by Marietta Taylor, etc., against H. F. Watson. Judgment for plaintiff, and defendant brings error. Affirmed.

E. G. McAdams, of Oklahoma City, for plaintiff in error. H. L. Fogg, of El Reno, for defendant in error.

KANE, J. This was a civil action for damages, commenced by the plaintiff, Marietta Taylor, by her next friend, E. E. Taylor, for a rape committed upon her by the defendant, H. F. Watson. Upon trial to a jury there was a verdict for the plaintiff upon which judgment was duly entered, to reverse which this proceeding in error was commenced. For convenience the parties hereinafter will be called plaintiff and defendant, respectively, as they appeared in the court below.

[5] The evidence of the plaintiff was to the effect: That she was an unmarried female, 17 years of age, of chaste character previous to the time of her relations with the defendant. That the defendant was a neighbor of her family, with whom she resided, and often visited their home on terms of friendly intimacy. That two or three weeks before Christmas, 1905, her mother sent her to the well near the house to get a pail of water. That just after she turned around to leave the well, the defendant came out of the dark, took hold of her arm, and pushed her toward the orchard some 20 steps, and there threw her down and commenced to pull up her clothes. That she called to her mother, whereupon the defendant jumped up and ran away, warning her not to tell what had happened. That she did not tell what happened because she was afraid of the defendant. As to what was said and done on that occasion, she testified: "A. He said come on and go with him. I said, 'No.' He said, 'Yes, come on,' and I said, 'No,' and hollered for ma, but she didn't hear me; the house was shut up. And he took me on down across the road, the road that led into the orchard, and he threw me down there." That a short time after the incident at the well, she and her mother accompanied the Watson family to a box supper in the neighborhood. That at the invitation of the Watson family, the Taylor family consented to remain over night at their home. That there were not quilts enough at the Watson home to provide for their guests, and the plaintiff and defendant and his daughter went to the Tay-

lor home in a wagon to supply the deficiency. That upon arriving at the Taylor home the plaintiff told defendant and his daughter to go into the house and get the quilts, whereupon defendant required his daughter to hold the team, and he accompanied plaintiff into the house. That after entering the house, the defendant came into the room where the plaintiff was and threw a quilt on the floor and threw her down upon it and attempted to take improper liberties with her. That after struggling with him and pushing him away, he desisted, whereupon they all returned to the Watson home. That a short time after this the plaintiff remained over night at the Watson home for the purpose of accompanying Mrs. Watson to Oklahoma City the next morning. That some time during the night the defendant entered her room, lighted a match, and looked over at a bed where his two little boys were asleep and then sat down on her bed. That he attempted to have sexual intercourse with her, but did not succeed, and left the room, warning her that she "had best not tell any one what had happened." That on the 14th of January thereafter plaintiff spent the night at the Watson home. That some time during the night she awoke and saw the defendant standing by her bed. Her testimony as to what occurred is as follows: "Q. You say when you woke up he was standing there? A. Yes, sir. Q. Did he say anything to you? A. Yes, sir. Q. What did he say? A. He said that I had better not tell it. I told him to get out of there, and he said, 'No,' and after he got in bed and had sexual intercourse he told me I had better not tell it. Q. What did he say before that? A. That it would not hurt me, or that he would either bet his farm or give his farm it would not hurt me or amount to anything. Q. Then what did he do? A. He went out and unlocked the door and went out in through the kitchen, and in about a half hour he came back in and did the same. Q. Did you scream out or holler? A. No, sir; I was scared. Q. Why didn't you scream out? A. Because I was so scared and nervous that I could not holler. Q. And what did you do, if anything, in resisting him? A. I turned over on my stomach, and he took hold of me and turned me back over."

On the 8th of the following October a child was born to the plaintiff which she testified was the fruit of her intercourse with the defendant. Plaintiff testified further as follows: "Q. When was the first time you ever told anybody about this? A. The 30th of August. Q. The 30th of August, 1906, you say this last time occurred on the 14th of January, and you never told anybody about it until the 30th of August? A. Yes, sir. Q. You had been pregnant about seven months about that time, hadn't you?

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A. I guess so. Q. It was so that it was quite perceptible, wasn't it? A. Yes, sir. Q. And it got to where you could not conceal it any longer and you told your mother about it? A. She asked, and I told her. Q. Did you ever tell Watson anything about it that you were in a family way? A. No, sir; I never did. * * * Q. And did you tell your folks about any of those incidents? A. No, sir. Q. Why didn't you? A. Because I was afraid to and the shame and the disgrace of it." The testimony of the plaintiff generally was to the effect that the act of sexual intercourse was accomplished against her will and in spite of all the resistance she could make under the circumstances, and that although it was committed at a place where any considerable outcry would have been heard by members of the defendant's family, some of whom (three small children) were sleeping in the same room, she did not scream or cry out because she was "so scared and nervous" that she could not.

[1] The defendant in his own behalf denied any sexual intercourse with the plaintiff and that he ever took any improper liberties with her, leaving her testimony otherwise uncontradicted. There was no attempt to show that the plaintiff was not of previous chaste and virtuous character, or that she ever had sexual intercourse with any other man than the defendant or with him, except upon the occasions detailed by her in her testimony. Counsel for defendant states his first and principal contention as follows: "The first assignment of error is that the court erred in overruling plaintiff in error's demurrer to the evidence of the defendant in error, introduced for and on behalf of the defendant in error in said cause. The court will observe that there is absolutely no testimony to show that the defendant, Watson, used any force or violence in accomplishing this alleged act. Nor was the plaintiff, Marietta Taylor, prevented from resisting, by threats of immediate or great bodily harm accompanied by power of execution. The court will also observe that at the time of this alleged assault the plaintiff was a woman weighing between 135 and 140 pounds; that there is no testimony that she made any resistance whatever, or that she made any outcry. Under these circumstances, we contend that the law presumes that she consented to this unlawful act of sexual intercourse, if there was any act of sexual intercourse, and if she did consent, she cannot recover in this action."

We cannot agree with counsel. It is true that the case was submitted to the jury upon the erroneous theory that in this jurisdiction consent and resistance are necessary elements to constitute the crime of rape upon a female of previous chaste and virtuous character, over the age of 16 years and under the age of 18, but granting, as contended for by counsel for the defendant,

that the cause must be determined here upon the same theory (*Herbert v. Wagg et al.*, 27 Okl. 674, 117 Pac. 209), it seems to us that there was sufficient evidence adduced at the trial tending to establish resistance and nonconsent to justify the trial court in submitting the cause to the jury and to sustain the verdict returned. In *Kaufman v. Boismier*, 25 Okl. 252, 105 Pac. 326, it is said: "It has been held not only by this court, but also by the Supreme Court of the territory of Oklahoma, in numerous cases, that it will not disturb the verdict of a jury upon controverted questions of fact, and it is immaterial whether such questions arise from direct or circumstantial evidence. The jury had the opportunity of seeing the witnesses on the stand face to face and observing their manner, apparent fairness, and candor, or want of it. This is not available to this court in a re-examination of evidence, and, where there is any reasonable evidence tending to support the verdict, it will not be disturbed here."

If this was a criminal case where the prosecution is bound to prove the charge beyond a reasonable doubt, it would probably be controlled by *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530, and cases of that class, cited by the defendant. But here whether the charge was established by a preponderance of the evidence largely depended upon the credit to be given to the testimony of the plaintiff, and that was a question for the jury.

The evidence shows the defendant to be a strong man, of mature years, with a large family, some of whom were grown at the time of the offense. His intimate and friendly relation with the family of the plaintiff gave him opportunities to discover that he wielded great influence over her and that on account of her youth and inexperience he could probably accomplish his evil purpose without great physical resistance. There is no evidence that the plaintiff sought the company of the defendant or threw herself in his way, or in any manner encouraged his advances; but, on the contrary, it all tends to show that he in every instance was the aggressor, and that he seized every opportunity to lay hold of her and forcibly carry her off in pursuance of his evil purpose, and that it was only after three unsuccessful attempts that he finally succeeded in overcoming her uniform resistance. As was said in a similar case: "It is not often that such an assault is or can be described by a female with that complete fullness of detail with respect to every word spoken or every fact and circumstance that may enter into the questions of consent or resistance. When the proof is given, as it sometimes is, in general terms, the jury must still be satisfied that there was no consent, and that resistance was made to the extent of the woman's ability. What that ability was must in many cases depend not only upon her strength and

power to defend herself or make herself heard, but also upon the element of fear when it exists. The age, strength, and physical appearance of the parties, with the manner in which they testify, are elements of some importance which the jury may consider with all the other facts. The relation which the parties bear to each other, as in this case, may also be considered. Where on one side we find extreme youth, inexperience, and dependence united with the principle of fear and obedience, and, on the other, mature age, great physical power, and dominating influence and control over the movements and will of another, the question of consent and resistance must be determined with reference to those conditions. "When such a case arises who is to determine when, as in this case, the girl, in stating the occurrence, states that she did not consent and did resist to the best of her ability, whether she tells the truth or not? Can this court, after the jury have accepted the plaintiff's version of the transaction and the General Term has approved the verdict, say, as matter of law, that there was no evidence for the consideration of the jury? This, I think, would be to transcend the limits of our jurisdiction as a court of law, without power to review disputed facts." *Dean v. Raplee*, 145 N. Y. 319, 39 N. E. 952, *Schenk v. Dunkelow*, 70 Mich. 89, 37 N. W. 886, and *Witzka v. Moudry*, 83 Minn. 78, 85 N. W. 911, are cases of this class wherein verdicts for the plaintiffs rendered upon similar states of fact were upheld on appeal.

[2, 3] Moreover, our statute provides (section 2353, Comp. Laws 1909) that all that is required to constitute the crime of rape is an "act of sexual intercourse accomplished with a female, not the wife of the perpetrator * * * where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character." The language of the statute is clear and unambiguous. It clearly eliminates the elements of consent and resistance from the case of an assault upon the class of females therein described. Its manifest purpose is to throw a protecting mantle about the female children of this state within certain ages, which the hand of the libertine may not withdraw except at his peril. The statute in effect says that chastity is such a precious jewel in the crown of maidenly graces that it cannot be stolen or removed therefrom even with the consent of the wearer, without offending the majesty of the law. To prove that the female consented will not mollify the statute, neither should it avail as a defense to a civil action for damages for an assault upon her committed in such manner and under such circumstances as to constitute rape as defined by the statute. *Altman v. Eckermann* (Tex. Civ. App.) 132 S. W. 523.

[4] Whilst we concede that under the authorities the case must be determined in this

court upon the same theory upon which it was submitted to the jury, yet the reasons which induced the Legislature to pass the foregoing statute cannot be ignored. The statute is obviously based upon the principle that consent or nonresistance on the part of a girl of tender years is not to be understood in the same way as in the case of like acts committed upon a woman of more mature years. The jury could have taken the same view of the case. *Dean v. Raplee*, supra. It is impossible to lay down any general rule which shall define the exact line of conduct which shall be pursued by an assaulted female under all circumstances, as the power and strength of the aggressor, and the physical and mental ability of the female to interpose resistance to the unlawful assault, and the situation of the parties, must vary in each case. What would be the proper measure of resistance in one case would be totally inapplicable to another situation accompanied by differing circumstances. One person would be paralyzed by fear and rendered voiceless and helpless by circumstances which would only inspire another with higher courage and greater strength of will to resist an assault. A young and timid girl might be easily overpowered and deprived of her virtue before she had an opportunity to recover her self-possession, and realize her situation, and the necessity of the exercise of the utmost physical resistance in order to preserve her virtue. It would be unreasonable to require the same measure of resistance from such a person that would be expected from an older and more experienced woman, who was familiar with the springs and motives of human action, and acquainted with the means necessary to be used to protect her person from violence.

[6] It is next contended that it was error for the trial court to permit a child 2½ years old, alleged to be the fruit of the unlawful intercourse, to be exhibited to the jury over the objection of the defendant. The decisions in the various jurisdictions seem to be divided on this question. They are all collected in notes to *State v. Danforth*, 6 Ann. Cas. 557, and *Rex v. Hughes*, 19 Ann. Cas. 534. In the *Danforth* Case, decided by the Supreme Court in New Hampshire (73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, 6 Ann. Cas. 557) it was held: "That in a prosecution for statutory rape, the child born to the prosecuting witness may be exhibited by the state to the jury for the purpose of establishing the facts of birth, and of prior unlawful intercourse." The annotator says that the reported case is in accord with the preponderance of authority, which holds that, where the putative father is in court and within the view of the jury, it is not improper to produce the child before the jury and to call attention to points of resemblance or difference between the two.

A more extended citation of the authorities will serve no useful purpose. It will

suffice to say that, after a careful examination of all the cases called to our attention, we have reached the conclusion approved by Mr. Wigmore (1 Wig. Ev. § 186) that: "The sound rule is to admit the facts of similarity of specific traits, however presented, provided the child is, in the opinion of the trial court, old enough to possess settled features or other corporal indications."

The other assignments of error relate to the pleadings and proceedings had below, and these we are required to disregard unless they affect the substantial rights of the adverse party. Section 5680, Comp. Laws 1906. We have examined the record with considerable care and cannot say that the errors complained of, if errors at all, injuriously affected any substantial right of the defendant. The court below submitted the case to the jury upon a theory which, according to our mind, cast an unnecessary burden upon the plaintiff, which she sustained to the satisfaction of the jury. The court below in examining the record, upon motion for new trial, was satisfied with the verdict and that the defendant had a fair trial according to the forms of law, and, as we also are of that opinion, the judgment of the court below ought to be affirmed.

It is so ordered. All the Justices concur, except DUNN, J., who dissents.

DUNN, J. (dissenting). In the conclusion reached by the court in this case I am unable to concur. The chief question raised and argued on this petition for rehearing is that there is no evidence in the record supporting the instructions on the ground of rape by force and violence, and in this contention I am constrained to concur. The instructions which were given by the court were unexcepted to. Hence they are the law of the case, and, right or wrong, the proof must measure thereto or the verdict will be without adequate support. *Myers v. Fear et al.*, 21 Okl. 498, 96 Pac. 642, 129 Am. St. Rep. 795; *Irwin et al. v. Thompson et al.*, 27 Kan. 643; *Lynch v. Snead Architectural Iron Works*, 132 Ky. 241, 116 S. W. 693, 21 L. R. A. (N. S.) 852; *Emerson v. County of Santa Clara*, 40 Cal. 543; *Sullivan v. Otis*, 39 Iowa, 328. In the case of *Myers v. Fear et al.*, supra, Justice Kane, who prepared the opinion for the court, says: "It is a well-settled rule that, when the verdict of the jury is contrary to the instructions of the court, it should be set aside." The Supreme Court of Kansas, in the case of *Irwin et al. v. Thompson et al.*, supra, in the syllabus says: "Where a case is tried by a jury and the court gives them instructions, such instructions, if unquestioned and not excepted to, become the law of the case; and, if the jury in their verdict plainly disregard such instructions, it is the duty of the trial court in the first instance, and of this court on review, to set aside such verdict and grant a new trial." The Court of Appeals of Ken-

tucky, in the case of *Lynch v. Snead Architectural Iron Works*, supra, in the syllabus says: "A verdict is contrary to law * * * when it is contrary to the instructions, whether they are right or wrong." The Supreme Court of California, in the case of *Emerson v. County of Santa Clara*, supra, in the syllabus says: "A verdict of a jury, in disobedience to the instructions of the court, although the instruction itself was not correct in point of law, is a verdict 'against law,' under subdivision 6, § 193, Practice Act."

The plaintiff in her petition alleged that on January 14, 1906, she was a minor, aged 17 years, and that the defendant on the night of that day made an assault and committed upon her by force and violence the crime of rape; that as a result thereof, on the ——— day of October, 1906, she was delivered of a bastard child. Under the laws of this state, a woman of the age of 17 years may consent to sexual intercourse, unless she is of previous chaste and virtuous character, and it is rape where she consents only when these conditions exist. Plaintiff in this case chose not to rely upon her previous chaste and virtuous character, but insists that defendant was guilty of rape because he had carnal intercourse with her against her will and by force and violence. At the conclusion of the evidence, the court instructed the jury as follows: "If you find from the evidence that the defendant, H. F. Watson, unlawfully and willfully accomplished the act of sexual intercourse with the plaintiff herein, Marietta Taylor, and that said Watson accomplished the said act of sexual intercourse by force and violence against her will, and that her resistance was overcome by force and violence, then you should find for the plaintiff. Without force, actual or constructive, there can be no rape. To constitute the crime of rape the testimony must show that the plaintiff resisted the alleged assault of the defendant to the utmost of her capacity and extent of her ability, except as hereinafter stated, and if you find from the evidence that the plaintiff submitted to the embraces of the defendant, while she had the power to resist, however reluctantly she may have yielded, such submission deprives the act of an essential element of rape. You are further instructed that should you find from the evidence that the plaintiff herein was prevented from making resistance by threats of immediate and great bodily harm, accompanied by power of apparent execution on the part of the defendant, that this would be equivalent to constructive resistance and would excuse the plaintiff from making actual or forcible resistance to the alleged assault of the defendant; and if raped under these circumstances the crime of rape would be accomplished notwithstanding her failure to make physical resistance to the alleged attack or assault of the defendant. You are further instructed that, if the carnal connection complained of by the plaintiff did not in fact take

place against the consent of the plaintiff, she cannot recover in this action."

Herein, then, on the challenge of the plaintiff is laid down the specific rules and law under which this cause must be decided. The intercourse, it is provided, must be by force and violence against her will, and that her utmost resistance was overcome by such force and violence. That if she yielded to the defendant while she had the power to resist, no matter how reluctantly, the offense with which he was charged was not consummated except there was present threats of immediate and great bodily harm, accompanied by the power of execution. To these heights must the evidence in this case rise, or the verdict rendered by the jury is without support. If there is any evidence in the case which, allowing for it all reasonable deductions to which it is entitled, and all logical conclusions which may be drawn from it, will support the verdict, then it must stand. If, on the other hand, after the case is stripped of all of the evidence of the defendant who denied in toto the charge made, and every inference against the evidence of the plaintiff, there is still lacking evidence sufficient to support the verdict, it must fall. To this test I am willing to subject the uncontradicted evidence given by the plaintiff and to assert that the record is totally devoid of any testimony which any reasonable, rational man ought to say meets the demand set forth in the petition of plaintiff and the instructions of the court. That evidence upon which she must rely discloses that she was a daughter of a neighbor of the defendant, one among several children; that she was 17 years of age, weighed between 135 and 140 pounds, and on the night of the alleged offense, accompanied the defendant and his family to his home where she was to remain all night.

The questions and answers of the plaintiff are then as follows: "Q. Did you want to go over with him that night? A. I don't know as I did, but I didn't want them to think it strange of me not going. Q. But you did testify at the preliminary hearing that you wanted to go that night? A. Yes, sir; but I went to keep the folks from mistrusting. Q. You did testify in the preliminary hearing that both wanted to go, so Pa held straws so you and sister could draw to see which one would go; that is the way you testified at the preliminary hearing? A. Yes, sir. Q. Now, going over to the house, who went with you over to the house? A. To their house? Q. Yes. A. Mrs. Watson and two of the girls and he. Q. Mrs. Watson and— A. Him and the two little girls. Q. How did you go over? A. In the wagon on a piece of a load of hay. Q. On the wagon on a piece of load of hay, where did you all sit? A. Up on top of the hay. Q. Now that night when you came back from the box supper at Mustang, where did you all sit in the wagon? A. We sat down in the wagon

the best I remember now. Q. I mean on the way home from the box supper? A. We sat down in the wagon the best I remember now. Q. Who sat on the seat? A. I don't remember; I believe I did. Q. Who sat with him? A. I guess I did, I sat on the seat with him. Q. Who all was at Watson's house that night? A. The night of the 14th? Q. Yes, the 14th of February, or January you now say it is, who was it was there that night? A. His wife and two little girls and him. Q. His wife and two little girls and him. Where did he and his wife sleep? A. In the other bedroom. Q. And where did you and the little girls sleep? A. In the other bedroom. Q. Two adjoining bedrooms? A. Yes, sir. Q. Then the little girl slept with you? A. Yes, sir. Q. When you went in you latched the door? A. Yes, sir. Q. Why did you do that? A. Because I thought maybe he might come in and I latched the door. Q. Is that the reason you latched the door? A. Yes, sir; the best I know now. Q. What did he do? A. He pulled up the covers, and I turned over on my stomach as he got into bed. Q. He pulled up the covers, you turned on your stomach, and he got in bed? A. Yes, sir. Q. Then what? A. He turned me over. Q. The girl was sleeping beside you in bed? A. Yes, sir. Q. The little girl five years old, or four or five? A. I don't know how old; I wasn't there when she was born; I don't know a thing about it. Q. You have testified she was four or five? A. I won't say sure how old she was. Q. That was your judgment? A. Yes, sir; but I was guessing at it then. I don't know anything about it. Q. But the little girl you have been testifying was four or five years old was in the bed beside you? A. Yes, sir; she might have been younger, I don't know. Q. Mrs. Watson was in the adjoining room? A. Yes, sir. Q. Make any outcry when he crawled in bed with you? A. No, sir; because I was afraid to. Q. He hadn't done anything the other time when in bed with you? A. No, sir. Q. Why were you afraid? A. Because he told me I had better not tell it. Q. Then he got in bed, what did he do then after he got in bed? A. He had sexual intercourse. Q. Tell the jury what he did, what was you doing? A. That is the best I know how to tell it. Q. Well, you were laying on your back when he came in? A. Yes, sir. Q. When he came in you turned over on your stomach? A. Yes, sir. Q. Then he got in bed with you? A. Yes, sir. Q. What did he do? A. I told you once; I don't know how to tell it any different. Q. You were lying on your stomach? A. Yes, sir; I told you he turned me over. Q. That was the first thing he did? A. Yes, sir. Q. And he had sexual intercourse with you? A. Yes, sir. Q. Was that with or without your consent? A. I was scared and nervous, and I told him to go on out and let me alone, and he said he bet his farm or give his

farm, I don't know which— Q. That it would not hurt you? A. That it would not hurt me. Q. He said that too? Well, how long did he stay in bed with you then? A. About a half hour, I guess, to the best I know. Q. Mrs. Watson was in the adjoining room. You didn't cry out? A. No, sir. Q. You knew if you did she would hear you? A. I was afraid to; I was scared and nervous. Q. That is what you said, you knew Mrs. Watson was in the adjoining bedroom, and knew if you did she would hear you? A. I was afraid to. Q. You knew she would hear you? A. Yes, sir; but how did I know what he might do. He might, oh what, he might cut my throat, or no telling what; I didn't know what he might do. Q. He hadn't cut your throat before that time? A. No, sir; but I didn't know whether he would or not. Q. Is that the reason you didn't cry out? A. I was afraid to; I told you that. Q. How long was he in bed with you? A. I don't know; he was gone out I judge a half hour, probably a half hour. Q. How long was he in bed with you? A. I said it might have been a half hour, or shorter, I don't know. Q. Somewhere about a half hour he stayed in bed with you? A. I think so. Q. What did you do all that time? A. I told you once. Q. Had sexual intercourse for a half hour? A. Yes, sir. Q. How much of a struggle took place in that bed? A. I don't remember now. Q. And he turned you over on your back. Did he have to take hold of your limbs to pull them apart? A. I don't remember now whether he did or not. Q. Now, to get this altogether straight, what was the first thing he said to you when he came in the room? You said in the first place to go out, then what did he say? A. He said, no, it would not hurt me or amount to anything. Q. Did he say that before you said anything about it hurting? He said, 'No.' What did you say? A. I don't remember just word for word. Q. You told it before. A. I seen him standing there, and I told him to go on out. He said, 'No,' and commenced hauling at the covers and said it would not hurt me; he would bet his farm or give his farm. Q. Then what? A. I said, yes, sir, I thought it would, and he said not. Q. Then what? A. I do not remember. Q. He said it would not hurt you, you said yes you were afraid it would, and he said no it would not, that he would bet his farm it would not, and you said yes it would, is that correct? A. Yes, sir. Q. Did it hurt? A. Yes, sir. Q. Then he was in bed with you about half an hour. When he left he went out the door. Do you know where he went? A. No sir, he went out the door. Q. And he came back again? A. Yes, sir. Q. Came back through the door the next time? A. Yes, sir. Q. Then got in bed with you again? Dressed the same as he was before? A. Yes, sir. Q. When he came back in he came in through the door. How do you know he

came in through the door? A. Because I seen him. Q. Was you awake or asleep? A. I know he came in that way. Q. You say you saw him? A. Yes, sir. Q. Were you awake or asleep? A. I was dozing. Q. You were dozing? A. Yes, sir. Q. If you were dozing, how did you see him come through the door? A. Because I opened my eyes and seen him. Q. Did you doze off to sleep, did you go to sleep after he was there the first time? A. I was just dozing off. Q. You were just dozing off? A. Yes, sir. Q. Didn't you testify at the preliminary hearing that you dozed off to sleep? A. Yes, sir; but I might have been mistaken. Q. What do you say now? A. I dozed off to sleep. Q. Oh, you dozed off to sleep? A. Yes, sir. Q. You dozed off to sleep, and yet you say you saw him come in through the door? A. Yes, sir. Q. Then he came to your bedside, and you told him to go away, he said no, you said yes, he said no, he said it would not hurt you, you said it would, and then what did he say after that? A. He said no he knew it would not, and he said I had better not tell any of it at all. Q. Then he said you had better not tell it? A. Yes, sir. Q. Why did he say that? A. I don't know anything about it. Q. Had you said anything about telling it? A. No, sir; but he told me that all the time. Q. He got in bed with you the second time? A. Yes, sir. Q. Was you lying on your back that time? A. I don't remember. Yes, sir; I believe so. Q. You turned over on your stomach again? A. No, sir. Q. You didn't the second time? A. No, sir; because I was scared and nervous. Q. How long were you discussing the question the first time of whether or not it would hurt you? A. I don't know how long it was. Q. You were too scared to discuss that? A. I just woke up, and I was scared, of course. Q. Did you get up and lock the door after he was in there the first time? A. No, sir. Q. Why didn't you? A. I don't know. I didn't do it. I didn't lock the door. Q. How long did he stay in bed with you the second time? A. About the same time. Q. About a half hour? A. About the same time. Q. About a half hour. What did he do in bed with you about a half hour? A. Did the same as he did the other time. Q. Had sexual intercourse for half an hour again? A. Yes, sir. Q. How many times did he have sexual intercourse with you that night? A. Twice. Q. And half an hour each time; that is true, is it? A. Yes, sir. Q. Well, after he went out the second time, did you get up and lock the door? A. No, sir. Q. Mrs. Watson was sleeping in this next room all the time? A. Yes, sir. Q. And the little girl slept beside you in the bed? A. Yes, sir. Q. That is the first time he had ever had sexual intercourse with you; you are absolutely positive of that? A. Yes, sir; I am. Q. Was that the last time? A. Yes, sir. Q. What time did you get up in the morning?

A. Pretty early; yes, Mr. Morgan and his brother came over there to load the potatoes early. Q. That he had gotten of Mr. Watson? A. Yes, sir. Q. Now, was the bed stained the next morning? A. No, sir; not that I noticed. No, sir; it wasn't. Q. Was any of your night clothes stained in any way? A. Not that I remember of now. Q. No hemorrhage or bleeding of any kind? Q. Did you answer the question? A. Yes, sir. Q. What did you say? A. I said no. Q. That was the first time any man ever had sexual intercourse with you? A. Yes, sir. Q. Now, after this occurrence, when was the next time you were over at Watson's? A. After the 14th? Q. Yes. A. I don't remember. Q. You don't remember when you were over there after that? A. I might have been one or two times. Q. You went to an entertainment at Red Hill schoolhouse with the Watsons? A. Yes, sir; and Ma and Sister went with us. Q. You rode in the wagon with the Watson family just the same as going to the supper? A. We all rode in the wagon. Q. When was the first time you ever told anybody about this? A. The 30th of August. Q. The 30th of August, 1906. You say this last time occurred on the 14th of January, and you never told anybody about it until the 30th of August? A. Yes, sir. Q. You had been pregnant about seven months about that time, hadn't you? A. I guess so. Q. It was so that it was quite perceptible, wasn't it? A. Yes, sir. Q. And it got to where you could not conceal it any longer, and you told your mother about it? A. She asked me, and I told her. Q. Did you ever tell Watson anything about it that you were in a family way? A. No, sir; I never did. Q. That you were in a family way, until you filed the action? A. No, sir."

To my mind the mere reading of the foregoing recital is sufficient and ought to convince any reasonable man that there was absolutely no conduct took place in the bed with the plaintiff that night which would constitute her forcible and violent ravishment. When asked as to how much of a struggle took place in the bed, she stated merely, "I do not remember." And when asked as to whether or not defendant took hold of her limbs to pull them apart, she again stated, "I do not remember." Yet her duty is to resist to her utmost, and the burden of proving this is upon her. And when interrogated on the very essential proposition involved in this case as to whether or not the act was committed with her consent, she did not answer it, but evaded the question and said, as is seen above, "I was scared and nervous and told him to go on out and let me alone," and then manifestly consented.

It is her duty to resist; the act of rape under her petition and the instructions of the court could not be consummated except by the defendant overcoming her resistance. No resistance, no rape. "Resistance" means to

fight back, not to quietly and submissively yield; or, as is said by Ryan, C. J., in *State v. Welch*, 87 Wis. 196, "Resistance is opposing force to force, not retreating from force." And not only must the resistance be made, but it must be made to the utmost of her capacity, for the court's instruction was that if the "plaintiff submitted to the embraces of the defendant, while she had the power to resist, however reluctantly she may have yielded, such submission deprives the act of an essential element of rape."

"Utmost" is defined by Webster to be: "The most possible; the farthest limit; the greatest power, degree, or effort." The plaintiff pleaded in her petition that by force and violence she was ravished, went into the trial of the case upon that issue, and then testified to facts which demonstrate to my mind beyond any reasonable doubt that there was no force and violence whatsoever used, or, if so, that she made absolutely no resistance.

I have examined a great number of cases involving the same question as here, and I have yet to find a report of any case with facts even approaching those shown by this record being sustained by any court as constituting the crime of rape. As I view it, the record is totally and absolutely devoid of any evidence whatsoever of force, violence, or resistance.

The definition of the word "force," according to Webster, is as follows: "Power, violence, compulsion, or constraint exerted upon a person or thing; strength or power, of any degree, exercised without law, or contrary to law, upon persons or things; violence." "Violence" is defined by Webster as follows: "Strength or energy actively displayed or exerted; vehement or forcible action; force; impetuosity; vehemence; of persons, vehement or unrestrained eagerness; highly excited or animated force or energy."

It is a misnomer, it is a misapplication of those terms, it is a violation of the fundamental common ordinary meaning the English speaking people apply to those words, for a court to say that that which plaintiff in this case says took place constituted ravishment by force and violence. No reliance whatever is made upon any threats having been made by the defendant against the plaintiff so that she was in no wise intimidated. All she says defendant said to her is set out above and of course does not show any threat. The evidence in this case not only contains no support for the claim, but it affirmatively, shows that none existed. Necessarily one would assume, if a female is forcibly ravished, her virtue stolen, and left in the mental condition that a decent female would be under those circumstances, that rest and sleep would be out of the question for at least the balance of that night. The ravisher would have murdered innocent sleep and left her distraught and wrought to the point of distraction. But not so in the present case. This woman of more than ordinary

strength, size, and weight says she peacefully dozed off to sleep after having been subjected to 30 minutes of forcible ravishment, and when her despoiler once more appeared at her bedside to repeat it, instead of screaming, fleeing, or fighting, she calmly and quietly told him to go away. And then once more admitted him to her bed and again permitted herself to be forcibly ravished for another half hour, and the little child which slumbered by her side, nor the other children in the same room, nor the wife in the adjoining room, were disturbed by her efforts to protect her virginity. The bed was not stained nor apparently disarranged, nor were her clothes stained in any way, nor did the ferocity of the attack result in any hemorrhage whatsoever, nor did either of them bear any marks of the combat. She arose the next morning, commingled with the plaintiff and his family, and her appearance apparently excited no comment on their part, nor did she complain to his wife, children, associates, or any one else of all the world until seven months later, when on the 30th of August, beginning to show signs of pregnancy, for the first time she told her mother. I challenge the annals of jurisprudence to supply another case of similar character, or one where the facts even approach those admitted in the case at bar, where a judgment civil or criminal has been sustained. The undisputed facts cannot exist and a righteous judgment stand. It shipwrecks logic, reason, and law to permit a judgment of this character on this evidence to be affirmed. I do not place this dissent upon precedent or authority, for I deem that I need not; but there are cases by the score where the facts are stronger than these, and appellate courts have done that which in every case they should do when there is no evidence to support a verdict, declined to affirm it. Nearly all cases of rape are criminal in their character. The evidence of the force, violence, and resistance must be established to the satisfaction of the jury beyond a reasonable doubt; but, after it is established beyond a reasonable doubt, it is no more nor less than the evidence of force and resistance. Hence the grade of proof required in no wise touches the question in this case; while they are too unreasonable for me to give them any credence whatever, the things to which this woman testifies are assumed to be absolutely established not only beyond a reasonable doubt but beyond every doubt—they are assumed to be simply true, and the position I take is that, being so established, there is no evidence of rape.

The facts in the case of *State v. Cowing*, 99 Minn. 123, 108 N. W. 851, 9 Ann. Cas. 566, disclose the following: "He was a farmer, 49 years of age, and had a family of seven children, including his oldest son, 22 years of age. He was never before accused of any crime, and had lived continuously for many years on a farm adjoining the farm of the father of the complaining witness. The

houses were about three-quarters of a mile apart. Apart from some trouble with rheumatism, the defendant was a man of at least ordinary strength and weighed about 165 pounds. The complaining witness was unmarried, 23 years of age, had done the usual work of a girl on the farm, was about 5 feet tall, and weighed about 100 pounds. The testimony, read in the light of the trial court's memorandum, tended to show, but not satisfactorily, that she had not the average mental endowment, nor ordinary physical strength, and that she had suffered from continued ill health. The complainant's version is that when she was in the kitchen defendant came in softly and grabbed me with my arms tight back of me and said, "Lizzie, we are going to have some fun." I said "No, I don't want no fun," dragging me. After I said I didn't want any fun, he grabbed me with both arms again. When he grabbed me the first time I was standing by the stove with my back toward the door. When he grabbed me the second time I was standing the same way. Then he jerked me around, my face to the east and my arms back of me, and grabbed me tight, dragging me out of the kitchen in through the door into the front room south of the kitchen. While he was dragging me, I tried to fight and get away as hard as I could, and screamed and hollered as loud as I could. I said for him to leave me alone, let go of me; but he dragged me in farther and threw me on the couch with my arms under me and threw me on my hands. I don't know how large the couch is. Then he kicked his left knee below my chest and pressed me down, and grabbed with his left hand into my throat and choked me as hard as he could, and with his right hand he rushed up my clothes so quick, and then he had sexual intercourse with me. It caused me to flow blood all over my skirt. I see him when he got off me. There was blood on his right hand, across his fingers, and across the whole length of his hand. This intercourse caused me pain. My throat was sore, and I was lame all over. It caused me pain when he was doing this. My head ached. It hurt me at the time he was doing this hard, just as though some one was running a knife through me and tearing me all to pieces. I did not in any manner consent to that intercourse I was not willing that he should have it with me. I tried just as hard as I could to get away. After he did this he went right off. When he got off my person he rushed his clothes right up quick with both hands and then went right out."

Discussing these facts, the court said: "The principal question presented by the record concerns the sufficiency of the testimony of the prosecutrix to show the degree of resistance to the assault charged which the law requires. That degree, in the nature of things difficult of determination, has

been the subject of much legal controversy. * * * In the case at bar there is no lack of testimony to the conclusion that the prosecutrix did not consent, but there is little other evidence in this regard. She says she tried to fight and get away just as hard as she could while he was dragging her; but there is no specific act of resistance testified to after she was carried to the couch. She does not say that she employed the instinctive devices of self-defense; for example, she does not say that she crossed her legs or tried to keep them together. There is no evidence that she used the natural means of defense. While the defendant's left knee was below her chest and he was pressing her down and held her throat with his right hand, as she testifies, it might well be that she could not have taken her arms out from under her body; but it is unexplained why she did not free one arm at least when he was in the position he must afterwards have assumed to have accomplished his purpose. Not only is she not shown to have used or tried to use her hands, but there is no testimony that she used or tried to use her body, legs, or any other ordinary means of reprisal. Neither the victim nor the perpetrator appear to have borne any bruise or mark resulting from the struggle. There is confused testimony that one of her skirts was slightly torn, but no evidence that her clothing had been touched or torn. Nor does the record show any threats or intimidation on the part of the defendant, or any intent on his part to use any means necessary to accomplish his purpose, nor any reasonable ground for apprehension of bodily harm, nor such a place or position of the prosecutrix as would have rendered resistance useless. It would seem that the only theory upon which her testimony is sufficient to show resistance is that ordinary means of self-defense were precluded by her mental condition. The record does not show her collapse or unconsciousness. The only evidence on this point is in her cross-examination. She was asked whether she had not testified on the preliminary examination to a series of statements, including at the end the following: "And pretty soon he threw up my clothes in a rush. My mind was gone so that I didn't know what he was doing. So pretty soon he got his privities into me as hard as he could, and mauled it around as hard as he could." Did you so testify? She answered that she 'did not testify that way the first time. Not the last part, I didn't.' The reporter who took the minutes of the testimony on the examination before the magistrate swore that she did so testify. Moreover, her own testimony on trial, previously referred to, was not consistent with the denial. For present purpose it is proper to consider this testimony most favorably to the prosecutrix; but, in allowing the testimony as to her mental condition to remain, it is to be borne in mind that there exist

contradictions as to her statement of her own analytical consciousness at the time of the act. Her testimony reveals a clear memory and close observation as to what happened immediately before and immediately after the act complained of. She heard him tear her skirt, which, in the trial, she said did not tear very easily, and as to which, on the preliminary examination, she testified, 'It tears very easy.' The tear did not make a very loud noise, but she heard it tear. 'I don't mean his little finger.' She had previously testified that her hearing was reasonably good. After the act she said 'there was blood on his right hand, across his fingers, and across the whole length of his hand.' Immediately afterwards she testified that the accused left. She then saw cows break out and come up towards the house where there was a line of fancy clothes, and she didn't want them to chew them, so she went out as far as the porch and set the dog on them; but she didn't run, she 'just wiggled out that far.' This testimony tends to corroborate that of the defendant as to the same incident. Taking the testimony as a whole, it creates more than a grave doubt whether either resistance or a state of mind excusing the failure to resist was shown. It is apparent that upon a new trial the testimony of the prosecutrix could be made more definite as to the specific acts of resistance and as to the condition of her will at the time of the alleged outrage. The proof as to her mental and physical condition at that time, now inadequate and leaving much to conjecture, is susceptible of being properly made more certain. See *State v. Peterson*, 110 Iowa, 647, 82 N. W. 329. It must occur that the circumstances of outrages such as this is alleged to have been are not so nearly identical that a decision on one state of facts can be regarded as determining another controversy. We are especially referred to *Spaulding v. State*, 61 Neb. 289, 85 N. W. 80, and *Baer v. State*, 59 Neb. 655, 81 N. W. 856, as containing judicial sanction of a conviction upon the facts similar to those at bar. In the case first named, the court, commenting on the absence of resistance as would usually be expected, sets forth, among other things, that the prosecutrix struck the defendant, leaving a mark on him visible for some time thereafter, that he admitted receiving a blow from her, and that her testimony as to becoming unconscious was in a degree corroborated by other witnesses. In the last-named case, the prosecutrix testified that in the struggle she was dragged around the floor many times, despite her most agonizing appeals to the defendant and to God. She was scratched, bruised, and her clothes torn, and made complaint immediately. There was also evidence of intimidation and of threats to kill." See, also, *Livinghouse v. State* (1906) 76 Neb. 491, 107 N. W. 854.

To the same effect is the early case from

the Supreme Court of Nebraska (*Oleson v. State*, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366), wherein Chief Justice Maxwell, who prepared the opinion, quoted approvingly from the following authorities, as follows: "In the case of *People v. Morrison*, 1 Parker, Cr. R. 625, it is said, to constitute the crime there must be unlawful and carnal knowledge of a woman by force, and against her will. * * * The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity. In *People v. Dohring*, 59 N. Y. 374 [17 Am. Rep. 349], it is held that 'in order to constitute the crime of rape of a female over ten years of age, when it appears that at the time of the alleged offense she was conscious, had the possession of her natural mental and physical powers, was not overcome by numbers or terrified by threats, or in such place or position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time, and under the circumstances.' In the case of *People v. Benson*, 6 Cal. 221 (65 Am. Dec. 506), it is said: 'That there was no outcry, though aid was at hand, and the prosecutrix knew it; that there was no immediate disclosure; that there was no indication of violence on her person; and that the act was committed at a time and under circumstances calculated to raise a doubt as to the employment of force—are put as strong circumstances of defense, not as conclusive, but as throwing a doubt upon the assumption that there was a real absence of assault.' In *Whitney v. State*, 35 Ind. 506, the court say: 'In prosecutions for this crime the best of judges of ancient and modern times have laid down certain tests by which to be governed in ascertaining the truthfulness of the party preferring the charge. They concur in saying that her evidence should be carefully considered; and if the witness be of good character, if she presently discovered the offense and made search for the offender, if the party accused fled for it, these and the like concurring circumstances which will give greater probability to her evidence. But on the other hand, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry—these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.'"

In the case of *Brown v. State*, 127 Wis. 193, 106 N. W. 536, 7 Ann. Cas. 258, the facts are stated as follows: "The informa-

tion alleged that 'on the 27th day of October, in the year 1904, at said county, Grant Brown did ravish and carnally know one Edna Nethery, a female of the age of fourteen years and more, by force and against her will and against the peace and dignity of the state of Wisconsin.' The two parties were children of neighboring farmers who had known each other all their lives. The accused was 20 years old, the prosecutrix 16. Within the year before the event they had been thrown to some extent in company at social gatherings, at one of which at least had occurred direct personal contact in some games described as involving 'kissing forfeits.' On October 29th, the prosecutrix went by a usual path across fields to her grandmother's house for the purpose of having an aunt try on certain clothing being made for her. Such path passed by and over parts of the farm of defendant's father. Defendant was in the field driving out hogs and repairing a fence, and, as prosecutrix reached a stile, he was close thereto, so engaged. She addressed him in a playful way with reference to his work, and he suspended the same and came up to her. Her story is that he at once seized her, tripped her to the ground, placed himself in front and over her, unbuttoned her underclothing, then his own clothing, and had intercourse with her; that the only thing she said was to request him to let her go, and, throughout the description of the event, her only statement with reference to her own conduct was, repeatedly: 'I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up. I pulled at the grass. I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled.' Also that at one time she got hold of the fence to try to pull herself away. Whenever he removed his hand from her mouth she repeated her screams. She denies any recollection as to the position of her limbs at any of these times, or where his were with reference to herself. She confined her statement of the force used by him to the actual sexual penetration. She makes no mention of any use of her hands or her lower limbs. After the completion of the intercourse, she says he made her promise not to tell, and, upon her doing so, allowed her to arise. She says she made the promise because she was afraid of him, and did not know what he would do if she did not. Thereupon she proceeded to her grandmother's house, something more than a quarter of a mile, but, before entering the house, went into a shed, slightly off her direct course, to arrange her underclothing. There she discovered flow of blood, and, as she states, became frightened and rushed into the house of her aunt, where she at once exclaimed: 'Grant Brown has (done something) to me. O! What shall I do?' Where-

upon the aunt immediately took her home and informed her mother. She was taken to the family physician for examination, who, however, postponed it until the next day, when, in company with another physician, a physical examination was made, disclosing fresh rupture of the hymen and a condition of the genital parts indicating recent sexual intercourse, but not significant as to whether the same had been accomplished forcibly or otherwise. Her person nowhere showed any bruises or injuries, nor did her clothing, except for a rip about an inch long in her drawers. At this examination she stated to one of the physicians that she had not resisted or made any fight. The defendant's story differed only in some details and in the denial of any resistance, asserting that when she came where he was at work and addressed certain playful remarks to him he approached her, placed his arm about her, and indulged in certain liberties with her person, to which she offered no resistance, whereupon he laid her down and had intercourse with her; she at no time making any resistance or outcry. There were no marks upon his face, hands, or clothing of any struggle. Accused (sic) was a well-matured girl for her years, weighing 117 pounds. About a week before the event she had been ill with measles for four or five days, and made some suggestion that she had not fully recovered her strength on October 29th. Defendant's physical characteristics are shown only to the extent that he weighed 150 pounds, and had been brought up on a farm doing farm work."

Discussing the case, the court said: "Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. We need not mention the exception where the power of resistance is overcome by unconsciousness, threats, or exhaustion, for, in this case, there is no proof of any of those things. Further, it is settled in this state that no mere general statements of the prosecutrix involving her conclusions, that she did her utmost and the like, will suffice to establish this essential fact; but she must relate the very acts done, in order that the jury and the court may judge whether any were omitted. *Bohlmann v. State*, 98 Wis. 617, 74 N. W. 343; *Devoy v. State*, 122 Wis. 148, 99 N. W. 455. Turning to the testimony of prosecutrix, we find it limited to the general statement, often repeated, that she tried as hard as she could to get away. Except for one demand, when first seized, to 'let me go,' and inarticulate screams, she mentions no verbal protests. While we would reasonably recognize the limitations resting on many people in attempting expression and description, we can-

not conceive it possible that one whose mind and exertions had, during an encounter of this sort, been set on resistance, could or would in narrative mention nothing but escape or withdrawal. A woman's means of protection are not limited to that, but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law. 3 Wharton & S. Med. Jur. §§ 172, 188, and authorities cited; 1 Beck, Med. Jur. 203. In addition to the interposition of such obstacles is the ability and tendency of reprisal, of counter physical attack. It is hardly within the range of reason that a man should come out of so desperate an encounter as the determined normal woman would make necessary, without signs thereof upon his face, hands, or clothing. Yet this prosecutrix, of at least fair intelligence, education, and ability of expression, in her narrative mentions no single act of resistance or reprisal. It is inconceivable that such efforts should have been forgotten if they were made, or should fall of prominence in her narrative. The distinction between escape and resistance is admirably discussed by Ryan, C. J., in *State v. Welch*, 37 Wis. 196, 201. Resistance is opposing force to force (Bouvier), not retreating from force. These illustrations but serve to point the radical difference between the mental conception of resistance and escape and emphasize the improbability that if the former existed only the latter would have been mentioned. This court does not hold, with some, that, as matter of law, rape cannot be established by the uncorroborated testimony of the sufferer, but, in common with all courts, recognizes that, without such corroboration, her testimony must be most clear and convincing. Among the corroborating circumstances almost universally present in cases of actual rape are the signs and marks of the struggle upon the clothing and persons of the participants, and the complaint by the sufferer at the earliest opportunity. In the present case the former is absolutely wanting, for the one-inch rip in prosecutrix's underwear was not shown to be of a character or location significant of force or violence. Not a bruise or scratch on either was proved, and none exist on prosecutrix, for she was carefully examined by physicians. Her outer clothing not only presented no tearing, but no disarray, so far as the testimony goes. When one pauses to reflect upon the terrific resistance which the determined woman should make, such a situation is well-nigh incredible. The significance of the other corroborative circumstance, that of immediate disclosure, is much weakened in this case by the fact that prose-

cutrix turned from her way to friends and succor to arrange her underclothing and there discovered a condition making silence impossible. Such facts cannot but suggest a doubt whether her encounter would ever have been disclosed had not the discovery of blood aroused her fear that she was injured and must seek medical aid, or at least that she could not conceal from her family what had taken place. Nor is this thoughtfulness of the disarrangement of her clothing consistent with the outraged woman's terror-stricken flight to friends to give the alarm and seek aid which is to be expected. We are convinced that there was no evidence of the resistance which is essential to the crime of rape, and that the motion for new trial should have been granted on that ground."

In the case of *Price v. State*, 36 Tex. Cr. R. 143, 35 S. W. 988, from the Court of Criminal Appeals, the prosecutrix detailed the facts as follows: "When we had gone into the Tatum pasture, and gotten about a mile or a mile and a half of my father's house, the defendant caught my horse by the bridle, and said, 'We want to stop here.' He got off of his horse on the left side, and caught hold of me, and pulled me off on the left side of my horse. He was riding on the right side of the road, and I on the left, going north. When he pulled me off my horse, while I was begging and crying, he pulled out a pistol, and said for me to quit, or he would kill me. He laid it down by us. He caught both of my hands in one of his, and held both in that way until he did what he wanted to. He pulled up my clothes, and raped me. His male organ penetrated my female organ. I did all I could to keep him from raping me. I begged him, and, while he held my hands in one of his, I shoved him as well as I could with my arms. I did not kick or scratch him. He was not bruised or scratched, as far as I know. My drawers were torn down one leg. He told me, if I told on him, he would kill my father. The prosecutrix testified that she went on home, appellant accompanying her, and that they arrived there a little before her sister and Mr. Maltby came; that she slept with her sister that night, and said nothing about it. Said nothing to her people the next morning, and did not mention the matter until in August following, and then she mentioned it only when her sister remarked that something was the matter with her, and she then told her about the rape that had occurred in the pasture, some seven months previous. Her excuse for not telling sooner was because the defendant threatened to kill her father if she did, and that he was a dangerous man, and she was afraid of him."

The court, discussing the case, said: "In this case, however, instead of only three months elapsing between the alleged offense and the complaint made by the prosecutrix,

more than seven months had elapsed, and only when her condition exposed her did she state anything in regard to the matter. This long silence and the circumstances under which she made the accusation should go very far to discredit her, and to suggest that the act of carnal intercourse, if it was with the defendant at all, was with her consent. The excuse she gives, that she feared the appellant would kill her father, under the circumstances of this case, must appear very flimsy, indeed. The appellant was shown not to live in the family, and not to have any authority or control over her; and this statement of hers, as a reason for her long silence, does not comport with the integrity of a virtuous female, who has been outraged, and who is jealous of her honor. If we look to the circumstances of the outrage itself as narrated by her, they likewise appear shadowy. There was no attempt at flight, though she was on horseback. No evidence of any injury or struggle. She appears to have unresistingly submitted to being lifted from her horse, and, after the outrage was accomplished, to be lifted back again, by the destroyer of her innocence, to have accepted his escort to her home, and to have gone with him on two sleigh rides a few days afterwards; and all this without any suggestion that he had demeaned himself towards her in any other wise than a manner which met her approval. Under all of the facts of this case, it occurs to us that the lower court should have unhesitatingly granted a new trial in this cause. Although a stricter rule prevails here with reference to a new trial than in the lower court, yet, from the record in this case, we cannot permit this verdict to stand."

The foregoing cases, while all criminal in their character, present no different legal situation aside from the result of the verdict than the case at bar. Both civil and criminal prosecutions for rape involve proof of the same elements. One must be proven by a preponderance of the evidence and the other beyond a reasonable doubt. In the case at bar I assume that the evidence of the prosecutrix is absolutely true, and, so assuming, feel that the same judgment should follow in this case as was rendered in the civil rape case of *Robinson v. Musser*, 78 Mo. 153, which is, "*Volenti non fit injuria*."

The foregoing are but a few cases of which scores may be found where appellate courts have refused to allow verdicts to stand where the evidence was infinitely stronger on the part of the prosecution than in this case, and I have never found one which in weakness has even approached it that has been challenged and sustained. There was evidence offered, as indicated in the opinion of the court, that the plaintiff was of previous chaste and virtuous character, and hence that, even though she consented, rape was

committed and she should recover; but it is to be observed that the defendant had no notice of any such charge being made against him. It was not averred in the petition, the case was not tried upon such theory, the court did not instruct upon it, and the defendant was given no opportunity to defend on that ground. I believe that this is the ground this case should have been based upon, that plaintiff should have charged defendant with having had intercourse with her, that she was not his wife, was of the age of 17 years, and of previous chaste and virtuous character, and substantial justice herein requires that the case be returned and tried upon that ground. If this defendant had intercourse with the plaintiff though with her consent and she is of previous chaste and virtuous character, the punishment inflicted upon him herein is wholly inadequate. He should not only be made to suffer civilly, but his act constituted a crime for which the state ought to proceed against him; but, in whatever form his punishment comes, it should be according to the law. If we convict guilty men by methods which ignore the law and its demands, we make it easy to convict innocent men in the same way. If a guilty man can be convicted without evidence, so may an innocent one, and this is the rank danger which lurks in the affirmance of this judgment. I make no claim to being a prophet, but the conclusion reached in this case will be departed from some day. It will not do to say that a man may be convicted of forcible rape on the uncorroborated evidence of a female who weighs 135 or 140 pounds in full possession of all her faculties, right in the heart of his family, with them all around him and undisturbed, when she does not fight, yell, or complain. Such a holding repeals the statute.

Hence, I feel in this case, a judicial crime is being perpetrated, and that this man is being stripped of his property in defiance of and contrary to law.

CLARKSON et al. v. WASHINGTON et al.
(Supreme Court of Oklahoma. April 15, 1913.)

(Syllabus by the Court.)

1. MARRIAGE (§ 20*)—INDIANS—PER VERBA DE PRÆSENTI—WHAT CONSTITUTES.

Evidence examined, and *held*, that the same reasonably tends to support the finding of the court that there existed from the inception such an agreement between the parties in interest as was necessary to constitute a marriage per verba de præsenti.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 12-14; Dec. Dig. § 20.*]

2. DOWER (§ 79*)—MARRIAGE—PRESUMPTION OF DIVORCE—ACTION FOR DOWER.

Where pending the time a man and woman, citizens of the Creek Nation, were living together as husband and wife under a common-law marriage, the husband was convicted of a

felony and sent to the penitentiary, and where, pending his confinement, the wife married another and after the death of her common-law husband brought suit for dower out of his allotment, *held*, in the absence of further evidence on the subject, that it will be presumed she was divorced from her common-law husband prior to her marriage with her second husband. *Held*, further, that as she was not the widow of the former husband she was not dowerable out of his allotment.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 294-306; Dec. Dig. § 79.*]

3. APPEARANCE (§ 26*)—AFTER JUDGMENT—EFFECT.

Where, in a suit in ejectment brought against a grantee to recover land conveyed her by warranty deed, judgment went against her administrator after her death and also over against her grantor for the price of the land mentioned in the deed as provided in Comp. Laws 1909, §§ 1205, 1206, and where, after judgment, the grantor appeared and filed a motion to set aside the judgment and for a new trial, *held*, that he thereby entered a general appearance and validated the judgment, and that, too, notwithstanding any defect in the proof of service of the notice prescribed by section 1205 and in the absence of service of summons on him.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 154-159; Dec. Dig. § 26.*]

Error from District Court, Okfuskee County; John Carruthers, Judge.

Action by George Washington, etc., and another, against George Clarkson and another. Judgment for plaintiffs, and defendants bring error. Affirmed in part, and reversed in part with directions.

A. A. Hatch, of Tulsa, for plaintiffs in error. C. B. Conner and J. B. Patterson, both of Okemah, and C. W. Brewer, of Stigler, for defendants in error.

TURNER, J. On October 16, 1908, George Washington, as guardian of Emma Alexander, a minor, and Mary Brooks, defendants in error, citizens of the Creek Nation, in the district court of Okfuskee county, sued Cynthia E. De Armond, in ejectment for what is conceded to be the allotment of Isaac Hawkins, a deceased Creek freedman. After answer filed defendant died, whereupon it was ordered by the court that the cause stand revived in the name of her administrator, Joseph De Armond, who for answer, adopted the answer of the defendant and alleged that, before the suit, by warranty deed, George Clarkson and wife had conveyed the land to said Cynthia for \$1,200; that pending this suit, she had notified them to come in and defend their warranty; and prayed, in the event judgment went in favor of plaintiff for title and possession, that, for breach of their warranty, defendant have judgment against said Clarksons for said sum with interest, etc. After R. J. Dixon had made known to the court that he had sold and by warranty deed conveyed the land to the Clarksons, and by leave had intervened and filed answer, there was trial to the court

and judgment for plaintiff; the court finding, in effect, that Emma Alexander was the minor child and sole heir at law of Isaac Alexander, enrolled and commonly known as Isaac Hawkins, and, as such, was entitled to the land; that Mary Brooks was his widow and said Emma their child born in lawful wedlock; that said Mary is the wife of Alexander Brooks and was, under the law in force in that jurisdiction, at the time of descent cast, and still is, entitled as dower to a one-third interest in said land for and during her natural life. The court further found that title was derived by Cynthia E. De Armond as stated; that after service of summons on her, and more than 20 days before trial, notice had been served on the Clarksons to defend their warranty as stated; that the covenant for title thereby conveyed had been broken; and that Joseph De Armond, as administrator, was entitled to recover of George Clarkson said sum of \$1,200, with interest from the date of his deed, and judgment was rendered and entered accordingly. After their respective motions for a new trial were filed and overruled, Clarkson and Dixon bring the case here.

[1] It is assigned that there is no evidence reasonably tending to support the finding of the court that Mary Brooks was the widow of Isaac Hawkins. On this point the evidence discloses that in 1898 Mary Brooks was a single woman of the name of Jefferson, living with her parents in the Creek Nation near Muskogee, and that Isaac Alexander, or Hawkins, was a single man living thereabouts; that at her father's house in that year Isaac told her "he wanted me to be his wife, and I told him it would be all right with me, ask my father"; that they immediately went into the presence of her father and mother and told the father they were going to get married, whereupon the father said "it was all right with him"; that they immediately left and went to live with Isaac's mother at Stillwater, then territory of Oklahoma, and lived there a while as man and wife, and then went to live at Bristol; that after living together two years as man and wife Isaac was arrested, convicted of a felony, and sent to the penitentiary for five years; that while he was in the penitentiary the plaintiff, Emma Alexander was born to them, after which Mary was married to one Brooks, with whom she still lives; that after Isaac got out he came to her house to see the child, and, after receiving his allotment, died.

As there is neither allegation or proof that these facts would, according to the laws or customs and usages of the Creeks, constitute a valid marriage, the question is whether this was such at common law, the same having at that time been extended to and put in force in the Indian Territory by chapter 20 of Mansfield's Digest of the Laws of Arkansas (Ind. T. Ann. St. 1899, § 465q). The trial

court held that such it was, and, as a result of holding her dowerable in the lands, in effect, held further that her marriage to Brooks was bigamous; which, if true, will bastardize that issue.

As the evidence reasonably tends to support the finding of the court that there existed from the inception such an agreement between these parties as was necessary to constitute a marriage per verba de presenti, the judgment of the court holding that a common-law marriage existed between them will not be disturbed, notwithstanding chapter 103 of Mansfield's Digest, entitled "Marriage," was in force in that jurisdiction at that time; as common-law marriages have been recognized in Arkansas from an early day.

In *Jones v. Jones*, 28 Ark. 19, appellant filed a bill in the circuit court as the widow of Elbert Jones to compel W. C. Jones, among other things, to set apart her dower as widow of the deceased. The court held against her presumably on the ground that she was not the widow. She claimed under a common-law marriage. In sustaining the judgment the court said: "It is generally considered, in the absence of any positive statute declaring that all marriages, not celebrated in the prescribed manner, shall be absolutely void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage. 2 Greenleaf, Ev. 417; 2 Kent, Com. 90, 91; Reeve's Dom. Rel. 196, 200, 290; Parton v. Harvey, 1 Gray, 119; Londonderry v. Chester, 2 N. H. 268 [9 Am. Dec. 61]; Cheseldine v. Brewer, 1 Har. & McH. [Md.] 152; Hantz v. Sealy, 6 Bin. [Pa.] 405. * * * In a suit for dower, it is clear that an actual marriage, either under the forms and solemnities prescribed by the statute, or as prescribed by the common law, is necessary."

Rogers on Dom. Rel. § 89, says: "In this country, at least it is the general rule that, in the absence of some positive statute or special law to the contrary, any marriage regularly entered into according to the course of the common law by the mutual consent of the parties, and recognition of each other as man and wife, is valid for all purposes."

In *Reaves v. Reaves*, 15 Okl. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353, the objection to the sufficiency of the evidence to prove a common-law marriage was raised, as here. There the court found as to the present agreement that: "On the 25th day of June, 1890, H. H. Reaves and Frances A. Reaves were each competent to contract marriage, and did, at the said time, in the city of Guthrie, agree with each other that they would be husband and wife to each other, and did immediately begin living together and cohabiting together as married per-

sons. That said marriage relations were entered into with the mutual consent of both parties, and that they immediately assumed all of the marital rights and obligations; and uninterruptedly exercised the same until the death of H. H. Reaves."

[2] But the fact of her common-law marriage to Hawkins was not sufficient to justify the court in presuming that hence her marriage to Brooks was bigamous, which, in effect, he did when he held Mary to be the widow of Hawkins and as such was dowable out of his allotment. Rather should the court have presumed the other way and held that, although she was his common-law wife at one time, the presumption in favor of marriage then was that she had been divorced from Hawkins prior to her marriage with Brooks, and, not being the widow of Hawkins, could not recover. This for the reason, as stated in *Coachman v. Sims et al.*, 129 Pac. 845, an able opinion by Ames, C., that: "Marriage should not be destroyed on presumption. The law is astute to preserve the sanctity of the marriage relation, the legitimacy of children, and stability of descent and distribution, and therefore presumes innocence and virtue, in the absence of proof." And in the syllabus: "When a man and woman have been living together as husband and wife for many years, and it appears that at the time of marriage the former wife was still living, in the absence of further evidence on the subject, it will be presumed that there had been a lawful separation or a divorce between the husband and the former wife."

We are therefore of opinion that Mary, while once the common-law wife of Isaac Hawkins, was not such at the time of his death, but had previously been divorced from him, and hence, not being his widow, was not dowable out of his allotment, and that the court erred in holding that she was.

[3] It is next contended that the court was without jurisdiction to render judgment of recovery on the warranty in favor of the administrator over against Clarkson, the warrantor of Cynthia De Armond, because he says, not that the notice prescribed by Comp. Laws of Okla. 1909, § 1205, was not served on him, but because the proof is insufficient to show service. The notice itself is in evidence without objection and is certified to have been served on Clarkson by J. G. Frame, Constable. Assuming the insufficiency, as claimed, in the proof of the service of the notice provided for in said section, which reads: "In all cases where an action is brought against a grantee to recover real estate conveyed to him by warranty deed he must notify the grantor, or person bound by the warranty, that such suit has been brought, at least twenty days before the day of trial, which notice shall be in writing and shall request such grantor or other person to defend against such action; and in case of

failure to give such notice there shall be no further liability upon such warranty, except when it is clearly shown that it was impossible to make service of such notice"—and that said Clarkson was not served with process, the fact that, after judgment went against him, as stated, he came in and filed a motion for a new trial, invoking the jurisdiction of the court to set aside the judgment, amounted to a general appearance and validated the judgment (*Welch v. Ladd*, 29 Okl. 93, 116 Pac. 573; *Lookabaugh v. Epperson*, 28 Okl. 472, 114 Pac. 738; *Rogers v. McCord & Co.*, 19 Okl. 115, 91 Pac. 864; *Farmers', etc., Bank v. First Nat. Bank, etc.*, 24 Okl. 140, 103 Pac. 685) rendered pursuant to the next section, which reads: "Where any grantor applies (appears) in any action to defend his warranty or fails to appear after due notice, the court shall determine all the rights of all the parties, and in case the recovery is adverse to the warranty, the warrantee shall recover of the warrantor the price of the land paid for the conveyance at the time of the warranty, the value of all improvements lost, if any, and all sums necessarily expended, including a reasonable attorney fee, and interest at the rate of ten per centum per annum on all sums so paid from the time of payment."

There was no error in this. We are therefore of opinion that the judgment of the court in effect that Emma Alexander is the sole heir at law of Isaac Hawkins and, as such, entitled to inherit this allotment, and that the administrator of Cynthia De Armond, the warrantee, is entitled to judgment over against George Clarkson on his warranty for \$1,200, is correct, and hence is affirmed; but in so far as the same holds Mary Brooks to be the widow of said Hawkins, the same is reversed, with directions to enter judgment in accordance with this opinion. All the Justices concur.

HEAD v. STATE.

(Criminal Court of Appeals of Oklahoma. May 10, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 576*)—DELAY IN PROSECUTION—DISCHARGE.

A defendant who has never demanded or been refused a trial is not entitled to be discharged upon the ground that he was not brought to trial at the next term of the court at which the indictment or information was presented, unless he shows that the laches was on the part of the state through its prosecuting officers; otherwise the presumption will prevail that the delay was caused by or with the consent of the defendant himself; and when a defendant is on bail he must demand a trial of his case, or resist a continuance of the case from term to term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 510*)—EVIDENCE OF ACCOMPLICE—SUFFICIENCY.

A verdict of guilty upon the uncorroborated testimony of an accomplice is contrary to the law and to the testimony, and as such will be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. § 510.*]

Appeal from McClain County Court; W. H. Woods, Judge.

Tom Head was convicted of violating the prohibitory law, and appeals. Reversed and remanded.

Osborn & Farriss and E. E. Glasco, all of Purcell, and Blanton & Andrews, of Pauls Valley, for appellant.

FURMAN, J. First. Appellant was prosecuted by indictment, which was returned in the district court of McClain county, Okla., on the 29th day of June, 1909, and on said date said indictment was by proper order of said district court transferred to the county court of McClain county. On the 9th day of July, 1909, the indictment was received and filed in the county court, and the case was set for trial at the July term of said county court. This, with a number of other indictments which were returned by said grand jury and transferred to the county court of McClain county, was attacked by demurrers, in which it was alleged that the grand jury which returned the indictments was not properly and legally drawn, and therefore the indictments were invalid. This motion in one of these cases being submitted was by the court sustained. The county attorney prosecuted an appeal from this decision to the Criminal Court of Appeals. Thereupon the county judge ordered that all cases pending in said county court, where indictments had been returned by the same grand jury, and in which the same motion had been filed, should be continued until the legality of the indictments should be determined by the Criminal Court of Appeals. Upon appeal the judgment of the lower court was reversed, and the indictments were held to be valid. See *Wells v. State*, 5 Okl. Cr. 22, 113 Pac. 210. Pending said appeal, the case now before the court remained on the docket without any effort on the part of the state to bring the appellant to trial until the 11th day of April, 1911. On said 11th day of April, 1911, appellant filed a motion to dismiss said case, upon the ground that he had not previously been brought to trial, and said cause had not been continued by him, and that the delay in the trial of said cause had not been occasioned by his application or fault, and because said defendant was not tried at the next regular term of the county court of McClain county after it was filed therein, and had not been brought to trial at any subsequent term of said court.

This motion was by the court overruled, to which appellant excepted.

[1] We think that the reasons why the cause was not tried sooner, which appear in the record, are good and sufficient. We also hold that where a defendant, who is on bond, has never demanded or been refused a trial he is not entitled to a discharge upon the grounds set forth in this motion. See *Parker v. State*, 7 Okl. Cr. 239, 122 Pac. 1116, 124 Pac. 80; *Bowes v. State*, 7 Okl. Cr. 316, 126 Pac. 580. In the latter case Judge Doyle, speaking for the court, said: "In the absence of a proper record affirmatively showing the contrary, the presumption is that the court had continued the case for a presumably lawful cause. The burden was on the defendant, in support of his motion to dismiss, to show that the laches was on the part of the state through its prosecuting officer; otherwise the presumption is that the delay was caused by or with the consent of the defendant himself; and when on bail he must demand a trial, or resist the continuance of the case from term to term. A defendant who has never demanded or been refused trial is not entitled to a discharge under the constitutional provision (article 2, § 20) and the statutory provision (section 6498, Comp. Laws 1909)." We therefore hold that the trial court did not err in refusing to sustain the motion to dismiss.

Second. The indictment charges that on the 7th day of June, 1909, Tom Head and Jim Head did sell to Marlon Crutchfield three pints of whisky in McClain county, Okla. It was for this sale appellant was convicted.

Marlon Crutchfield testified that on the day in question he met Jim Head, Arthur Webb, Jim Head's little boy, and Dave Mitchell riding in a buggy, and that he purchased two bottles of whisky from them; that he obtained the whisky from Arthur Webb.

Arthur Webb testified to the sale made to Crutchfield, and that Jim Head, Jim Head's little son, and Dave Mitchell were present. Arthur Webb also testified that he was engaged by Jim Head and Tom Head to work for them on the farm and also to sell whisky for them, and that he received a commission of 25 per cent. for all money paid him for whisky.

A number of material statements made by Webb were proven to be false. It was also proven that he stated that he was to receive \$25 a head from the sheriff of Garvin county for each whisky peddler he turned in. It was proven that appellant was constable of his precinct in McClain county at the time of this alleged sale of whisky.

[2] Appellant was a witness in his own behalf, and denied in toto the testimony of Arthur Webb as to his having any connection with the sale of the whisky to Crutchfield. There was no evidence connecting appellant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the sale of the whisky to Crutchfield, except that of Arthur Webb. Webb being an accomplice, a conviction could not be sustained upon his testimony, unless there was other evidence tending to connect appellant with the offense committed. See *Hendrix v. State*, 8 Okl. Cr. 530, 129 Pac. 78. There is testimony in the record that at another and different time Jim Head did sell whisky to another person, of which appellant had knowledge. If appellant had been tried and convicted for complicity in this sale made by Jim Head to such other person, an entirely different question would have been presented; but as there is no evidence in this record that appellant was in any manner connected with the sale of whisky made by Arthur Webb to Crutchfield, except the testimony of the accomplice, Webb, and as Webb was not corroborated in his statement that he (Webb) was employed by appellant, or in any manner connected with him, we are of the opinion that the verdict is not supported by the testimony, and is contrary to the law.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

ARMSTRONG, P. J., and DOYLE, J., concur.

GORMAN v. STATE.

(Criminal Court of Appeals of Oklahoma. May 7, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1099*)—APPEAL—TIME OF TAKING.

The statute limiting the time within which appeals can be taken to this court is mandatory; and, where counsel delay perfecting an appeal until the last moment, they do so at their peril, and if the time for taking an appeal has expired, before the appeal is perfected, this court is without power to do otherwise than dismiss the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1099.*]

2. CRIMINAL LAW (§ 1099*)—APPEAL—CASE-MADE.

If there is any question about making and serving a case-made within the time provided by law, counsel desiring to appeal should file in this court a transcript of the record and a petition in error, and thereby perfect their appeal. After this court has acquired jurisdiction of the case, it has the power to extend the time for preparing and filing the case-made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.*]

Appeal from Superior Court, Pottawatomie County; G. C. Abernathy, Judge.

Claud Gorman was convicted of murder, and appeals. Dismissed.

F. H. Riley and J. T. Williams, both of Shawnee, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. The judgment in this case was rendered against appellant on the 6th day of February, 1911. The petition in error and case-made were not filed in this court until the 5th day of September, 1911, nearly a month after the six months provided by law for perfecting appeals in felony cases had expired.

Counsel for appellant have filed a motion requesting this court to direct the clerk of the court to correct the record, and make it show that the petition in error and case-made were filed in court on the 5th day of August, 1911. In support of this motion, they show by the affidavit of one of the attorneys for appellant and also by the affidavit of the agent of the American Express Company at Shawnee, Okl., that on the 4th day of August, 1911, the petition in error and case-made were deposited with the agent of the American Express Company at Shawnee, Okl., for transportation to the clerk of this court, properly directed to the clerk of this court, and that, if the express company had performed its duty, said case-made and petition in error would have been delivered to the clerk of this court on the 5th day of August, 1911, within six months from the date of the final judgment allowed by law for appeals in felony cases, and that through some inadvertence or mistake on the part of said express company said case-made and petition in error were miscarried by the American Express Company, and were not delivered to the clerk of this court but were sent to the city of Chicago, Ill., and were returned to the agent at Shawnee on the 26th day of August, 1911, after the time had expired for filing said petition in error and case-made with the clerk of this court.

It is contended by counsel for appellant that for these reasons the court should order the petition in error and case-made to be filed as of date of August 5, 1911. In support of this contention counsel in their brief say: "Suppose a case-made in a capital case in which a man is condemned to death reaches the clerk's office two days before the time for filing has expired, and the clerk negligently failed to file it until one day after the expiration of the time fixed by statute for filing the appeal. Under the contention of the state the man must die because the clerk failed to perform his duty. It is no answer to this illustration to say such a thing would not occur or happen, and the argument is an extreme one and beyond all probability. It could happen, and it might happen. Of course, the presumption is that it would not happen, but it might. Then under such circumstances what would be the duty of this court? Certainly this court, like nearly every other court that has passed on this question, would take the reasonable and heroic position that, inasmuch as the record reached the clerk's office in time, construc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tively it was filed, and the time lost is not counted. This is a very serious matter, and should not be treated lightly or as if it was a bootlegging case or some other misdemeanor. It is true that the above illustration is hypothetical, but it points out the danger of such an immutable rule for which the state is contending." Under the illustration presented by counsel for appellant, the court would treat the case-made and petition in error as having been filed at the time it came into the possession of the clerk of the court, and would direct an order to that effect, because the clerk of the court is the agent of the court and depositing a case-made and petition in error with said clerk would in effect be the filing of the papers, and no further action would be required on the part of the appellant. But this illustration has no application to the facts stated. The express company was in no sense of the word the agent of the court, and the court is in no manner responsible for its neglect of duty. When the appellant deposited the case-made in the office of the express company, he thereby constituted such express company his agent for the prompt delivery of such package to the clerk of this court. Any negligence on the part of the express company was therefore the negligence of appellant.

[2] Parties desiring to appeal in felony cases have six months within which to perfect their appeals. If there is any question about perfecting a case-made within this time, counsel for appellant should file a transcript of the record with the petition in error in this court, and thereby perfect the appeal. This court, having acquired jurisdiction of the case, would then have the power and right to extend the time for filing the case-made.

[1] The time prescribed by law for perfecting an appeal is mandatory. The law provides no exceptions, and no court has the power to extend such time. See *Farmer v. State*, 5 Okl. Cr. 151, 114 Pac. 753; *Musick v. State*, 5 Okl. Cr. 608, 115 Pac. 377; *Kanamaya v. State*, 6 Okl. Cr. 208, 118 Pac. 151; *Green v. State*, 7 Okl. Cr. 5, 120 Pac. 1037; *Bethel v. State*, 7 Okl. Cr. 36, 121 Pac. 792; *Billus v. State*, 7 Okl. Cr. 37, 121 Pac. 790; *Drake v. State*, 7 Okl. Cr. 313, 123 Pac. 568; *Kinnon v. State*, 7 Okl. Cr. 320, 123 Pac. 567. Where counsel delay perfecting an appeal until the last moment, they do so at their peril, and, if the time expires before said appeal is perfected, this court is without power to grant relief. In the case of *Dobbs v. State*, 5 Okl. Cr. 485, 115 Pac. 372, this court said: "While it is true that an appeal is a constitutional right, yet it is subject to legislative regulation, and a failure to comply with the legislative provisions touching this matter is fatal to an appeal. Attorneys complain that the laws relating to appeals are entirely too strict and rigid. We

think that directly the opposite is true. The writer of this opinion for many years practiced law in Texas, where the statement of facts and bill of exceptions had to be prepared and placed in the hands of the trial judge not later than 10 days after the adjournment of the court in which the case was tried. We had no stenographers then, and this work had to be done by the lawyers themselves, and from memory alone. The writer never had the least difficulty in getting up any of his records. The reports of the appellate courts of Texas will show that very few defective records are filed in those courts. When lawyers know that work of this kind must be done 'right now,' it will not only be done promptly, but will also be done correctly. On the other hand, if attorneys have months in which to have their records made up, and then have the assistance of a stenographer in preparing this work, they often put the work off until the very last moment, when it is apt to be hurriedly and carelessly done, and many mistakes will be made. When this case was tried, the attorneys had one year within which to perfect their appeals. In this case counsel took all of this time. To the length of time which the appellant had within which to perfect his appeal must be attributed the fatal errors that were made in the preparation of the case-made and the transcript of the record. If the law had required this work to have been done promptly, the chances are ten thousand to one that it would have been done correctly. A very large per cent. of the records that are brought to this court and the Supreme Court of this state are in a fatally defective condition, as is evidenced by the large number of dismissals which have been entered in each court. We think that the length of time granted by the law in which appeals may be perfected is largely responsible for this."

The motion to dismiss the appeal is therefore sustained, and the appeal is dismissed, with directions to the trial court to proceed with the execution of its judgment.

ARMSTRONG, P. J., and DOYLE, J.,
concur.

GREENWOOD v. STATE.

(Criminal Court of Appeals of Oklahoma.
May 7, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236*) — ILLEGAL SALE—PRIMA FACIE EVIDENCE.

The payment of the special tax required of liquor dealers by the United States by a defendant constitutes prima facie evidence of an intention thenceforth, during the term of the license, to violate the prohibition law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Tulsa County Court; N. J. Gubser, Judge.

W. A. Greenwood was convicted of violating the prohibitory law, and appeals. Affirmed.

Davidson & Williams, of Tulsa, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was convicted in the county court of Tulsa county on October 31, 1911, of the offense of unlawfully having in his possession intoxicating liquors with intent to violate the prohibitory law. To reverse the judgment there was filed in this court December 21, 1911, a petition in error with case-made.

Various errors are assigned, none of which we deem it necessary to discuss, for the reason that it appears from the testimony of the defendant as a witness on his own behalf that he is guilty of the offense charged. The defendant admitted the payment of the special tax required of liquor dealers by the United States, which designated his place of business as the place where the intoxicating liquors were found, and he admitted "that he had run that joint awhile." The term of the government license did not expire until the end of the following June. Even if the case was close, the several assignments of error are of such a trivial character as to be undeserving of any consideration.

The judgment is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

GILBREATH v. STATE.

(Criminal Court of Appeals of Oklahoma.
May 10, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1069*)—APPEAL—TIME OF TAKING.

Where an appeal is not taken within the time prescribed by the statute, this court is without jurisdiction to review the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1069.*]

Appeal from Greer County Court; Jarret Fott, Judge.

Jim Gilbreath was convicted of violating the prohibitory law, and appeals. Dismissed.

John Evans and J. L. Carpenter, both of Mangum, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, of Oklahoma City, for the State.

PER CURIAM. The plaintiff in error was convicted on an information which charged he did unlawfully sell whisky, and in ac-

cordance with the verdict of the jury was sentenced to serve a term of six months in the county jail and to pay a fine of \$500. The judgment and sentence was entered September 17, 1912. From the judgment an appeal was attempted to be taken by filing in this court, January 15, 1913, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal herein, and as grounds therefor says: "That this is an attempted appeal from a conviction for violation of the prohibitory laws; that the judgment was entered on September 17, 1912, at which time defendant was given 30 days in which to make and serve a case-made, to be filed in this court within 60 days from said date; that thereafter on October 14th an extension of 30 days was made, 'making in all 60 days from the date of judgment and sentence herein, in which to make, serve, have settled and signed, and for filing his appeal to the Criminal Court of Appeals of the state of Oklahoma'; that thereafter, on November 15th, an order was made granting defendant 30 days from said date, 'making in all 90 days from the time and date upon which the motion of the defendant for a new trial herein was held, in which to make, serve, have signed and settled, and filed case-made in said cause, and in which to perfect appeal herein of said cause to the Criminal Court of Appeals of the state of Oklahoma'; that thereafter, on December 14th, an order was made allowing defendant ten days from said date in which to perfect appeal, said time being allowed to make, serve, have signed and settled, and for filing case-made in the court below and in this court; that said petition in error and case-made were not filed in this court within the ten days last above named, but filed long thereafter, to wit, January 15, 1913." No answer to this motion has been filed, and no response made thereto.

It appearing from the record that the motion to dismiss is well taken, the appeal is dismissed, and the cause remanded to the county court of Greer county, with direction to enforce its judgment and sentence therein.

ROGERS v. STATE.

(Criminal Court of Appeals of Oklahoma.
May 1, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1168*)—HARMLESS ERROR—EVIDENCE.

The admission or exclusion of testimony which, in the light of subsequent developments during the trial, indicates conclusively that no injury did or could have resulted is not ground for reversal of a judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 1169*)—TRIAL—ADMISSION OF EVIDENCE—CURE OF ERROR.

The admission of testimony which is of doubtful competency, and which is afterwards by the court excluded out of an abundance of caution, is not error sufficiently prejudicial to justify a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 8088, 3130, 3137-3143; Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§§ 622, 673*)—SEVERANCE—RIGHT—JOINT TRIAL—EVIDENCE—ADMISSIBILITY.

(a) When two persons are jointly charged with the commission of an offense against the laws of this state, if such offense is a felony, they are entitled to separate trials if they so demand, as provided by statute.

(b) When persons who are jointly charged with a felony are jointly tried, testimony which is admissible as to one and inadmissible as to the other is properly admitted, when limited in its effect by instructions from the court to the jury confining it to the particular defendant against whom it is admissible; and this is the rule even though the testimony introduced is such that, were the complaining accused on separate trial, it would have been reversible error to admit the same as against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390, 1597, 1872-1876; Dec. Dig. §§ 622, 673;* Witnesses, Cent. Dig. § 248.]

Appeal from District Court, Love County; Stilwell H. Russell, Judge.

Ance Rogers was convicted of murder, and appeals. Affirmed.

Eddleman & Graham, of Marietta, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Ance Rogers, was tried and convicted at the June, 1911, term of the district court of Love county on a charge of murder, and his punishment fixed by the court at imprisonment for life in the state penitentiary.

A complete synopsis of the testimony was prepared and submitted by the Assistant Attorney General in his brief on behalf of the state, which brief was filed several months before any brief was filed on behalf of the accused, and no objections to its accuracy or fairness have been made or suggested by counsel for the accused. We adopt the synopsis for the purposes of this opinion.

Will Riley, on behalf of the state, testified that he lived at Marietta; was in the cattle business; that he knew Henry Taylor in his lifetime; had known him for four or five years; during part of that time that he had been in this witness' employ; that he was killed on the 10th day of April, 1911, and that at the time of his death he was working for witness; that he knew Ance and Mart Rogers and also their father, R. L. Rogers; that R. L. Rogers lived on Rock creek about four miles west of Marietta, close to the road; that at the time of his death Taylor was batching with one Mike Freeman on witness' farm about a mile north of where Rogers lived; that on the Monday

of the killing Taylor was to go about four miles south of Rogers' house down on Rock creek to get a load of corn to feed cattle with; in going down there it was necessary to go by Rogers' house, and also necessary to pass there returning; that the road down to where this corn was kept was right down in the bed of the creek, which runs west of where Rogers lived about 100 yards, running north and south; that there was timber and brush; that the road was within 25 or 30 feet from the bank of the creek; that there used to be an old road that ran from Rogers' store or residence in a southwesterly direction down towards the creek; this road has been fenced up; that the deceased, Taylor, was a man about 60 years of age, and on the day of the killing was driving a span of mules, one a little iron gray and the other a kind of yellow colored mule; that on the day he was killed he was hauling a load of corn and had on extra side boards on the wagon, and the spring seat necessarily would have been about six feet from the ground. Witness also saw the deceased the next day after the killing, and described the wounds upon his head.

Mike Freeman, for the state, testified that he was 19 years old; that he lived on Will Riley's place six miles west of Marietta; that he knew Henry Taylor during his lifetime; that he was shot on Monday in the early part of April, 1911; that on the Sunday before the Monday on which Taylor was killed Mart and Ance Rogers and Leonard Hensley came out to where this witness and Taylor were batching—two of them were riding horses and one of them was riding a mule—about 2 o'clock in the afternoon; they came up there and said they had come to straighten about that bridle business; they started to raise a racket and tried to get Mr. Taylor to leave the house, called him vile names, and told him if he would leave the house they would whip him; Ance Rogers said this; he was mad. Taylor refused to go, and Ance told him to meet him down on the creek, and Taylor said, "No;" he would not meet him down there. "This was about a mile from Rock creek. He had a bridle taken on the Saturday before this, and Taylor had told me that the Rogers boys and Hensley were the only people who were by there the day the bridle was missed, and he had been over to the Rogers house and looked for it before they got out there on that Sunday. This was over a week before the killing. On the day of the killing Mr. Taylor and I went over to feed a bunch of cattle about two miles east of Rock creek, and Mr. Taylor went down on the creek to get a load of corn. He was in a wagon. I went over to the pasture on horseback. I left him between 8 or 9 o'clock in the morning. In going Mr. Taylor had to pass by Rogers' house and go down the Rock creek

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

road. I went down to where Mr. Taylor went for corn about 12 o'clock that day, but did not see Mr. Taylor. However, I learned that he had been there and left. It was about 2 o'clock that afternoon that I learned of his death."

Hendricks Freeman, for the state, testified that he worked on the ranch of Jim Rose, and was a brother of Mike Freeman; that he was acquainted with the defendants, Ance Rogers and Mart Rogers, and also that he knew Mr. Taylor in his lifetime; that on the Sunday week before the killing of Taylor he saw the defendant and Leonard Hensley at Taylor's house, and heard the conversation between them and Mr. Taylor about the larceny of the bridle and the threats that were made by Ance Rogers against old man Taylor, and in this respect the witness' testimony is not materially different from that of his brother, Mike Freeman, heretofore quoted.

Lon O'Dell, for the state, testified that he was 18 years old; lived about six or eight miles west of Marietta, and worked for J. E. Rose. This witness also testified as to being present at Taylor's house on the Sunday before the killing, and heard the dispute between Ance Rogers, Mart Rogers, Leonard Hensley, and old man Taylor. His testimony is not materially different from that of other witnesses for the state who were present at that time.

Anderson Rackley, for the state, testified to the same conversation.

Jesse Hamilton, for the state, testified that he lived out west on Rock creek; had been living there since last Christmas on Rogers' place, the father of the defendants; that he lived about 150 yards from the store of Dick Rogers; that he remembers the morning Henry Taylor was killed; that he left home about half hour by sun that morning, went over by Uncle Dick Rogers' house, and then rode down in the field to split stove wood; when he got over to Rogers' house Uncle Dick and the boys were there, and that just before he left Mr. Thaxton stopped in; that he saw Mart and Ance, and that Hensley was putting a saddle on his horse just before he got to the house; he stopped there a very short time; that he was working about 200 yards south of Rogers' house that day; that when he left Rogers' house there was nobody there but Uncle Dick Rogers and Ance and Mart Rogers and Leonard Hensley and Mr. Thaxton; he thinks that Leonard Hensley left about the time he did, but did not pay any attention to that; that the place where he was working that day was about 150 yards east of Rock creek; that after he went out there to work he saw the defendants, Ance Rogers and Mart Rogers, come down towards the fence along Rock creek to work; that he first saw them up there along the road working on the fence; this was about an hour

after the witness had left Rogers' house; that he never saw anybody else except these two defendants; did not pay much attention, as he was at work; he noticed these defendants driving posts; did not notice whether any of them had any weapon or not; the fence had been built along there, but was not finished; the last of the fence was not put up, and a cow could walk in and out of it; the wires were not stretched; that the witness remained down in the field until about 12 o'clock that day; that he heard a shot fired; never saw who fired it, but saw the smoke of the gun; this smoke was right up close to the road along where the witness had seen the boys at work. "I think this was about 11 o'clock. I left the field about a half hour after that to go to my dinner. In a minute or two after the shooting I saw Mart Rogers and Ance Rogers going across the field toward Uncle Dick's house. When I first noticed them, they were about 20 or 30 yards from where I saw the smoke of the gun, and about 100 yards from Rogers' house. They were walking pretty peart. I saw something on the shoulder of one of them. I never paid any attention; couldn't tell what it was. I thought it was an axe or some other tool. I don't know how long it was after I saw the Rogers boys going down to the fence until I heard the shot; it might have been an hour and maybe two hours. In about five or ten minutes after the shooting Mr. Thaxton came down to where I was working. He stayed about five or ten minutes, and when he started off I asked him what time it was, and he said five minutes until 12, or 25; I could not understand which. He never said anything to me about the killing; he started off like he was going home, and I never watched him. Mart Rogers came down there also before I quit work; it was just a little while after Mr. Thaxton had been there. He did not tell me anything about anybody being killed. I afterwards went up to Uncle Dick's house, and there I saw Mart and Ance and Uncle Dick in the house. I asked what was the matter with Uncle Dick, and Ance Rogers said they had shot Mr. Taylor, or killed Mr. Taylor, I don't know which he said, and I asked him where he was, and he said 'Out there on the wagon,' sort of pointing up there on the side of the hill, and I said, 'Whereabouts?' or something that way, and he said he would show me. I stepped out. He said: 'Here he is; come out here and I will show him to you'—and he and Uncle Dick started out there. We went out to the road where we could see up the road to the wagon, and Ance says, 'There he is on the wagon.' Uncle Dick says, 'I don't see him; where is he?' and Ance says, 'There he is; don't you see his legs there hanging over the spring seat?' and then I saw him, and we went up there. Ance went back to

the house. I found Mr. Taylor lying back on the wagon with his feet over the spring seat, and one of the lines was drawn around his legs. The wagon had double side boards on, and was full of corn. His head was lying back on the corn. He was lying flat on his back. He had on a white hat. His head was lying on the hat. We just went up within three or four feet of the wagon; didn't make any examination of the wounds. Ance Rogers made no statement to me, except he told me he shot him down on Rock creek. The wagon was 40 or 50 yards up the hill east of Rogers' store when I saw it. The next person I saw at the wagon was a fellow named Jones. He was working some prisoners down on the road there that day. On the afternoon of the killing I went down on Rock creek with Mr. Stanley, the county attorney, down to where I had seen these boys chopping wood, and I saw Mr. Stanley pick up a knife down there—an old knife. The knife was found just below the old road, pretty close to a stump. There was just one stump close by a burr oak, 12 to 16 inches through, or a little bigger; I never paid any attention. There was some trees close there—one large oak tree. This tree was about 10 or 15 steps from the road and close to the stump. I could not tell how far this tree and this stump were from where I saw the smoke of the gun; it was in that direction. There are trees and stumps along the road on Rock creek; not much brush on the east side of the road."

Olin Rhodes, for the state, testified that he lived at Marietta, and that he was city marshal; remembers the date of the killing of Henry Taylor; that on that date he went down to old man Freeman's on Rock creek in an automobile with Dr. Autry; that in going there they passed Rogers' house and went down the Rock Creek road south of there; that the road runs for a mile or two down along the bed of the creek. "After passing Rogers' house going west, we turned south down Rock creek and went down the creek a mile and a half or two miles. As we were going down the creek, I seen two boys there close to Rogers' farm. One of them had a post in his hand, and they were working on a fence. We met several wagons that day all along the road, both going and coming; but after we passed these boys working on the fence going down to Mr. Freeman's we met a man hauling water; had barrels in his wagon. After we had gotten out of the bed of the creek and went along there over the rough part of the road through the thicket, we came back to Rock creek on a rock crossing and met there a man, who went east of us. He was driving north. This was something like three-quarters of a mile south of where we had seen the boys working on the fence. I don't know what time it was when we passed there, but when we left Freeman's to start back it was five

minutes of 10 o'clock. We went back by the same road and saw these defendants still working on the fence. I think they were farther north as we went back than they were when we went down, I judge about 50 yards. I afterwards learned that Mr. Taylor had been killed that day. After I learned that, Mr. Stanley, the county attorney, and I got a team and went out there. I afterwards examined the wounds on the body of Mr. Taylor. I helped undress him. He was shot in the right side of the head about the temple and close to the eye, and the shot came out near the nose and both his eyes were gone. I counted six holes in his head; they looked about the size of No. 2 buckshot to me." The witness described the hat that the deceased had on, showing the shot marks, and the same was admitted in evidence. The witness testified that the shots came out higher than where they entered. When the deceased was undressed, witness saw his pockets examined, and there was a small penknife and a 32 Winchester cartridge, a pencil, and some matches taken out. Witness then gave measurements of wounds from the distance to the point of entrance to exit, etc.

Tom Stofel, for the state, testified that he lived out west of Marietta, about a mile from Rogers' place; that on the day that Mr. Taylor was killed he went to haul water from the Rock Creek spring, which was about a mile south of Rogers'; that going to the spring he had to pass Rogers' place and go down the Rock Creek road; that on that day he saw Henry Taylor, the deceased; met him as he was coming back; that Taylor had a load of corn and was near the ranchhouse; Taylor was in a wagon, driving a span of mules; that after the witness met Mr. Taylor he saw the defendants down on Rock creek. "It was between a quarter and a half mile from where I saw Taylor. Mart Rogers came down into the creek after I had traveled up the road in the bed of the creek about 25 yards. I came on up the creek, and Ance came up the bank and crawled under the fence, and there was a tree cut down, and he walked in behind that tree from me. He had a gun, a double-barrel shotgun, and when he crawled under the fence he came on down and walked in behind the tree just before I got up to him, or when I was about even with him. He checked up like he was looking for something, and one of my mules is afraid of a gun, and I watched him more closely than I would have if he had not sort of checked up. He had the gun right up on his arm. This was in the morning along about half after 9, I guess. I met Olin Rhodes and Dr. Autry before I did the Rogers boys. They were driving in an automobile in the same direction that Mr. Taylor was going. I met them about a quarter of a mile south of where the boys were working. I judge I

passed the Rogers' store, going after this water, about 8 o'clock that morning. When I passed there, these defendants were working on the house. Ance Rogers never spoke to me when I passed him going back. There was about 20 or 25 feet between us when he was standing behind the tree top."

R. C. Baker, for the state, testified that he was a county commissioner and lived at Leon; that he remembered the day that Henry Taylor was killed, and heard the shooting; was coming through the Rock Creek bottoms beyond the creek, about 250 or 300 yards on the other side of Rogers' store, west of the store, about 150 yards from the creek. "After hearing the shot I came right on in the buggy right across the creek. Jim Mays was with me. After I crossed the creek, my attention was directed to two men coming across the field southwest of Rogers' joint. They were angling across the field towards Rogers' place. I did not recognize them. One of them was larger than the other. It looked to me like one of them was carrying a gun. Pretty soon after I saw these two men, I noticed a wagon coming. It had just turned around the corner of this field, the northwest corner of it. After turning the corner it started east towards Rogers' house. There were two mules hitched to the wagon, and they were traveling at a fast walk. I noticed some one lying in the wagon. I did not know what it was at first, but the wagon kept going on, and I noticed that the man was not paying any attention to the team. It ran over obstacles and jarred around a great deal, and I kept noticing the wagon. It went like it was going to the house, and I suppose it went within 20 or 30 feet of Rogers' house, and I thought it had stopped there; but as we kept driving very slow up the hill directly I saw the wagon come up the hill. It came up the hill on the steep place, up onto the main right of way, and when it got to where the road was broad enough for us to turn to one side, we turned out on the left-hand side, and this team came up on the side of us next the bank, and we stopped the team, and then we saw what was on the wagon. I never got out of my buggy. I saw a man on the wagon that looked like he was mortally wounded. He was lying on his back, seemed like in the center of the wagon. His feet were hanging up over the spring seat. The seat had turned up edgewise. He was just breathing at the time. I told Jim Mays to go back down to Rogers' house and see what he could find out, and see what was to be done. He went down there, and came back in a very few minutes. I did not hear any conversation that he had with any one at Rogers' place. He got in the buggy, and we came on to Marietta to get the officers. I saw that the man needed help. We left the wagon standing right where we had stopped it. The wagon was loaded with corn."

Jim Mays, for the state, testified that he lived at Leon, and was a constable; that he remembered the day that Henry Taylor was killed, and heard the shooting; that he was with R. C. Baker at the time. This witness' testimony is practically the same as that of R. C. Baker, with the addition of what occurred when he went down to Rogers' store after discovering the man in the wagon dying. Concerning his trip to Rogers' store he had the following to say: "I got out of the buggy and then went down to Uncle Dick's joint to get some rope, and I seen Mr. Thaxton standing in there, and I holloed, 'Hello, Uncle Dick,' to him two or three times; I don't remember how many times I holloed. I said, 'There is a dead man out here.' Mr. Thaxton says, 'A dead man!' I says, 'Yes; a man has been shot;' and by that time Uncle Dick Rogers came up to the door facing and leaned up against the door facing, and pointed his left hand out this way, and he said: 'Walk on away from here; go on up the hill; get out and go on all of you'—two or three times. I saw two or three other people in Rogers' place at that time besides Uncle Dick and Mr. Thaxton. I could not tell who they were. I think one of them was Mart Rogers. Somebody had a bottle of whisky in his hand. I think it was Mr. Thaxton. After Uncle Dick spoke to me this way, I went up the hill and got into the buggy and came on to Marietta and reported it to the sheriff, and I got in the buggy with Bo Blake, deputy sheriff, and went back to the scene of the tragedy. When I got back out there, the wagon was just about where it was when I left it, and Uncle Dick Rogers and some man was standing sort of at the back end of the wagon. I stayed in the buggy while Mr. Blake went down to the joint. When he came back up to where I was at the wagon, I wanted to move the dead man around, and I raised up the slicker which was on the front end of the wagon, and when I looked under it I saw a gun. The slicker was doubled up in the front end of the wagon, and the spring seat had fallen over the end of the slicker. The pistol was lying down under the slicker. I did not examine it to see its condition. I gave the pistol to Bo Blake. It seemed to be a 44 or 45 frame revolver. The body was taken down to Fraer's undertaking establishment."

R. C. Baker, for the state, recalled, testified that the shooting occurred about 11 o'clock, perhaps a little bit before 11.

W. H. Hartman, for the state, testified that he lived at Leon, and on the day of the killing he came to Marietta, and in coming to Marietta he passed the Rogers boys on Rock creek about 11:30 in the morning; that he saw Mr. Rogers there; that he had a conversation with Mr. Rogers and learned that Mr. Taylor had been shot; that as he left the store and came up the hill he saw a wagon and the dead man on it. "This was about 40 or 60 yards east of Rogers' store.

The body was lying on a load of corn; looked like the dead man had been sitting on the spring seat, and that he just fell back. The spring seat turned back, and his knee got over the front of the seat. His right hand was lying down that way, and his left hand was back that way (indicating). I did not stop at the wagon. When I left the wagon, Uncle Dick Rogers was there. I was there when Bo Blake and some other man came out there. I saw Mr. Mays pick up the slicker and the gun out of the wagon. The slicker was on the front of the wagon. I did not see the gun until the slicker was picked up. The slicker looked like it had been bundled up and thrown upon the wagon."

Will Anglin, for the state, testified that he lived at Marietta; that he knew the defendants, Ance and Mart Rogers, and also the deceased, Henry Taylor; that on the day of the killing he went out to the scene with Bo Blake and Jim Mays. "The first thing I saw was a wagon loaded with corn and a dead man lying on his back on top of the wagon. This wagon was about halfway up the turn of the hill east of Rogers' house. When we got out there, Uncle Dick Rogers and Mr. Hamilton were six or eight steps back of the back end of the wagon. We went down to Rogers' house. Nobody was there but Ance and Mart Rogers. Ance was in a little side room putting on his boots. Mart was sitting back in the south end of the room. Uncle Dick Rogers went down there with us. Ance said that he killed Taylor, and was ready to go. He said he was working on the fence at the time of the killing. He did not tell me exactly where he was. He simply said down there by the old road. Mr. Blake asked for the gun that the killing was done with, but Uncle Dick Rogers did not want to give it up. We examined it, and it was still loaded. Ance said that he had reloaded it. I did not examine the kind of shells it was loaded with. Ance set out a little bottle of whisky and asked me to take a drink, and I just made the remark that there was not enough in the bottle for all of us, and he just set it back and set out a full pint, and we all taken a few sups out of it. Bo Blake put the pint in his pocket and said, 'I will take that with me.' Ance got in the buggy with me, and we drove on up to the top of the hill and stopped there. While I was sitting there, I asked Ance to tell how the killing occurred, and he said that they had had some little trouble, some trouble over a bridle, and that Mr. Taylor had threatened his life, and he had come by that morning and told his young brother that he was fixed for him, and asked where he was. I don't remember where his brother told him that he was. I believe though he said he was out hunting a hawk, or something like that. Ance said that when Mr. Taylor came up with a load of corn he was down working on the fence and had a shotgun down there, and he had found some squirrels, or he was look-

ing for some squirrels, was how he came to have the gun down there; and he said Mr. Taylor stopped and commenced cussing him and made a motion. He supposed he had a gun, and he said he just stepped back and got his gun from against the tree as quick as he could and shot him. The way Ance made the motion to me, he just threw his head down by his side like he was going down after a gun or something. He said he did not see any gun though. Ance said that the shotgun was loaded with No. 2 buckshot. He said the gun was leaning against a tree near where he was at work. When Ance made the motion indicating how Mr. Taylor had done at the time he shot him, Mr. Blake was present."

Bo Blake, for the state, testified that he was deputy sheriff of Love county; that he remembered the day Henry Taylor was killed; that after the killing he went out to the scene with Jim Mays and Will Anglin; that he noticed the wagon and team, the dead man on it, and from there went on down to Uncle Dick Rogers' house; the first person he saw was Mart Rogers, and he asked him where Ance was, and he said he was in the other room. "I walked into the room, and Ance was sitting on the edge of the bed, and I spoke to him and asked what he was doing out there, and he said, 'Nothing much.' I said, 'Who killed that old man up there?' Ance said, 'I did.' I asked him what he killed him with, and he said a shotgun. I asked him where he killed him, and he got up by the door and pointed and said, 'I killed him right down there,' pointing down the creek. I asked him what the trouble arose over, and I think he said something like this: That Taylor had insulted him; accused him of doing something or saying something. That they had had trouble before. Taylor had accused him of doing things that he did not like to be accused of, or something to that effect. I don't remember the exact language used. I told him I would have to take him with me, and he said: 'All right; I'm ready.' I asked him where the gun was, and he said, 'Right there' (pointing), and I noticed three guns up in the corner. I reached and took hold of the shotgun, and Uncle Dick Rogers took hold of it about the same time, and he said he could not give up his gun. I told him I would have to take it, and Ance spoke up and said, 'He will give it back to you,' or something to that effect. 'Let him have it.' And he turned it over to me, and I opened it up and noticed that it had not been shot; it had all full shells in it; and I says, 'Ance, this gun has not been shot,' and he says: 'Yes; I reloaded it.' I cut open one of the shells that was in the gun, and it was loaded with No. 4 buckshot." (The gun and shells were here introduced in evidence.) Witness also testified to Ance Rogers producing the pint of whisky at the house; of taking a drink. "We went out of the house-

and got into the buggy, and Jim Mays was sitting in the buggy holding the lines, and I told him to get out and drive that wagon with that old man in it up on the top of the hill, and Mr. Anglin and Ance and myself got into the buggy. When we got to the top of the hill, we stopped, and I got out and straightened the dead man out on the wagon and then drove on down to a fellow by the name of Thaxton, and put him in the wagon. There was a slicker and a six-shooter on the front end of the wagon. I examined the pistol. It was neither cocked, nor had it been shot. It was a 32 caliber on a 45 frame. I asked Ance how this killing occurred, and he said he was down on the creek fixing the fence, he and his brother Mart, and that he went off to hunt a calf, and when he came back Mart told him that that fellow Taylor had passed by there and asked where Ance was, and Mart told him that he had gone off hunting a calf, or something, and Taylor replied, 'Well, tell him I am looking for him,' and applied a vile epithet; and Ance said that Mart told him what Taylor had said when he came back. He said he was still working on the fence when Mr. Taylor drove back, and as he came up he said, 'Oh, yes,' applying a vile epithet, 'I have found you now,' and that he reached down for his gun, or reached like he was going for a gun, and he said, 'I run and got my gun and shot as quick as I could.' I asked him how far his gun was away, and he pointed out to a post on the side of the road, a telephone post, about as far as from here to the corner of that seat over there—about as far as from here to that boy, the boy that stands up. I would judge it would be 15 or 16 feet, maybe a little farther. Ance said that after Taylor made the demonstration like he was going to get his gun that he ran and got his gun and shot as quick as he could. I asked him if he had seen a gun, and he said, 'No,' he had not seen any. I asked him what he was doing with a shotgun down there, and I believe he said he was hunting squirrels, and I asked him, 'What were you doing hunting squirrels with that size shot?' and he says, 'It was all I had.' He said that old man Taylor and he had had some trouble a few days before that, and that the old man either accused him of stealing a bridle or some money from him, and that old man Taylor was all the time pinching him, or something to that effect." The witness then described the wounds that were on the dead man's body.

James Fraer, for the state, testified that he lived at Marietta, and was in the furniture and undertaking business; that on the 10th of April, 1911, the body of Henry Taylor was brought to his place of business, and that he prepared it for burial and made an examination of the wounds; that the wounds entered the body on the right side of the head, part of them about even or a little

above the right eye, and part of them below the eye, about one inch to the back of the eye. "There were about five holes, all close together, in a space that could have been covered by a dollar. They came out by the left eye. Both eyes were blown out of the head, and there was a hole through the nose. The range of the bullets was slightly from behind and upward. I did not see any powder burns on the face. The point of exit was just a slight bit higher than the point of entrance."

Jim Wolfenbarger, on behalf of the accused, testified that he lived at Bawles; that he knew the defendant Ance Rogers, and also Henry Taylor in his lifetime; that a short time before the killing, about two weeks, he sold Henry Taylor a gun, a 32 on a 45 frame. "I can't tell what make it was. I never paid much attention to it. All I know is that it was a 32 on a 45 frame. I would know the gun if I saw it. (Witness is handed a gun.) I don't believe I can get the cylinder off. I think I could tell you if I could get it off. (After taking out the cylinder): Yes; I believe it is the gun. When I sold him the gun, I had a conversation with Taylor about Ance Rogers and old man Rogers. He said the boys had been talking about him a great deal, and he was going to try to defend himself. He said, 'If they ever run onto me, I am going to kill him.' He said Ance Rogers first, and then he said the whole outfit. He said he was going to kill the whole outfit if they run onto him again. On Sunday morning before Taylor was killed I told Ance he had better look out. This was all I said to him. I told Pat Rogers and Leonard Hensley what the old man had said about Ance." On cross-examination the witness was asked what peculiar mark there was in the cylinder of a gun by which he could identify it, and he said: "There is a kind of a groove where the pin goes in. (The gun was displayed to the jury to see if they could see any such mark.) I just told Ance that he had better look out. I never told him why. I said, 'Look out,' or something of that kind. Ance told me that he was going to whip old man Taylor if he did not keep his mouth shut. He claimed that old man Taylor said he had stolen some money from him."

Tom Hawthorne, for the accused, testified that he had lived around Marietta for four or five years; that he was acquainted with Henry Taylor in his lifetime, and also knew Ance Rogers; that about a month before old man Taylor was killed that he had a conversation with him out in Riley's field when he was plowing; he had lost some money out there in the field and had been harrowing over the ground; thought he had plowed the money under and was looking for it, and said he might as well have taken it down and given it to Ance Rogers; that Rogers stole \$17.50 from him, and that he might as well have given him this for all the good it

had done him; and he went on to say that he would get Rogers for it, and, furthermore, the whole works, if they fooled with him. "I told Ance about this the latter part of March. I believe it must have been on Thursday or Friday before the killing on Monday. I don't remember just exactly the day. There was nobody present when I told him." On cross-examination it developed that this witness was a very intimate friend of the Rogers family.

Henry Johnson, for the accused, testified that he lived at Marietta; that he had lived in Love County 18 or 19 years, and that he knew Henry Taylor in his lifetime; that he had a conversation with Henry Taylor, not in reference to Ance Rogers alone, but to the whole Rogers family; that was 6 or 7 months ago. "He mentioned Ance Rogers' name and said that Ance had robbed him of some money. He said if he could get hold of some of that house they built down there he would put a stick of dynamite under it and blow them away. I was advising him not to talk that way; that he might get into trouble. I told him I thought I would keep my mouth shut. This was all I said. I never told any of the Rogers about it."

Thorney B. Huddlestone, for the accused, testified that he lived four miles north of Marietta; that he had met Ance Rogers, and knew Henry Taylor in his lifetime; that some time in the fall before the killing he had a conversation with Taylor in reference to Ance Rogers. "He said that Ance had robbed him while he [Taylor] was drunk, and he said he was going to have his money if he had to get his knife and work on him. He did not use Ance's name. I did not pay much attention to it. If he said it was Ance, I don't remember."

Frank Seagroves, for the accused, testified that he was a merchant and lived at Bowles; knew the defendant Ance Rogers; that he had a conversation with Taylor about the Rogers family, not about Ance. The record does not disclose what this conversation was.

Fred Erick, for the accused, testified that he lived on Rock creek, and was acquainted with Henry Taylor in his lifetime and knew Ance Rogers; that Taylor had a conversation with him about Ance Rogers on Saturday before the killing occurred on Monday; this occurred at Taylor's house; nobody was present except the two. "He said Ance threatened to whip him, and he says, 'When he jumps on me, he will jump off quicker than he jumps on.' He said that Ance had accused him of stealing a bridle, or that Mr. Taylor had accused Ance of stealing a bridle; that is what the boys had accused him of. I asked him what they were going to whip him for, and he said that the boys had accused him—had told that he had told that they had stolen a bridle." Witness lived about 300 yards from Rogers' store.

Leonard Hensley, for the accused, testified that he lived at Cornish, but had been down

in Love county for the past two years; that he is a cousin of Ance Rogers; knew Henry Taylor in his lifetime; also knew Jim Wolfenbarger and had a conversation with Mr. Wolfenbarger prior to the time Taylor was killed; that he told Ance about it; told him that Jim Wolfenbarger said that old man Taylor was aiming to kill him; this was on Sunday before the killing on Monday; that on the Sunday week before the killing the witness and Ance and Mart Rogers went over to Taylor's house. "There was quite a bunch of boys over there—Mike Freeman, Lon O'Dell, and Anderson Rackley. Mr. Taylor had accused us of stealing a bridle up there as we came by the day before, and I went up there and holloed, 'Hello,' and old man Taylor came out, and I says, 'Where is Mike?' and he says, 'In the house,' and I told him that we had come there to straighten up about that bridle, and he says: 'I can quick tell you what became of that bridle. You are the only ones that could have got it; the only ones that passed here.' And Ance said, 'We would be bright ones to come up here and steal a bridle, and you out there at work,' and Mr. Taylor says: 'You are the only ones that could have got it; the only ones that passed here. You would do anything; you robbed me of \$17 down here last fall.' And Ance says, 'Now, I did not come up here for no trouble,' and Taylor went to cussing him and opened a knife and was leaning against the wire fence, and the next thing he turned around and walked out and opened the knife and commenced shaking it at Ance, and Ance said, 'Mr. Taylor, I didn't come up here for no trouble, and I don't want any,' and he said, 'If nothing else will do you, if you will come off away from your house, I will whip hell out of you,' and Mr. Taylor says, 'No, I am not able to fight you fair,' but he says: 'You have got me to meet again over this, and I will be fixed for you, and I will make you regret you ever seen me. Henry Freeman said he understood one of you wanted to whip Mike'—and if we wanted to do it that right there was a good place to do it, and said if Mike couldn't whip us he could. On the day of the killing I went to Marsden to pay a fine, and didn't get back until about half past 2 or 3 o'clock that evening. When I left that morning, Ance was ditching around their house there."

On cross-examination witness said that he lived at Cornish and had a crop on Bill Newton's place, and had left it about two weeks before the killing and had been down to the Rogers' place all that time; Mr. Rogers' house is a three-room house, facing north; that he kept some groceries in the front room; Mr. Rogers is 56; three of them were staying there at that time; that at the time of the killing "we had been working on this fence and had it all completed, except two or three days' more work on it."

S. H. Thaxton, for the accused, testified that he knew Henry Taylor in his lifetime, also knew Ance Rogers, Leonard Hensley, Pat Rogers, and Mart Rogers; that on the day Henry Taylor was killed he saw Ance Rogers at Uncle Dick Rogers' house between 9 and 10 o'clock in the morning. "When I went down there that morning, I saw Pat Rogers, Leonard Hensley, Ance Rogers, Mart Rogers, and Uncle Dick Rogers. Ance Rogers was working on their house, throwing up dirt around it, Leonard Hensley was saddling his pony, and Pat Rogers either had a horse saddled, or was saddling it; I don't know which. About 15 or 20 minutes after I got there, Leonard Hensley and Pat Rogers left. Ance and Mart Rogers were there at the house until Uncle Dick sent them off to fix some fence. They left the house and went off down the hill toward the northwest corner of the field. Ance had a gun and Mart had an axe. I don't know how long I stayed at Rogers' house, but it did not seem like I was there over half an hour. I saw Mr. Hamilton working down in the field that day in some new ground. I saw Mr. Hamilton at the house before he went down there to work. I went down to where he was working about 11 o'clock that day. Hamilton asked me what time of day it was, and I told him; but I can't remember what time it was. I never saw Ance and Mart Rogers that morning after I saw them go down to work. I live about 400 or 500 yards from Rogers' store. On the day before the killing I was down to Rogers' place and drank some whisky with Uncle Dick Rogers. I suppose the sun had been up three or four hours. When I went down there on the day of the killing, I saw Mr. Taylor, the dead man, pass there that morning; it was 9 or 10 o'clock. I don't mean to say that I saw him going down after the corn. I heard the shot fired. I judge this was something like half an hour after I had seen Mart and Ance Rogers go down to fix the fence. The next thing I saw after I heard the shot fired was Mr. Taylor in the wagon coming up the hill. The wagon was within 30 or 40 yards of the house or closer, maybe as close as 20 steps. I supposed Taylor was dead; he looked like he was dead to me; we did not stop the wagon. Just about that time Uncle Dick had pulled out some whisky, and he gave me a drink. I think, as the wagon passed, I told Uncle Dick that I believed that man was dead; I don't think he said anything. Just directly after the wagon went back, Mart and Ance Rogers came into the side room of that building and then went into the rear room. If they said anything, I did not hear them. Ance had a double-barrel shotgun, and as well as I remember he set it down in the corner. I did not stay there at the house but two or three minutes longer. I didn't go up to where the dead man was. I went over to the field where Mr. Hamilton was; he

was working about 150 yards from where the shooting occurred. I told him that there was a man up there killed. I did not tell him who killed him. From there I went home."

Mart Rogers, for the accused, testified that he lived at Healdton with his mother; that his mother and father had been separated about six years; that he came down to his father's place about two weeks before the killing to help him build a fence, and that in that time he fenced about 160 acres; that he remembered going up to Taylor's house about a week or ten days before the killing with Ance Rogers and Leonard Hensley; went up to straighten about a bridle that Mr. Taylor had accused him of stealing. "Some other people were there; I didn't know who they were. We went up to see Mike Freeman. When we got up there, Leonard holloed, 'Hello,' and Mr. Taylor came out, and Leonard says, 'Where is Mike Freeman?'. Mr. Taylor says, 'He is in the house,' and Leonard says, 'I come up to straighten up about that there bridle question.' Mr. Taylor says, 'I can ——— quick tell you what I know about the bridle,' and Ance says, 'We would be a wise lot to come up here and steal a bridle, and you out at work in the lot there,' and Taylor just walked on the outside and commenced cussing us. He commenced cussing Ance for everything he could think of; I can't repeat the language used. Ance told him he did not come up there to have trouble, but if nothing else would do him but fight to come down here and he would whip him. Taylor told him, 'No;,' that he was not able to fight him fair. He said that he would have to meet him again, and he would be fixed for him and make him regret that he ever saw him. Ance says, 'Boys, let's go,' and we turned around and went away. The next time we saw Mr. Taylor after this was on the day of the killing. Ance and I were working down in the field fixing the fence, and Ance had gone over in the field to count some posts. Taylor came by traveling in a wagon, a team of mules hitched to it. He drove up and stopped and asked me where Ance was, and I told him he was over in the field somewhere, and he said, 'I would like to see the ———',

and drove on down the creek. When Ance came back, I told him about it. We went back to work straightening up the fence. We had worked about 200 yards south of the northwest corner. After Taylor passed there, I saw some other people pass, one man driving in a wagon; had some water in the wagon, hauling water. I did not know his name. The next time I saw Taylor that day he was traveling along in a wagon going north. I was cutting brush down in the bed of the creek, cutting tree tops, and Ance was dragging the brush up and putting it under the fence where the old road came out. Taylor drove up and says to Ance, 'Oh, yes,'

with an oath, 'I'll get even with you right here,' and Ance turned around and said, 'Even, how?' and Taylor said, 'I'll shoot your lights out; that is how;' and he sort of made a motion with his hand this way (indicating a forward and downward motion), and his team started up, and he sort of jerked up on the lines and made another motion down, and then Ance jumped and grabbed his gun and shot him. (The witness here indicated just how Ance jumped and got the gun and just how Taylor motioned.) When the shot was fired, the spring seat turned back, and Taylor fell over. Ance fired only one shot. After the shooting we went to the house across the field. The wagon went on up the road. I saw it as it went out of sight up the hill behind our house. It was going northeast. Ance was two or three steps from his gun when Taylor came up and stopped his team. When we went out to work that morning, I took an axe and a hammer, and Ance took a shotgun. I didn't see Taylor go by the house for the corn that morning. I was down working on the fence at that time. Before we went down to work on the fence that morning, I had been throwing some corn out of a wagon up by the house, and Ance had been shoveling some dirt by the house. I didn't get the corn thrown out of the wagon when I went down to work on the fence, and Ance hadn't got his work done either. I didn't know what the shotgun was loaded with. I didn't know that they kept buckshot there in the store. I don't know how long we had been down working on the fence when old man Taylor came after the corn; I guess it was about 15 minutes. After old man Taylor went by there, and while Ance was counting the posts, I went up to the house. I didn't stay but a minute or two. When I told Ance what old man Taylor said, he says, 'Let's hurry up and maybe we can get through here before he comes back.' He meant to get through building the fence along the road there. We had about 50 yards more of fence to build along the road there. When Mr. Stofel passed there with the water, I was working down in the bed of the creek, and Ance was about 10 steps from me at the time. I continued down in the creek. Ance turned out of the road and went up on the bank next to the fence. He had a shotgun at the time. Stofel was driving a team of mules to a wagon, and was going north at that time. He came from the direction that Taylor had come in. The killing occurred right close to where the old road went down, a little north of there, about three or four steps, I guess. At that time Ance's gun was standing against a tree, an elm tree, the first large tree north on the old road. I guess Ance was about 50 yards from me at that time. I told Ance, 'There comes that fellow,' and Ance just kept on working. He was dragging brush at the time, and continued to work until Taylor stopped. Taylor was right up even with

him before he stopped his wagon. At that time Ance was standing about 10 steps from the road from Taylor, and when Taylor drove up and stopped Ance kept on working. His back was turned toward Taylor. At that time I was cutting some brush off the tree tops in the bed of the creek. I guess I was about 10 steps southwest of where Taylor stopped. When Taylor stopped, he run his hand down this way like he was going to get something (indicating a forward and downward movement), his right hand. I don't know whether I was west of him or not. I think I was a little bit more on the east than on the west. I was back down the creek from him. He says, 'I'll get you now,' running his hand down in front of him. Ance says, 'Get even, how?' and Taylor says, 'I'll shoot your lights out; that is how.' Ance quit working when he said he would shoot his lights out. He did not stop until then. Ance just turned around. When Mr. Taylor was going for his gun, Ance jumped and grabbed his gun and shot him. Ance went to this tree and got his gun. When he turned to get his gun, that threw his side toward Taylor, not his back. Mr. Taylor never got his gun. He did not have it at the time Ance shot him. Ance did not go after his gun until Taylor made the second effort to get his. Where Taylor stopped was just about even with where Ance's gun was standing by the tree. Q. I will ask you if you told Sheriff Davis and Mr. Rhodes, as you were coming in from your father's place the afternoon of the killing, if Mr. Taylor did not go to his hip pocket for that gun? A. No, sir; I did not. Q. You deny that, do you? A. Yes, sir; I do. After the shooting we went back up to my father's store. We never went up to where the dead man was; didn't go up to see if we could do anything for him or not. Afterwards I went down into the field where Mr. Hamilton was working. I didn't tell him anything about the killing."

Ance Rogers, the accused, testified that he lived at Healdton with his mother; his father and mother were separated, and had been living apart five or six years; that the last two or three weeks before the killing he had been working and staying with his father, helping build a fence; that on the Sunday week before the killing he went up to Taylor's house to see about a bridle that he had been accused of stealing. "We called him out from the house, and Leonard says, 'We come to straighten up about that bridle,' and Taylor says, 'I can ——— quick tell you what I know about that bridle question,' and he says, 'You know ——— well you got it.' I said, 'We would look wise up here to steal a bridle, and you out there by the lot at work, wouldn't I?' and he opened his knife and came outside to where I was, right up close to me, and commenced cussing me and said: 'You would do anything; you stole \$17.50 from me down there last

summer.' I called him a liar. He kept on cussing, and I said, 'If nothing else will do you but fight, come off down from your place and I will whip hell out of you, or try to do it,' and he said: 'No; I'm not able to fight you fair, but the next time I see you I will be prepared for you, and I will make you regret you ever seen me.' The next time I saw Mr. Taylor was on the Monday week after that; I saw him come up Rock creek. Mart had told me that a fellow had passed there who seemed to be awful mad. He said he wanted to see me, and I asked him what he wanted, and he said, 'I would like to see the _____.'

_____.' I told him I thought it was old man Taylor. I had not seen Taylor that morning before that. I had seen Mr. Rhodes pass by that morning in an automobile. I saw some other parties pass by that morning, but didn't know who they were. I also saw a man that I know to be Stofel pass there hauling some water. When he passed, I was working about 30 or 40 yards from the northwest corner of the field. We went down there to tighten some wire. There was no tree top down at that place, as testified to by Stofel. I spoke to him when he passed." Witness also tells of certain threats by Taylor that were communicated to him by Jim Wolfenbarger, Leonard Hensley, and Tom Hawthorne: "When Taylor came back that day, Mart says, 'Yonder comes that fellow now.' I looked around and says, 'That is Taylor.' He was about 30 or 40 yards from me at that time; he was down in the bed of the creek and was coming up the creek; he came up even with me, and he says: 'Oh, yes; you _____'

_____, I'll get even with you right here.' I was stuffing some brush under the fence. I says, 'Even, how?' and he said: 'I'll shoot your lights out; that is how.' He reached down after his gun, and his team started up, and he stopped them and reached down again, and then I jumped and grabbed my gun as quick as I could and shot him. My gun was sitting by the side of an elm tree. Mr. Taylor was west of me, sitting in his wagon. The bank of the creek on which I was standing was about four feet high. My gun was about two or three steps from me when I started after it. Taylor was in a crouching position when I shot him. I shot one time. I shot to save my life. After the shooting the team jumped as fast as they could, and the seat fell back with Mr. Taylor, and he fell back on the corn. He never said anything. I never told anybody what I had done. When I was coming to town with Mr. Blake that day, I indicated the distance that I was from Mr. Taylor at the time I did the shooting, not the distance that I was from my gun."

On cross-examination the witness testified that he was 25 or 30 years old, didn't know

which; that when old man Taylor had cursed him and accused him of stealing a bridle on the Sunday week before the killing that it made him mad, and that he left Taylor's house mad at him; that when he took the shotgun with him that day he did not know what kind of shot it was loaded with. "I picked up the gun and unbreeched it and saw that it was loaded. I didn't tell Will Anglin that that was the only kind of shot we had there. I don't know whether I put the same kind of shell in the gun when I reloaded it after the killing that was in there when I shot it, or not. I don't know whether we had any shot out there that was not buckshot or not. I took the gun down there thinking that I would probably see some squirrels. I had not killed any that morning. I didn't examine to see what kind of shot I was taking along. Sometimes I shoot squirrels with buckshot."

Al Davis, in rebuttal for the state, testified that he is the sheriff of Love county; that he is acquainted with Mart Rogers. "Q. I will ask you, Mr. Davis, if on the afternoon of the killing of Henry Taylor, if the witness Mart Rogers did not tell you in the presence of Mr. Rhodes that the dead man, Taylor, went back to his hip pocket for the gun, and that Ance Rogers, his brother, jumped and got his gun and shot him? A. Yes, sir."

Olin Rhodes, in rebuttal for the state, testified the same as sheriff Al Davis.

J. W. Blassingame testified that he was the surveyor of Love county, and that the bank on the east side of the creek, down along where this shooting occurred, is six feet high, and that the elm tree standing in the field north of the old road is 13 feet from the road.

[1, 2] The first assignment of error raised by counsel on behalf of the plaintiff in error is as follows: "The court erred in not sustaining the objection of plaintiff in error to the testimony of Olin Rhodes, wherein he was asked, on direct examination, these questions: "Q. What did Mart Rogers, the defendant, say to Sheriff Davis? Mr. Eddleman: Now, if the court please, on behalf of the defendant Ance Rogers, we object to this testimony as incompetent, irrelevant, and immaterial. The Court: I have already instructed the jury on my own accord that the testimony applied only to Mart Rogers. Mr. Eddleman: We want to save an exception to any declaration of Mart Rogers at this time on behalf of Ance Rogers. The Court: I have anticipated that myself for you and instructed the jury that it apply only to Mart Rogers—whatever the talk was. He may answer the question. Proceed. (To the ruling and action of the court the defendants at the time excepted.) A. Mr. Davis, after talking to him about it—he said he didn't want to talk about it first, but he said he would like to know some particulars

about it, and Mart told him that he killed him, and he had it to do. Q. That who had killed him? A. He said, 'He killed him, and he had it to do.' Q. He said who killed him? A. That Ance killed him. Q. How did he say it happened? A. In my judgment he said there— The Court: Wait a minute; I will hold up that testimony; I will hold that up. You would better hold that back at this time—declarations—I thought you were seeking only declarations against Mart Rogers. Mr. Mathers: Yes. Mr. Eddleman: That is what we objected to. The Court: I do not think the evidence is competent now, at this time. Mr. Mathers: I would like to tell the court what we expect to prove by him. (The county attorney talks to the court out of the hearing of the jury and the reporter.) The Court: At this time, gentlemen of the jury, you will not consider any statement that the witness has made as coming from Mart Rogers to these officers after the killing took place. Any declarations that he may have made against his brother are not competent now, and therefore you will not consider what has been said. Proceed."

Counsel concede that this assignment is without merit. The trial court excluded the testimony from the consideration of the jury. But even if it had been admitted no harm could have resulted, because the accused afterwards admitted the killing himself, and as to this fact there was and could have been no issue, and therefore could have been no injury.

Counsel's next assignment is as follows: "The court erred in permitting the witness Jim Mays to give the following testimony on behalf of the state: 'I got out then and went back down to Uncle Dick's joint to get some rope, and I seen Mr. Thaxton standing there, and I holloed, "Hello, Uncle Dick," to him two or three times; I don't recollect how many times I holloed. I said, "There is a dead man out here." Mr. Thaxton says, "A dead man!" I says, "Yes; a man has been shot;" and by that time Uncle Dick Rogers came up to the door facing and leaned up against the door facing about that distance from me, and he said— Mr. Eddleman: Wait a minute. We object to any statements there, unless it was in the presence of these defendants. Q. Were those two defendants in the room there? A. I could not say whether they were or not. I seen somebody there, but I— Q. Who else did you see there besides old man Rogers and Mr. Thaxton? A. Well, sir, I could not say to be certain who they were; I taken it to be that young man sitting over there. Q. Which one did you take it to be? A. That one—the black-headed boy. Q. Mart Rogers? A. Mart; I taken it to be him, but I could not swear it was Mart. Q. Was any one else in there? A. Yes; I seen some more in there, but I could not say who they were. The Court: How long was that after— Mr. Mathers, when does the state claim that Mr.

Baker and Mr. Mays saw this man? Mr. Mathers: I was just going to ask him. The Court: I ask that question in view of the ruling on that testimony just now."

This testimony was not improperly admitted. The court, however, excluded it evidently because it was in doubt as to its admissibility; but even had it been inadmissible it does not appear that serious injury would have resulted. The circumstances indicate strongly that the accused was present, and, even though he was not, this occurrence was immediately following the homicide. The Assistant Attorney General insists that this testimony was properly admitted as a part of the *res gestæ* and confined within the limits of time and matter that tended reasonably to shed light on the killing. Witnesses Mays and Baker both testified that they were driving along the road together when they heard a shot fired, and a short time thereafter, coming from the direction in which they heard the shot, they saw a wagon with two mules hitched to it coming at a fast walk and a man on top of the wagon, apparently wounded. Then they saw two men, one larger than the other, coming through the bottom from the direction in which they heard the shot; one of them carrying a gun and going in the direction of Dick Rogers' house. Undoubtedly these two persons were the accused and his brother, who was charged jointly with him. The team came on up the road behind them and passed the Rogers' house. No effort was there made to stop it. Mays and Baker waited until the team overtook them, and they stopped it and found the man on the wagon mortally wounded. All this occurred within a very short period. Mays went immediately back to the Rogers' house and made inquiries as to the killing. He had seen the man with the gun, and his companion, going in that direction. No other person except the wounded man had been seen. We are unable to discover anything in the action of the trial court that justifies criticism of this ruling.

[3] Counsel next complain of the action of the court in permitting the introduction of certain testimony which tended to incriminate Mart Rogers, who was afterwards, by permission of the court, discharged from prosecution by the county attorney. At the time he was discharged the court withdrew all the testimony from the jury which tended to incriminate Mart Rogers, and not this accused, and had previously limited, by proper instructions, the effect of such testimony to Mart Rogers. The action of the court was entirely fair and proper. The rulings and orders made in this connection are the law in this jurisdiction. The accused had the right to a separate trial if he had so demanded, and it is the well-recognized rule that testimony competent as to one codefendant on trial with another, although prejudicial to the other, is admissible, when

properly limited by the trial court, by instructions, to the codefendant against whom it is admissible; and this is true even though the testimony is such that, were the complaining accused on separate trial, it would have been reversible error to admit such testimony. *Gonzalus v. State*, 7 Okl. Cr. 444, 123 Pac. 705.

Counsel next urged that this judgment should be reversed because the trial court permitted the state, on cross-examination, to ask certain questions indicating that witness Thaxton, who testified for the accused, was drinking whisky a few days before this homicide. We are of opinion that the learned trial judge extended the doctrine farther than this court ever intended in any of its opinions in this connection. The error, however, was trivial, and could not have resulted in serious injury. The doctrine in *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447, we think, is probably the safer rule.

The only other error urged, which we deem it necessary to in any way discuss, is based upon the following paragraph of the tenth instruction given by the court to the jury: "You are instructed that if you believe from the evidence that threats to take the life of the defendant or do him great personal injury were made by the deceased, but were not communicated to the defendant prior to the homicide, such uncommunicated threats can be considered by you, in connection with all the other evidence in the case, in determining who was the probable aggressor at the time of the killing, and for no other purpose." It is the contention of counsel that this instruction is seriously prejudicial, because it prohibited the jury from considering these uncommunicated statements or threats for the purpose of ascertaining the condition of the mind of the deceased, his animus toward the accused, or for the purpose of explaining his conduct at the time of the fatal shooting. We are of opinion that the instruction could have included a clause permitting the jury to consider these threats as tending to show the feelings and interest of the deceased toward the accused at the time of the shooting, and for the purpose of shedding light, if any to be deduced therefrom, as to whether or not he so acted at the time of the shooting as to induce in the mind of the accused an honest belief that the deceased intended to kill him or do him great bodily harm. But considering this charge together with all of the instructions given by the court, and construing them in the light of the evidence introduced, we are unable to conclude that the instruction was in any manner prejudicial.

We have gone carefully over the entire record in this case and considered the same in all its phases, and are impelled to the conclusion that this accused had a fair and impartial trial, and that a just and proper conviction resulted therefrom. We can find no

error in the record which would justify this court in interfering with the judgment, even had the death penalty been imposed, and certainly none that would warrant an interference with the verdict of the jury, imposing life imprisonment and the judgment as pronounced.

Let the judgment in all things be affirmed.

DOYLE and FURMAN, JJ., concur.

BOUIE v. STATE.

(Criminal Court of Appeals of Oklahoma. May 7, 1913.)

(Syllabus by the Court.)

1. RAPE (§ 53*)—ASSAULT TO COMMIT—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to commit rape upon a female child under the age of consent, the evidence is held to support the verdict and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-81; Dec. Dig. § 53.*]

2. RAPE (§ 16*)—ASSAULT TO COMMIT—DEFENSE.

Since, by statute, a female child under the age of consent is legally incapable of consenting to carnal knowledge of her person, she is incapable of consenting to an assault upon her with intent to commit rape, and every act done in furtherance of a purpose and intent to know her carnally is unlawful and felonious; and, if such acts would constitute an assault if done without her consent, then no act of hers can waive the assault.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5919-5925; vol. 8, p. 7778.]

3. CRIMINAL LAW (§ 366*)—ASSAULT TO COMMIT RAPE—RES GESTÆ—COMPLAINT MADE.

Where it appears, in a prosecution for assault to commit rape upon a child of tender years, that immediately after the alleged assault she was crying and met an older sister and then and there made complaint, not only the fact that such complaint was made, but the complaint as made, is admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.*]

4. CRIMINAL LAW (§ 720*) — ARGUMENT OF COUNSEL.

The prosecuting attorney has the right and privilege in his argument to the jury to refer to the evidence and his deduction therefrom and urge upon the jury the truth or falsity of any testimony given in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

5. CRIMINAL LAW (§ 1090*)—APPEAL—ARGUMENT OF COUNSEL—PRESENTATION FOR REVIEW.

Misstatements of the prosecuting attorney in his address to the jury cannot be reviewed on appeal, where the only evidence thereof contained in the record are recitals in the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

*(Additional Syllabus by Editorial Staff.)***6. CRIMINAL LAW (§ 1150*) — APPEAL — REFUSAL OF CHANGE OF VENUE.**

Since Comp. Laws 1909, § 6766, leaves an application for a change of venue to the sound discretion of the trial court, a refusal to grant such change will not be disturbed on appeal in the absence of an abuse of discretion to defendant's prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044; Dec. Dig. § 1150.*]

Appeal from District Court, Garvin County; R. McMillian, Judge.

N. C. Boule was convicted of assault with intent to commit rape, and he appeals. Affirmed.

Thompson & Patterson and Carr & Field, all of Pauls Valley, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and J. S. Estes, of Oklahoma City, for the State.

DOYLE, J. The plaintiff in error was tried upon an information for assault with intent to commit rape. He was found guilty and in accordance with the verdict of the jury was sentenced to imprisonment in the penitentiary for a term of four years and six months. The judgment and sentence was entered on the 3d day of June, 1911.

The noticeable assignments of error are confined to three points.

[6] The first concerns the refusal of the court to grant a change of venue. Our Code leaves such an application to the sound discretion of the trial court (section 6766), and unless it appears that such discretion was abused to the prejudice of the defendant this court cannot interfere. *Edwards v. State*, 131 Pac. 956, and cases therein collated. The record shows some 17 affidavits in support of the application and about 45 counter affidavits. Upon this showing the court overruled the application. The record shows that the defendant was given an opportunity to make a further showing in the matter after the court's ruling by examining a number of witnesses on behalf of the defendant and then again overruled the application. There is nothing to indicate that the court abused its discretion in the matter or acted arbitrarily.

[1] The second ground upon which error is assigned is that the evidence is not sufficient to support the conviction and that the court erred in refusing to grant the motion to direct a verdict of not guilty.

The facts of the case, as we gather from the evidence, are as follows: The defendant lives on a farm within a mile of Stratford. On Saturday, November 12, 1910, the defendant took several children from Stratford in his wagon to a pecan grove on his farm to pick pecans, under an arrangement whereby he was to give the children one-half of the pecans they picked. A short time after they arrived at the place, the prosecutrix, Iola

McCurdy, nine years old, went with the defendant to the house 200 or 300 yards distant for water. She returned with some water in a cottolene bucket and was crying. Her testimony as to what transpired is in the words as follows: "I stopped to pick the cockleburs out of my clothes. He said he would help me, and he helped me to pick them out. He unbuttoned my bloomers and laid me down. He unbuttoned his clothes, and he got on top of me and laid down on me. He took his—I don't know. He put it on me, and said, 'Did you have anybody do this to you before?' and I said, 'No, sir.' I had to button my own clothes and he buttoned his. There was matter on my leg." That they then went to the pump, and he told her to return with the water the way she came. She was then asked, "Who was the first one who spoke to you?" and answered, "My sister Ruby." "Q. Did you tell Ruby? A. Yes, sir; I told her." That she said she wanted to go home, and the defendant came, and they all got into the wagon, and he took them home. And she told her mamma what the defendant had done to her.

Ruby McCurdy testified that she was 12 years old; that when her sister Iola had been gone about 30 minutes she became uneasy and went to the fence and called her; that she answered and returned crying, and "she told me what Mr. Boule had done to her."

The testimony of several of the children tends to show that while going home after the alleged assault the prosecutrix cried continuously.

Frank Farris testified, as undersheriff, he went on the second day after with the two McCurdy girls and three or four other persons to the place; that it was in the bed of a creek with banks six or seven feet high, and there was an impression in the sand.

J. R. Gillman testified that he was with the party and saw the impression in the sand in the bed of the creek; "that there was footprints, one very small and a large one, along there."

W. U. Goodwin testified he was with the party. His testimony is substantially the same as that of the others.

Mrs. McCurdy testified that the girls came home about 11 o'clock, and Iola was crying and told her what she was crying about.

The defendant testified on his own behalf "that Mr. McCurdy's little girl said she wanted a drink and would go with me and take back a bucket for the other children. She went with me to the well, and I got her the water, and I went to the house, and when I returned to where they were picking pecans she was crying. I asked the child if any of them whipped her, and she said no, that she wanted to go back home, that she was hungry, and I took the children

*For other cases see same topic and section NUMBER in Dec. Dig., & Am. Dig., Key-No. Series & Rep'r Indexes

home." He denied having mistreated her in any way.

[2] Counsel in their brief say: "If the little girl had only cried out and frightened him away; if she had only kicked him with her feet, or slapped him in the face, or scared him, or cried for help, or have prevented him from attempting to enter her in any manner—that it would then be an assault with intent to rape. But in the absence of any proof of this character, the case does not come within the definition of an assault with intent to rape, and that if the court will closely read the evidence, we think that it will bear out our contention that the state has wholly failed to show that there was any attempt at penetration of the person of Iola McCurdy. Granting all that she may have said to the jury to be true, there can be no conviction for attempted rape in this matter. We call attention further to the fact that under the law, in order to convict, the jury must be satisfied that an attempt was made to have sexual intercourse by force or fraud."

Counsel's contention is not tenable, and is without support in reason, law, or authority. The fact that the defendant was deterred from the consummation of his diabolical purpose and intent by reason of the youth and immaturity of his victim, and that she by reason of her youth, want of understanding, or trusting innocence, did not protest or resist, is no defense to the crime charged. "Carnal knowledge of a female child under 16 years of age is rape under our statute, with or without the use of force, no matter what may be the circumstances, and the question of consent is wholly immaterial; whether the prosecutrix submitted to the acts of the defendant in ignorance of his criminal intent, or whether she exercised a positive will, and consented or submitted to what the defendant did with full knowledge that his purpose and intent was to have carnal connection with her, is immaterial. The prosecutrix being under the age of consent was conclusively incapable of legally consenting to an assault with intent to have carnal knowledge of her. Every attempt to commit a felony against the person involves an assault; and if the acts of the defendant, done in furtherance of a purpose to have carnal knowledge of the prosecutrix, constituted an assault to commit rape, if done without her consent, then no act of hers could waive such assault." *Lee v. State*, 7 Okl. Cr. 141, 122 Pac. 1111, and cases cited, holding that there may be an assault with intent to commit rape upon a consenting female where she is under the age of consent.

Upon the record before us there can be no doubt but that the verdict of the jury is amply supported, if the jury believed the evidence given on the part of the state. That the jury did believe this evidence is clearly established by the fact that they

found the defendant guilty of the crime charged.

The remaining cause urged for a new trial is alleged misconduct of the county attorney in his closing argument to the jury.

[6] Several statements are set forth in the motion for a new trial that are not shown by the record. Recitals in a motion for new trial are not evidence of misconduct and cannot be reviewed on appeal unless properly incorporated in the record.

[4] The record does show the following statements made by the county attorney in his closing argument: "Turn this man loose if you wish and put your stamp of approval upon his lecherous conduct, and let him go and rob the cradle and ruin other homes." That the county attorney stated to the jury that Ruby McCurdy, the sister of the prosecuting witness, had testified that Iola McCurdy had told her when she came up with the bucket of water what the defendant had done to her, and also stated to the jury that the mother had testified that the little girl told her when she came home what had been done to her. To which argument and statements of the county attorney the defendant's counsel then and there objected and requested the court to instruct the jury to disregard them, which objections were overruled and requests denied.

The first statement complained of may be somewhat objectionable, but was probably provoked by the argument of the defendant's counsel, and was made in reply to their demands to the jury for acquittal. It is clear that it was not such an impropriety as would be sufficient to set aside a verdict which on the evidence was just and proper.

[3] The objections to the remaining statements are without merit. The prosecutrix was asked if she told her sister and her mother about the offense charged, and she replied that she did. The court refused to allow her or them to state what she said to them. This was error in favor of the defendant, as the complaints so made were admissible as a part of the *res gestæ*. "It is admissible to show by the testimony of the prosecutrix or other witnesses, in corroboration of her testimony, that complaint was made shortly after the commission of the alleged offense, and when, where, and to whom it was made, but by the weight of authority the evidence must be confined to the bare fact that complaint was made; the details or particulars of the complaint not being admissible as substantive testimony unless the statements are part of the *res gestæ*." 33 Cyc. 1463, and cases cited. Where the complaint is made immediately after the occurrence, it constitutes a part of the *res gestæ*; and, where the party assaulted is of tender years, it would seem that not only the fact that complaint was made, but the particulars of the complaint

as made, should be admitted. The county attorney's argument in this respect was a proper discussion of the evidence, and it is evident to us that he was careful in confining his argument to the fact that complaint was made.

The instructions likewise were more favorable to the defendant than the testimony warranted.

It is apparent that justice has been done, and the conviction ought not to be set aside except for some prejudicial error in the proceedings.

We have been unable to find any such error in this case. The judgment of the district court of Garvin county is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

EDWARDS v. STATE.

(Criminal Court of Appeals of Oklahoma. May 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 121, 134, 1150*) — CHANGE OF VENUE—DISCRETIONARY RULING—APPEAL.

(a) An application for a change of venue is addressed to the discretion of the trial court, and the ruling of the court thereon will not be reviewed upon appeal in the absence of a showing that the court abused its discretion.

(b) For counter affidavits held to be sufficient to put in issue the fact as to whether or not so great a prejudice existed in a county against a defendant as to prevent him from securing an unbiased and unprejudiced jury and a fair and impartial trial in said county, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 243, 251, 252, 304a; Dec. Dig. §§ 121, 134, 1150.*]

2. CRIMINAL LAW (§§ 586, 603, 1151*)—CONTINUANCE—SUFFICIENCY OF APPLICATION—APPEAL.

(a) An application for a continuance is addressed to the discretion of the trial court, and the ruling of the court thereon will not be reviewed upon appeal unless it is made to appear from the record that this discretion has been abused.

(b) For an application for a continuance held to be wholly insufficient on the question of diligence and also upon the question of the actual merits of the case, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1348-1361, 3045-3049; Dec. Dig. §§ 586, 603, 1151.*]

3. CRIMINAL LAW (§§ 543, 1144*)—ADMISSIBILITY OF EVIDENCE—TESTIMONY AT PRELIMINARY TRIAL—DISCRETIONARY RULING—APPEAL.

(a) Where a witness has testified in a preliminary trial and has been cross-examined by the defendant, and where the attendance of said witness cannot be obtained upon a subsequent trial of said cause, it is not error for the trial court to permit the introduction by the state of the testimony given by said witness upon such former trial.

(b) Where the evidence shows that a witness who had testified upon a preliminary trial could not be found by the officers after a diligent search, the trial court has a right in the exer-

cise of its discretion to permit the admission of such testimony against a defendant, and upon appeal it will be presumed that this discretion was properly exercised in the absence of a showing to the contrary.

(c) For evidence which justified the trial court in admitting the previous testimony of a witness who was absent at the final trial, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1234, 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §§ 543, 1144.*]

4. CRIMINAL LAW (§ 1171*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Where the evidence conclusively shows the guilt of a defendant of murder and the jury only convicts him of manslaughter, ordinarily the court will not consider objections to improper remarks made by the county attorney in his closing argument to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

5. CRIMINAL LAW (§§ 1144, 1186*)—HARMLESS ERROR—GROUND FOR REVERSAL—PRESUMPTION OF REGULARITY.

(a) A conviction will not be reversed on account of the action of the trial court unless two things affirmatively appear in the record: First, that the court committed error during the trial of the cause; second, that by such error the defendant was deprived of a substantial right to his injury.

(b) It is no part of the duty of the members of the Criminal Court of Appeals to act as counsel for an appellant. We will not presume that the trial judge, the county attorney, and the jury entered into a conspiracy to unlawfully deprive an appellant of his liberty, or that either of them have not faithfully performed their respective duties. Every presumption will be indulged in favor of the rulings of the trial court, the regularity of the proceedings, and the correctness of the verdict of the jury. This is necessary in order that property rights may be protected and human life may be made safe and sacred in Oklahoma.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037, 3215-3219, 3221, 3230; Dec. Dig. §§ 1144, 1186.*]

(Additional Syllabus by Editorial Staff.)

6. CRIMINAL LAW (§ 308*) — APPEAL — PRESUMPTION OF INNOCENCE.

After conviction the presumption of innocence is destroyed, and on appeal the counter presumption, that the verdict is correct and appellant guilty, prevails.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.*]

Appeal from District Court, Garvin County; R. McMillan, Judge.

C. F. Edwards was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The material testimony in the case may be substantially stated as follows: The homicide occurred on the 15th day of April, 1911, in Garvin county, Okl., at the home of appellant, who resided four or five miles west from Pauls Valley. The deceased lived about half a mile from appellant. On the day of the homicide the deceased and appellant came to Pauls Valley driving a pair of mules belonging to deceased hitched to a wagon belonging to appellant. They were accom-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

panied by some friends in the wagon. They bought some feedstuff and groceries, and appellant procured a quart bottle of whisky. The deceased and appellant and some other persons in the wagon with them took a drink or two of whisky on their way home from Pauls Valley. The parties first stopped at the house of Ed Swan, where they got out of the wagon and placed in his house some goods which he had purchased. He then drove on half a mile further to the home of appellant. Up to this point there is no conflict in the evidence.

The testimony of F. L. Strickland at the preliminary trial was admitted. He testified: That on the day of the homicide he was breaking sod on appellant's farm working for appellant and that he was present at the time when the homicide occurred. That at 6:20 o'clock he left the field and went to the house. He there saw appellant and the deceased. That appellant came out of his house to the wagon. That deceased came out of the house and went to the wagon and sat down on the ground and drove a peg in the ground and was pitching his knife at it. That appellant and deceased were talking about a check which witness had given the deceased. Deceased told witness that the check had been turned down. Witness and appellant promised to pay deceased the money for the check. That they then ceased to discuss the check matter. That appellant said to deceased, "Ed, I made her come clean," and deceased replied, "My wife told the truth." Appellant then said, "I don't like to have my wife called a liar." Deceased then said, "My wife told the truth." Appellant did not make any reply to this, but he drew his knife out of his pocket and began to open it, but he did not open the knife, but drew out a revolver which he held in his right hand. Witness then took appellant by the left arm, and said, "Don't do that," and appellant replied, "Get back, or I will hurt you." Deceased was then standing up about 10 feet off, and, when ordered to turn appellant loose, witness stepped back, and appellant then walked up in front of deceased. Deceased said to appellant, "Kirk, you have got me bested." Appellant then struck deceased an upper cut with his left hand and knocked him down, at the same time holding his revolver in his right hand. Deceased got up and walked over and sat down on the wagon tongue. At this time the pair of mules which witness had been driving ran off, and witness pursued them and caught them, and as he pulled back the lines he heard a shot. Witness was then 25 or 30 yards from the scene of the homicide. Witness started to the place where the shooting occurred and found deceased lying on the ground. Appellant was there with a pistol in his hand. Deceased did not say anything. Witness then left and returned a few minutes after, and appellant and his brother John Edwards were there. John Edwards, speak-

ing to witness, said, "He is as good a friend as I ever had and it was all over you," referring to witness.

W. W. Campbell testified for the state that at the time of the killing he lived in a tent about 75 or 100 yards from the house of appellant; witness' attention was attracted by some loud talking; he then looked; he saw appellant standing with his arms stretched out; he heard the report of a shot; he did not see deceased at the time; witness then went up to the house of appellant and to the wagon; he there saw deceased lying on the ground; deceased lived 15 or 20 minutes after witness reached him.

Dr. Johnson testified that he examined the body of the deceased; that there was an abrasion on his face just beneath the right eye and a gunshot wound $1\frac{1}{4}$ inches behind and a quarter of an inch above the right ear and coming out on the left side three inches above and three inches behind; that the abrasion on the face of the deceased was made before death.

Dr. Lindsay testified to the same facts, and further that he saw no powder marks on the deceased when he examined the body.

B. Bruce testified that he took a photograph of the deceased; that there was a black swollen place beneath a scar under one eye on deceased's face.

Jim Young testified to the bruise on deceased's face when his body was prepared for burial.

J. S. Kercheval testified to the bruised place on the face of the deceased, and also that he saw no powder marks on the deceased when he was prepared for burial.

Anna Edwards, the wife of appellant, testified that appellant and the deceased were pretty full of whisky at the time they came from Pauls Valley; that she first heard loud talking and then saw them scuffling; that she rushed out upon hearing the shot, and her husband came toward her and exclaimed, "What have I done?" Appellant then said he was going for a doctor, and left.

John Edwards testified that he came home in the wagon with appellant and the deceased; that they were both pretty full of whisky when they got home; that witness saw appellant and deceased scuffling and heard a gun fire and deceased fell back dead.

Appellant testified that he lived near deceased and that deceased had been friendly with him for quite a while; that when in the town of Pauls Valley on the day of the homicide he and the deceased drank considerable whisky and they had a quart bottle with them when they started home; that they took as many as 8 or 10 drinks a piece; that after they reached home appellant went into the house and talked to his wife, and while there he got his pistol and put it in his pocket; appellant said he didn't know why he put the pistol in his pocket; appellant and deceased were talking about a check that Strickland had given to deceased which had

been turned down; that they then saw Strickland coming over the hill driving toward them; that a hound dog came along and started toward the chicken house; that appellant drew his pistol and said, "I believe I will shoot him;" deceased jumped up and grabbed the gun, and deceased and appellant were scuffling over the gun when they stumbled over the wagon tongue and fell, and the gun went off accidentally and killed the deceased.

A number of minor circumstances were testified to tending to impeach the testimony offered for appellant.

Thompson & Patterson, Carr & Field, and Blanton & Andrews, all of Pauls Valley, for appellant. Smith C. Matson and Joseph L. Hull, Asst. Attys. Gen., and John M. Stanley, Co. Atty., of Pauls Valley, for the State.

FURMAN, J. (after stating the facts as above). Counsel for appellant have assigned 42 different errors alleged to have been committed upon the trial of this cause and thereby brought up for review all of the rulings made by the trial court. It is the undisputed right, and it is also the duty of counsel, when they prosecute an appeal, to present for review every material question which in their judgment involves an erroneous ruling of the trial court to the injury of their clients. But it is hardly probable that the trial court would commit material error in every ruling made. It is therefore respectfully suggested that when an appeal is taken counsel can save themselves and the members of this court a great deal of unnecessary labor by selecting the questions brought up and presenting only those which have substantial merit. We know that during the hurry of a trial counsel frequently reserve exceptions without having time to determine as to whether or not they are well taken. This is also their right and duty. But after they have had time for reflection it would be the better plan if they would eliminate from the record and only present on appeal those questions which upon investigation they regard as actually meritorious. When the entire case is brought up on appeal for review it naturally suggests the inference that counsel themselves are in doubt as to all of the propositions which they have presented and do not know exactly upon what they rely.

The brief in this case covers 122 pages, which we have carefully read and re-read and considered from the beginning to the end. We will, however, only discuss those questions which go to the substantial merits of the cause.

[1] First. When the case was called for trial, appellant presented a motion for a change of venue, in which it was set up that so great a prejudice existed against appellant in the minds of the people of Garvin county that he could not obtain a fair and impartial trial in said county. This motion was duly

sworn to by appellant and was supported by the affidavits of seven compurgators as required by law. The state filed a number of controverting affidavits to the effect that the signers thereof had read defendant's motion for a change of venue and his supporting affidavits, and that they believed the persons making said affidavits were not reliably and rightfully informed as to the condition of the minds of the citizens generally of Garvin county toward defendant, and that they further believed that an unbiased and unprejudiced jury could be obtained in said Garvin county for the trial of said cause, and that appellant could obtain a fair and impartial trial on said charge in said county. The court overruled the motion for a change of venue, to which appellant excepted. The first objection made to the ruling of the trial court is that the counter affidavits filed by the state in opposition to the motion for a change of venue were insufficient because they only expressed the opinions of the affiants and did not in direct and positive terms deny the credibility of the compurgators of appellant and state that the change was not necessary. As to whether or not the compurgators of a defendant seeking a change of venue are credible persons, necessarily, is a matter of opinion which might be based upon a great variety of circumstances which would have more or less influence with different persons. As to whether or not a change of venue should be granted in any given case is also largely a matter of opinion. No witness could swear as a matter of fact, independent of his judgment, that so great a prejudice did or did not exist in the minds of the inhabitants of a county against a defendant that an unbiased and unprejudiced jury could or could not be obtained in said county for the trial of said defendant. Any statement on this subject would necessarily be so blended with the opinions and beliefs of the affiant as to be inseparable therefrom. This is one of the cases in which persons not experts are permitted to testify as to opinions formed by them as to conditions which could not be produced in court. See *Miller v. State*, 131 Pac. 717, decided at the present term of the court. We think that the counter affidavits of the state were properly received by the court for the purpose of attacking the credibility of the compurgators of appellant and also for the purpose of showing that a change of venue was not necessary. It was the privilege of the trial court, had he been in doubt as to the merits of the application for a change of venue, to place all of the persons making affidavits, and such others as the court desired, upon the witness stand and examine them fully as to their means of knowledge and the circumstances upon which their opinions were based. We have discussed this question so often that we do not deem it necessary to enter fully into it again.

In the case of *Tegeler v. State*, 130 Pac.

1164, decided at the March term of the court, this court said: "Section 6763, Comp. Laws 1909, among other things provides that a change of venue may be had on the application of the defendant by petition, setting forth the facts verified by affidavit, supported by the affidavits of at least three credible persons who reside in said county. It further provides that the county attorney may introduce counter affidavits 'to show that the persons making affidavits in support of the application for a change of venue are not credible persons, and that a change is not necessary.' Under this statute, the state may file counter affidavits stating any fact or facts that would show that a change of venue was not necessary. If the court is of the opinion upon an inspection of the affidavits filed in support of and in opposition to a motion for a change of venue that a change of venue should not be granted, then it should be so ordered; but, if the court is not satisfied on this question, it may have all of the parties making these affidavits on both sides, and such other persons as the court may think proper, sworn as witnesses and examined in open court touching the matter in controversy. The presumption of law is that a defendant can get a fair and impartial trial in the county in which the offense was committed, and, if this is not true, the burden is upon the defendant to establish his right to a change of venue. The granting of a change of venue is by the Constitution and statute made discretionary with the trial court, and this court will not reverse a ruling of the trial court denying an application for a change of venue, unless it is made clearly to appear that there has been such an abuse of this discretion as to amount practically to a denial of justice. By abuse of discretion is meant a clearly erroneous conclusion and judgment; one that is clearly against the logic and effect of the facts presented in support of and against the application. Whatever the decisions in other states may be, this is not an open question in Oklahoma. See *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 865; *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988; *Black v. State*, 3 Okl. Cr. 547, 107 Pac. 524; *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300."

We find nothing in the record which indicates that the trial court abused its discretion touching this matter. We therefore cannot review the action of the trial court in refusing to grant the application for a change of venue.

[2] Second. When this case was first reached for trial on the 29th day of April, 1911, appellant filed a motion for a continuance in which he alleged that on the 15th day of April of the same year he had accidentally shot and killed the deceased, and that he had been incarcerated in the county jail of Garvin county ever since; that his preliminary trial on said charge was not held until the 19th day of April; that appellant

had been attempting to employ lawyers since to act as counsel for him, but that he had only made temporary arrangements with certain lawyers to represent him; and that the lawyers whom he had thus employed have not had time or opportunity to prepare his case for trial.

The homicide occurred at the home of appellant on Saturday afternoon about sundown. Appellant noticed a number of persons passing his house traveling west on said afternoon and believes that some who passed along said road at said time were eyewitnesses to said accidental homicide, and that if given opportunity and time he believed he might be able to produce such witnesses, but he was then unable to give the names and residences of any such persons; that the county court of Garvin county had been continuously in session since the day of the homicide, and the district court had also been in session a greater portion of this time; and that the lawyers whom the defendant had spoken to to represent him had been busily engaged in the trial of causes in said courts and had not been in a position to prepare defendant's case for trial. Supporting affidavits were also filed by counsel who represent appellant showing that said counsel had not been able to prepare for trial. The county attorney filed a replication to the motion for a continuance upon the ground that said motion did not show the nature and materiality of the evidence expected to be obtained, or state any fact that appellant expected to prove by the undiscovered witnesses referred to in said application; that on the 16th day of April appellant procured counsel to represent him who on that day repaired to the scene of the killing and interviewed the eyewitnesses to the transaction; that on the 17th day of April appellant and his wife executed a mortgage securing a fee of \$1,500 to his counsel to represent him, and that on said day said counsel appeared before the examining court in appellant's behalf, but that the trial was postponed to the 19th day of April, at which time his said counsel again appeared and represented appellant; that appellant was arraigned on the 24th day of April and pleaded not guilty and did not seek any postponement of the trial of said cause; that the state had summoned all of the eyewitnesses to said killing, including the immediate members of the family of defendant, and said witnesses were then in court. The court thereupon postponed the trial of said cause in order that appellant and his counsel might have time to prepare for trial. The case was again called for trial on the 30th day of May, 1911, at which time appellant again filed a motion for a continuance.

The material portion of said second motion for a continuance is as follows: "Comes now the defendant, C. F. Edwards, and shows to the court that he cannot safely go

to trial at this term of the court for the reason heretofore stated in his motion for continuance filed on the 29th day of April, 1911; that he here now renews said application as then made for the reason therein set forth, and asks that said motion be considered a part of this motion the same as if it were repeated herein in full; and petitioner further shows to the court that he has been unable to obtain the evidence of the witnesses mentioned in said motion for continuance not through any fault, neglect, or omission on his part; that he has been confined continuously since said date in the county jail of Garvin county, Pauls Valley, and that his attorneys, the firms of Blanton & Andrews, Carr & Field, and Thompson & Patterson, have been continuously occupied in the trial of cases, both civil and criminal, and of all grades in the district court of Garvin county; that they have not had the time within the space allotted by the order of this court postponing the trial hereof to secure the evidence of the witnesses mentioned by reason of being unable to get away from court a sufficient length of time to procure such evidence. Petitioner hereto attaches the affidavits of his said attorneys, and makes the same a part hereof. Petitioner further shows to the court that, if the trial of this cause is postponed to the September term of the district court of this county, he can and will procure the attendance and evidence of said witnesses; that said evidence is material to his proper defense herein; and that he cannot safely go to trial without the same."

This motion is supported by the affidavits of counsel for appellant that they had been so busy in court since their employment that they had been unable to prepare the defense of appellant in this cause. This motion was by the court overruled, to which counsel for appellant excepted. It is not necessary for us to consider as to whether or not the first application for a continuance set up facts sufficient to require the court to grant a postponement of the trial until further investigations could be made. The court did postpone the trial 30 days, and when the case was called for trial on the 30th day of May appellant renewed his motion to continue the cause for the term. The trial court was in a far better condition than this court is to determine whether or not counsel for appellant had had sufficient time within which to prepare for trial. The motion shows that appellant was represented by three of the leading law firms of Garvin county. Certainly it is not unreasonable to presume that some of them, had they so desired, could have made all necessary investigations and preparation for trial. The motion for a continuance does not state the name of any absent witness who might be obtained, nor any facts which could be proven by any unknown witness in the event the case had been continued. No assurance whatever was given that absent witnesses

could or would ever be found, or, if found, as to what their testimony would be. The law requires that an application for a continuance must state the names of the witnesses on account of whose absence a continuance is sought and their place of residence, if known, and the probability of procuring their attendance at a subsequent term, and must also state the facts expected to be proven by such absent witnesses. See *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300. Men who are prosecuted in Oklahoma for crime must understand that this is a very serious business and that the courts cannot be trifled with and will not wait on the convenience of any man, and when a defendant seeks a continuance he must give the court something more than his opinions and hopes; otherwise it would be well-nigh impossible for the trial courts of this state to dispose of the cases before them. See *Musgraves v. State*, 3 Okl. Cr. 421, 106 Pac. 544; *Bryan v. State*, 5 Okl. Cr. 542, 115 Pac. 619. The granting or refusal of a continuance in a criminal case is largely a matter of discretion with the trial court, and this court will not review the action of a trial court in refusing to grant a continuance unless it is shown that there has been an abuse of this discretion. See *Hughes v. State*, 7 Okl. Cr. 117, 122 Pac. 554. In this case Judge Doyle, speaking for the court, said: "The rule is well settled that the granting or refusal of a continuance, particularly for causes not enumerated in the statute, is a matter largely within the sound discretion of the trial court, and nothing but the abuse of this discretion will warrant the appellate court in interfering with the judgment. *Vance v. Territory*, 3 Okl. Cr. 208, 105 Pac. 307."

For the necessary elements of an application for a continuance on the ground of absent witnesses, see *Boswell v. State*, 8 Okl. Cr. 152, 126 Pac. 828.

We think that the application for a continuance in this case was altogether insufficient in failing to set up any legal ground why the case should be continued, and that it was addressed solely to the discretion of the trial court. There is nothing in the record indicating that the trial court abused its discretion in this matter.

[3] Third. F. L. Strickland testified as a witness for the state in the preliminary examining trial of appellant. He was cross-examined by appellant and his testimony was reduced to writing. He was subpoenaed as a witness in behalf of the state for the final trial, and to insure his presence he was required to enter into a recognizance to appear and testify as a witness. When the trial was reached, said witness made default in his recognizance and wholly failed to appear and testify for the state.

It was shown by the state that one J. L. Aldred, a deputy sheriff of Garvin county, made an effort to serve a subpoena on F. L.

Strickland, commanding him to be present at court on May 30th. He went to Ward's and Wren's, the places where witness stayed. He made inquiries of most everybody out there that knew the witness, and nobody had seen him since the Tuesday just preceding; a return was made by him on the subpoena that witness was not found in the state. The subpoena was given him Monday afternoon, the day before the trial. He had subpoenaed witness once or twice before that in this trial, but not for the 30th. It was about 12 miles out to the place he went and back. He visited Ward's and Kercheval's and all those places along out there where persons knew anything about witness. He went west where witness had a crop and had been working all the year. He was gone all afternoon, something like four hours. He made inquiries in town and in the country too, and failed to learn where the witness was. He served a subpoena on Strickland for his appearance in this trial on May 1st; service being made on April 29th. Also served a warrant for his arrest about May 10th, and brought him in, and he was placed under bond as a witness. Strickland claimed to have a crop at Mr. Ward's. Witness testified that Strickland was not around in Garvin county where anybody knew; that he did not know where he was.

T. J. Austin, clerk of the court, swore that Strickland's bond was forfeited for his failure to appear as a witness, that morning; also against the sureties, L. M. Ward and W. M. Wren.

W. M. Wren knew Strickland, saw him last Tuesday afternoon, last about 4 o'clock, at his home. He had made a search for him since then, but could learn nothing of him. He was not in the community where he formerly lived.

L. M. Ward, the other surety, testified that he saw witness last a week ago. He had been sleeping and staying at Ward's house. Strickland told him he was going to Wren's and Ward's brothers and Joe Baur's. He has searched for him, but could not find him. He inquired at his brother's but Strickland did not go there.

Chester Strickland, brother of F. L. Strickland, swore he saw F. L. last Saturday night a week ago at Luke Ward's; does not know where he is. Had not heard of him since then; he was an unmarried man and lived at defendant's home up to the time of the killing; their mother lived at Dewey, Okl.; F. L. did not say anything to him about going to any place.

Upon this showing the court permitted the state to introduce the written testimony of said witness taken at said preliminary trial, to all of which appellant objected and excepted.

In the case of Warren v. State, 6 Okl. Cr. 1, 115 Pac. 812, 34 L. R. A. (N. S.) 1121, this court held that the constitutional provision which guarantees to a defendant the right to

be confronted by the witnesses against him is fully complied with when the defendant has had the opportunity to cross-examine the said witnesses in a preliminary trial before a justice of the peace. When this has been done, and upon a subsequent trial of the said cause, if it is satisfactorily proven that such witnesses have, since the former trial, died, become insane, left the state, or that their whereabouts cannot with due diligence be ascertained, or are sick and unable to testify, the testimony of such witnesses given upon said former trial may be proven upon the subsequent trial.

In the case of McNamara v. State, 60 Ark. 400, 30 S. W. 762, the previous testimony of an absent witness was admitted where it was shown that a subpoena and an attachment had been in the hands of the officers for said witness, and that they had made every effort to find him and were informed by those who knew that he was out of the state.

In the case of State v. King, 24 Utah, 488, 68 Pac. 420, 91 Am. St. Rep. 808, the court said: "The testimony tends to show that the witness could not be found, and the trial court had a right to exercise his discretion in the admission of the testimony, provided he did not abuse such discretion. The reasons given for the absence of the witness were reasonable, and were satisfactory to the trial court. We are not prepared to say that the discretion of the court was improperly exercised."

In the case of People v. Boyd, 16 Cal. App. 130, 116 Pac. 323, the court said: "Where a trial court, in its discretion, admitted the testimony of an absent witness, given at a preliminary hearing, it must be presumed on appeal that the discretion was properly exercised."

In the case of Shackelford v. State, 33 Ark. 539, the previous testimony of an absent witness was admitted upon proof that the witness had been placed under a recognizance which he had forfeited and that he could not be found by the officers after a diligent search.

In the case of People v. Melandrez, 4 Cal. App. 396, 88 Pac. 372, the previous testimony of an absent witness was admitted, where, after considerable search, in and about the place frequented by the witness, the officers had been unable to find him.

In the case of People v. Fish, 125 N. Y. 136, 26 N. E. 319, the previous testimony of an absent witness was admitted, where it was proved that the witness had been subpoenaed. He stated he was going to his sister's and would appear in court. Upon his failure to appear the officers went to his sister's, but could not find him or learn of his whereabouts.

We know of no higher or safer authority than Prof. Wigmore. In volume 2, par. 1405, of his work on Evidence, Prof. Wigmore

says: "If the witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance. Such a disappearance is shown by the party's *inability to find him* after diligent search. The only objection to recognizing this ground of unavailability is the possibility of collusion between party and witness; but supposing the court to be satisfied that there has been no collusion, and that the search has been bona fide, this objection loses all of its force. For *former testimony* this cause of unavailability has long been recognized. It ought equally to suffice for *depositions*."

In the case at bar the evidence fully justifies the conclusion of the trial court that the absent witness had left the jurisdiction of the court for the purpose of avoiding giving testimony against appellant. There is not a single circumstance in the evidence which indicates any collusion between the absent witness and the prosecution. We do not believe that the attorneys who represented appellant are in any manner responsible for the disappearance of this witness. We have not overlooked the fact that this witness previously resided at the home of appellant, and as he was the only eyewitness for the state, and as his testimony was most damaging to appellant, it is safe to assume that his absence was caused by a desire on his part to benefit appellant. If, under circumstances of this character, the state is not permitted to reproduce the testimony of a witness who had previously been confronted by appellant and who testified and was cross-examined fully, then it is within the power of a defendant or his friends to have such a witness leave the jurisdiction of the court and thereby deprive the state of his testimony altogether. This would often result in the miscarriage of justice.

We think the ruling of the trial court in all respects correct in admitting the testimony of the witness Strickland.

[4] Fourth. Counsel for appellant complain of remarks made by the county attorney in his closing argument to the jury. It is not necessary, however, for us to discuss in detail the nature and character of the remarks made, because upon a consideration of the entire record it affirmatively appears that appellant was not injured thereby. If the minds of the jurors had been misled or inflamed against appellant by anything said by the county attorney, they never would have found appellant guilty of manslaughter in the first degree, when the evidence makes out a plain case of a brutal and a cowardly murder.

The facts of this case with unerring certainty point to the guilt of appellant and demonstrate that his defense was a pure and transparent fabrication. A few minutes before the fatal difficulty occurred appellant went to the house and armed himself with an automatic pistol, but claims not to

know why he did this. He wanted the jury and court to believe that while he was quietly and peaceably talking to the deceased, who he claims was his friend, a hound dog came up, and that he (appellant) then drew his pistol from his pocket, declaring that he would shoot the dog, and that thereupon deceased without cause and without saying a word interfered and attempted to take the pistol away from appellant, and that while they were scuffling together for the possession of the pistol they fell over the tongue of the wagon, and the pistol was accidentally discharged, and the deceased was killed. Upon its face this statement is unreasonable, if not absolutely impossible. If it were true that appellant and deceased were scuffling over the pistol when it was discharged, and if it were possible for them to have had their hands in such a position that the wound could have been inflicted upon the deceased as described by the physicians, then they would necessarily have been so close together that deceased would have been badly powder burned from the effects of the shot. The defense of appellant is inconsistent with the physical facts of the case. The testimony shows that there was a fresh wound or bruised place on the face of deceased beneath his right eye which the doctors testified was inflicted prior to death. If this wound was inflicted by the fall of the deceased at the time the shot was fired, he must have fallen on his face; then appellant could not have been in front of him struggling with him for the pistol. All of the facts sustain the testimony of the state's witness Strickland that the deceased and appellant immediately before the shooting had some words with reference to a controversy involving their wives, and that deceased's only offense consisted in stating that his wife had told the truth; that, angered at this, appellant pressed the controversy and drew his pistol with one hand and knocked the deceased down with the other; that deceased made no resistance, but stated to appellant, "You have got me bested"; that then the appellant deliberately shot the deceased while the deceased was sitting upon the wagon tongue and not making any attack whatever upon appellant. It is true that the testimony shows that appellant was more or less under the influence of intoxicating liquor, but that he knew exactly what he was doing, and that he intended to kill deceased conclusively appears from the record. This was therefore a case of murder and was not manslaughter.

Instead of being influenced by improper motives or acting upon prejudice against appellant, the record shows that the jury in great mercy erred in convicting him of a lesser degree of offense than that of which he was guilty.

The jury were evidently influenced in arriving at their verdict by the fact that ap-

pellant and the deceased previous to the homicide had been friends, and by the further fact that at the time of the homicide appellant was more or less under the influence of intoxicating liquor. Yet there is nothing in the testimony to show that appellant was so much under the influence of intoxicating liquors as to be unable to understand the nature and consequences of his act and incapable of forming a premeditated design to take the life of the deceased. On the contrary, the evidence did show that appellant acted deliberately and knew exactly what he was doing. But in this case, as they do in many others, the jury made undue allowances for the weaknesses, frailties, and imperfections of mankind, and found appellant guilty of manslaughter in the first degree when he should have been convicted of murder. But this is an error of which appellant cannot complain, because it inures to his benefit. But it at least shows that the jury were not influenced by improper motives in finding the defendant guilty, and that appellant was not injured by the remarks of the county attorney.

[5] Fifth. A number and variety of other exceptions are presented and argued with great ability and at length in the brief by counsel for appellant. A number of the rulings made by the trial court are subject to the criticisms made by counsel, but we do not think that any of them affect the substantial questions involved in this case, or could have influenced the jury improperly against appellant. By the terms of our statute this court is prohibited from reversing a conviction upon any exception or ruling of the trial court, unless it appears from an examination of the entire record that the appellant was deprived of some substantial right thereby. See *Byers v. Territory*, 1 Okl. Cr. 677, 100 Pac. 261, 103 Pac. 532, and every case decided since by this court in which this question has been mentioned. This is not only the statute law of Oklahoma, but it is fully sustained by reason and justice. We very much doubt if an absolutely flawless trial from a technical standpoint was ever had in a hotly contested case when able counsel appeared for both sides. If convictions are to be reversed upon immaterial errors, the courts would no longer perform the duty of protecting society, but would find themselves practically the protectors of criminals. Wherever a substantial right is involved in a technical rule this court will enforce such rule strictly. But where, as in this case, the appellant is clearly guilty, and none of the errors complained of were calculated to influence the jury to his prejudice, it would be a miscarriage of justice to set aside the conviction.

Judges should always remember that laws are enacted to be enforced, and that penalties are prescribed to be inflicted upon those

who violate the law, and that courts are established and supported by the people solely for the purpose of administering justice and protecting the people in their property and in their lives, and that it is a perversion of their powers and duties for courts to administer the law for any other purpose than that of the protection of society. An appellate court has no right to assume that the trial judge, the county attorney, and the jury have entered into a conspiracy to unlawfully deprive a defendant of his liberty. These persons are all officers of the law and are acting under oath, and every presumption must be indulged in favor of the regularity, good faith, and justice of their action.

[6] Before conviction a person charged with crime is presumed to be innocent. A defendant participates in the selection of the jury, and when a juror is accepted by a defendant he thereby vouches for the intelligence, integrity, and impartiality of such juror, and he is bound thereby unless the contrary affirmatively appears from the record. Therefore, after a jury has found a defendant guilty, the presumption of innocence is destroyed, and upon appeal the counter presumption prevails; that is, that the verdict of the jury is right and that the appellant is guilty. Appellate courts have no right to act as counsel for a defendant and hunt for excuses to set aside the verdicts of juries and the judgments of courts, and no case should be reversed unless it affirmatively appears from the record that the trial court committed material error to the injury of the appellant, or that the jury were influenced by improper motives, or that the verdict is contrary to the evidence. There should be an end to criminal trials, for it is the nearness and certainty of punishment which deters criminals and thereby protects society. This court is unalterably committed to the enforcement of these principles for the purpose of protecting property rights and making human life safe and sacred in Oklahoma.

We find no material errors in the record. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

Ex parte O'DANIELL.

(Criminal Court of Appeals of Oklahoma. May 6, 1913.)

Petition for writ of habeas corpus by Jesse O'Daniell. Writ denied.

S. B. Garrett and S. J. Castleman, both of Altus, for petitioner. The Attorney General, for respondent.

PER CURIAM. The petition for writ of habeas corpus discloses the fact that petitioner is confined in the county jail of Jackson county

under and by virtue of two separate commitments issued on two separate judgments rendered in the county court of said county against him for violations of the prohibition law. The petitioner avers that his imprisonment is illegal, in that the two sentences as a matter of law run concurrently, not being made cumulative by the judgment of the court, and petitioner, having been confined a sufficient length of time to thus execute and satisfy both sentences, is therefore entitled to be discharged.

The record shows the first judgment was rendered at the January term, and the second at the May term. By numerous decisions of this court it has been held that, if the defendant has been convicted of two or more offenses before the judgment and sentence in any one has been executed and satisfied, the imprisonment under one sentence is to commence on the execution of the other, whether or not the judgment and sentence so recites.

Our Penal Code provides (section 2818): "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be." The application of the petitioner fails to show that the judgment and sentence under which he is imprisoned has been executed or satisfied, or that he is entitled to a release.

Hence the writ of habeas corpus is denied.

WOLF v. HUMBOLDT COUNTY.

(No. 2,028.)

(Supreme Court of Nevada. May 2, 1913.)

1. APPEAL AND ERROR (§ 907*)—APPEAL FROM JUDGMENT ALONE—REVIEW—PRESUMPTIONS.

The court, on appeal from a judgment only, will presume that the evidence is sufficient to support the findings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2809, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

2. ACCORD AND SATISFACTION (§ 1*)—ACTS CONSTITUTING—EVIDENCE.

To support a plea of accord and satisfaction, it must clearly appear from the evidence that there was in fact a meeting of the minds of the parties on that point, and the proof may not depend on the construction that may be placed on a statute.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 1-13; Dec. Dig. § 1.*]

3. ACCORD AND SATISFACTION (§ 26*)—ESTABLISHMENT—BURDEN OF PROOF.

A party seeking to avail himself of a plea of accord and satisfaction has the burden of proving clearly a meeting of the minds of the parties, accompanied by a sufficient consideration.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 162-165; Dec. Dig. § 26.*]

4. ACCORD AND SATISFACTION (§ 10*)—CLAIMS AGAINST COUNTY—DISALLOWANCE IN PART—EFFECT OF ACCEPTANCE OF PART ALLOWED.

A party who accepts the amount allowed on his claim against a county, disallowed in part, is not estopped from recovering the part disallowed, unless the acceptance was under

circumstances disclosing a settlement or compromise of the matters in dispute.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 67-74; Dec. Dig. § 10.*]

5. COUNTIES (§ 206*)—CLAIMS—DISALLOWANCE IN PART—EFFECT OF ACCEPTANCE OF PART ALLOWED.

Under Rev. Laws, § 1523, prohibiting actions on a demand against a county, unless first presented to the county commissioners and county auditor for allowance, and providing that where they fail to allow the same, or some part thereof, the claimant may sue, and sections 1535 and 1541, providing that demands against a county must be presented in the form of bills, one having several liquidated claims may put them in one bill, and where specified demands are allowed and others rejected the claimant may accept the amount allowed and sue for the claims disallowed in whole or in part; and a constable presenting monthly bills made up of various items for services rendered, for which the statute prescribes fees, may accept the part allowed and sue for the part disallowed, though in the case of an unliquidated demand the allowance of a part requires claimant to accept the part as satisfaction for the claim, or sue for the entire demand.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325-330; Dec. Dig. § 206.*]

6. SHERIFFS AND CONSTABLES (§ 30*)—COMPENSATION—CONTRACTS—VALIDITY.

The constable of a town, who performs services, the fees for which are fixed by statute, may not accept a greater sum, nor may the county commissioners tender a less sum; and an agreement to accept a greater is illegal, and an agreement to accept a less sum is void, as contrary to public policy.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 47; Dec. Dig. § 30.*]

Appeal from District Court, Humboldt County; L. N. French, Judge.

Action by Phillip H. Wolf against Humboldt County. From a judgment for plaintiff, defendant appeals. Affirmed.

Salter & Robins, of Winnemucca, for appellant. Mack, Green, Brown & Heer, of Reno, for respondent.

McCARRAN, J. This is an action wherein Phillip H. Wolf, the constable of Lake township, Lovelock, Humboldt county, brought suit in the district court in and for Humboldt county to recover on certain claims for services rendered by him, acting as constable of said township. His claims had been presented to the board of county commissioners of Humboldt county, and were by said board disallowed in part. The case was tried in the district court of Humboldt county, with Hon. L. N. French, judge of the Eighth judicial district for Churchill county, presiding. Judgment in the lower court was rendered in favor of the plaintiff, and a lengthy decision in writing was filed by the learned judge. No motion for a new trial was made, and the case comes to this court on appeal from the judgment alone.

In their opening brief counsel for appellant submits but one contention for this court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to determine, namely: "As respondent accepted and was paid the allowance on 10 claims made by the county commissioners, is he entitled to sue for the amounts so disallowed?"

The picture of the 10 claims in question is here given:

Demand.	Allowed For.	Difference.
\$ 222 55	\$ 202 55	\$ 20 00
34 95	32 25	2 70
192 40	54 20	138 00
210 45	166 90	43 55
437 40	427 40	10 00
334 15	318 55	15 60
168 80	166 00	2 80
454 35	28 80	425 55
241 05	139 65	101 40
431 35	250 00	181 35
Total... \$2,727 45	\$1,786 50	\$940 95

[1] Appellant claims that the judgment entered below should be reduced in the sum of \$940.95, for the reason that respondent's acceptance of the part allowed constituted accord and satisfaction, and he is barred from recovering the balance. It is a well-settled rule that on an appeal from a judgment only the reviewing court will presume that the evidence was sufficient to support the conclusions of the trial court. The only thing left for this court to decide is: Did the acts of respondent in accepting the part allowed by the commissioners on the various claims constitute a bar to his suit for that part rejected by the commissioners?

[2] In order to support a plea of accord and satisfaction, it must clearly appear from the evidence that there was in fact and in reality a meeting of the minds in accord and in satisfaction. The conclusion of accord and satisfaction should not be supported by mythical or theoretical reasoning; nor should a matter so important rest upon any finespun argument. Proof of accord and satisfaction should not depend upon the construction that might be placed upon a statute; nor should it be maintained as a pitfall into which the unwary may fall by some act wholly unintended to express his acquiescence in a transaction, wherein his lack of experience or lack of knowledge of technical law might debar him from a right of action—might deprive him of his "day in court."

[3] The general trend of modern decisions indicates that the courts are determined to establish a principle that he who avails himself of a plea of accord and satisfaction must bear the burden of proof; he must establish clearly that there was a meeting of the minds of the parties, accompanied by a sufficient consideration.

[4] Appellant cites the case of *Wapello County v. Sinnaman*, reported in 1 G. Greene (Iowa) 413, *Fulton v. Monona County*, 47 Iowa, 622, and *Brick v. Plymouth County*, 63 Iowa, 462, 19 N. W. 304. These cases were referred to and commented upon in a later case decided by the Supreme Court of Iowa, entitled *Wilson v. Palo Alto County*, reported

in 65 Iowa, 19, 21 N. W. 175. In this latter case the court very properly said with reference to the former decisions: "The general principle on which these cases were decided, and, as we think, upon which all others involving like states of facts must be decided, is this: Unless the party has accepted the amount allowed on his claim, under such circumstances as that a settlement or compromise of matters in dispute between the parties can be inferred therefrom, he is not precluded thereby from maintaining his action for the portion disallowed. If the board of supervisors, in passing upon a claim against the county, should allow a certain per cent. of the whole amount claimed and refuse to allow the remainder thereof, they would thereby say to the claimant, in effect, that his claim, as made by him, was regarded as unjust or invalid, but that they were willing to pay the amount allowed in settlement or compromise of it; and if, with full knowledge of the action which had been taken on his claim, the claimant should, without objection, accept the amount allowed, this should be regarded as an acceptance by him of the terms of compromise offered, and he ought to be precluded from maintaining an action for the portion disallowed. But if the claim should include some items about which there was no dispute between the parties, and others that were denied, and the former should be allowed and the latter rejected, we see no reason for holding that his acceptance of the amount which was not at all disputed should bar his right of action for the items which were denied and disallowed."

We think that this expresses the true trend of modern law and puts a correct interpretation upon the whole principle, and we would go even further, as does the Colorado Court of Appeals (*Rio Grande County v. Hobkirk*, 13 Colo. App. 180, 56 Pac. 993), and say that proof of accord and acceptance in satisfaction must be clear.

Independent of any controlling statutory provisions modifying the law of accord and satisfaction, so far as claims against counties are concerned, there is nothing in this case that amounts in law to accord and satisfaction. We recognize that it is within the power of the Legislature to control the manner of action upon claims against counties. Many of the decisions that have been cited to this court are based upon peculiar statutory provisions of the states from which the decisions are cited.

[5] The section of our general county government act applicable to this case is as follows: "No person shall sue a county in any case for any demand, unless he or she shall first present his or her claim or demand to the board of county commissioners and county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the party feeling aggrieved may sue the county; and if the party su-

ing recover in the action more than the said board allowed, or offered to allow, said board and auditor shall allow the amount of said judgment and costs as a just claim against the county; but if the party suing shall not recover more than the board and auditor shall have offered to allow him or her, then costs shall be recovered against him or her by the county, and may be deducted from such demands." Revised Laws, § 1523; Gen. Co. Gov. Act, § 24.

No other state, so far as we have been able to find, has a similar provision, and this section has not heretofore been construed by this court. In the case of *Russell v. Esmeralda County*, 32 Nev. 304, 107 Pac. 890, which was an action by the constable of Goldfield township for the balance alleged to be owing on account of several claims presented against that county for fees as constable, the question was raised in the final brief of the appellant, under the section cited, *supra*, that, as the plaintiff had accepted and was paid the amount allowed upon the several claims, he was not entitled to sue for the amount disallowed. The question was not raised in the lower court, and hence was not determined in this court.

The effect of section 24, *supra*, depends upon the construction to be placed upon the word "demand" used in that section. By sections 1535 and 1541 of the Revised Laws it is provided that claims or demands against a county must be presented in the form of bills, but no particular form is prescribed for the presentation of the same. Several claims or demands may be included in one or several bills. If the person having several claims or demands puts the same on one bill, each separate demand must necessarily be acted upon by the board of county commissioners. If certain specific demands are allowed and others rejected, we do not think it was the intent of the section of the statute to prohibit the claimant from accepting the amount allowed for the undisputed demands and bringing his action for the demands which have been disallowed in whole or in part. The fees of the constable are fixed by statute, and hence the fees for each service rendered by him in his official capacity constitute a separate item of demand against the county. If there is no dispute as to the service, or as to the performance of the specific official act for which a fee item is claimed, there can be no question as to the amount he is entitled for such service or act. Where, as in this case, the constable presents monthly bills made up of various items for services rendered, for which the statute prescribes a fixed fee, and the board of commissioners allows certain of these items and disallows others, the acceptance of the amount allowed is not a bar to an action upon the demands disallowed. Where there is no dispute as to the services rendered, the fee for the service is a liquidated claim against the county.

In the case of an unliquidated demand against a county, the allowance of a part by the board of commissioners makes it incumbent upon the claimant to accept the part allowed as entire satisfaction for the claim, or sue for the entire amount of the demand.

In the case of *Clarke v. Lyon County*, 7 Nev. 75, the county employed an attorney to represent it in certain litigations. A claim was presented for the reasonable value of services rendered. This was an unliquidated demand, and was disallowed in part only. If there had been an acceptance of the part allowed, it would have been a ratification and a bar to the right of action for the balance.

The appellant contends that respondent should have refused to accept the part allowed by the board, and should have sued for the whole sum. We do not believe that this is sound reasoning. If there was no meeting of the minds by way of compromise, then there was no compromise of the disputed claims; hence the part allowed was only a part of what might be legally due. The very extreme application of the principle of acceptance of a part of a claim being a bar to an action for the balance is expressed by the Supreme Court of Arizona in the case of *Yavapai County v. O'Neill*, reported in 3 Ariz. 363, 29 Pac. 432, and this was rendered in the light of a particular statute. We can see no good reason why one who may be in the service of a county in any capacity, with fixed fees for services, where the county board allows one part of his claim, should be precluded from drawing down the part allowed and submitting his claim for the balance by way of a suit in a court having power to try and determine the controversy along legal lines. In our opinion, the claimant should not be compelled to go without the benefit of the part allowed until the courts might adjudicate his right to the part disallowed, unless it clearly appears that he accepted the amount offered in compromise or satisfaction for the whole, and when that is established his right of action ceases.

In the case under consideration the one question for the court to determine is: Did the acceptance of a part of the claim constitute a bar to an action for the remainder of the claim disallowed by the commissioners? If there had been a compromise voluntarily entered into between the board and Wolf, if there had been a meeting of the minds, wherein the officer had agreed to accept the part received in satisfaction for the whole, if the trial court could reasonably infer that the officer at the time of drawing the warrant took the sum tendered in settlement or compromise, if there had been a reconsideration on the part of the claimant and a voluntary acceptance of the part of his claim in discharge of the whole, then the plea of accord and satisfaction would have been well founded, and under that state of affairs the claimant would have been barred

from maintaining an action for the balance. But it was incumbent upon the appellant, as defendant in the court below, to prove some of these conditions clearly. The trial court found that these requisites had not been proven, and this being an appeal from the judgment only this court is compelled to presume that the evidence presented to the trial court was such as supported the findings of that tribunal. The mere acceptance of the part of an itemized claim allowed, where such items are liquidated, will not debar the claimant from maintaining an action for the items disallowed.

[8] It is scarcely necessary for us to consider the right of the respondent in this case to accept a less sum than that fixed by law as a fee for each particular service rendered, and we do not consider this point particularly vital in this case. Notwithstanding that, however, we may say that, as constable of Lake township, the fees of the respondent for each service performed were fixed by statute. He would have no right to accept a greater sum than that which the law prescribed; nor would the board of county commissioners have the right to tender a less sum than that which the law prescribed for each item of service. The former would be illegal, and the latter would be contrary to public policy; and any agreement that might be entered into between the board of county commissioners and the respondent in this case for the payment and acceptance of a less sum for any particular service than that fee fixed by statute would be void, being contrary to public policy. Mechem's Public Officers, § 377.

The contention of appellant has been ably briefed and presented by Messrs. Robins & Salter, special counsel for the defendant county, and their position is somewhat sustained by a line of decisions setting forth, as we have expressed it, the extreme limits to which a plea of accord and satisfaction may go; but it is our opinion that in this case, as in all others involving the same matters, the broader and more liberal view is supported by a stronger reasoning expressed in the more modern line of decisions.

The judgment of the trial court is affirmed.

WHISE v. WHISE. (No. 2,023.)

(Supreme Court of Nevada. May 3, 1913.)

1. JUDGMENT (§ 337*)—SETTING ASIDE—LIBERAL CONSTRUCTION OF STATUTE.

Comp. Laws, § 3163, permitting the court, in furtherance of justice, upon just terms, to relieve a party from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect, should be very liberally construed in furtherance of its purpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 665; Dec. Dig. § 337.*]

2. DIVORCE (§ 151*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The fact that plaintiff moved from the state after rendition of a judgment of divorce in his favor could not be considered as newly discovered evidence affecting the material issues in an action for divorce for cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 500-513; Dec. Dig. § 151.*]

3. DOMICILE (§ 4*)—RESIDENCE—INTENTION.

Residence is a matter of intention.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-23; Dec. Dig. § 4.*]

4. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF WITNESSES.

Newly discovered evidence, which could only be used by way of impeachment, is not ground for granting a new trial, unless evidence of the witness sought to be impeached was so important, and the impeaching evidence so convincing, that a different result would necessarily follow the admission of the impeaching evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 220, 227; Dec. Dig. § 108.*]

5. NEW TRIAL (§ 103*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

The alleged newly discovered evidence must be material or important to the party seeking a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. § 103.*]

6. NEW TRIAL (§ 103*)—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence on a matter collateral to the issues is seldom ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. § 103.*]

7. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—WEIGHT.

In order to compel the granting of a new trial, newly discovered evidence must be so strong as to make it probable that a different result would be obtained in another trial; it not being sufficient merely that it "might" change the result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 220, 227; Dec. Dig. § 108.*]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by Melchior Whise against Esther Whise. From an order granting defendant permission to amend her notice of motion for new trial, plaintiff appeals. Reversed.

Huskey & Springer, of Reno, for appellant. Mack, Green, Brown & Heer, of Reno, for respondent.

MCCARRAN, J. In this case Melchior Whise instituted an action for divorce against Esther Whise in the district court of the Second judicial district. The case was tried by the court on the 8th day of June, 1911, judgment was rendered in favor of the plaintiff, appellant herein, and on June 20, 1911, a decree of divorce was granted to the plaintiff on the ground of extreme cruelty.

By order of court, as appears from the statement on appeal, the time in which for defendant to file her notice of intention to move for a new trial was extended, and on August 5, 1911, within the time allowed by

the court, the defendant, through her attorneys, filed her first and original notice of intention to move for a new trial.

The notice, as filed August 5th, is set out in full in the statement on appeal, and is based upon three separate grounds, to wit: First, insufficiency of the evidence to justify the decision of the court; * * * second, that said decision is against the law; and, third, errors of law occurring at the trial and excepted to by the defendant.

The matter seems to have rested in abeyance until the 13th day of December, 1911, on which date, and after the expiration of the time allowed by the court for filing the notice of intention, the defendant filed notice of motion for an order permitting her to amend the former notice by adding a new ground thereto, to wit: "Fourth, newly discovered evidence material for the defendant, which she could not with reasonable diligence have discovered and produced at the trial."

The hearing of the motion for permission to amend was had and determined on the 1st day of April, 1912. At the conclusion of the hearing the court made the order granting defendant permission to amend her original notice of intention by adding the fourth ground, i. e., newly discovered evidence. The plaintiff, having resisted the motion to amend in the court below, and having entered his exception, comes here on appeal from the order granting defendant the right to amend.

The time in which defendant, respondent herein, should have filed her notice of intention to move for a new trial had unquestionably expired, but having previously filed her original notice of intention within the time allowed the question is: Was it abuse of discretion, in view of the showing made, to permit her to file, as an amendment, a fourth ground, namely, newly discovered evidence?

[1] Section 3163 of the Code, in the light of which this case must be considered (Cutting's Compiled Laws), sets forth: "The court may, in furtherance of justice, * * * upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." This is in the nature of a remedial statute; its object was to relieve litigants who through some inadvertence, such as is common to mankind, might be deprived of a hearing upon the merits through their unintentional failure to bring themselves within a rule. Statutes such as this were intended to relieve the harshness of rigid form by applying the flexibility of discretion. The various text-writers and many of the recent decisions dwelling on the subject of remedial statutes have expressed themselves as favoring very liberal construction on the application of such statutes. Lewis'

Sutherland, *Statutory Construction*, § 717; *Black's Interpretation of Law*, p. 311.

This court, in the case of *Sherman v. Southern Pacific*, 31 Nev. 290, 102 Pac. 259, speaking through Mr. Justice Sweeney, said: "It seems clear to us that the Legislature of Nevada, in passing this remedial statute, had in mind the necessity of having a provision wherein, in proper cases, upon a proper showing of excusable neglect, surprise, mistake, or inadvertence, in the interests of justice, and that a full determination of litigants' rights should be received, trial courts should, in proper cases, be permitted to grant relief by giving a further extension of time to counsel thus aggrieved, if properly applied for."

In considering decisions of the various courts on subjects bordering upon the one under consideration, we find none that have gone so far as has this court in the case of *Sherman v. Southern Pacific*, supra. The advanced and liberal policy of the court, as expressed in that case, is supported in other well-considered decisions, and gives the true expression to the fact that the first place to secure judicial reform is from the bench itself. In fact, we believe it is and should be the trend of modern law that in matters of procedure and pleading, where the interests of justice demand, the court should have full power to disregard technicalities minutely prescribed by statute, and should be invested with authority throughout all of a proceeding to ignore any excusable neglect or inadvertence or defect, where such may arise or exist without affecting the material rights of the parties. This power, however, should only be exercised where the showing clearly justifies, and it is that question, as applicable to the case at bar, that we will now consider.

In the *Sherman Case*, supra, the affidavit of the attorney for the moving party sets forth such things as would most properly entitle the court to grant the relief prayed for. There were the uncontradicted facts of pressing and urgent business and the serious illness of the wife of the attorney for the moving party. Together with that there was manifest diligence displayed on the part of the attorney by proper motion in the district court. This, together with the showing made, indicated clearly inadvertence and excusable neglect; but in the case under consideration there is no showing that would indicate either surprise, inadvertence, or excusable neglect, and what is more the record indicates a lack of diligence in pressing the original motion to a hearing. The notice of motion to amend reads as follows:

"Melchior Whise and Messrs. Huskey & Springer, His Attorneys: You will please take notice that on Saturday, the 3d day of December, 1911, at the hour of 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, defendant will move the court for an order permitting defendant

to amend her notice of motion of intention to move for a new trial, filed and served herein on the 5th day of August, 1911, by inserting in said notice the following fourth and additional ground upon which said motion will be made, to wit: 'Newly discovered evidence material for the defendant, which she could not with reasonable diligence have discovered and produced at the trial.'

"Said motion will be made upon the ground that, since the said notice of intention to move for a new trial was filed and served herein, the plaintiff, Melchior Whise, has left the state of Nevada and returned to the city of Chicago, state of Illinois, and has there resumed his residence and the practice of his profession, and that the said city of Chicago is now the permanent residence of the said plaintiff, and that at the trial of the above-entitled action said plaintiff testified that he had taken up his permanent residence at the city of Reno and intended to remain in said city of Reno, state of Nevada, in the permanent practice of his profession here, and that the fact that shortly after the judgment in this case was rendered the said plaintiff returned to the city of Chicago, which had been his home within six months and two days prior to the commencement of his action, shows that he did not take up his residence in the city of Reno, state of Nevada, in good faith, for the purpose of becoming a permanent resident, and that his testimony in that behalf was false, and that the fact of the plaintiff's return and resumption of his residence and the permanent practice of his profession in the city of Chicago, state of Illinois, could not be known to defendant at the time of the filing and service of intention to move for a new trial, and that the failure to include among the grounds of such motion the newly discovered evidence herein referred to constitutes excusable neglect on the part of the defendant. * * *

The affidavit of George S. Brown, one of the attorneys for the moving party, filed in support of the motion, sets forth the substance of plaintiff's testimony at the trial, relative to his residence and his intention of residence, and further sets forth, in substance, that the testimony of Whise given at the trial, relative to his intention of making Reno his permanent residence, was false, and that his having moved from the state and taken up the practice of his profession in the city of Chicago is indicative of its falseness.

[2, 3] In her motion to amend it will be observed that the respondent used the following words: "The fact that shortly after the judgment in this case was rendered the plaintiff returned to the city of Chicago, which had been his home within six months and two days prior to the commencement of this action, shows that the plaintiff did not take up his residence in the city of Reno, state of Nevada, in good faith, for the

purpose of becoming a permanent resident, and that his testimony in that behalf was false." The fact, if it be a fact, that Whise moved from the state of Nevada after the rendition of a judgment and the filing of the decree could not, we think, be considered as newly discovered evidence that would affect the material issues of the case. Residence is a matter of intention, and has been generally so held. Both parties to this action had submitted themselves to the jurisdiction of the trial court, in which court there had been a trial and determination of all of the issues, and at the conclusion of the controversy either party had the right to go wherever he or she saw fit. Moreover, the act or acts of appellant in moving to another state after the termination of the litigation could, at best, be only considered as impeachment of his testimony given at the trial of the case, and then an impeachment by inference only. In fact, as shown from the motion itself, the defendant seeks only to use such evidence for the purpose of impeaching the testimony of the plaintiff, Whise, at the trial.

[4] By a strong line of authorities it has been held that, where newly discovered evidence could serve only the purpose of impeachment, it will not constitute grounds that will warrant the court in granting a new trial. If, from the nature of the evidence that the moving party seeks to rely upon as disclosed by their motion and affidavits, it is apparent no purpose can be served other than the impeachment of the testimony of an adversary, or a witness of the adverse party, a new trial should not be granted, unless the testimony of the witness sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing, that a different result must necessarily follow. It follows that an amendment, by inserting the new ground of newly discovered evidence, offered after the time had expired, should not be permitted, where the evidence that might be offered by reason of the amendment could not warrant the court in granting a new trial.

[5-7] Newly discovered evidence, to have any weight in the consideration of a trial court, must be material or important to the moving party. Evidence on a matter collateral to the issue is seldom grounds for a new trial, and it is not sufficient that the new evidence, had it been offered in the trial, might have changed the judgment. It must be sufficiently strong to make it probable that a different result would be obtained in another trial. The new evidence must be of a decisive and conclusive character, or at least such as to render a different result reasonably certain.

The evidence sought to be relied upon in this instance, the nature of which was set forth in the motion and the affidavits, was clearly for the purpose of impeachment only.

It was not such as should or would render a different result probable on a retrial of the case. Hence there would be no material rights lost to the moving party by denying the motion to amend, in that the evidence to be introduced by reason of the amendment could avail the moving party nothing, and the proposed amendment would serve no purpose. On the other hand, the granting of the motion might work great annoyance to the adverse party, and would be sure to result in delay and involved litigation.

Had the motion to amend been made within reasonable time and been supported by a showing clearly indicating inadvertence, surprise, or excusable neglect, and had there been a manifestation of due diligence of the moving parties, and had the nature of the evidence sought to be relied upon been such as would warrant the court in entertaining it in furtherance of their motion for a new trial, the court might, in the light of the decision of this court in the *Sherman Case*, supra, have permitted the amendment. But in this case, as indicated by the motion and by the several affidavits in support thereof, all of these essential elements were lacking, and we think that it was an abuse of discretion on the part of the trial court to permit the amendment after the time had expired, in view of the showing made.

The order appealed from is reversed.

TALBOT, C. J., and NORCROSS, J., concur.

WEBB v. STATE.†

(Supreme Court of Arizona. May 1, 1913.)

1. CRIMINAL LAW (§ 1178*) — APPEAL — ASSIGNMENTS OF ERROR—WAIVER.

Assignments of error which appellant does not argue in his brief will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

2. LARCENY (§§ 40, 47*)—INDICTMENT—VARIANCE—OWNERSHIP OF PROPERTY.

Under an indictment charging larceny from a corporation, it was sufficient to prove that the owner was a corporation de facto doing business as such; and hence its articles of incorporation, although not in full compliance with the law, were admissible as tending to show its de facto existence.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126, 139, 160; Dec. Dig. §§ 40, 47.*]

3. LARCENY (§ 47*) — EVIDENCE — OWNERSHIP OF PROPERTY.

On a trial for larceny from a corporation, its articles of incorporation and evidence that S. was its president and secretary were sufficient evidence of its existence as a corporation to justify the admission of evidence of its ownership of the stolen property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 139; Dec. Dig. § 47.*]

4. LARCENY (§ 47*) — EVIDENCE — OWNERSHIP OF PROPERTY.

On a trial for larceny of cattle, a bill of sale of the cattle was admissible to show owner-

ship in the party alleged in the indictment, although recorded in the office of the live stock sanitary board after the date the offense was committed, notwithstanding Laws 1906, c. 51, § 63, providing that every person, firm, etc., owning range horses, cattle, etc., may adopt a brand and earmark; that the right to use for branding and marking range animals a brand adopted as therein provided and recorded as therein required shall be deemed the property of the person so designing, adopting, and recording the same, and may be sold and transferred; and that no sale, transfer, or incumbrance of the right to use such brand shall be valid, unless evidenced by a written bill of sale recorded in the office of the secretary of the live stock sanitary board—the purpose of that section being to compel those transferring brands and marks to adopt a method of notifying others of the true ownership thereof, and the statute having no reference to the sale of animals.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 139; Dec. Dig. § 47.*]

5. LARCENY (§ 47*) — EVIDENCE — OWNERSHIP OF PROPERTY.

Under Laws 1906, c. 51, providing that brand tax receipts shall be prima facie evidence that the owner of the brand has complied with provisions of that section for the year ending July 1st following, section 67, making it unlawful to use any brand upon which the tax has not been paid, and providing that live stock freshly branded with any such brand shall be subject to seizure and confiscation, and section 68, providing that the brand of the owner who has complied with the provisions of that act, borne by a range animal, shall be taken as prima facie evidence that the animal bearing it is the property of the owner of such brand, a brand tax receipt issued May 6th was admissible on a trial for a larceny committed prior to that date as prima facie evidence that the holder of the receipt was the owner of the brand set forth therein, and had complied with provisions of that act at all times prior to the 1st of July following, and with a bill of sale of such brand to such party was prima facie evidence that the animal bearing the brand was the property of such owner.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 139; Dec. Dig. § 47.*]

6. WITNESSES (§ 398*) — IMPEACHMENT — LAYING FOUNDATION.

On a criminal trial the testimony of a witness, given on a preliminary examination, could not be contradicted and impeached without laying a foundation therefor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1267, 1274, 1275; Dec. Dig. § 398.*]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

W. D. Webb was convicted of larceny, and he appeals. Affirmed.

Reese M. Ling, of Phoenix, for appellant. G. P. Bullard, Atty. Gen., Leslie C. Hardy, Asst. Atty. Gen., P. W. O'Sullivan, Co. Atty., Jos. H. Morgan, Asst. Co. Atty., J. Ralph Tascher, and E. S. Clark, all of Prescott, for the State.

SHUTE, J. The appellant, W. D. Webb, was indicted by the grand jury of Yavapai county on the 3d day of May, 1911, for the crime of grand larceny, committed on December 12, 1910, by stealing a neat animal, the property of the J. W. Sullivan Cattle, Land

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 6, 1913.

& Water Company, a corporation. He was tried and found guilty. Defendant appeals from the judgment of conviction and the order overruling his motion for a new trial.

[1] He assigns as error, first, the admission of the articles of incorporation of the J. W. Sullivan Cattle, Land & Water Company; second, the admission of a bill of sale from J. W. Sullivan to the J. W. Sullivan Cattle, Land & Water Company; fourth, the admission of a brand tax receipt for the year ending June 30, 1912, over the objection of the defendant; fifth, the ruling of the court in refusing to permit witnesses to testify for the purpose of contradicting and impeaching the deposition of one William Dougherty; and 3, 6, 7, 8, and 9 are assignments of error which appellant concedes are determined by the disposition of the other assignments, and are not argued in the brief and will not be considered. *Bail v. Hartman*, 9 Ariz. 321, 83 Pac. 358; *Mayhew v. Brislin*, 13 Ariz. 109, 108 Pac. 253; *Southern Pac. Co. v. Richey*, 13 Ariz. 67, 108 Pac. 225.

[2] The first assignment of error is the admission of the articles of incorporation of the J. W. Sullivan Cattle, Land & Water Company, a corporation, over the objection of appellant; he claiming that, inasmuch as the articles of incorporation did not contain the names of the incorporators, etc., and the record revealing that the articles of incorporation complained of were couched in the ordinary language, that "we, the undersigned," etc., at the bottom of which were signed the names of those purporting to be the incorporators of the company. Such articles were inadmissible.

It was proved by the evidence that the company known by the name given in the indictment was a corporation de facto and doing business as such. It is now generally conceded by the great weight of authority that it is sufficient to establish that a corporation de facto exists to maintain an allegation of ownership in a corporation in larceny cases; and to establish that fact the introduction of its proposed articles of incorporation, whether in full compliance with the law of incorporation or not, would be a step in proving its de facto existence; hence the trial court did not err in admitting the articles complained of. *People v. Hughes*, 29 Cal. 258; *Jones on Evidence*, par. 55; *People v. Frank*, 28 Cal. 507; *People v. Barric*, 49 Cal. 344; *Spring Valley W. W. v. San Francisco*, 22 Cal. 441. And the general rule is very well expressed in 3 *Encyc. of Evidence*, page 594, as follows: "Should the prosecution for an offense committed on the property of corporations prove that the corporation was a de facto corporation, doing business as such under the corporate name set out in the indictment, it is sufficient; it is not necessary it should be proven to be a corporation de jure."

[3] The second assignment of error is the

admission of the bill of sale from J. W. Sullivan to the Sullivan Cattle, Land & Water Company, over the objection of appellant, when the J. W. Sullivan Cattle, Land & Water Company had not been shown to be a corporation under the laws of this state; secondly, for the reason that the purported bill of sale was undoubtedly filed, and was recorded, in the office of the live stock sanitary board of Arizona on the 5th day of May, 1911, which was after the date of the alleged commission of the offense, and could not be any evidence of the ownership prior to the date of its filing in the office of the live stock sanitary board.

The first objection is disposed of by the fact that a certain copy of the articles of incorporation of the J. W. Sullivan Cattle, Land & Water Company is in evidence; and the record further shows that J. W. Sullivan was president and secretary of the corporation. We think that is sufficient. *People v. Hughes*, 29 Cal. 258.

[4] The second objection calls for a consideration of Act 51 of the Laws of Arizona 1905, § 63, which is as follows: "And every person, firm, association, or corporation owning range horses, mules, asses, or neat cattle, sheep or goats in this territory, may design and adopt a brand and earmark with which to brand and mark their animals. No two or more brands of the same design or figure, and no two or more earmarks of the same kind, shall be adopted or recorded. The right to use for branding and marking range animals a brand or earmark designed and adopted as herein provided, and which shall have been recorded as hereinafter in this act prescribed, shall be deemed to be the property of the person so designing and adopting and recording the same, and such right may be sold and transferred. No sale, transfer, or incumbrance of the right to use such brand or mark shall be valid, however, except it be evidenced by a written bill of sale, duly signed and acknowledged, as deeds for the conveyance of real estate are required to be acknowledged, and recorded in the office of the secretary of the live stock sanitary board."

This section is one adopted for the protection of those owners of range horses, mules, asses or neat cattle, sheep or goats, who may design and adopt a brand or earmark with which to mark or brand their animals, and when adopted and recorded as provided by law shall be deemed the property of him who so designs and records such brand or mark, which right may be sold and transferred. The statute provides that no such sale, transfer, or incumbrance "of the right to use" such brand or mark shall be valid, unless it be evidenced by written bill of sale properly signed, acknowledged, and recorded in the office of the secretary of the live stock sanitary board. There is nothing in this section that by direct application would prevent one

from selling animals which probably had upon them brands that were not recorded and could not have been recorded; for it must be conceded there are to-day, and always will be, thousands of such animals upon the range, to say nothing of other possessions under the same conditions, that should be entitled to protection. This whole statute is one for the benefit and protection of the live stock industry, and fixes the place for the recording of brands and marks in the live stock sanitary board, and the above section is only for the purpose of compelling those transferring brands and marks, when so transferred, to adopt a method of notifying others of the true ownership of such brand and mark. Other similar statutes have been construed by this court in *Brill v. Christy*, 7 Ariz. 217, 63 Pac. 757, and *Epperson v. Crozier*, 10 Ariz. 30, 85 Pac. 482. In the latter case it was held, where a bill of sale complying with the provisions of section 27, Act 6, Session Laws of 1897, is made sufficient evidence of the sale, and where the penalty of being prima facie a thief is attached to the one holding the animals under bill of sale not complying with the act, such bill of sale is admissible as evidence of a sale. Not only from a reading of this statute, but from the construction placed upon similar statutes by this same court, it seems to us clear that the statute under consideration had no reference to the sale of animals, and was admissible as evidence of ownership.

[5] The fourth assignment of error challenges the authority of the trial court to receive in evidence, over the objection of the defendant, a brand tax receipt issued May 6, 1911. The appellant very strenuously contends that because the offense was charged and proved to have been committed in December, 1910, that the brand tax receipt should not have been received in evidence; for, having been issued at a time subsequent to the proving of the commission of the offense, that about all that would be proved was that at the time of the commission of the offense the owner thereof had transferred all right and title to the use of the brand by virtue of section 22 of Act 28, Session Laws of 1903. This point is not well taken, as the act above cited was superseded by chapter 51 of the Laws of 1905; the subdivision directly affecting this matter being section 67, which provides that a noncompliance with the tax provided therein only works a confiscation of freshly branded animals under the law. The appellant, in support of his contention, cites several cases drawn from the Texas statute, which provides "that no brands, except such as are recorded by the officers named in this chapter, shall be recognized in law as any evidence of the ownership of the cattle, horses or mules upon which same may be used." Article 4930, Rev. Civil Statutes 1895. We have no such statute. On the contrary, our law provides: "Said receipt shall be prima facie evidence that the owner

of said brand or earmark has complied with the provisions of this section of this act to the year ending the first day of July next after the date of said receipt, and as well for all years preceding the date of said receipt." Laws 1905, c. 51, § 66. It would thus seem that the issuance of the receipt would be, by provision of law, prima facie evidence of a compliance with the brand law, not only up to the 1st day of July, but as well for all years preceding the date of the receipt. Therefore the issuance of the receipt, dated May 6, 1911, was prima facie evidence that the J. W. Sullivan Cattle, Land & Water Company was the owner of the brand set forth in the receipt, and had complied with the provision of the act up to the 1st day of July, 1911, and was prima facie evidence of a full compliance of the law for all time prior to May 6, 1911. Section 68 of Act 51, Laws of 1905, provides: "The brand or earmark of the owner thereof, who has complied with the provisions of this act, borne by a range animal, shall in all courts in this territory be taken as prima facie evidence that the animal bearing the same is the property of the owner of such brand or mark." Therefore the bill of sale introduced, showing that J. W. Sullivan had transferred such brand to the J. W. Sullivan Cattle, Land & Water Company, taken together with the receipt, which shows a full compliance with all the law applicable to the subject for the year ending June 30, 1912, became prima facie evidence that the animal bearing the brand was the property of the J. W. Sullivan Cattle, Land & Water Company. The trial court therefore did not err in admitting the said receipt in evidence.

[6] The fifth assignment of error is the refusal of the trial court to permit the appellant to impeach the testimony of a witness, given at a preliminary examination, without having first laid the foundation therefor. There is some conflict in the decisions upon this question, but the great weight of authority is in favor of the ruling of the trial court. *Wigmore on Evidence*, par. 1032; 7 *Encyclopedia of Evidence*, 100; *People v. Compton*, 132 Cal. 484, 64 Pac. 849; *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668; *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247; *Baker v. Sands* (Tex. Civ. App.) 140 S. W. 521. In the latter case the authorities are quite fully collected and ably discussed.

This disposes of the entire assignments of error complained of by the appellant, and there appearing no error the judgment of the superior court is affirmed.

FRANKLIN, O. J., and CUNNINGHAM, J., concur.

N. B.—Judge ROSS being disqualified, and announcing his disqualification in open court, the remaining Judges, under section 3 of article 6 of the Constitution, called in Hon.

G. W. SHUTE, Judge of the Superior Court of the State of Arizona, in and for the county of Gila, to sit with them in the hearing of this cause.

THOMAS v. BARTLESON.†

(Supreme Court of Arizona. May 5, 1913.)

APPEAL AND ERROR (§ 671*)—QUESTIONS REVIEWABLE—APPEAL FROM JUDGMENT ALONE.

On appeal from the judgment alone, only errors appearing upon the judgment roll will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

Appeal from District Court, Pinal County; before Justice Edward Kent.

Action by Susan M. Bartleson against Emline T. Thomas. From a judgment for plaintiff, defendant appeals. Affirmed.

Alexander & Christy, of Phoenix, for appellant. Kibbey, Bennett & Bennett, of Phoenix, for appellee.

BAXTER, J. This action was instituted by S. M. Bartleson against appellant for partition of personal property. It was tried before the court with a jury. The verdict of the jury found the issues in favor of appellee, upon which judgment was entered decreeing a partition of the property in kind—one-half thereof to be assigned and allotted to the defendant, and one-half to the plaintiff. From this judgment the defendant appealed.

The appellant assigns several errors, as follows: (1) The admission of evidence over objection. (2) That the verdict and judgment are not supported by the evidence. (3) That the judgment is contrary to the law. (4) The court erred in denying defendant's motion to direct a verdict for defendant. (5) The court erred in denying the defendant's motion to set aside the verdict and grant a new trial.

The assignments are full and complete, conforming in that regard to the rules of the court. Our statement of them is an abbreviation, but indicates what they are. All of these assignments are such as require of this court an examination of the evidence, in order to determine whether error was committed in the trial court or not. The first, second, fourth, and fifth errors complained of grow out of the evidence or lack of evidence, and the appellant's elaboration of the third assignment shows that an examination of the evidence is necessary.

The appellant does not appeal from the order of the court overruling her motion for a new trial. The appeal is from the judgment alone. Following the rule laid down in *Arizona Eastern R. Co. v. Globe Hardware Co. et al.*, 129 Pac. 1104, and *Miami Copper Co. v. Strohl*, 130 Pac. 605, only er-

rors appearing in the judgment roll are before us.

No error appearing in the judgment roll, the judgment of the trial court is affirmed.

CUNNINGHAM and ROSS, JJ., concur.

FRANKLIN, C. J., being disqualified, and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. FRANK BAXTER, Judge of the Superior Court of the state of Arizona, in and for the county of Yuma, to sit with them in the hearing of this cause.

BALL v. CRUM et al.

(Supreme Court of Arizona. Oct. 9, 1912. On Rehearing, May 3, 1913.)

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

Action by G. W. Ball against C. B. Crum and others. From a judgment for defendant on a counterclaim, plaintiff appeals. Affirmed on rehearing.

John McGowan, of Safford, for appellant. George H. Crosby, Jr., of Safford, for appellees.

CUNNINGHAM, J. The action is founded on a promissory note, and the complaint is in the usual form. The defense confesses the making and delivery of the note, and seeks to avoid liability by pleading in set-off a counterclaim arising from a breach of warranty of title to certain goods, chattels, and one-eighth interest in an irrigation ditch and one-eighth interest in a water right. The consideration for the purchase of said property was \$1,000, of which the note in suit formed a part. In said transaction of sale and purchase the plaintiff was the seller and warrantor, and S. P. Crum, one of the defendants, was the purchaser. A counterclaim arising out of the same transaction as the note, although for unliquidated and uncertain damages, is a proper subject of set-off by the express provisions of paragraph 1364, Civil Code of Arizona 1901, and may be pleaded as such in an action enforcing payment of such note. Whether the joint makers of a promissory note can relieve themselves from liability on the note by pleading in set-off an individual defense of one of their number, a defense not applicable equally to all makers, is a question we do not consider necessary to decide in order to dispose of this appeal.

The conveyance from the plaintiff to defendant S. P. Crum was in writing and acknowledged, and contains this express covenant of warranty: " * * * I do * * * agree and covenant to and with the second party * * * to warrant and defend the sale of said property * * * against all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied June 11, 1913.

and every person whomsoever lawfully claiming or to claim the same." The defendants pleaded this covenant in its legal effect in these words: "And did by said bill of sale warrant that the said plaintiff had a good title in fee simple to the said interest in said ditch and water right." Defendants assign a breach of the covenant of warranty, as follows: "That the plaintiff was not then and there the owner of but one-twelfth interest in said ditch and water rights, and that J. N. Ethridge then and there was the lawful owner in fee simple of the one-third of the one-eighth interest which the plaintiff * * * purported to convey to defendant S. P. Crum." We will treat this pleading, for the purpose of this appeal, as sufficient to present the issuable facts setting up an hostile and irresistible, lawful and paramount title in another at the date of the conveyance to said defendant.

Upon the trial of these issues, defendants were permitted to prove a parol contract between plaintiff and J. N. Ethridge, whereby plaintiff agreed to convey to Ethridge a one-third of his one-eighth interest in the ditch and in the water right, when plaintiff should procure title to his homestead entry, in consideration that Ethridge pay a third part of the expenses of a pending litigation involving said property, and furnish a third of the work in the construction of the ditch. The same contract, in effect, was at the same time made between defendant C. B. Crum and Ethridge, except as concerning the time and condition when the conveyance should be made. In pursuance of such contract with plaintiff and C. B. Crum, Ethridge did the work and paid the expenses. No written conveyance was made of the interest, and on demand therefor plaintiff refused to deliver a deed until his homestead title was perfected. No evidence was offered so far as the record discloses that such homestead title has ever been perfected. The parties to this action have stipulated that defendant S. P. Crum, at the time of his purchase and conveyance, had no notice of the transaction with or the claim of Ethridge to an interest in the property. The stipulation goes further, and to the effect that no other evidence in support of the defendants' counterclaim was offered than the testimony of witness J. N. Ethridge. The above is the substance of that testimony.

The court considered this evidence applicable to the issues, and considered the evidence established in J. N. Ethridge a legal and paramount title to the property claimed by him, thus establishing a breach of warranty and an eviction of defendant, and rendered judgment for the defendants for their costs. From which judgment and from an order denying plaintiff's motion for a new trial plaintiff presents this appeal, and assigns, among other errors, that the judgment fails to conform to the pleadings and the nature of the case proved.

This evidence produced in support of the allegation of legal paramount title of J. N. Ethridge to the lost interest could have no effect to establish other than an equitable right of action against plaintiff Ball in favor of Ethridge to enforce a specific performance of the parol contract to convey when Ball should acquire his perfect homestead title. The stipulation goes further, and extinguishes that right in that form of action, because S. P. Crum had no notice of such equitable claim at the time of his purchase, and without actual or constructive notice of such claim his title would not be affected thereby, and by a conveyance of all his interest in the property, the plaintiff has made it impossible to perform his parol contract; and for redress of his wrongs in this particular Ethridge must resort to some other remedy. A right of action in Ethridge against plaintiff is no defense for defendants to a suit on the note. The obligation of warranty is not that he is the true owner or that he is seised in fee with the right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons thereafter asserted. The covenant of general warranty is broken by eviction under a lawful and paramount title (11 Cyc. 1121), and the covenantee, when he has submitted to the claim without actual eviction by a judgment of court, must plead and prove that another person is in some manner asserting an irresistible paramount title. The evidence appearing in the record fails to support such allegation. The claim of Ethridge is no title when asserted against the title of S. P. Crum, a purchaser without notice, and the defendants, having the burden of sustaining their defense, have produced no evidence of a breach of warranty entitling them to a set-off.

The judgment complained of is not supported by the evidence, and it is reversed, and the cause is remanded to the superior court, with instructions to vacate the judgment, and render judgment for the plaintiff as prayed.

FRANKLIN, C. J., and ROSS, J., concur.

On Rehearing.

PER CURIAM. At the former hearing of this case we went into the whole case as upon an appeal from the judgment and order overruling the motion for a new trial. Upon this rehearing our attention for the first time has been called to the fact that the appeal is from the judgment alone.

The pleadings disclose that it is a suit upon a promissory note. The defendants' answer set up a counterclaim in the nature of a recoupment of damages. Defendants had judgment in the trial court. No error is assigned as against the judgment roll, nor have we discovered any error therein.

Judgment is affirmed.

In re ANDERSON'S ESTATE†

HOUCK v. ANDERSON.

(Supreme Court of Arizona. April 28, 1913.)

1. WILLS (§ 100*)—JOINT AND MUTUAL WILLS.

An instrument executed by husband and wife owning community property and having no issue, whereby each gave to the other all his or her interest in the property, effective on his or her death with remainder over after the death of the survivor to the heirs at law of both, is a joint and mutual will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 238; Dec. Dig. § 100.*]

2. WILLS (§ 191*)—REVOCATION—MARRIAGE OF TESTATOR.

Under Civ. Code 1901, par. 4216, providing that, if after making a will the testator marries and the wife survives, the will shall be revoked unless provisions have been made for her by marriage contract, or unless she is provided for in the will, or is mentioned therein, so as to show an intention not to revoke, a will is revoked by the marriage of testator subsequent to the execution of the will provided the wife survives, in the absence of provisions for her in a marriage contract or in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. § 191.*]

Appeal from Superior Court, Graham County; G. W. Shute, Judge.

Proceedings by Violet Houck for the probate of the will of Peter Anderson, deceased, in which Ruth Anderson appeared and opposed the probate. From a judgment of the District Court rejecting the will rendered on appeal from a judgment of the Probate Court allowing the will, proponent appeals. Affirmed.

W. K. Dial, of Safford, for appellant. Stratton & Lynch, of Safford, and Kibbey, Bennett & Bennett, of Phoenix, for appellee.

ROSS, J. [1] Peter Anderson and Isabell Anderson, husband and wife, on the 25th day of August, 1902, being the owners of certain community property and having no issue, made and executed an instrument, bearing some of the characteristics of a deed, but clearly indicating by its recitals a testamentary purpose, inasmuch as it was to have no effect until after the death of the testators. Counsel for both parties unite in affirming its testamentary character and we think correctly so. It is reciprocal in its terms in that each purports to give all his interest in the common property to the other, effective upon his death, with remainder over after the survivor's death to the nearest heirs at law of both the testators. It is a joint and mutual will. Isabell Anderson died in 1903 and Peter Anderson died in 1911. The instrument was not probated as the will of Isabell Anderson, but after the death of Peter Anderson, the appellant, as one of the legatees of the will, asked that it

be admitted to probate as the last will and testament of Peter Anderson. It was allowed by the probate court, but on appeal to the district court it was rejected.

It is the contention of the appellant that this joint and mutual will had the effect of constituting the survivor a trustee of all the common property for the use and benefit of the devisees named therein; that it was a testamentary contract based upon sufficient consideration, the consideration being that the property upon the death of the survivor should not succeed to his heirs as provided by law, but should pass in equal shares to the heirs of both the testators. Whether the instrument had the effect contended for by appellant we deem it unnecessary to decide for the reasons hereinafter stated.

[2] Peter Anderson, in September, 1908, married the appellee, Ruth W. Anderson, and it is her contention that the will, even if valid, was revoked by such marriage.

Paragraph 4216, R. S. 1901, provides that no will "shall be revoked except by a subsequent will, codicil or declaration in writing, executed with like formalities, or by the testator destroying, canceling or obliterating the same or causing it to be done in his presence; provided, that if after making a will the testator marries, and the wife survive the testator, the will shall be revoked unless provisions have been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to revoke such provisions and no other evidence to rebut the presumption of revocation must be received."

In this case the marriage subsequent to executing the will is admitted. There is no evidence that provision was made for appellee in a marriage contract. She is not provided for in the will, nor mentioned therein. The language of the statute is plain and unambiguous and not susceptible of an interpretation different than it clearly imports. A marriage, the wife surviving ipso facto, revokes the prior will unless the wife is mentioned or provided for as stated. The South Dakota statute is the same as ours and in *Re Estate of Niels Larsen*, 18 S. D. 335, 100 N. W. 738, 5 Ann. Cas. 794, the facts were that Larsen had made a will during coverture. His wife dying he married again. That court said: "While conceding that Niels Larsen married Christina, his surviving wife, after making the will in which her name is not mentioned, either as a devisee or for the purpose of showing the intention not to make her such, and the nonexistence of any provision made for her by means of marriage contract or otherwise, counsel for appellant contends that the will is revoked only as to that portion of the property of the decedent that she would take had he died intestate, and that none but the surviving

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 27, 1913.

wife can question the validity of the instrument. Independently of a statutory provision similar to the one under consideration, but in states like ours, where the husband and wife inherit from each other, the revocation of a will made by the husband prior to his marriage is conclusively presumed from such facts and circumstances as this record discloses. *Tyler v. Tyler*, 19 Ill. 151. The mind of the testator always relates to the time of his death, and, in the absence of something in or out of the will pertaining to the marriage relation existing at the time of the husband's demise, it is not reasonable to presume that he would deliberately dispose of his entire estate without making some provision for his wife. Surely it cannot be said that a future marriage was contemplated by the decedent at the time his will was made, or that he afterward intended that the surviving son of his former wife should take all his property, notwithstanding the new relation to a person having a natural claim to his affection and a legal right to share his property. It is fair to assume that these considerations, and others of a like character, suggested the enactment of our statute, in plain and concise terms, by which such a will as the one under consideration is revoked absolutely, and the introduction of all evidence to the contrary is expressly prohibited. In order to sustain the contention of counsel for appellant to the effect that the will is revoked in so far only as it affects the interest of the widow, and should be admitted to probate upon her petition, it would be necessary to disregard statutes in pari materia, and resort to unwarrantable interpolation, where the legislative meaning is plain and unmistakable. Unless the existence of a condition excepting it from the rule of revocation is shown by such evidence as the statute contemplates, the will cannot be admitted to probate, and it was so held in California under a statute of which ours is an exact copy. *Corker v. Corker*, 87 Cal. 643, 25 Pac. 922. By the marriage of Niels Larsen the will was unqualifiedly revoked, and the judgment appealed from is affirmed."

Other courts under statutes like or similar to ours have held that marriage revokes a will, "unless the existence of a condition excepting it from the rule of revocation is shown by evidence as the statute contemplates." *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Francis v. Marsh*, 54 W. Va. 545, 46 S. E. 573, 1 Ann. Cas. 665.

The order of the lower court refusing the purported will to probate was correct and is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

STATE ex rel. MITCHELL et al. v. MEDLER, District Judge, et al.
(Supreme Court of New Mexico. April 14, 1913.)

(Syllabus by the Court.)

1. OFFICERS (§ 74*)—REMOVAL—NATURE OF PROCEEDING.

An action for the removal of an officer from office, under the provisions of chapter 36, Laws of 1909, is a civil, and not a criminal, proceeding.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 101-103, 105, 106; Dec. Dig. § 74.*]

2. TRIAL (§ 13*)—PREFERRED CAUSES—OFFICERS—REMOVAL PROCEEDINGS—"IMMEDIATELY SET DOWN FOR TRIAL."

The words "immediately set down for trial," as used in section 12, c. 36, Acts 1909, are not peremptory, but secure merely to the public and the defendant a preference of right of trial over other cases, and impress upon the proceeding as much expedition as within the power of the court (citing 4 Words & Phrases, 3408).

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 32; Dec. Dig. § 13.*]

3. PROHIBITION (§ 3*)—GROUNDS.

A writ of prohibition is not available as a writ of error, but is only available where there is a lack of jurisdiction.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Proceeding for a writ of prohibition by the State, on the relation of James P. Mitchell and others, against Edward L. Medler, Judge of the District Court of Lincoln county, and such court. Alternative writ of prohibition discharged.

Holt & Sutherland, M. B. Thompson, and N. C. Frenger, all of Las Cruces, for relators. Wade & Wade and Llewellyn & Llewellyn, all of Las Cruces, H. B. Hamilton, of Carrizosa, J. H. Paxton, of Las Cruces, and F. W. Clancy, of Santa Fé, for respondents.

PARKER, J. This is a proceeding for a writ of prohibition against the district court of Lincoln county and the judge thereof, seeking to restrain them from entertaining jurisdiction of a cause there pending. It appears that the relators are the duly elected, qualified, and acting trustees of the town of Las Cruces, N. M. On February 22, 1913, in the district court of Dona Ana county, the grand jury of said court returned into open court a presentment or accusation charging the said relators with certain delinquencies as such trustees therein specified. Upon the coming in of the presentment, Judge Medler issued an order for the service of a copy of the same upon the relators, together with a notice to be and appear before said court on the 3d day of March, 1913, which was done. Upon the return day, a demurrer was interposed by the relators to the presentment, upon various grounds, which was overruled, and afterwards a motion was filed to make the presentment more definite and certain,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which was likewise overruled, and afterwards an additional demurrer was filed and overruled by the court. It is alleged in the petition for the writ that the court required the relators to plead "guilty" or "not guilty" to the presentment, but this fact is denied by the respondents. The plea of "not guilty," however, was entered. Thereupon counsel for the state in said cause moved the court for a change of venue of the cause to some other county, for the reason that a fair and impartial trial could not be obtained in the county of Dona Ana. This motion was sustained by the court, and a change of venue granted to Lincoln county, and the causes set down for trial in that county for March 19, 1913. Thereupon relators filed a demand for an immediate trial, and objected to any continuance of the cause to any future date or time, and objected to the change of venue and the setting of the cause for trial in Lincoln county on March 19th, and objected to the discharge of the jury theretofore in attendance upon the regular term of the court in Dona Ana county after the return of the accusation in court, and urged that the court in so discharging the jury, and so continuing the cause, had wholly lost jurisdiction over the defendants and the subject-matter of the action. This motion and objections were overruled by the court.

The proceeding was instituted in pursuance of the provisions of chapter 36 of the Laws of 1909. This act provides six different causes for removal of officers of various kinds, among whom are the relators. The act provides for a presentment by the grand jury to the district court of the county in and for which the officer accused is elected. The pertinent provisions are as follows:

"Sec. 5. The accusation must state the offense charged in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

"Sec. 8. The defendant may answer the accusation either by objecting to the sufficiency thereof, or any portion thereof, or by denying the truth of the same."

"Sec. 13. The trial must be by jury and conducted in all respects in the same manner as a trial on an information or indictment for a misdemeanor."

"Sec. 14. The form of verdict of the jury in such cases shall be 'guilty' or 'not guilty.'"

"Sec. 15. Upon a conviction the court must pronounce judgment that the defendant be removed from office; and the judgment must be entered upon the minutes assigning therein the causes of removal."

"Sec. 17. From a judgment of removal, appeal may be taken to the Supreme Court in the same manner as from a judgment in a civil action, but until such judgment is reversed, the defendant is suspended from his office, and pending the appeal, the office must be filled as in case of vacancy."

"Sec. 10. All matters of procedure not oth-

erwise herein provided for shall be governed by the Code of Criminal Procedure."

"Sec. 16. The district attorney and the defendants are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial of an information or indictment."

"Sec. 7. The defendant must appear at the time appointed in the notice and answer the accusation unless for sufficient cause the court has assigned another date for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence."

"Sec. 12. As soon as the case is at issue, it must be immediately set down for trial and shall have precedence over all other cases on the docket."

The argument of relators is based upon the following propositions:

(1) The proceeding is a criminal proceeding, and therefore, when the court changed the venue of the cause from Dona Ana county to Lincoln county, upon the application of the state and over the protest of relators, it lost jurisdiction of the parties and subject-matter, and the district court of Lincoln county acquired no jurisdiction thereof.

(2) The relators were entitled to an immediate setting of the case for trial, and when the court discharged the jury then in attendance upon the court, and changed the venue of the cause to Lincoln county, the court thereby lost jurisdiction to further entertain the proceeding.

(3) The presentment or accusation does not state facts sufficient to constitute a cause of action, and therefore the court did not acquire jurisdiction of the subject-matter.

[1] 1. The act in question is a curious, but by no means an unusual, conglomeration of provisions extracted from the principles of the civil and criminal law. Various states have acts quite similar in provisions, including California, Utah, Idaho, the Dakotas, and others. The determination of whether a proceeding instituted under a statute of this kind is a criminal or civil one has varied in the different states, and various reasons have been assigned why the proceeding has in one instance been held to be a criminal proceeding, and in another instance a civil proceeding, and in one or more instances a special proceeding. The divergence of opinion as to what a proceeding of this kind really is will be found to arise, we think, out of some peculiar feature of the statute in a given state not common to that of others.

For instance, in California the statute provides in substance the same as ours as to procedure and the effect of the proceedings, with this exception: That in that state the statute provides that, in addition to the judgment of removal from office, the court shall award judgment of \$500 in favor of the informer. This judgment for \$500 is construed by that court as in the nature of

a fine, and consequently in that state they hold that the proceeding is criminal. *Kilburn v. Law Judge*, 111 Cal. 237, 43 Pac. 615. It is likewise provided in the Penal Code of California that "a crime or public offense is an act committed or omitted in violation of the law forbidding or commanding it, and to which is annexed, upon conviction thereof, the following punishment: * * * (4) Removal from office." For this reason, also, they hold in California that the proceeding is criminal. *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1.

In Idaho they have the same provision in regard to a judgment for \$500 in favor of the informer. Notwithstanding this provision, it is held in that state that the proceeding is not a criminal proceeding, and is not intended for punishment, but is intended to protect the people from corrupt or incompetent officials. *Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502. The court says: "The right of the Legislature to provide for the summary removal of incompetent or unfaithful officers is no new doctrine; and such legislation is on lines distinct from that which provides for punishment for extortion, or the right of recovery by the injured party of the sum wrongfully procured by an official through color of office. It arises from the exigencies of government, and, if its enforcement is to be obstructed by all the delays and embarrassments incident to a jury trial, the aim and purpose of the law would be entirely defeated."

In South Dakota it is said: "The necessity of the resolution, passed upon mature deliberation at a meeting of the board, to the effect that the charge be made and the action be instituted, is apparent, when we consider the grave consequences of a prosecution under a provision of law by which the accused may be summarily suspended from office by an order of the court, before trial, and at any time after the commencement of the action, and by which his prosecutors, the board of county commissioners, temporarily fill the office by appointment, as required by section 1389, which also provides that the verdict shall be 'guilty' or 'not guilty,' and, in case of a conviction as charged, the judgment may be as provided for in the Code of Criminal Procedure. * * * A suit for that purpose, and before his guilt has been judicially established, is harsh in its application, and penal in its character; and he ought, with certainty, to be advised by what authority he is accused, and by whom he is being prosecuted, before he is required to answer to a charge which is injurious to his reputation, even though he be innocent." *Minnehaha County v. Thorne*, 6 S. D. 449, 61 N. W. 688.

In Oklahoma the proceeding is held to be a civil case by reason of the terms of the statute, which provides that: "For the purpose of such removal a petition may be filed in the district court of the county wherein

such officer resides, in the name of the state, on the relation of any citizen thereof, upon the recommendation of the grand jury; grand juror, or on the relation of the board of county commissioners, or of any attorney appointed by the Governor under the provisions of this act. Summons shall be issued and proceedings had therein to final judgment as in other civil cases." The court says: "It was evidently the intention of the Legislature to place this particular action in the same classification as quo warranto, which is a civil action under all the authorities." *State v. Brown*, Judge, 24 Okl. 433, 103 Pac. 762.

In *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487, the Utah court held that a proceeding of the kind under consideration is of a civil and not a criminal nature. In that state they have a similar statute to ours, and the statute there, like ours, omits to provide for the \$500 fine. The court says: "True, section 4575 of the same act as is section 4580 provides that the trial shall be conducted in the same manner as the trial of an indictment or information for a felony. The Legislature doubtless intended by this provision to throw around the accused the same safeguards with which the law clothes a defendant in a criminal action. The same rules governing the introduction of evidence must be followed, and the guilt of the defendant must be established by the same degree of positive proof as is required in criminal prosecution generally. It does not necessarily follow from this that a proceeding commenced in pursuance of the act in question is to be classed as a criminal action. The character of an action must be determined by the thing or object intended to accomplish and the kind of judgment that may be entered. Counsel for respondents have cited several California cases in which proceedings of this kind are held to be criminal. While the sections of the California statute relating to this class of actions are, in the main, similar to the corresponding sections of our own Code, yet there is a distinction. Under the California statute, when the defendant is found guilty, the court must, in addition to entering a decree depriving him of his office, enter judgment in favor of the informer for \$500. This penalty of \$500, which is imposed on the defendant, the Supreme Court of that state has held to be nothing more nor less than a fine. *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615. In this state, as we have observed, no fine can be imposed in an action brought under section 4580. The Supreme Court of Idaho, in construing a statute of that state which provides for a fine of \$500, and which, in other respects, is practically the same as the California Statute, has held, in a number of well-considered cases hereinbefore cited, that this class of proceedings is civil and in no sense criminal. The reasoning of the Idaho and Michigan cases hereinbefore cited and

referred to, and the conclusions therein reached, are more in accord with our views of the law on this question than are the principles announced in the decisions which hold to the contrary doctrine."

See, also, *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172, where a statute of this kind, which provides for an indictment, is nevertheless held to be a civil proceeding. The court says: "We think the Legislature did not intend this to be a strictly penal statute for the punishment by fine or imprisonment of the individual offender, but intended by this mode to reach every register of deeds who should use his office or his official name in a false or fraudulent manner, or give currency or credit to any official certificate or other paper which might be used for the purpose of fraud or imposition to the damage of honest men."

The obscurity and difference of opinion in regard to the interpretation of statutes of this kind no doubt often arises out of the fact that misfeasance and malfeasance in office were crimes at common law. The procedure at common law always contemplated a prosecution by indictment or information, and conviction was followed by a fine and imprisonment, as well as removal from office. See Bacon's Abridgment, title "Officers," (N). But in these modern statutes, which make no provision for punishment of any kind, the proceeding is plainly intended to rid the public of an incompetent or unworthy public servant, and are in this particular entirely different in nature from the original common-law proceedings. Our own territorial court, in passing upon a territorial statute of similar import, held, in a well-considered opinion, that the proceeding was a civil proceeding, and that the court was authorized to direct a verdict as in other civil cases. *Territory v. Sanches*, 14 N. M. 493, 94 Pac. 954. This case is also reported in 20 Ann. Cas. 109, and in a note accompanying the case all of the cases are collected, showing that a great preponderance of authority is to the effect that the proceeding is a civil proceeding under a statute like our state statute.

We think the view taken of a statute like the one under consideration by the Utah court is more in accordance with the evident legislative intent in enacting our statute. It is true, as in Utah, Idaho, and elsewhere, that while certain features of the criminal law, by way of procedure, form of verdict, degree of proof required, etc., are ingrafted upon the proceeding, the real essence of the proceeding is simply to remove an officer from office. Some of the acts provided in the statute as causes for his removal may be the commission of a crime; but the object of the proceeding is not to punish the officer for any crime or dereliction, but to remove him from his office in the interest of the public, so that the office may be filled and the functions thereof exercised by some com-

petent and honest official. The principles of the criminal law which are ingrafted upon the proceeding are designed for the protection of the officer himself. It may well be said that a person who has been elected to an office by the people among whom he has lived, and whose respect he has evidently attained, is not to be summarily removed from such an office until his dereliction is made to appear beyond all reasonable doubt. A presumption of honesty and capacity attends an officer who has been elected by his fellow citizens. That presumption ought not to be overcome by any flimsy or unsatisfactory proof. Hence the Legislature has provided that this presumption shall go with him throughout the trial down to verdict, and shall only be overcome by the same measure of proof as is required to convict a citizen of crime. We think these are wise provisions, and have no doubt that they were inserted in this act with that object in view. A careful consideration of the act leads us, however, to the conclusion that it is an action civil in its nature, and that it is not a criminal action.

It follows, from the conclusion reached, that the objection to the change of venue from Dona Ana county to Lincoln county, on the theory that the proceeding was criminal in its nature, is not well founded.

[2] 2. It is urged by relators that the district court lost jurisdiction of the subject-matter of the cause by failing to comply with section 12 of the act, hereinbefore quoted. It is true that the section provides that the cause, as soon as at issue, must be immediately set down for trial, and shall have precedence over all other cases on the docket. This section was evidently intended, so far as the public is concerned, to afford speedy and efficient remedy to remove an unsatisfactory official. So far as the defendant is concerned, it was designed to secure to him a speedy trial. We cannot interpret the terms used in this section to be absolutely peremptory in effect. In adopting such a section, the Legislature necessarily took into account the usual course of proceedings in courts of justice. The Legislature knew that various considerations moved the court from time to time to adopt different courses of proceeding to meet the exigencies then confronting it. All that the Legislature could have intended by the section was to impress upon the proceeding the greatest possible expedition, both for the benefit of the public and of the defendant. It might possibly be that, if a proceeding of this kind were allowed to be delayed an unreasonable time, the defendant might be entitled to a discharge; but the word "immediately," as used in the section, and as applied to the subject-matter regulated by the act, can certainly reasonably mean no more than that the proceeding shall have a preference, and shall be expedited as much as within the power of the court. See 4 Words and Phrases, 3403.

[3] 3. The argument of the relators that by reason of the failure of the complaint to state a cause of action the court has never acquired jurisdiction of the subject-matter, and should be prohibited from further entertaining the cause, is clearly untenable. The subject-matter of the proceeding against the relators is clearly within the general jurisdiction of the district court of Dona Ana county. If the court proceeds upon a complaint which does not state a cause of action, it commits an error which is reviewable only upon appeal or writ of error. As is well said in *State v. Brown*, 24 Okl. 433, 103 Pac. 762: "It is a well-settled rule that, where an inferior court has jurisdiction to take the action contemplated under any circumstances, the exercise of such power by him involving a judicial discretion, a writ of prohibition will not lie. It is only where an inferior tribunal is about to do some act wholly unauthorized by law, or in excess of its jurisdiction, that the writ will lie. Ex parte Engles, 146 U. S. 357, 13 Sup. Ct. 281, 36 L. Ed. 1005; In re Fassett, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087; People ex rel. Graver v. Circuit Court of Cook County et al., 173 Ill. 272, 50 N. E. 928; State ex rel. Hofmann v. Scarritt, Judge, et al., 128 Mo. 331, 30 S. W. 1026; State ex rel. Franklin v. Raborn, 60 S. C. 78, 38 S. E. 260; Board of Education, etc., v. Holt, 51 W. Va. 435, 41 S. E. 337." See, also, *State ex rel. Brown v. District Court*, 27 Utah, 336, 75 Pac. 739, 1 Ann. Cas. 711, as to the authorities in accordance with the general doctrine, that a writ of prohibition is not available as a writ of error, but is available only where there is a lack of jurisdiction.

The relators rely upon the case of *Evans v. Willis*, 22 Okl. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258. An examination of that case, however, discloses the fact that the information exhibited in the court against the defendant was by a private prosecutor, and that no officer authorized by law had filed such information, and it was therefore held that the court could acquire no jurisdiction of the subject-matter upon such an information. In other words, that case was a case in which the court could not, under any circumstances, acquire jurisdiction. The distinction between that case and this is apparent. In this case the presentment emanates from the proper source, is filed in a court of competent jurisdiction, and whether it is sufficient in law to state a cause of action against the relators is a question reviewable only upon appeal or writ of error.

For the reasons stated, the alternative writ of prohibition will be discharged; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

SEWARD et al. v. DENVER & R. G. R. CO.
(Supreme Court of New Mexico. April 3, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 391*) — STATE REGULATION OF RATES—RIGHT.

The legislative branch of the government has the right to regulate rates and compel the performance of other duties on the part of the public service corporations; but such rates so established, or requirements made, must be reasonable, both to the carrier or public service corporation and to the public.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1573, 1578; Dec. Dig. § 391.*]

2. CORPORATIONS (§ 393*)—REGULATION—FIXING OF RATES—REASONABLENESS.

While the fixing of rates, or the determination of the facilities to be afforded, in the first instance, is a legislative question, the determination of the reasonableness and lawfulness of the rate or other requirement is a judicial function.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1574, 1575; Dec. Dig. § 393.*]

3. CORPORATIONS (§ 394*) — CONSTITUTIONAL LAW (§ 297*)—JURY (§ 12*)—RAILROADS (§ 9*)—DUE PROCESS—FIXING OF RATES—DETERMINATION OF REASONABLENESS—ORDER OF RAILROAD COMMISSION—REVIEW—EVIDENCE—DECISION—JURY TRIAL—GENERAL APPEARANCE — "DECIDE SUCH CASES ON THEIR MERITS."

Sections 7 and 8 of article 11 of the state Constitution construed.

(a) *Held*: That said sections provide for a review by the Supreme Court of the reasonableness and lawfulness of an order made by the State Corporation Commission, upon the evidence adduced before the Commission; that such sections do not deny due process because on such review additional evidence is not allowed, and because the court must act on the evidence already taken; the court not being bound by the findings of the Commission, and the party affected having the right, on the original hearing, to introduce evidence as to all material points.

(b) *Held*, further, that where the cause is removed to the Supreme Court by the Commission, upon failure to comply with the order, within the time limited, by the public service corporation, additional evidence cannot be introduced.

(c) Where, however, the cause is removed by one of the parties, and a showing is made that new evidence has been discovered, which the party by the exercise of reasonable diligence could not have presented at the original hearing, the cause may be remanded to the Commission for the taking of such further evidence.

(d) Where the cause is removed to the Supreme Court by one of the parties within the time limited, the court may, of its own motion, remand the same to the Commission for the taking of further evidence.

(e) The Supreme Court, under the constitutional provisions, upon the evidence, determines the reasonableness and lawfulness of the order made by the Commission; if it finds such order to be reasonable and lawful it enforces it; if, on the other hand, it finds such order to be unreasonable or unlawful, it refuses to enforce the same.

(f) The direction in section 7 that the Supreme Court shall "decide such cases on their merits" means that the court shall decide such cases on a consideration of their substance and the legal right involved in opposition to a decision based upon mere defects of procedure or the technicalities thereof; that the court shall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

do justice irrespective of informal, technical, or dilatory objections.

(g) The court decides, upon the merits, the question of the reasonableness and lawfulness of the order made by the Commission, and whether the defendant shall be compelled to comply therewith.

(h) The defendant in such cases, under the Constitution, is not entitled to a trial by jury, and a denial of such right does not violate either the federal or state Constitution.

(i) The railroad company, by its general appearance before the Commission, without objection, waived all irregularities preceding such hearing (citing 5 Words and Phrases, 4493 et seq.).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1576; Dec. Dig. § 394; * Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297; * Jury, Cent. Dig. §§ 27-34, 82, 99, 101, 103; Dec. Dig. § 12; * Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 8, p. 7721.]

4. CORPORATIONS (§ 394*)—ORDERS OF RAILROAD COMMISSION—REVIEW.

While it is proper for the Commission to make findings of fact, such findings have no force or effect in the Supreme Court, as this court is required to pass upon the merits of the case, without indulging in any presumptions, and the court forms its own independent judgment, as to each requirement of the order, upon the evidence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1576; Dec. Dig. § 394.*]

5. MANDAMUS (§ 72*)—CORPORATIONS (§ 394*)—ORDERS OF CORPORATION COMMISSION—CONTROL OF DISCRETION.

Mandamus does not lie to compel the performance of a duty calling for the exercise of judgment and discretion on the part of the person at whose hands the performance is required; therefore the order made by the Commission should be definite and certain.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 184; Dec. Dig. § 72; * Corporations, Cent. Dig. § 1576; Dec. Dig. § 394.*]

6. RAILROADS (§ 9*)—ORDERS OF CORPORATION COMMISSION—REVIEW—"ADEQUATE FACILITIES."

Under the Constitution the Commission is authorized "to require railway companies to maintain adequate depots, stock pens, station buildings, agents and facilities for the accommodation of passengers and for receiving and delivering freight and express," and such as may be reasonable and just. *Held* that, in determining what are "adequate facilities," the court must take into consideration the volume of business, the revenue derived by the railroad therefrom, the number of people to be accommodated, the present facilities, and all the facts and circumstances, considering on the one hand the rights of the stockholders of the railroad, and on the other the rights of the public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

7. RAILROADS (§ 214*) — DUTIES — ENFORCEMENT.

A railroad company is chartered for the purpose of transporting freight and passengers, and so long as it continues to exercise its rights, under such charter, and does not elect to surrender up its franchise, the performance of the duty for which it was called into existence and given its being may be enforced, even though such performance may entail a pecuniary loss.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.*]

8. RAILROADS (§§ 58, 217*)—DUTIES—FACILITIES.

While it is the absolute duty of a railroad company to transport freight and passengers, it is not its prime duty to provide depots, waiting rooms, station agents, telephone and telegraph facilities.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136, 714; Dec. Dig. §§ 58, 217.*]

9. RAILROADS (§ 214*)—DUTIES—ENFORCEMENT—EXPENSES.

When a railroad company is called upon to perform an absolute duty, the question of expense is not to be considered; but when the duty sought to be enforced is only an incident to the main duty, the question of expense is to be taken into consideration in connection with the public necessities.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.*]

10. RAILROADS (§§ 58, 226*) — POWERS OF CORPORATION COMMISSION—ESTABLISHMENT OF STATIONS—EXPENSE AND BENEFIT.

The Constitution does not confer upon the Corporation Commission the right to arbitrarily establish a station or to require a station agent, regardless of the expense entailed upon the company, or the benefit to be derived by the public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136, 740; Dec. Dig. §§ 58, 226.*]

11. RAILROADS (§ 217*) — DUTIES — STATION FACILITIES.

The facilities afforded at any station to the general public must, in a measure, be commensurate with the patronage and receipts from that portion of the public to whom the service is rendered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 714; Dec. Dig. § 217.*]

12. RAILROADS (§ 226*) — DUTIES — STATION FACILITIES—EXPENSE AND BENEFIT.

It is not reasonable to require the installation of telegraph service for the purpose of bulletining trains, where the cost of such service is out of proportion to the revenue derived from that portion of the traveling public benefited thereby.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 740; Dec. Dig. § 226.*]

Petition by Edwin B. Seward and others against the Denver & Rio Grande Railroad Company. Defendant neglected to comply with an order of the Corporation Commission, and the Commission removes the cause to the Supreme Court. Remanded to the Corporation Commission.

On the 7th day of May, 1912, certain residents of Tres Piedras, a small town in Taos county, N. M., about one-half mile distant from a station on the Denver & Rio Grande Railroad, bearing the same name, petitioned the Railroad Commission to require said railroad company "to maintain adequate station facilities for the accommodation of passengers and for receiving and delivering freight and express at its station of Tres Piedras," and further asked that said railroad company be required to maintain an agent at said station through whom the patrons of said railroad "may transact business with such railway company."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon the filing of said petition or complaint, the Commission had more or less correspondence with the officials of such railroad company in an endeavor to secure the facilities requested "by mediation," as required by section 2 of chapter 78, S. L. 1912; but failing to come to an agreement therefor, on July 30, 1912, a notice of hearing was served upon the railroad company, together with a copy of the order of the Commission requiring such hearing, which order was as follows:

"Informal complaint having been presented to this Commission by and on behalf of parties residing at and in the vicinity of Tres Piedras, a station on the line of railway operated by the said the Denver & Rio Grande Railroad Company within the state of New Mexico, to the effect, that said company had failed to maintain at said station adequate facilities for the accommodation of passengers and for receiving and delivering freight and express, and that said company was not maintaining an agent at said station, to the great detriment of the complainants; the Commission having made a personal examination into the matter, and it appearing to this Commission that conditions are such as to require a more thorough investigation: It is hereby ordered that a hearing on the matter set out in said complaint be held at the office of the State Corporation Commission at Santa Fé, N. M., commencing at the hour of 10 o'clock a. m., on the 30th day of July, 1912, at which time and place the said complainants will be heard in support of the allegations of their complaint, and the said railway company will be heard in rebuttal thereto. The parties in interest will be notified accordingly. Done at the office of the State Corporation Commission at Santa Fé, N. M., on the 15th day of July, 1912. Hugh H. Williams, Chairman. Attest: George W. Armijo, Clerk."

Upon the date fixed, the cause was heard, upon the evidence of Edwin B. Seward, for the complainants, and W. D. Shea, for the railroad company. From the evidence adduced it appears that Tres Piedras was established as a station on the Denver & Rio Grande Railway in 1880 and had been continuously maintained until December, 1910, with waiting room, freight room, and the usual station accommodations, including an agent, who was also a telegraph operator, and who, in conjunction with some arrangement by the railroad with the Western Union Telegraph Company, received and transmitted commercial messages. In December, 1910, the railroad company withdrew the agent from said station, and thereafter maintained no facilities for passengers at said place, but did stop its trains there and take on and let off passengers. Freight was received and delivered at said station, but, having no agent, freight charges were required to be paid in advance upon all incoming freight. When freight reached Tres Piedras, it was unload-

ed by the train crew and placed inside the freight room, the key to which was kept by the wife of the section foreman, who resided in the station, and who upon application delivered the key to persons receiving freight, who would then unlock the door and select their freight. It appears that no serious loss to any person had occurred by reason of such arrangements, but that it was more or less inconvenient to prepay the charges upon freight ordered, and also to personally superintend the loading of freight when it was shipped out.

Tres Piedras is a small town having one general store run by Mr. Seward, the witness who testified, and a harness shop. It is also headquarters for the Forest Reserve, where, all told, 40 people are employed; but many of these employes are not permanently located in the town. Outside the members of the Forest Reserve, there are perhaps 25 residents within the town, and within a radius of 10 miles there are probably 150 people, not all of whom, however, are served by this station, as Servilleta, a station ten miles from Tres Piedras, is also within the radius. Mr. Seward says that all told there are 40 families who would receive freight at this station, should they have goods shipped in.

For the 12 months ending December 31, 1911, the earnings on passengers and freight, both inbound and outbound, were:

Freight forwarded	\$1,075 81
Freight received	1,850 66
Passengers	581 23
Total	\$3,507 70

Of this amount, \$988.26 was earned during the month of July by the shipment of several car load lots of wool by wool growers. No evidence was introduced tending to show the earnings and operating expenses of the road in New Mexico.

Mr. Seward did not testify that he had ever been a passenger upon the road, but he did testify to inconveniences suffered by people who sought passage, in that there was no shelter at the station in inclement weather, and no means of ascertaining the time of the arrival and departure of trains, except by using the telephone in his store and calling up Servilleta ten miles away. No contention was made, or supported by the evidence, that the installation of a telephone or telegraph service was necessary for the proper operation of the road, in order to secure the safety of employes and passengers, or to facilitate the service. The principal complaint of Mr. Seward in that regard seemed to be that there was no commercial telegraph station maintained at that place.

Upon the evidence taken the Commission made the following statement of facts, viz.: "The evidence adduced at the above hearing on behalf of the complainants shows the following: That station agent and adequate station facilities had been maintained at

Tres Piedras for a period of thirty years prior to December, 1910. That there are some three or four outlying communities in addition to the town of Tres Piedras, which draw their supplies from the town of Tres Piedras. That Tres Piedras is a distributing point to those outlying communities in the United States mail matters. That the freight receipts by the Denver & Rio Grande Railroad Company at Tres Piedras for freight received and forwarded amounted to between \$3,000 and \$4,000 in the year 1911. That there are considerable wool shipments from the station of Tres Piedras in the wool season of July each year. That the station building of the Denver & Rio Grande Railroad Company is kept closed to passengers, and that persons desiring to take a train at Tres Piedras must wait on the platform in inclement weather for the arrival of trains. That there is no means of communication from the railroad station for purposes of obtaining information as to the movements of trains or whether or not they are running on time. That the freight received at Tres Piedras is unloaded at owner's risk, and it frequently happens that others than the consignee get this freight, on account of no representative of the railroad company being present to check out said freight. The evidence further shows that Mr. E. B. Seward pays a major portion of the receipts on account of freight shipments at this station; he being a general merchant in the town of Tres Piedras. The claim of the Denver & Rio Grande Railroad Company by its Mr. E. N. Clark, in his letter of June 7, 1912, to the Commission, and testimony of their witness W. D. Shea, that the business of the station did not justify its being kept open, that the station was not self-sustaining, that it would have to be operated at a monthly loss to the company, if an agent were maintained, is not borne out by the facts as shown in this cause."

And upon the facts so found the Commission made the following order: "This Commission holds railroad interests are not the only interests to be served at this station, owing to the fact that this railroad is a public service corporation and the interests of the public are coextensive with those of the defendant company, and the public is entitled to a reasonable degree of service in return for the patronage afforded. In view of these various facts as shown by the record in this cause, it is hereby ordered by the Commission that the Denver & Rio Grande Railroad Company open its station building at the town of Tres Piedras for the purpose of affording accommodations to the traveling public who may desire to take a train at Tres Piedras or alight therefrom, and provide suitable seats, fuel, and water for the comfort of said passengers. It is further ordered by the Commission that the Denver & Rio Grande Railroad Company maintain a

representative at this station, whose duty it shall be to receive freight and properly store same in freight station, to protect same from pillage and the elements, and to properly check out such freight to the rightful owners when called for. It is further ordered by the Commission that some adequate means of communication be maintained at this station for the purpose of obtaining information as to the running of trains. Whether this be by telephone or telegraph is left to the discretion of the company. This order shall be effective on and after the 15th day of September, A. D. 1912. Done at the office of the State Corporation Commission in the city of Santa Fé, New Mexico, on this 22d day of August, A. D. 1912."

Defendant neglected to comply with the order, and the Commission removed the cause to this court, in compliance with the provisions of section 7 of article 11 of the Constitution of New Mexico.

Frank W. Clancy, Atty. Gen., for complainants. Renehan & Wright, of Santa Fé, and E. N. Clark and R. G. Lucas, both of Denver, Colo., for defendant.

ROBERTS, C. J. (after stating the facts as above). Before reviewing the order of the State Corporation Commission, for the purpose of determining the reasonableness and lawfulness of the same, it will be necessary for us to consider and dispose of numerous constitutional questions raised by defendant, and questions of practice and procedure interposed by both parties. We believe that many of these questions will best be solved by a general résumé of the provisions of the Constitution under which they arise and a statement of our views in regard thereto, supported by such authorities as we have been able to find, bearing upon the questions involved.

The Corporation Commission of New Mexico was created by section 1 of article 11 of the Constitution of the state, and by section 7 of said article it is provided: "The Commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping car, and other transportation and transmission companies and common carriers within the state; to require railway companies to provide and maintain adequate depots, stock pens, station buildings, agents and facilities for the accommodation of passengers and for receiving and delivering freight and express; and to provide and maintain necessary crossings, culverts and sidings upon and alongside of their road beds, whenever in the judgment of the Commission the public interest demand, and as may be reasonable and just. The Commission shall also have power and be charged with the duty to make and enforce reason-

able and just rules requiring the supplying of cars and equipment for the use of shippers and passengers, and to require all intrastate railways, transportation companies or common carriers, to provide such reasonable safety appliances in connection with all equipment, as may be necessary and proper for the safety of its employees and the public, and as are now or may be required by the federal laws, rules and regulations governing interstate commerce. The Commission shall have power to change or alter such rates, to change, alter or amend its orders, rules, regulations or determinations, and to enforce the same in manner prescribed herein; provided, that in the matter of fixing rates of telephone and telegraph companies, due consideration shall be given to the earnings, investment and expenditure as a whole within the state. The Commission shall have power to subpoena witnesses and enforce their attendance before the Commission, through any district court or the Supreme Court of the state, and through such court to punish for contempt; and it shall have power, upon a hearing, to determine and decide any question given to it herein, and in case of failure or refusal of any person, company or corporation to comply with any order within the time limit therein, unless an order of removal shall have been taken from such order by the company or corporation to the Supreme Court of this state, it shall immediately become the duty of the Commission to remove such order, with the evidence adduced upon the hearing, with the documents in the case to the Supreme Court of this state. Any company, corporation or common carrier which does not comply with the order of the Commission within the time limited therefor, may file with the Commission a petition to remove such cause to the Supreme Court, and in the event of such removal by the company, corporation or common carrier, or other party to such hearing, the Supreme Court may, upon application in its discretion, or of its own motion, require or authorize additional evidence to be taken in such cause; but in the event of removal by the Commission, upon failure of the company, corporation or common carrier, no additional evidence shall be allowed. The Supreme Court, for the consideration of such causes arising hereunder, shall be in session at all times, and shall give precedence to such causes. Any party to such hearing before the Commission, shall have the same right to remove the order entered therein to the Supreme Court of the state, as given under the provisions hereof to the company or corporation against which such order is directed. In addition to the other powers vested in the Supreme Court by this Constitution and the laws of the state, the said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders and

decrees made in such cases, by fine, forfeiture, mandamus, injunction and contempt or other appropriate proceedings."

Section 8 is as follows: "The Commission shall determine no question, nor issue any order in relation to the matters specified in the preceding section, until after a public hearing held upon ten days' notice to the parties concerned, except in case of default after such notice."

Other sections of the article will not be incorporated in this opinion, as they have no bearing upon the issues involved, but it is perhaps pertinent to add that section 12 makes the provisions of the article applicable to all corporations doing business in New Mexico and subject to state supervision.

The provisions of our Constitution are peculiar to New Mexico. So far as we have been able to ascertain, no other state, either by statute or constitutional provision, has the same method of procedure. All similar commissions, whether the creatures of statute or constitutional provisions, are designed to control and regulate public service corporations; to secure the safety of employees; the protection of the traveling public; and to compel such corporations to discharge their duty to the public. The matter of such regulation is primarily a legislative function, but experience has demonstrated the inability of the various legislative assemblies to cope with the problem, charged as they are with so many other diversified duties, and their sessions usually of limited duration.

[1] While the right of the Legislature of a state to regulate rates and compel the performance of other duties on the part of public service corporations has always been recognized by the courts, the rule that such rates, so established, must be reasonable, both to the carrier or public service corporation and to the public, is equally well settled. *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970.

[2] While the fixing of the rates, or the determination of the facilities to be afforded, in the first instance, is a legislative question, the determination of the reasonableness and lawfulness of the rate or other requirement is a judicial function. This being true, it was early recognized that legislative assemblies could not give to such questions the required time to investigate and determine in advance the reasonableness and justness of the proposed rate, or other requirement, necessitating, as such a question would, long and protracted hearings, and intricate knowledge of such matters. For this reason, we apprehend, the plan was devised, now in vogue in practically all the states, and adopted by the national government, of creating commissions, supposed to be made up of especially trained men; and the delegation to such bodies of administrative and legislative powers. Such bodies are given great lati-

tude and power in investigating all such questions, and upon them is conferred the duty of fixing rates and requiring proper facilities for the public accommodation.

The final action of the Commission, or rate-making body, was, in many instances, attended by long and protracted litigation, through various courts, before the reasonableness and lawfulness of the rate was finally established. The public service companies, not infrequently, would render no assistance whatever to the rate-making body, when the matter was under investigation, so that body could arrive at a just rate, and, after the rate was established, would go into the courts, and there disclose facts which would clearly demonstrate the unreasonableness of the rate and compel its cancellation and revocation. By this method the almost impossible task of securing justice for the public was clearly discernible. To overcome this difficulty plans were devised, by which the public service corporation was required to present all its evidence before the Commission, in advance of the fixing of the rate or other requirement, so that the Commission would have the benefit of such knowledge as it might impart and thereby be enabled to arrive at a just conclusion, if possible. From the action of the Commission in fixing the rate, or other determination, an appeal or review in the courts was provided, for the determination of the reasonableness and lawfulness of the order made, but upon the evidence taken in advance before the Commission. If the court found the action of the Commission unlawful or unreasonable, it was set aside. That such procedure does not violate the Constitution of the United States, and is authorized, was held by the Supreme Court of the United States in the recent case of *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863, where the court had under consideration the Washington statute (Session Laws 1905, c. 81, as amended March 18, 1907, c. 226). The method provided by the statute of Washington was for a hearing before the Commission, upon notice in advance to the company, as to the proposed order which the Commission was asked or was proposing to make, at which hearing the company had the right to appear by counsel, cross-examine the witnesses produced by the complainants or Commission, and to introduce such evidence as it desired. After such investigation the Commission made such order as it saw proper, and if the company affected thereby deemed it contrary to law, it applied to the superior court of the proper county for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. In the superior court, the cause was heard without the intervention of a jury, on the evidence and exhibits introduced before the Commission and certified to by it. Upon such hearing the superior

court entered an order, either affirming or setting aside the order of the Commission under review and remanding the cause back to the Commission for further action. If such order was affirmed, the right of appeal to the Supreme Court was given.

In the case of *Oregon R. & N. Co. v. Fairchild*, supra, it was contended that the Washington statute failed to furnish an adequate hearing or opportunity for judicial review, especially in prohibiting the submission to the court of competent evidence as to the unreasonableness of the order; and, further, that there was no evidence of a public necessity, and that the order was void as taking property without due process of law. Speaking of the objection that the statute failed to furnish an adequate hearing or opportunity for judicial review, the court says:

"So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the fourteenth amendment. *Chicago, etc., R. R. v. Minnesota*, 134 U. S. 418 [10 Sup. Ct. 462, 702, 33 L. Ed. 970]; *Smyth v. Ames*, 169 U. S. 466 [18 Sup. Ct. 418, 42 L. Ed. 819]; *Chicago, etc., R. R. v. Tompkins*, 176 U. S. 167, 173 [20 Sup. Ct. 336, 44 L. Ed. 417].

"2. This was recognized by the Supreme Court of the state, which held that this constitutional right was not denied, but that the statute furnished, first, an adequate opportunity to be heard before the Commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the superior court. Both of these rulings are assigned as error by the Oregon Company. It complains that the statute did not afford it the means of making a defense before the Commission and yet required it to attack the reasonableness of the order on such evidence as it might have been able to produce before the administrative body. If this were true, the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established. But, as construed by the state court, all these rights were amply secured by the statute, which declared that the Commission, 'after a full hearing,' might require track connection. On such investigation the company could have objected to the sufficiency of the complaint and obtained an order requiring it to be made more specific as to the exact location of the proposed tracks. The defendant was given the benefit of compulsory process to secure and present

evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents, and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the Commission and the privilege of offering evidence on every matter material to the investigation.

[3] "3. The defendant insists, however, that, no matter how complete the right to be heard before the Commission, the statute, having denied all other opportunity for testing the validity of the order in the state courts, furnished an utterly inadequate judicial review, because, as the carrier could not anticipate what decision would be made, it was unjust to require it to produce evidence, to show in advance the unreasonableness of an order, the terms of which were not known. From this it argues that the statute was unconstitutional in so far as it prevented the court from receiving competent and noncumulative testimony tending to prove that there was no public necessity for making the track connection and that the order was void.

"This position would be true if the defendant had not been put on notice as to what order was asked for and then given ample opportunity to show that it would be unjust or unreasonable to grant it. In this case, and under the statute, it was given such notice. The complaint alleged that some of the towns were important shipping points and that at all of them there was a public necessity that the roads should be connected. The defendant denied each of these allegations. The hearing, both on the law and the facts, was necessarily limited to that issue. There could have been no valid order which was broader than that claim. The defendant was charged with notice that if the allegations of the complaint as to necessity were established the order could then be lawfully granted, unless there was also proof that the cost, in comparison with the receipts, or other fact, made it unjust to require the connections to be made. The carrier was therefore given the right both to meet the charge of public necessity and also to establish any fact which would make it unjust to pass the order for which the complainant prayed. The act further provided that, after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the superior court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the Commission, it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence, since it acted judicially, under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed

to the discharge of official duties.' Kentucky Railroad Tax Cases, 115 U. S. 321, 334 [6 Sup. Ct. 57, 29 L. Ed. 414].

"4. Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order and having adopted the statutory method of review, this company cannot complain. It had the right to offer all competent testimony before the Commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master. Nor would there be any impairment of the right to a judicial review, because additional testimony could not be submitted to the chancellor. * * *

"5. If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing."

The Constitutional Convention of New Mexico, when it adopted article 11 of the Constitution, and provided for the somewhat novel procedure, after the hearing and determination by the Commission for the judicial review of the action of the Commission, was attempting to expedite the judicial inquiry into the reasonableness and lawfulness of the order made by the Commission; provide a method of procedure that would be inexpensive and simple, and that would preserve the rights of the people on the one hand, and of the owners of the public service corporations on the other.

To this end, notice to the company to be affected by a proposed order was to be given, and a hearing required thereon, at which the company and the complainant may produce all their evidence bearing upon the issues and the justness of the proposed order, cross-examine witnesses, etc. It was the evident intent of the framers of the instrument that all the known evidence should be produced before the Commission in the first instance. After the Commission has made its final order, the public service company has 20 days within which to voluntarily comply with the order. If it does so comply, and the order is satisfactory to the complaining party, no further proceedings are required. Should it fail to comply, unless an order of removal is taken from such determination by the Commission, by the company affected, the Commission must remove such cause, together with all the evidence adduced upon the hearing, with the documents, etc., to the Supreme Court. It is also provided that, when the case is removed to this court by the Commission, "no additional evidence shall be allowed." If the case has been removed here by the defendant, the "Supreme

Court may, upon application in its discretion, or of its own motion, require or authorize additional evidence to be taken in such cause." We must confess that this provision of the Constitution has required a great deal of consideration to enable us to arrive at what we believe to have been the purpose and intent of the framers of the instrument in this regard. It has been suggested that the proper solution is that, in the event of a failure on the part of the company affected to remove the cause, it is our duty to affirm the order of the Commission and carry into effect its determination; that the court, in such event, is not required to look into the question of the reasonableness or lawfulness of the order. We do not, however, believe that such was the intent, but rather that the court should, in either event, from the evidence adduced, determine such questions and mete out justice to the company and to the public. That being true, the only purpose or design, in giving to the company the right to remove the cause, was that such party could make a showing to the court that new evidence had been discovered or new facts developed which would have a material bearing upon the matter, and thus give to the court the power to remand the cause to the Commission for the taking of such further testimony; or, to give to the court, where the cause was removed by the company, and it found the evidence not altogether satisfactory in some respect, or upon some point, power to remand the cause and require the taking of additional testimony. In brief, then, the difference between the two methods, as we understand it, is that where the cause is removed by the Commission, this court must determine the lawfulness and reasonableness of the order upon the evidence adduced, even though it may appear to the court that other facts might be produced, which might show the order to be unreasonable. Where the cause is removed by the company, it gives to the court more latitude, and enables it to require additional testimony before arriving at an ultimate determination of the question. We believe it was the intention to, in all cases, accord to both parties a judicial hearing, upon the merits.

Upon the hearing in this court it was argued by the Attorney General that this court had the right to form its own independent judgment in the matter; that it was not confined to a consideration of the reasonableness and lawfulness of the order made by the Commission, with the power to either enforce such order by its judgment, or refuse to enforce it. That the court could, for instance, in a rate case, where the Commission had fixed the rate at two cents a mile for carrying passengers, either raise or lower the rate by its judgment. That such power was conferred by the language, "The said court shall have the power and it shall be its duty to decide such cases on their merits, and

carry into effect its judgments, orders and decrees made in such cases, by fine, forfeiture, mandamus," etc. Now, if the contention is sound, then the provision just quoted invests this court with legislative power to fix rates. There is no doubt but that the people of the state by constitutional provision could confer such power upon the judges of the Supreme Court. If they saw fit, they might combine all the power of government in one department; but such action would not be in accord with the settled policy of the states of the Union, where it has been the studied purpose to, so far as possible, keep separate the three great departments, and we should not construe the provision as conferring legislative power upon this body, unless compelled to do so by clear and unmistakable language.

Let us consider the results that would follow such a construction. Section 152 of article 12 of the Constitution of Virginia is in many respects similar to the provisions of our Constitution, for the regulation of public service corporations, but specifically provides, however, for an appeal to the Supreme Court, and that "whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall at the same time substitute therefor such order as, in its opinion, the Commission should have made at the time of entering the order appealed from." This language, it will be observed, is free from doubt, and specifically confers the claimed powers upon the court. This provision of the Virginia Constitution was before the Supreme Court of the United States in the case of *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, on appeal from the Circuit Court of the United States, where a bill in equity was filed to enjoin the enforcement of a rate established by the Virginia Commission. The court, speaking through Mr. Justice Holmes, held that the power, exercised by the court, in fixing a rate, under this Constitution was legislative and not judicial. He says, "The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind," and "Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. § 720 [U. S. Comp. St. 1901, p. 581], no matter what may be the general or dominant character of the body in which they may take place. * * * That question depends, not upon the character of the body, but upon the nature of the proceedings." And, "the decision upon them cannot be res judicata when a suit is brought." Now, if this be the correct rule, and it appears to be firmly settled in the United States, and certainly appeals to reason, were we to adopt the construction suggested, it would make of this court, in these cases, a mere

legislative body. Its decisions would not be res judicata, and parties affected by the orders would be enabled to go into the courts and secure a judicial determination of the reasonableness and lawfulness of the ultimate rate fixed, or facility required to be furnished, by this court. Instead of a speedy determination, untimely delay and expense would be incurred. We do not believe that the case last cited had been called to the attention of the able Attorney General prior to the argument, or the consequences considered in the light of the rule there announced.

What does the language used, "decide such cases on their merits," mean? The word "decide" means to form a definite opinion; to determine; to deliberate. The direction to decide such cases "on their merits" simply means that the court shall decide them on a consideration of their substance and the legal rights involved in opposition to a decision based upon mere defects of procedure or the technicalities thereof. It means the court shall do justice irrespective of informal, technical, or dilatory objections or contentions. See cases cited in 5 Words & Phrases, p. 4493 et seq., and also *Mulhern v. Railway Co.*, 2 Wyo. 465, and *Seely v. State*, 11 Ohio, 501.

But what is the court to decide on the merits? It is the question of the reasonableness and lawfulness of the order made by the Commission, and whether the defendant shall be compelled to comply with such order. It is true the Constitution does not prescribe the question which the court is to decide, but we apprehend no other question could be involved. If the court finds the order reasonable and lawful, it enters a judgment to that effect and proceeds to enforce the same. If it finds it unlawful or unreasonable, it refuses to enforce it, and in such event the State Corporation Commission may proceed to form a new order, if necessary or proper, under proper rules to be prescribed by the Commission.

The attorney for the railway company applied to the court for permission to introduce before this court additional evidence, for the claimed purpose of showing that the order entered by the Commission was unconstitutional, unreasonable, unjust, and confiscatory, and in violation of section 1 of the fourteenth amendment to the Constitution of the United States, and because, under the provisions of our Constitution, said company was precluded from introducing such evidence, the argument was made that section 7 of article 11 was unconstitutional and in violation of said section 1 of article 14. This contention, however, is answered by the Supreme Court of the United States in the case of *Oregon R. & N. Co. v. Fairchild*, supra, and need not be further considered. We might add, however, that in no case does the Constitution contemplate the taking of additional evidence in the Supreme Court; but

as has been said, in a proper case, the cause will be referred back to the Commission, for such purpose.

Having considered the provisions of our Constitution, involved in this proceeding, we will notice such objections, contained in the motion to dismiss, filed by the railway company, as have not already been disposed of by what has been heretofore said.

The company insists that it is entitled to a jury trial of the issues involved, because, by section 12 of article 11 of the Constitution of this state, it is provided that the right of trial by jury, as it heretofore existed, shall be secured to all and remain inviolate, and, at the time of the adoption of the Constitution, the provision of the federal Constitution that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," was in force in the territory. That the provision was in force cannot be disputed. But it is likewise true that the state could abolish trial by jury, if it so elected. In considering the conflicting provisions of a Constitution or a statute, the great object to be kept in view is the legislative intent. Viewing the instrument as a whole, we do not believe there is any conflict. It was evidently the purpose to retain the right to a trial by jury, as it theretofore existed in the territory of New Mexico, except in special proceedings, for which express provision was made in the same instrument. The later express provision carved an exception out of the previous general provision, and of course would be held to control. Were the two provisions irreconcilably repugnant, the last in order of time and local position would be preferred. *Quick v. White Township*, 7 Ind. 570.

Objection is made because of the failure of the Commission to serve upon the railway company copies of the petitions or complaints upon which the action was based; but the company is not in position to take advantage of such failure, were it vital, in that no objection was interposed before the Commission because of such failure. It will not be conducive to orderly procedure to permit a company, against whom proceedings are instituted, to sit quietly by in the Commission and permit the hearing to be closed, and raise objections in this court which, if interposed before the Commission, could be cured, and delay and expense avoided. Both parties to a proceeding are presumed to be familiar with the files in the case and to know the record. The company, by its general appearance without objection before the Commission, waived all irregularity preceding such hearing.

It is next claimed that the record discloses the Commission did not, prior to the making of the order for the hearing, endeavor by mediation to effect a settlement of the grievances complained of as required by sec-

tion 2, c. 78, S. L. 1912. No objection to such failure was interposed before the Commission, and therefore it is not availing here. We might add however, that the record does show that numerous letters passed between the Commission and the company, in an effort to bring about such settlement.

It is insisted that the cause should be dismissed, because it appears upon the face of the record herein that no certified copy of the order of the State Corporation Commission made herein was served on the railway company as required by section 4, c. 78, S. L. 1912. The record contains the certificate of Edwin F. Coard, assistant clerk of the Commission, wherein he certifies "that I served a copy of the within order upon the within named the Denver & Rio Grande Railroad Company by delivering a true copy thereof to," followed by a statement of the person served, etc., which is not questioned. It is true, the proof of service does not specifically show that a certified copy was delivered, but it does recite that a true copy of the same was served. This certainly was sufficient to convey notice to the company of the order and its terms and provisions, and was all the company could ask. This court is enjoined by the Constitution, in these matters to disregard technicalities, and this objection is, we think, a trivial technicality, and without merit.

[4] Passing now to the consideration of the question raised by the railway company, upon the merits of the case, we find objections interposed to certain specific findings of fact made by the Commission; the assertion being made that such findings are not supported by the evidence. While it is proper for the Commission to make findings of fact, still such findings can have no force or effect in this court. Our Constitution does not require this court to consider or give any effect to such findings, but enjoins that this court shall "decide such cases on their merits." It does not even, as is usually the case, make the order of the Commission *prima facie* just and reasonable, but, on the other hand, requires this court to pass upon the merits of the case, without indulging in any presumptions. This being true, it is our duty to take the order made by the Commission and test its reasonableness and lawfulness by the evidence adduced upon the hearing. This court forms its own independent judgment, as to each requirement of the order, upon the evidence; therefore the findings made by the Commission may not be justified by the evidence, yet if the evidence sustains the reasonableness and lawfulness of the order made it would be our duty to uphold and enforce it. It will not therefore be necessary for us to consider the objections interposed to the findings of fact; but we will pass to a consideration of the order made, and ascertain whether it is just, reasonable, and correct, and supported by the evidence.

The order made was divided into three separate requirements or provisions, and we will discuss them in their order. The first is as follows: "It is hereby ordered by the Commission that the Denver & Rio Grande Railroad Company open its station building at the town of Tres Piedras for the purpose of affording accommodations to the traveling public who may desire to take a train at Tres Piedras or alight therefrom, and provide suitable seats, fuel, and water for the comfort of said passengers."

The evidence discloses that the company has maintained a comfortable station building at Tres Piedras for the past 30 years; that it is ample to accommodate the traveling public in the matter of waiting rooms, etc.; but that the company keeps the building closed, and that during inclement weather no shelter is provided; that the section foreman and his wife reside in a portion of the station, and it appears that the railroad company with but little expense could fulfill these requirements. It is true there is but little passenger traffic originating there; but, still, a requirement that the company should maintain a waiting room and properly heat and light the same is but a humane provision, and we think fully warranted by the facts. Complaint, however, is made as to the form of the order; the company claiming that it is so vague and indefinite that it does not inform the company as to just what is required. The contention is urged that by the use of the word "accommodations," in the clause "open its station at the town of Tres Piedras for the purpose of affording accommodations to the traveling public," it might mean that the company was to install an agent to sell tickets, check baggage, and run a bureau of information. As we read the order, however, we do not so understand the language used, nor do we think that it is obscure or uncertain. It simply directs the company to open the building "for the accommodation of the traveling public"; to open it, so that the public using the road may have shelter. It does not direct the furnishing of accommodations, but the opening of the building, so that the accommodations will exist, viz., a place to await the train, sheltered from the cold or inclement weather.

[5] More trouble exists in the remaining part of the order, "and provide suitable seats, fuel and water for the comfort of the passengers." The order made by the Commission, if found to be reasonable and lawful, is to be enforced by this court by "fine, forfeiture, mandamus, injunction, and contempt or other appropriate proceedings." Now suppose we found this portion of the order to be in compliance with the law, and proceeded to enforce it. The company, claiming a compliance with the order, should show that it had provided two seats, and had provided a ton of coal or a load of wood, but no stove; could this court punish by fine, for-

feiture, or contempt for a failure to comply with the order? Who is to determine what number of seats are sufficient or the kind of seats? Who is to say whether the seats are suitable? While the order directs the furnishing of fuel, it does not require the waiting room to be heated. The court can only enforce an order which is reasonably definite and certain. The company may exercise its best judgment, and yet be met with a new complaint and be subjected to the burden of another investigation with reference to the same situation. The public may secure an order for certain accommodations, which will be absolutely fruitless, because of their inability to secure its enforcement. This precedent, if established, would ultimately prove unduly burdensome upon the court, the Commission, the railroads, and the people. In the interest of justice there should be an end to litigation. Mandamus does not lie to compel the performance of a duty calling for the exercise of judgment and discretion on the part of the person at whose hands the performance is required. *Spelling, Inj. & Ex. R. § 1384.*

As said by the court in the case of *Ross v. Butler*, 57 Hun, 110, 10 N. Y. Supp. 444: "The appellant has not been directed to do any specific thing, and, if a commitment were issued upon such an order, it would be impossible for the sheriff to determine when the appellant had conformed to its requirements. It is absolutely clear that a party cannot be adjudged to be in contempt without definitely stating what he shall do in order to purge himself of the contempt." In order to be valid, binding, and enforceable, the order must be reasonably definite and certain in its terms and requirements. *Railway Company v. People*, 20 Colo. App. 181, 77 Pac. 1026. See, also, 81 Cyc. 51, where it is said: "The orders of the Railroad Commission must be definite and specific as to what is required to be done by the railroad company." *State v. Chicago, etc., R. Co.*, 16 S. D. 517, 94 N. W. 406.

We think the order in the present case should have specified the number and kinds of seats, and, instead of requiring the furnishing of fuel, should have required the station to be comfortably heated during certain hours previous to the arrival of trains.

A more serious question, going to the merits of the order, is presented by the second requirement, viz.: "It is further ordered by the Commission that the Denver & Rio Grande Railroad Company maintain a representative at this station, whose duty it shall be to receive freight and properly store the same in freight station to protect same from pillage and the elements, and to properly check out such freight to the rightful owners when called for."

The evidence in the record—and of course we must determine the reasonableness and lawfulness of the order solely upon such evidence—shows that when this station was es-

tablished, and for many years, it continued to be the shipping point for Taos, the county seat of Taos county, and the community surrounding it. While this condition existed, the station was very remunerative, and an agent and the usual station facilities were maintained. A few years before the railroad decided to discontinue the agent and telegraph station, a new wagon road was built from Taos to Servilleta, which was much shorter and easier of travel. The railroad company then established a station at the latter point, and by far the major portion of the traffic that had hitherto found an outlet through Tres Piedras went by Servilleta. Business at Tres Piedras fell off to such a point that the company decided that it was not warranted in continuing to keep an agent at that place, and accordingly removed the agent, and since December, 1910, said station has been operated as a "prepay" station. The railroad has continued to stop its trains at that place for both freight and passengers. The business of the station for the year 1911, as shown by the evidence, amounted to: Passenger receipts, \$581.23; freight forwarded, \$1,075.81; freight received, \$1,850.66—or a total of \$3,507.70. Now it is very evident that the total should not be credited to this station, because to do so would be to deprive the stations from which the incoming freight originated, and the outgoing freight was received, of their proper credit, and their proper share of the necessary expense in handling the same. It is not clear whether the passenger receipts were all derived from outgoing passengers; therefore we will not consider them in the division of business, but will presume that they were properly all credited to this station. Should we divide equally, the incoming and outgoing freight, between this station and the stations of its origin or destination, we find that this station should only be credited with the sum of \$2,044.46, which included the passenger receipts, for the purpose of arriving at the question—if it be material—as to whether the earnings of the station justify the requirement for the maintenance of an agent. The undisputed evidence shows that it will cost the railroad company \$75 per month to maintain an agent at this place, who is not also a telegraph operator, and, as the Commission did not require the agent to be an operator, we will assume that that sum would be sufficient. This would require the yearly outlay of \$900, to which we add the sum of \$90, shown to be the added incidental expense in the way of fuel, etc. Deducting this sum from the total, properly creditable to the station, it leaves a balance of but \$1,064.46 for this station to contribute toward the maintenance and operation of the road, payment of interest, and reasonable dividends. Of course, it goes without saying that, under the facts shown to exist in this case, the proportion is not reasonable.

at this place, who would do all that the order required done, at a much less cost than \$960 a year; but the Commission has failed to develop any evidence to show such fact, and we cannot go outside of the record.

The Attorney General contends, however, that upon the facts disclosed by the record in this case, the court, in determining the reasonableness or unreasonableness of the order made requiring the maintenance of an agent, must necessarily presume that the order is reasonable and just because the railroad company has failed to introduce evidence showing the receipts from the operation of its lines in New Mexico, and the expense and the just proportion of the fixed charges, etc., upon the road; that, having failed to make such showing, the court must presume that its net profits upon its lines in New Mexico are sufficient to justify it in incurring the increased expense at the station in question. He evidently reasons upon the theory upheld by the Supreme Court of the United States in the case of *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398, wherein the court says: "As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." In that case the court was considering an order made by the Corporation Commission of North Carolina, which was sustained by the Supreme Court of the state, requiring the railroad company to install an additional passenger train, in order that the passengers on its lines could make connection with another road. The Supreme Court of the United States, in the case under consideration, differentiates between an order fixing rates and an order requiring the furnishing of a facility, necessarily required, in order that the road may carry out its absolute duty to the public. The court says: "The distinction between an order relating to such a subject and an order fixing rates, coming within either of the hypotheses which we have stated, is apparent. This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result. It follows therefore that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness under the doctrine of *Smyth v. Ames*, or under the concessions made in the two propositions we have stated." The court sustained the order which required the railway company to run an additional passenger train, even though to do so resulted in a daily loss to

the company of \$15. It is true the facts in the case disclosed that the company was making a large profit by its operation within the state of North Carolina, and it was contended that the same rule should be applied as that applied in rate cases. The court used language that might seem to imply that if that rule were applied it would be proper to take into consideration the net income; but, as we read the case, the court did not base its decision upon the fact that such net income was shown, but rather upon the theory that it was the absolute duty of the road to provide sufficient passenger and freight trains for the accommodation of the public, and that the duty could be enforced, even though as a result a pecuniary loss was entailed. This is so, we think, because it is the primal and absolute duty of the railroad to provide such facilities. Such is the very purpose of its organization. It is chartered for the purpose of transporting freight and passengers, and so long as it continues to exercise its rights, under such charter, and does not elect to surrender up its franchise, the performance of the duty for which it was called into existence and given its being may be enforced, even though such performance may entail a pecuniary loss. So long as it continues to exercise its franchise rights, it cannot escape the absolute duties thereby imposed.

[8, 9] Its absolute duty is to transport freight and passengers. It is not its prime duty to provide depots, waiting rooms, station agents, telephone and telegraph facilities. These duties are only incidental to the main purpose of its organization. It might discharge its absolute duties without any of these facilities, by merely stopping its trains at designated places and loading and unloading freight and passengers. When it is called upon to perform an absolute duty, of course, the question of expense cannot be considered; but, when the duty is only an incident to the main duty, then the question of expense becomes of more importance, and, in determining the question of reasonableness, the revenue derived by the company from the public, for whose accommodation the facility is to be furnished, becomes of importance and must be considered in connection with the public necessity.

This distinction we think was made more manifest in the case of *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472, where the court, in sustaining an order of the Kansas Corporation Commission requiring the railroad company to run a separate passenger train, say: "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at

a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road, is then the question to be considered. It may not be doubted that the road by virtue of the charter under which the branch was built was obliged to carry passengers and freight, and therefore, as long as it enjoyed its charter rights, was under the inherent obligation to afford a service for the carrying of passengers."

The same distinction is recognized by the same court in the case of *Oregon R. & N. Co. v. Fairchild*, supra, where the court say: "If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon the proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criterion to be taken into view in determining the reasonableness of the order.' *Atlantic Coast Line R. R. v. North Carolina Commission*, 206 U. S. 1, 27 [27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398]; *Missouri Pacific Ry. v. Kansas*, 216 U. S. 262 [30 Sup. Ct. 330, 54 L. Ed. 472]. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order, the court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts, the question of public necessity and the reasonableness of the order must be determined."

[10-12] The Constitution does not confer upon the Corporation Commission the right to arbitrarily establish a station or to require a station agent regardless of the expense entailed upon the company, or the benefit to be derived by the public. It is only authorized to make such an order in this regard, as "the public interests demand, and as may be reasonable and just." It is not to consider alone the interests of the public affected, by the order, but must determine whether or not, taking into consideration both the interests of the public and the expense entailed upon the railroad company, the order is just and reasonable. Of course, were the question involved in this case of

the safety or expedition in the operation of trains, or the performance of an absolute duty, a different proposition would be involved; but these questions are not involved.

Suppose for instance, the railroad company had introduced proof as to its earnings in New Mexico, and it was shown that the railroad company was earning a net return of, say, 10 per cent. over and above all operating expenses, would that fact, in and of itself, authorize the Corporation Commission to require the installation of a service at a station not reasonably warranted by the business which the station produced or required by the public necessities? A little consideration of the question will demonstrate clearly, we think, the fallacy of such argument. Suppose, for instance, that it was a fact that the railroad company in New Mexico was earning 10 per cent. net, after making all proper deductions from its receipts; the Corporation Commission, in view of this large net revenue, and following the theory suggested by the Attorney General, could require the installation of stations, agents, and facilities at divers places along the line of its road where the receipts did not fairly warrant the service, or the public necessities require, thereby entailing upon the company such an expense that its net earnings were reduced to, suppose, 6 per cent. per annum, which we will assume for the purpose of illustration would be a fair return upon the property, and below which the Corporation Commission would have no right to reduce its earnings. The maximum passenger fare in New Mexico as fixed by statute is 6 cents per mile, and suppose, for illustration, that the company is charging the maximum amount of fare allowed by law, if the Corporation Commission is to be permitted, so long as the earnings upon the present rate of fares and charges show a net return above 6 per cent., to require facilities at a station not warranted by the business; how would it ever be possible for the people of New Mexico to secure a reduction in fares and charges? To sanction such a policy would be to impose an unjust burden upon the patrons of larger stations, whose receipts will be required to help make up the deficit caused by the smaller stations.

As said by the Supreme Court of Oklahoma in the case of *C. R. I. & P. R. Co. v. State et al.*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 893: "Where the receipts of such stations will not justify the installation of such service, there being eliminated the question of the safety or expedition in the operation of trains, it would be unreasonable to require such service to be installed creating a deficit at such station to be borne by the receipts at a larger station, except in exceptional instances. The patrons of a large station, after the expenditures for the reasonable maintenance of the station and the proper contribution towards mainte-

nance, equipment, and operation of the line, and the paying of a reasonable dividend on the investment, are entitled, if it be reasonably practicable, to a reduction in rates; and, except as stated, it is unreasonable and unjust to require the large stations to contribute to pay deficits at small stations."

And the same court, in the case of *St. Louis & S. F. R. Co. v. Newell*, 25 Okl. 502, 106 Pac. 818, say: "But the facilities afforded at any station to the general public must in a measure be commensurate with the patronage and receipts from that portion of the public to whom the service is rendered. Otherwise, not only would an injustice be done the railroad company, which would be required to furnish the services at a financial loss, but the other portions of the general patronizing public would be required to pay an additional charge for the service rendered to them, over and above that necessary to pay the expenses of such services, and a fair and reasonable dividend on the investment of the railway company, in order to make up the deficit for the additional services required at such places."

Applying the facts to the principles above enunciated, it does not appear that the order made, requiring the maintenance of an agent at this station at the annual charge shown, is reasonable and just, and as the duty is imposed upon the court to determine the reasonableness and justness of the order upon the evidence in the record, we must decline to enforce the order.

The third provision of the order was as follows: "It is further ordered by the Commission that some adequate means of communication be maintained at this station for the purpose of obtaining information as to the running of trains; whether this be by telephone or telegraph is left to the discretion of the company."

The evidence discloses that there are but two trains a day operated upon this road; one going north, and the other south. The train going north is usually on time, while the one running south is frequently late. But the passenger receipts from this station, as disclosed by the record, are but \$581.23 a year. To maintain an agent who is a telegraph operator would require an additional charge of \$20 a month, or an annual charge of \$240, almost 50 per cent. of the receipts from this portion of the traffic. If it be contended that it is optional with the company to install telephone facilities, the answer is that there is no proof in the record showing the cost of installing this service. The court cannot speculate as to the probable cost, but it is the duty of the Commission to present evidence as to all such facts, so that the court will be enabled to determine therefrom the reasonableness and justness of the order. If it be true that the telephone service could be installed for a reasonable amount,

then an order so requiring would probably be just and proper. Certainly it would not be reasonable to require the installation of telegraph service for the purpose of bulletining trains where the cost of such service would be out of proportion to the revenue derived from that portion of the travelling public to be benefited thereby. The position of the court is fully supported by the adjudicated cases upon the proposition. See *St. Louis & S. F. R. Co. v. Newell*, supra; *C. R. I. & P. R. R. Co. v. State*, supra.

For the reasons stated, the court must refuse to enforce the order made by the Commission, and the cause is remanded to the Corporation Commission for further proceedings should it so elect, in accordance with this opinion.

HANNA and PARKER, JJ., concur.

AMES v. ROBERT. †

(Supreme Court of New Mexico. April 10, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 134*) — DESCRIPTION OF PROPERTY.

Where a mortgage deed is made, specifically describing certain real estate, and such description concludes with the words, "and all other real estate which we may own in Chaves county, New Mexico, or have an interest in," nothing passes under such concluding clause, except such property as is then vested in grantors by legal title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 254; Dec. Dig. § 184.*]

2. MORTGAGES (§ 163*)—MORTGAGEE AS BONA FIDE PURCHASER—PRIORITY OF RECORD.

A deed of land, though not recorded, is good as between grantor and grantee and divests the title of the former, so that it does not pass to a subsequent grantee or mortgagee, who takes a conveyance only of the estate which belongs to the grantor at the time of the grant.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 368-379; Dec. Dig. § 163.*]

Appeal from District Court, Chaves County; McClure, Judge.

Action by Ben Ames against Sallie L. Robert. Judgment for plaintiff, and defendant appeals. Affirmed.

On or about August 7, 1911, appellee entered into a contract with Anna P. Sutherland and her husband for the purchase of certain real estate in Chaves county, N. M. On the 15th day of August thereafter, the Sutherlands executed a warranty deed to said real estate, and the deed and contract were placed in escrow. The trial court found that the deed was delivered to appellee about January 15, 1912, and that appellee had entered into possession of the real estate prior to January 1, 1912. On January 27, 1912, Anna P. Sutherland and her husband executed and delivered to Wm. J. Chisum a mortgage deed to secure the payment of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† Rehearing denied.

sum of \$1,260, which mortgage deed conveyed certain real estate, specifically described in said mortgage, and all other estate which said mortgagors owned at said time in Chaves county, N. M., or in which they had an interest at said time. At the time of the execution of the mortgage by the Sutherlands, appellee had not recorded the deed to him from the Sutherlands, and the real estate described in the deed to appellee was not specifically described in the mortgage deed executed by the Sutherlands to Chisum, and was not included therein, unless by the clause, "and all other real estate which we may own in Chaves county, New Mexico, or have an interest in." Some time in March following Chisum assigned the note and mortgage executed to him by the Sutherlands to the appellant, and she claimed that the land deeded to appellee was included in and covered by the terms of the mortgage deed so held by her. To remove this cloud and quiet his title appellee instituted this action. Wm. J. Chisum was joined with appellant as a party defendant, but he filed a disclaimer. Appellant filed an answer, setting up her mortgage deed, and alleged that it was a lien upon the real estate claimed by appellee under said deed. A trial was had before the court, and findings of fact were made and judgment rendered for appellee quieting his title as against said mortgage. From such judgment this appeal is prosecuted.

D. W. Elliott, of Roswell, for appellant. Reid & Hervey and Tomlinson Fort, all of Roswell, for appellee.

ROBERTS, C. J. (after stating the facts as above). The trial court in this case made findings of fact in accord with the preceding statement of facts, and, as such facts so found are supported by sufficient evidence, such findings will not be disturbed by this court. *Carpenter v. Lindauer*, 12 N. M. 388, 78 Pac. 57. This being true, it is only necessary for this court to consider one proposition, viz.: Were the lands embraced in the deed to Ames covered by the description of the real estate mortgaged to Chisum, under which mortgage appellant claims? The mortgage contains a specific description of certain real estate and concludes the description with this clause: "And all other real estate which we may own in Chaves county, New Mexico, or have an interest in." It is not contended by appellant that the property described in Ames' deed is covered by the real estate specifically described in the mortgage, but the contention is made that this clause is broad enough to cover, and does embrace, the land deeded to Ames. Ames not having recorded his deed at the time of the execution of the mortgage, had the mortgage specifically described the real estate theretofore conveyed to him, title to the real estate would have passed under

such mortgage, in the absence of a showing of knowledge of the existence of such unrecorded deed on the part of the mortgagee.

[1] It is conceded without question that ordinarily a general description of "all my property," or "all the property I own," in a specific location is good as to any property owned by the grantor, which is embraced in the terms of the general grant. The cardinal rule that the intention of the parties, as gathered from the instrument, should prevail in the construction of the contract is equally applicable to deeds. It would therefore seem that the words, "or have an interest in," would by the very terms of the instrument indicate a clear intention not to convey more than the grantor's interest in any property that might be conveyed under this general clause. Grants under general words like the above are not effective upon the idea that the description in the instrument is sufficient in itself to convey anything, but, by the application of the rule "Id certum est quod certum reddi potest," the grantee is permitted to apply such description by allundi evidence to any property that its terms may include. But this does not mean that the presumption of title, as shown by the record, would be the only proof or limit the proof to such facts as the record shows. In such a case, such record proof would raise a mere rebuttable presumption, and the question of the grantor's title would be determined by all the facts relative thereto. The rule is very different where the terms of the description of itself defines the property conveyed, for in such a case we do not have to go beyond the record to determine these facts. But where the property conveyed is described in general terms, as in this case, the deed upon its face shows that we must look to extraneous evidence and facts to apply such description to the property conveyed. To grantee by its very terms it limits its description to whatever real estate grantor might own, or to grantor's interest in real estate in Chaves county, N. M.

"Where a contract for the sale and conveyance of lands remains executory, and no deed has passed, each of the parties has an interest in the premises which may be made the subject of a mortgage. A mortgage by the vendor in such circumstances will pass to the mortgagee exactly the rights which remain in the vendor and no others." 27 Cyc. 1037. It is clear that under this rule the general words of conveyance could not be construed to include any property in which the mortgagor had no interest, such as that conveyed by deed to Ames. In this case, from the findings of the court, it appears that the deed had been delivered, but was unrecorded when the mortgage was given. This being true, the mortgagor had no interest in the land included in Ames' deed at the time of the execution of the mortgage, and the mortgagee therefore could not claim a lien on the land conveyed to Ames.

[2] In *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen (Mass.) 159, it was held: "A release of all the grantor's property, estates, rights and privileges, without further description, will not include land previously conveyed by him by an unrecorded deed, although the grantee had no knowledge of the existence thereof." In the opinion in this case, Bigelow, C. J., said: "When a deed is made of all a grantor's real estate, without description, nothing passes except such property as is then vested in him by a legal title. A deed of land, though not recorded, is good as between grantor and grantee and divests the title of the former, so that it does not pass to a subsequent grantee who takes a conveyance only of the estate which belongs to the grantor at the time of the grant." See, also, *Adams v. Cuddy*, 13 Pick. (Mass.) 460, 25 Am. Dec. 330; *Chaffin v. Chaffin*, 4 Gray (Mass.) 280. Therefore, in no view of the case was the mortgage of appellant a charge upon the land conveyed to Ames.

Appellant cites numerous authorities in support of the proposition that a description in a mortgage worded as "all the property of the mortgagor in a certain place" creates a lien on all the property owned by such mortgagor in that place. This is a correct statement of the rule but does not apply in this case because of the fact that the mortgagors, under whom appellant claims, did not own the land in question at the time of the execution of the mortgage.

Finding no error in the record, the judgment of the lower court is affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

ANDREWS v. FRENCH et al.

(Supreme Court of New Mexico. April 10, 1913.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT (§ 12*)—VOLUNTARY DISMISSAL—RIGHT.

A party usually has the right to discontinue any action or proceeding instituted by him, unless substantial rights of other parties have accrued and injustice will be done by permitting the discontinuance.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 27; Dec. Dig. § 12.*]

2. DISMISSAL AND NONSUIT (§ 15*)—VOLUNTARY DISMISSAL—DISCRETION.

While such dismissal must be by order of the court, and the court has a discretionary control over its orders and decrees, if no facts appear which show that such dismissal will violate any of the rights or interests of the adverse party, a refusal of leave becomes merely arbitrary and without any basis upon which discretion can rest.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 31; Dec. Dig. § 15.*]

3. DISMISSAL AND NONSUIT (§ 12*)—VOLUNTARY—RIGHT—REFERENCE.

Where a party files a claim with the referee, in accordance with the provisions of section 82 of chapter 79, S. L. 1905, and demands that a jury decide thereon, and such claim is certified to the district court for trial, as required by said section, the claimant has a right to discontinue said proceeding, in the absence of any showing that such discontinuance will violate or prejudice the rights or interests of other interested parties.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 27; Dec. Dig. § 12.*]

Appeal from District Court, Dona Ana County; Parker, Judge.

Claim by T. W. Andrews against Frank T. French, receiver, and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Upon proceedings instituted by a creditor, under chapter 79, S. L. 1905, the Stephenson-Bennett Consolidated Mining Company was adjudged to be insolvent, and the usual decree in such cases was entered, and Frank T. French was appointed receiver. Appellant filed a claim against said corporation with the referee, in accordance with the provisions of section 82 of said chapter, and demanded that a jury decide thereon. The claim was certified to the district court, the issues were made up, and the case was called for trial. Prior to the introduction of any testimony, the appellant, plaintiff in the lower court, moved to dismiss said cause without prejudice. The motion was overruled and appellant excepted. Thereupon the evidence of plaintiff was taken, upon the conclusion of which the defendants moved for judgment; the motion was sustained; and a decree was entered for the defendants, from which judgment this appeal is prosecuted.

Adrian F. Sherman, of Kansas City, Mo., and Bonham & Reber, of Las Cruces, for appellant. Holt & Sutherland and M. B. Thompson, all of Las Cruces, for appellees.

ROBERTS, C. J. (after stating the facts as above). Several errors are complained of; but in the view we take of the case it will only be necessary to consider the action of the court in overruling the plaintiff's motion to dismiss the cause, as the decision of that question will be conclusive of the case.

[1, 2] A party usually has the right to discontinue any action or proceeding instituted by him, unless substantial rights of other parties have accrued and injustice will be done them by permitting the discontinuance. While such dismissal must be by order of the court, and the court has discretionary control over its orders and decrees, if no facts appear which show that such dismissal will violate any of the rights or interests of the adverse party, a refusal of leave becomes

merely arbitrary and without any basis upon which discretion can rest. Matter of Petition of Butler, 101 N. Y. 307, 4 N. E. 518. See, also, Winans v. Winans, 124 N. Y. 140, 28 N. E. 293. And the object of the plaintiff in asking for the dismissal is of no concern to the court. Banks v. Uhl, 6 Neb. 145. The same rule seems to be applied in equity cases, where no cross-bill has been filed. Reilly v. Reilly, 139 Ill. 180, 28 N. E. 960. By section 2908, R. S. 1897, it is provided: "Any cause pending in any court of this territory may be dismissed by the plaintiff in said cause, at his costs, at any time before the same is submitted to the jury in causes tried by the jury, or before judgment has been rendered in causes tried by the court."

[3] Appellee contends, however, that this is a special statutory proceeding and is not governed by the general rule or the statute just quoted. It is a statutory proceeding, true, but it is conducted as an ordinary action at law and is triable in the same manner. The statute does not undertake to prescribe a different rule of practice, relative to such causes, after they are certified to the district court. Appellees have failed to point out how any of their rights would have been jeopardized by a dismissal, or any injustice done them thereby.

Under section 81 of said chapter 79, supra, the court has the right to limit the time within which creditors shall present and make proof before the referee of their respective claims against the corporation, and may bar all creditors and claimants failing so to do within the time limited from participating in the distribution of the assets of the corporation. So long as appellant could file and make proof of his claim, within the time limited by the court, no delay would be occasioned in the final settlement of the estate. If he could not refile his claim within the limited time, such fact did not concern the appellees. The statute above quoted says that "any cause pending in any court * * * may be dismissed by the plaintiff, etc." The language is very broad and includes all cases. The right to dismiss, however, is, of course, dependent upon whether such dismissal will leave the defendant in the same position as he would have stood if the suit had not been instituted; he would not have the right where there has been a proceeding in the cause which has given the defendant a right against the plaintiff, or an injustice would be done the defendant by the dismissal.

We think the court erred in refusing to allow appellant to dismiss the cause, and for this error the judgment of the lower court will be reversed and the cause remanded, with directions to sustain the motion to dismiss, and it is so ordered.

HANNA, J., concurring. PARKER, J., did not participate in this opinion.

LANIGAN v. TOWN OF GALLUP et al.
(Supreme Court of New Mexico. April 10, 1913.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 31*)—SELF-EXECUTING PROVISIONS—POWERS—CREATING INDEBTEDNESS.

Sections 12 and 18 of article 9 of the state Constitution do not confer the power upon municipalities to contract indebtedness, independent of legislative authorization. In this regard such sections are not self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 31.*]

2. CONSTITUTIONAL LAW (§ 29*)—SELF-EXECUTORY PROVISION—WHAT CONSTITUTES.

A constitutional provision is self-executing when it takes immediate effect, and ancillary legislation is not necessary to the enjoyment of the right given or the enforcement of the duty imposed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 29.*]

3. MUNICIPAL CORPORATIONS (§ 918*)—BONDS—VALIDITY—PROCEDURE.

Where the board of trustees of a town, proceeding under sections 12 and 13 of article 9 of the Constitution, held an election to determine the question as to the issuance of bonds for the construction of a system of waterworks and sewers, and did not follow the procedure required by subsection 67, § 2402, Comp. Laws 1897, the bonds authorized at such election are invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

4. MUNICIPAL CORPORATIONS (§ 957*)—WATER AND SEWER SYSTEM—LIMITATION ON INDEBTEDNESS.

The 12-mill levy limitation fixed by section 12 of article 9 does not apply to debts contracted for the purchase or construction of a system for supplying water, or for a sewer system, for cities, towns, or villages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2015-2022; Dec. Dig. § 957.*]

5. MUNICIPAL CORPORATIONS (§ 918*)—WATER AND SEWER SYSTEM—BOND ELECTION.

Cities, towns, and villages are not authorized to submit to the voters of such municipality the joint proposition of issuing bonds for the double purpose of constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

Appeal from District Court, McKinley County; Reynolds, Judge.

Action by W. L. Lanigan against the Town of Gallup and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

The town trustees of the town of Gallup, McKinley county, N. M., by ordinance provided for the submission to the voters of said town the question of the issuance of \$64,000 of waterworks and sewer bonds, for the purpose of constructing and erecting a system of waterworks and sewers. The proposed issue of bonds was authorized by the vote of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taxpaying electors of said town, and thereafter, by ordinance, the town trustees provided for the sale of the bonds to the highest bidder. The bonds were sold, and the town trustees were proposing to issue \$50,000 of said bonds, when the present action was instituted in the court below to enjoin the town officers from so doing. The lower court refused to restrain the issuance of said bonds and dismissed the complaint upon the merits, from which judgment this appeal is prosecuted.

John A. Young, of Gallup, for appellant.
A. T. Hannett, of Gallup, and F. William Kraft, of Chicago, Ill., for appellees.

ROBERTS, C. J. (after stating the facts as above). Subsection 67, § 2402, C. L. 1897, confers upon cities and towns the power to erect and operate waterworks, sewers and sewer systems, and other public utilities, and specifically provides the procedure by which the question of incurring an indebtedness therefor shall be submitted to a vote of the electors of such city or town. Provision is also made for the issuance and sale of the bonds as evidence of such indebtedness, and the levy of a tax to provide for the payment of the principal and interest of the bonds authorized.

The state Constitution adopted in 1911, and under which New Mexico was admitted as a state in January, 1912, by sections 12 and 13 of article 9, provides as follows:

"Sec. 12. No city, town or village shall contract any debt except by an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied, and which shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question, by ballot deposited in a separate ballot box, shall have voted in favor of creating such debt.

"Sec. 13. No county, city, town or village shall ever become indebted to an amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such county, city, town or village, as shown by the last preceding assessment for state or county taxes; and all bonds or obligations issued in ex-

cess of such amount shall be void: Provided, that any city, town or village may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or for a sewer system, for such city, town or village."

All proceedings looking to the issuance of the bonds in question were had after the adoption of the Constitution and the admission of New Mexico as a state. No attempt was made by the town trustees to comply with the requirements of subsection 67 of section 2402, C. L. 1897, but it appears that they assumed that the provisions of the Constitution, above quoted, were self-executing and repealed all of subsection 67.

[1] The first question, therefore, which presents itself for determination is whether the above provisions of the Constitution are self-executing, in that they confer the power upon municipalities to contract indebtedness independent of legislative authorization.

If such power is granted, it must be by the language used in the proviso to section 13, viz.: "Provided, that any city, town or village may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or for a sewer system, for such city, town or village," for it could not be argued with any plausibility that other language used in either of said sections confers such power, or authorizes the creation of any indebtedness, for any purpose, independent of legislative authorization. It will not be contended that a city or town has an inherent right, independent of legislative sanction, express or implied, to borrow money.

"Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." Dillon's *Municipal Corporations* (8th Ed.) § 237. The power to borrow money may be granted to such corporations or withheld from them by the Legislature; and the Legislature may limit the right to certain purposes. It may grant the power for one purpose and withhold it as to others.

Section 12 of said article contains no language which, by any rule of construction, could be held to confer power upon such municipalities, independent of a legislative grant, to incur indebtedness for any purpose. Said section begins, "No city, town or village shall contract any debt except by an ordinance," and this language is followed by specific provisions as to what the ordinance shall contain. It does not say that cities, towns, and villages may contract debt in the manner provided, but that no debt shall be created, unless it be created in a certain way. This portion of the section is simply a procedure provision, and no debt

created in any other manner would be valid. It is true the language used, "and which shall provide for the levy of a tax, not exceeding twelve mills," etc., "sufficient to pay the interest on, and extinguish the principal of, such debt within fifty years," is either a limitation upon the debt-contracting power, or upon the tax-levying power; but whether the one or the other such clause cannot be held to authorize the incurring of indebtedness, in and of itself. By the language used we do not understand that the Legislature might not properly limit the time the bonds should run to less than 50 years, but certainly it could not provide that such bonds should run for a longer period. The concluding clause in said section is, like the first clause, a procedure provision.

That portion of section 13 which precedes the proviso, above quoted, is a limitation upon the debt-contracting power of such municipalities. It does not undertake to confer upon such governmental agencies the power to contract debts, in the aggregate, amounting to 4 per centum of the value of the taxable property, but limits the amount of such aggregate debts to such ratio of the taxable property, beyond which the Legislature is powerless to authorize. The limitations contained in said sections upon the debt-contracting power of such municipalities are certainly self-executing. *Doon Tp. v. Cummins*, 142 U. S. 388, 12 Sup. Ct. 222, 35 L. Ed. 1044; *Dunbar v. Canyon County*, 5 Idaho, 407, 49 Pac. 409; *Law v. People*, 87 Ill. 385. And the procedure provisions of section 12 are self-executing in the sense that no debt contracted, except in compliance therewith, would be valid. But no language used in either of said sections can be held to confer the authority upon municipalities to contract debts, unless such power is conferred by the proviso to section 13, to contract debts for water and sewer systems. By this proviso the framers of the Constitution were carving an exception out of the limitations theretofore imposed upon the debt-contracting power of such municipalities. In other words, by previous language used the convention placed limitations upon the legislative power to authorize, and the municipal power to incur, indebtedness, out of which limitations it excepted debts for the two purposes named, leaving intact, however, the procedure provisions. It will be noted, however, that such procedure provisions are not complete, in and of themselves, but that legislation is required to supplement them.

[2] A constitutional provision may be said to be self-executing when it takes immediate effect, and ancillary legislation is not necessary to the enjoyment of the right given or the enforcement of the duty imposed. In short, if a constitutional provision is complete in itself, it executes itself. *Town of Lyons v. City of Longmont (Colo.)* 129 Pac.

198; *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; *Cooley on Constitutional Limitations* (7th Ed.) § 121; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

Tested by the above rule, a brief consideration of the language used in the sections will clearly demonstrate that such provisions are not complete, but that legislation is necessary to the enjoyment of the right given.

[3] Under section 12, before such debt can be incurred, the question must first be submitted to a vote of the qualified electors of such municipality, who have paid a property tax therein during the preceding year. By whom, or what board or body, is the question to be submitted? No provision is made as to any notice to be given the electors that such a question will be submitted. While such question must be determined by ballot, deposited in a separate ballot box, no provision is made as to what said ballot shall contain, or how the voter shall express his desire. How is the vote to be canvassed, and to whom shall the return be made? Again, when it comes to issuing the bonds, for what length of time shall they run? Who is to execute the bonds? What rate of interest shall they bear? In what denominations shall they be issued? How shall they be sold? If it be argued that many of these questions are already provided for by existing laws, such argument would only tend to demonstrate that the provisions in question are not self-executing; for it would be evident that it was necessary to supplement such provisions by law, and all the reasoning advanced for sustaining the validity of the bonds in this case would fall.

Here no contention is made that the town authorities complied with the existing statutes upon the subject; but the broad claim is made that it was unnecessary to comply with any of the statutory provisions theretofore existing and continued in force by the Constitution, because the constitutional provisions were self-executing and provided a full and complete method of procedure, and in and of themselves authorized the creation of the indebtedness. We do not think the provisions in question are self-executing, but legislation is necessary for the enjoyment of the rights given.

"The Constitution, except when special provision is made for that purpose, does not enforce itself. It defines certain powers, but to make them operative legislation is necessary." *St. Joe & Denver City R. R. Co. v. Buchanan County Ct.*, 39 Mo. 485.

In the case of *Ohio & Mississippi R. R. Co. v. Lawrence County*, 27 Ill. 50, the contention was made that the Constitution of Illinois, by the eighth section of article 5, conferred jurisdiction upon the circuit courts in all cases of appeals from inferior courts, and that the right existed in that case (which

was an attempted appeal from the action of the board of supervisors, increasing the assessed valuation of appellant's property) by force of that provision. The court says: "As a general proposition, subject, however, to some exceptions, it may be safely asserted that the Constitution cannot execute its own provisions, independent of legislative enactment. In this case it no doubt not only authorizes, but requires, the General Assembly to make all necessary provisions to carry this requirement into effect. If, independent of legislation, an appeal were attempted, it would be found that innumerable difficulties would be presented to its accomplishment. If this constitutional provision stood alone, unaided by legislation, and an appeal were attempted, how could it be perfected? Would it be accomplished by simply filing a transcript of the record in the superior court, or would bond with security have to be given? If so, in what sum, with what conditions? Which court should impose them? Within what time would it have to be prayed and perfected? And when in the appellate court, how would the trial be had—on the transcript, or de novo on the merits? It will be readily perceived that these form not a few of the obstacles that present themselves at the very threshold of this question. From these considerations it appears to be perfectly apparent that this provision of the Constitution cannot be carried into effect unaided by legislative enactment."

The same reasoning applied by the Illinois court is applicable to the provisions of our Constitution under consideration. The submission of the question to the qualified tax-paying electors is required; but the manner of conducting the election, making the returns, etc., is not provided for, and effect cannot be given to these provisions, unaided by legislative enactment.

Article 209 of the Constitution of Louisiana, adopted in 1879, provided certain limitations upon the tax rate in parishes and municipalities, and concluded with the following proviso: "Provided, that for the purpose of erecting and constructing public buildings, bridges and works of public improvement, in parishes and municipalities, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the property taxpayers of such parish or municipality entitled to a vote under the election laws of the state, and a majority of same voting at such election shall have voted therefor."

In the case of *Surget v. Chase*, 33 La. Ann. 833, it was contended that this provision of the Constitution was self-executing, and that an election held thereunder was lawful. The court, in discussing the section, say: "The article does not purport to be a grant of taxing power to either the state or municipal authorities, which grant is to be found in article 202, but it is, what it purports to be,

a restriction of the taxing power in the General Assembly and in its grant of the taxing power to parishes and municipal corporations. And the exceptions contained in the proviso, under which the limit of parish and municipal taxation can be increased in certain specified cases, must remain dormant and ineffective until rectified by legislative breath. * * * It therefore follows that article 209 is not self-acting."

From what we have said it follows that the provision of the Constitution, requiring the submission to a vote of the tax-paying electors of the question of issuing bonds, cannot be given effect unaided by legislation. And as no attempt was made in this case to comply with the provisions of subsection 67 of the Compiled Laws, supra, the bonds authorized by said election are invalid, and their issue is not authorized.

Subsection 67 of section 2402 of the Compiled Laws, supra, having been entirely disregarded, it is not necessary for us to pass upon the question as to whether said subsection was repealed, or to what extent changed and amended, by the constitutional provision above quoted. Since the election was held in this case, the Legislature, by chapter 76, Session Laws of 1912, has provided for the submission of such questions to the vote of the qualified electors, and the procedure for the issuance of bonds.

[4] Two other questions, however, are involved in this case, which should be determined because of their importance, and for the future guidance of municipal authorities. The first is as to the effect of that clause in section 12 of article 9, which provides that the ordinance "Shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years," upon the right of cities, towns, and villages to contract debts for supplying water and for sewer systems. If such limitation applies to such debts, it will prohibit such municipalities from exercising the right to issue bonds, without limitations, for such purpose. In other words, it provides a limitation almost, if not quite, as effective as that contained in that portion of section 13 of said article which precedes the proviso.

The two sections of the article under consideration have for their object the regulation of the debt-contracting power of such municipalities and the mode of exercising this power. Both sections, being directed to the same subject-matter, are in *pari materia*, and should be construed together with the design of advancing the object of their provisions. In order to ascertain this object, it is proper to consider the occasion and necessity for their enactment.

Experience has demonstrated that it is necessary to place a check or curb upon the power of municipalities to incur indebtedness

which future generations will be called upon to repay. Given unbridled power in this regard, such municipalities are prone to contract large debts, for purposes which at the time seem desirable, thereby imposing an unjust burden upon the future taxpayers. Indeed, in many instances this unrestrained power led to the bankruptcy of the governmental agency and the ruin of the property owners. Various devices have been resorted to in order to prevent the incurring of such extravagant and onerous indebtedness. The constitutional limitation on the power, although of recent origin, is now chiefly relied upon, and is generally adopted by most of the states; the design being to place a reasonable limitation upon the exercise of the power, thereby preventing its abuse, but at the same time giving to the municipality a reasonable leeway, so that it will not be unduly hampered in providing for the needs of the community.

With this end in view, the framers of our Constitution placed two limitations upon the debt-contracting power: The first, in section 12, supra, which indirectly limits any single debt to an amount which can be discharged, both as to principal and interest, within 50 years by the levy of a 12-mill tax upon the taxable property within such municipality; the second, found in section 13, supra, which limits the total indebtedness, for all purposes, which such municipality may incur to 4 per centum upon the taxable property within such municipality.

New Mexico is an arid state, and the greatest problem which confronts cities, towns, and villages is the procuring of an ample supply of pure water. In many instances it is necessary to conduct the water supply through pipes from the mountain streams for many miles, and the cost is necessarily enormous. The states in the arid regions, almost without exception, have no constitutional limitation upon the amount of indebtedness which may be incurred for this purpose, and the framers of the Constitution of New Mexico, familiar as they were with the conditions in the state, and the necessity which existed for an unlimited right to issue bonds and incur indebtedness for the purpose of providing a water supply, attempted, by the proviso to section 13, to exempt the amount of such indebtedness from the restrictions and limitations which they had imposed upon indebtedness for other purposes. Likewise, they realized that for the health of the community it was necessary that the sewerage should be disposed of, and they included in the same category with a water supply sewer systems.

It is thus manifest that it was the intention of the framers of the Constitution that no restraints should be laid on municipalities in their efforts to procure a water supply, by either the purchase or construction of systems for such purpose, or of sewer systems.

The question then is, Did the framers of the Constitution so express their intention that it may be put in force?

The proviso, "any city, town or village may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or for a sewer system, for such city, town or village," clearly excepts indebtedness incurred for supplying water from the general provision of section 13, which limits the amount to which a city, town, or village may become indebted to 4 per centum of the value of the taxable property within such city, town, or village, and is, in effect, permission, so far as the Constitution regards this question, to become indebted in such an amount as may be necessary to furnish a supply of water for the municipality. It being the plain intent of the framers of the Constitution to permit municipalities to contract indebtedness in such an amount as will provide a supply of water for the municipality, it becomes our duty to give effect to such intention. It would be vain and idle to say to a municipality, "You have permission to contract indebtedness in any amount for the supplying of water," and then limit the municipality in the amount it may levy for taxes to pay such indebtedness. If the provisions contained in section 12 of article 9, limiting the amount which may be levied for taxes to retire or discharge the principal and interest of the indebtedness to 12 mills per annum on the taxable property within the municipality, could be held to apply to indebtedness excepted by the proviso contained in section 13, then the manifest object preserved by the proviso would be destroyed. The carefully framed provision of section 12, requiring the ordinance whereby a debt is contracted by a municipality to "provide for the levy of a tax, not exceeding 12 mills on the dollar, * * * sufficient to pay the interest on, and extinguish the principal of, such debt," was inserted with the object of providing against the repudiation by a municipality of the indebtedness incurred by the ordinance, and to fix a limitation upon the amount of a single debt for purposes not excepted from its operation. To hold that this proviso withholds from the municipality the power to levy a tax sufficient to pay the interest and principal of the indebtedness which it may incur, without limit, for the supplying of water would, in many cases, compel the repudiation of its indebtedness incurred for a water supply, and therefore bring about the very opposite of the object intended to be accomplished by the proviso, or effectually limit the indebtedness which could be incurred.

The rules which courts must observe in construing legislative enactments apply equally to constitutional provisions. Every statute or constitutional provision must be construed with reference to the object intended to be

accomplished by it, and as already said, in order to ascertain this object, it is proper to consider the occasion and necessity for this enactment. If the purpose and well-ascertained object of a statute or constitutional provision is inconsistent with the precise words, the latter must yield to the controlling influence of the will of the lawmaking power, resulting from the whole act or the entire Constitution. *Commercial Bank v. Foster*, 5 La. Ann. 516; *State v. Clark*, 29 N. J. Law, 96; *U. S. v. Jackson*, 143 Fed. 783, 75 C. C. A. 41.

While it is true the proviso regarding indebtedness contracted for supplying water for municipalities appears at the end of section 13 of article 9, in order to carry out the manifest intention of the framers of the Constitution, as we find it to be from a consideration of both sections 12 and 13 of said article, we must hold that the proviso is, in effect, an independent provision, and that neither the limitation contained in section 12, limiting the amount of the tax levy, nor the limitation contained in section 13, limiting the amount to which a municipality may become indebted, affect the debt-contracting power of a municipality with regard to indebtedness incurred for supplying water for the municipality.

While the operation of a proviso is usually and properly confined to the clause or provision immediately preceding, yet, where necessary to effectuate the intent of the lawmaking power, it will be considered as applying also to other preceding or subsequent section, or to the entire act or provisions in *pari materia*. 36 Cyc. 1163; *U. S. v. Babbitt*, 1 Black, 55, 17 L. Ed. 94. And see, also, cases cited by the Supreme Court of Missouri in the case of *State ex rel. Crow v. St. Louis*, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

In that case the court said: "The particular intent expressed in a proviso or exception will control the general intent of the enactment. * * * Neither grammatical construction, punctuation, nor relative arrangement of the several parts of the section must be allowed to absolutely control. A common sense interpretation is the safest and surest to apply, bearing always in mind the mischiefs to be remedied and the benefits to be secured by the law."

The Supreme Court of Alabama, in the case of *Wartensleben v. Haithcock*, 80 Ala. 565, 1 South. 38, in discussing the effect of a proviso, say: "Generally, the appropriate office of a proviso is to restrain or modify the enacting clause, or preceding matter, and should be confined to what precedes, unless the intention that it shall apply to some other matter is apparent. When from the context and a comparison of all the provisions relating to the same subject-matter it is manifest that the object and intent were to give the proviso a scope extending beyond

the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection."

To limit the proviso to that portion of section 13 which precedes it leaves it without any practical or serving purpose and effect. When we consider the conditions prevailing in New Mexico, the necessity that exists for an ample supply of pure water for municipalities, the cost of procuring such supply, the assessed valuation of property in the cities and towns of the state, the amount of bonds which could be issued, were the 12-mill levy limitation to apply, it is apparent that it would be an absurdity for the Constitution makers to say that cities, towns, and villages could issue bonds in excess of 4 per cent. of the taxable property within such municipality, or without limit as to amount, with the evident design and purpose of enabling such municipalities to issue bonds in such an amount as would be requisite to provide a water supply, and then to place upon such issue an even more effectual limitation by providing that such bonds could not be issued beyond an amount which could be discharged, as to both principal and interest, within 50 years by the levy of a 12-mill tax. We venture the assertion that a 12-mill tax would not even provide for the interest upon bonds issued in an amount sufficient to enable any city in the state to purchase a waterworks system now owned and operated by private capital, much less provide a sinking fund for the payment of the principal.

It is a familiar rule of construction, applied to constitutional and statutory provisions, that when cases of doubt arise, in arriving at the intent and purpose of the act or provisions, courts will look to contemporaneous history for the evils sought to be remedied and the conditions that probably led up to and induced the enactment.

"When the intent and purpose of the act is thus made clear and consistent, and the act is calculated to effect the obvious purpose, necessary words may be implied, and words limited or enlarged in meaning, and the ordinary meaning of words and phrases required to yield to the construction which upholds and makes effective the legislation." *Bailey v. State*, 163 Ind. 165, 71 N. E. 655, and authorities cited.

"The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso; the intention expressed being paramount to form." *Propet v. Railroad*, 139 N. C. 397, 51 S. E. 920.

The phraseology used in sections 12 and 13, *supra*, is practically the same as that found in section 8 of article 11 of the Colo-

rado Constitution. The provisions of sections 12 and 18 of article 9 of the New Mexico Constitution are covered by the one section of the Colorado Constitution. In the Colorado Constitution the tax-levying power is fixed at 12 mills, and the limit of indebtedness at any one time is fixed at 8 per cent. of the valuation, etc. Provisions as to the election are identically the same. The exemption of the application of such limitations to water purposes in the Colorado Constitution is found in the following language: "Debts contracted for supplying water to such city or town are exempted from the operations of this section." This language not only exempts such debts from the operation of the limitations as to the total amount and the 12-mill provision, but likewise exempts said debts from the operation of all the other provisions of the section, so that such debts may be contracted without the submission of the question to a vote of the people and the remaining safeguards thrown around the creation of other debts. The framers of the Constitution of New Mexico evidently intended to remove the limitation as to the amount of indebtedness that could be contracted for such purposes, and to leave the remainder of the section requiring a vote of the electors, etc., in full force.

For the reasons given, we hold that the limitation fixed by section 12 of said article, providing in substance that no debt thereby created, which cannot be discharged, as to both principal and interest, by the levy of a 12-mill tax upon the taxable property within such municipality within 50 years, does not apply to debts included in the proviso to section 18 of said article.

[5] The second proposition is as to the right of the town to submit to the voters the joint proposition of issuing bonds for the double purpose of constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question. There appears to be a decided conflict in the holdings of the various courts upon the question. It would serve no good purpose to review the various cases, but we content ourselves by referring to the case note to the case of *Stern v. Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665. As the practice has not been established in this state, we are at liberty to adopt the rule which, in our judgment, will best protect the rights of the people and secure to the voters an opportunity to fully and freely express their desires and wishes in such matters. In the matter of voting for candidates for office, it is universally conceded that the voter must have the right to vote for or against any candidate. It

would shock the moral sense were a statute enacted requiring the voter to vote for or against all the candidates on one ticket. The purpose of the Constitution in requiring the submission of the question of issuing bonds to the taxpaying electors of the municipality is to determine whether or not they desire the improvement to be made and bonds issued in payment therefor. A voter might desire a system of waterworks, and it might be absolutely necessary to provide therefor; while, on the other hand, a sewer system might reasonably be dispensed with, and the voters not desire it. It is more important that a safe rule should be announced by this court in this regard than that either line of authorities should be followed. The bonds in this case have not been issued, and the cause must be reversed for other reasons; therefore no delay or injustice will be occasioned or rights interfered with by laying down the rule which will require such questions to be separately submitted, and by so doing we believe we will best preserve the rights of the voter and protect the municipality against fraud or imposition.

Appellees, however, insist that as the answer in this case alleges that the two systems are connected, and the one would not be desirable without the other, and the answer being taken as true, this court is bound thereby. This contention, however, is disposed by the case of *Stern v. Fargo*, supra, where the court say: "The question is not one of connecting by words, but identity of purpose, or can one naturally be operated without the other?"

In the complaint in this case it is made to appear that the town of Gallup already has a system of waterworks, and that the bonds are to be issued for the purpose of enlarging it. Now, it might be that the voter would desire the sewer system, but would not be in favor of enlarging the waterworks, or he might, were opportunity afforded, vote to enlarge the waterworks, and against sewers. We are of the opinion, therefore, that the two propositions should have been separately submitted, so that the voter could have expressed his choice upon each question, independent of the other. We do not mean to hold that the two propositions could not have been submitted at the same election, or upon the same ballot, but simply that the ballots should have been so prepared that each proposition would have stood alone.

For the reasons stated, the judgment of the lower court is reversed and the cause remanded, with instructions to issue the restraining order as prayed for in the complaint; and it is so ordered.

HANNA and PARKER, JJ., concur.

OWENS v. ANDREWS et al.

(Supreme Court of New Mexico. April 8, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 792*)—ELECTION TO TAKE UNDER WILL—EVIDENCE.

An election to take, under a will, may be inferred or implied, from the conduct of the party, his acts, omissions, modes of dealing with the property, acceptance of rents and profits, and the like.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. § 792.* Executors and Administrators, Cent. Dig. § 696.]

2. WILLS (§ 792*)—ELECTION TO TAKE—EVIDENCE.

Courts of equity have never laid down any rule determining for all cases what conduct shall amount to an implied election, but each case must depend in great measure upon its own circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. § 792.* Executors and Administrators, Cent. Dig. § 696.]

3. WILLS (§ 792*)—"ELECTION" TO TAKE UNDER WILL—EVIDENCE.

To raise an inference of election from the party's conduct merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. § 792.* Executors and Administrators, Cent. Dig. § 696.]

For other definitions, see Words and Phrases, vol. 3, pp. 2336-2339.]

4. WILLS (§ 796*)—REVOCATION OF ELECTION—INJURY.

The principle of law precluding the revocation of an election is necessarily the doctrine of estoppel, and there can be no estoppel where there is no injury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2064-2068, 2070; Dec. Dig. § 796.*]

Appeal from District Court, Chaves County; William H. Pope, Judge.

Bill by Fayette Owens, now Mrs. Chase, against Lizzie M. Andrews and others. Decree for complainant, and defendants appeal. Affirmed.

The appellee, Fayette Owens, now Mrs. Chase, brought this action in equity to obtain a decree sustaining her claim to her part of the community property left by the death of her former husband on April 25, 1907. Decedent left a will, in which he provided by an alleged agreement with the appellee that she was to share equally with their children all the estate. She was nominated one of the executors. She had the will probated, qualified as executrix, and acted in that capacity for over three years. The defendants below are her children and the only other heirs of her former husband. The pleadings brought the whole controversy down to a single issue, viz.: Was there an election on her part to take under her former husband's will? Her claim is based upon the statute providing for the distri-

bution of community property, the affirmative of the issue devolving upon the defendants below. The cause came on to be heard at the May, 1910, term of the district court, for Chaves county, the Honorable William H. Pope presiding. The court found the issue in favor of the plaintiff below. From this finding and the decree rendered, this appeal is prosecuted. The additional facts necessary to this opinion are fully set out therein.

Reid & Hervey and G. A. Richardson, all of Roswell, Madden & Truelove, of Amarillo, Tex., and Herman Mohr, of Roswell, for appellants. U. S. Bateman, of Roswell, for appellee.

HANNA, J. (after stating the facts as above). All the property affected by this case is admitted to be community property, in which the widow had a one-half interest, and in which, by the terms of the will, she was given a one-tenth interest; it being insisted by appellants that by the terms of the will (section 3) the widow was put to an election as to whether she would take, under the statute, her community interest, or the provisions made for her in the will. Appellants admit that no express election was made, but that one must be implied by her conduct.

The section of the will referred to is as follows, viz.: "(3) It is my will and desire, and in accordance with the agreement and understanding between myself and my wife. I do hereby give devise and bequeath to my wife, Fayette Owens, if living at the time of my death, a like amount and share in all of my estate and property with each of my children, and I give devise and bequeath to my said wife a portion of my said estate equal to a child's part therein, in lieu of any interest she would have as my widow under the laws of the state of Texas, and the territory of New Mexico, to have and to hold to her heirs and assigns, forever."

[1] Text-writers agree that an election to take, under a will, may be inferred or implied, from the conduct of the party, his acts, omissions, modes of dealing with the property, acceptance of rents and profits, and the like.

[2] "Courts of equity have never laid down any rule determining for all cases what conduct shall amount to an implied election, but each case must depend in great measure upon its own circumstances." 1 Pomeroy's Eq. § 515. While the trial court expressed doubt as to whether this was a case calling for an election, the point was waived and the question considered as one calling for an election. We think the case should be so considered.

The next question therefore is: Did the plaintiff, appellee here, make her election? It would be borne in mind that this state

has no statute governing election, or providing for the time within which an election must be made. It is contended by appellants that the record discloses many facts from which an election, by appellee, must be implied. They point out that she accepted a legacy, probated the will, and is acting as executrix without bond; is being paid a compensation for administering upon the estate, thus accepting another benefit and evidencing her intentions to take under the will; has accepted an allowance from estate funds for maintenance of her minor children; has drawn from estate funds money with which to pay attorney's fees, incurred in defending the son who was charged with the murder of the man who killed her former husband; that she has used the estate funds, at her will, and for her benefit, to such extent that she is precluded from revoking her election.

On the other hand, the plaintiff testified, among other things, to the following facts, viz.: That she had nothing to do with the making of the will, and never had the agreement with her husband, referred to therein. That she had been so completely under the influence of her late husband that after his death she wished to manage the business affairs and dispose of the property just as her husband had directed. That the probating of the will and plaintiff's acquiescing in it for the length of time she did "was more to carry out his ideas than it was anything else." That the will in question was probated in August, 1907, when she qualified as one of the executors. She did not remember that Mr. Madden advised her that she could elect to take under the law and was not bound to take under the will. That she "did not remember anything that he said about the will much, because I was worried so about Sonie. We went up there more to see about Sonie's case than anything else, and if he told me that, I can't remember it. I didn't pay much attention to what they said anyway." That she was greatly worried and hardly knew what she was doing, as she said, "because I was worried and grieved so over my husband's death and had worried so over my boy, I was not thinking about my rights at all; I was just trying to do as Mr. Owens directed; I never gave it a thought." That she did not have any knowledge as to what the laws of the territory provided about the community property, and first knew upon consulting her attorney in this case that under the laws of New Mexico she was entitled to a one-half interest in the community property. That at the time of probating the will she did not know what she was entitled to under the laws of New Mexico. That she knew that Mr. Gibbany, a lawyer, had drawn the will, and therefore thought that it was valid. That up to the time she had words with her son she had never consulted any attor-

ney "with reference to the will or the law governing estates in the territory of New Mexico or in the state of Texas, or what might be her rights one way or the other." That she had always managed the estate as though it belonged to her. That Mr. Gibbany was the attorney for the plaintiff as executrix, and she consulted with him about her rights, and he in substance advised her to let the sale of the real estate in Texas go through, and also advised her that she could not take under the law, but was bound to take under the will. That no report was ever made to the probate court, and the will has not been probated in New Mexico. That she never knew anything about an election. That she and the adult defendants, after the institution of this action, undertook to compromise the same, because of this agreement to compromise, and before it was abandoned she accepted \$2,000 as her legacy, but paid out of it to Mr. Gibbany \$1,082. That she had a talk in the spring of 1909 with a lady on a train that caused her seriously to consider her legal rights in the estate of her late husband, and it was in the fall of 1909 that she decided to abandon her rights under the will and take under the law. That she had intended to take under the will, supposing at the time that she must do so. That she had asked Attorney Gibbany if she could break the will, but as Mr. Gibbany drew the will and was a lawyer, and from what he told her, she had an abiding conviction that it was valid and could not be done away with.

The foregoing brief of the evidence constitutes but a small portion of the evidence adduced, at the trial, pertaining to this issue in the case. We have examined the record in its entirety and believe that the character of the controversy is clearly pointed out by the evidence here referred to. It is from these, and similar facts, that we must determine whether an election can be implied from the conduct and statements of appellee.

The learned trial judge in his written opinion, filed in this case, expressed himself upon this question in the following language: "The court is not convinced by this testimony, especially in the light of the denials of Mrs. Owens of her knowledge of her rights under the law, that at the time she did the acts alleged to constitute an election, she had such knowledge of her rights as would justify the court upon that ground in shutting her out from an exercise of her rights under the law at this time. The uncertainty of Mr. Gibbany's testimony—not unnatural considering the interval of time from the making of the will to the giving of his testimony—and the circumstances under which she made, if at all, the statements to Mr. Mangun coming so soon as they did after her husband's homicide, fail to carry conviction that during this period she was intelligently surrendering a one-half interest in the estate for a one-

tenth interest. The law does not enforce upon heirs, and especially upon widows, a hasty choice of rights, and the inadequacy of the provision in the will for this spouse of 26 years' co-operation with her husband is not without weight in deciding whether her acts were done with intelligent intention to elect. * * * The court will not enforce upon her an alleged election, with results so disproportionate to elements of justice without clearer proofs of an intelligent and discriminating choice, with full knowledge of the facts, than is here shown."

[3] Pomeroy, at section 515, says under the subject of implied election that: "To raise an inference of election from the party's conduct merely, it must appear that he knew of *his right to elect*, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties." See, also, *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 151; *In re Peck's Estate*, 80 Vt. 469, 68 Atl. 438.

In the light of all the evidence and the principles of law applicable thereto, we cannot say that the appellee had such knowledge of her rights even though she possessed full knowledge concerning the property and intended an election, as would bind her to an implied election to take under the will arising from conduct, or thoughtless statement. We are more inclined to believe her statements to the effect that she was worried and grieved over her husband's death, and worried so about her boy's predicament, that she was not thinking about her rights at all. We agree with the authorities that the acts and declarations relied upon must be unequivocal, and must clearly evince an intention to elect and take under the will, and the choice must be made by the widow, with her full knowledge of her rights and the status of the estate. We might discuss the evidence at greater length, but it is needless to do so, as we find no error in the assignments pertaining to this question.

The remaining assignments of error have to do with the question of the widow's right to revoke her election if one was made. We might urge that our opinion as herein expressed makes it unnecessary to pass upon this question, or the remaining assignments of error; but the questions are so intermingled that we will speak of the conclusions our studies have led us to adopt.

We are mindful of the fact that in this, as in the other numerous questions pertaining to elections, the authorities are apparently in hopeless confusion. The courts have determined the cases almost entirely upon the facts pertaining to each in an earnest desire to do equity; the divergent facts leading to the seeming conflict. Our examination of the numerous authorities cited by counsel in their able briefs leads us to the opinion that this conflict is less real than apparent, and that through nearly all the

authorities there runs a consensus of opinion that, "to make the enforcement of one demand, which is inconsistent with another, a final and binding election to take that and not the other, the party must either be shown to have acted advisedly, with a proper knowledge of all the circumstances, and with a consciousness of the effect of the act relied upon, or the party adversely interested must have so changed his position in reliance upon such action that it would be inequitable to permit the party who has the choice to recede from his former action." *Young v. Young*, 51 N. J. Eq. 500, 27 Atl. 634; *Hill v. Hill*, 88 Ga. 612, 15 S. E. 675; *Goodrum v. Goodrum*, 56 Ark. 532, 20 S. W. 353.

[4] We think that the principle of law precluding the revocation of an election is necessarily the doctrine of estoppel, and that there can be no estoppel where there is no injury. The injury claimed to have resulted to two of the appellants by reason of investments made on the strength of prospects from the estate seems to us to be too speculative to come within the class of injuries which might operate an estoppel. So, too, we consider the facts pertaining to the marriage of certain of the children, alleged to have been entered into in contemplation of their rights under the will. We see no change of status, in these appellants, that cannot be corrected by the judgment of the district court.

Finding no error in the record, the judgment of the district court of Chaves county is affirmed.

ROBERTS, C. J., and PARKER, J., concur.

NOBLE v. BEEMAN-SPAULDING-WOODWARD CO. et al

(Supreme Court of Oregon. April 29, 1913.)

1. BILLS AND NOTES (§ 246*)—PARTIES—"INDORSER."

Under the provision of the Negotiable Instrument Law (Laws 1899, p. 18) that a person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity, a party who indorsed upon the back of a note, "I hereby guarantee payment of the within note," was not an "indorser," having indicated by the appropriate word "guarantee" his intention to be bound in that capacity and not as an indorser.

[Ed. Note.—For other cases, see Bills and Note, Cent. Dig. §§ 555-558; Dec. Dig. § 246.*

For other definitions, see Words and Phrases, vol. 4, pp. 3567, 3568; vol. 8, p. 7686.]

2. BILLS AND NOTES (§ 246*)—PARTIES—"ACCOMMODATION PARTY."

Under L. O. L. § 5862, providing that an "accommodation party" is one who signs as maker, drawer, acceptor, or indorser without receiving value therefor and for the purpose of lending his name to some other person, one who, for the accommodation of the maker, guar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

anted the payment of a note was not an accommodation party; the statute having limited accommodation parties to the four classes mentioned.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 555-558; Dec. Dig. § 246.*]

For other definitions, see Words and Phrases, vol. 1, pp. 73, 74.]

3. BILLS AND NOTES (§ 253*)—ORDER OF LIABILITY.

Under L. O. L. § 6023, providing that the person primarily liable on an instrument is the one who, by the terms of the instrument, is absolutely required to pay the same, and that all other parties are secondarily liable, the liability of accommodation makers and an accommodation guarantor was successive and not concurrent; the accommodation maker being primarily liable and the guarantor only secondarily liable, in the absence of a special contract changing their liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 612, 613; Dec. Dig. § 253.*]

4. BILLS AND NOTES (§ 253*)—ORDER OF LIABILITY.

Accommodation parties to ordinary commercial paper are liable to each other in succession as their names appear upon the instrument, unless they specially agree that they are to be bound jointly and not severally, in which case they are entitled to contribution as among themselves.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 612, 613; Dec. Dig. § 253.*]

5. EVIDENCE (§ 423*)—INDORSERS—ORDER OF LIABILITY.

An agreement between parties to negotiable instruments, to be equally liable instead of being liable to each other in succession as their names appear, may be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.*; Bills and Notes, Cent. Dig. § 1723.]

6. BILLS AND NOTES (§ 253*)—ORDER OF LIABILITY.

That an accommodation guarantor of a note knew when he executed the guaranty that certain of the makers were accommodation parties did not make his and their liability concurrent instead of successive, in the absence of a special agreement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 612, 613; Dec. Dig. § 253.*]

7. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

The finding of the trial court on a question of fact amounts to a verdict and cannot be disturbed on appeal unless the court can say affirmatively that there is no evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

8. BILLS AND NOTES (§ 519*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

A finding against the contention of accommodation makers that they and an accommodation guarantor were to be concurrently liable was supported by evidence that the guarantor was a stranger to the real debtor, a corporation, while the accommodation makers were directors and interested therein.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1802; Dec. Dig. § 519.*]

9. PLEADING (§ 359*)—ANSWER—SHAM PLEADING.

In an action for the amount of a note, where, on the other pleadings and the evidence, it was undisputed that the note was given to a bank for a loan and guaranteed by plaintiff, who was compelled to pay it, the court would have been justified in disregarding as sham a defense which alleged that the note was given to plaintiff for a loan by him.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1120-1128; Dec. Dig. § 359.*]

10. BILLS AND NOTES (§ 539*)—ACTIONS—FINDINGS—SUFFICIENCY.

In an action by a guarantor of a note given by a corporation against accommodation makers, the finding that the corporation turned all its assets over to a trustee for the benefit of creditors, that a large number of its creditors signed an agreement with the trustee by which he was to reduce the assets to money and pay the creditors pro rata who were to receive such payment in full of their claims, but that plaintiff never signed such agreement and never was paid anything on account of the note, was a sufficient finding as to defendant's contention that plaintiff assented to such agreement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913, 1934; Dec. Dig. § 539.*; Trial, Cent. Dig. § 859.]

11. BILLS AND NOTES (§ 260*)—ACTIONS—DEFENSES—SETTLEMENT WITH PRIMARY DEBTOR.

A guarantor or indorser of a note, who at that time had not paid it, could not, by assenting to an agreement, by which creditors of the real debtor were to receive their pro rata share of its assets in full settlement of their claims, do anything either favorable or unfavorable to accommodation makers, and hence, in determining their liability to the guarantor, it was immaterial whether he assented to such agreement or not.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 608-610; Dec. Dig. § 260.*]

12. PLEADING (§ 277*)—ANSWER—SUPPLEMENTAL ANSWER—NECESSITY.

Where, after the issues were made up between plaintiff and the answering defendant, plaintiff took a default judgment against another defendant, the answering defendant could not rely on such judgment as a bar to a recovery against him unless he pleaded it by a supplemental answer under L. O. L. § 108, permitting material facts occurring after the answer to be pleaded by a supplemental answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 834; Dec. Dig. § 277.*]

13. BILLS AND NOTES (§ 120*)—JOINT AND SEVERAL LIABILITY.

The makers of a note providing that, "For value received, I promise to pay," were jointly and severally liable to the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. § 120.*]

14. BILLS AND NOTES (§ 260*)—JOINT AND SEVERAL LIABILITY.

Where makers of a note were jointly and severally liable to the payee, their liability to a party who guaranteed payment was also joint and several.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 608-610; Dec. Dig. § 260.*]

15. JUDGMENT (§ 237*)—PERSONS CONCLUDED—JUDGMENT AGAINST ONE OF JOINT AND SEVERAL DEBTORS.

A default judgment against one of several parties jointly and severally liable on a con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tract was not a bar to a recovery against others of such parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 415, 418-421, 429; Dec. Dig. § 237.*]

16. BILLS AND NOTES (§ 534*)—PAYMENT BY GUARANTOR—AMOUNT OF RECOVERY.

An action by a guarantor of a note, who paid the note but did not take an assignment thereof against the makers, was not an action on the note, but was an action for reimbursement for the amount paid by him for the defendants, and hence he was not entitled to recover the attorney's fees and interest stipulated in the note, notwithstanding L. O. L. § 5954, providing that, where the instrument is paid by a party secondarily liable, it is not discharged, but that the party so paying it is remitted to his former rights as regards all prior parties, and may strike out his own and all subsequent indorsements and again negotiate it; this manifestly referring to indorsers for value who at some prior time owned the note, and not to accommodation parties who never had any "former rights."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

17. BILLS AND NOTES (§ 530*)—AMOUNT RECOVERABLE.

A guarantor of a note, which provided for interest at 8 per cent., was entitled to recover interest from the date he paid the note at only 6 per cent. under L. O. L. § 6028, fixing the legal rate of interest at 6 per cent., except on contracts where a higher rate is fixed by express agreement of the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1941-1944; Dec. Dig. § 530.*]

Bean, J., dissenting.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by C. H. Noble against the Beeman-Spauling-Woodward Company and others. From a judgment for plaintiff, defendant Milton G. Smith appeals. Modified.

About March 30, 1908, the Beeman-Spauling-Woodward Company, hereinafter called the corporation, applied to the Hibernia Savings Bank, to be called the bank, for a loan of \$2,500. The bank officers drew up a note of that date, of which here follows a copy: "\$2,500. Portland, Ore., March 30, 1908. On demand, after date, without grace, I promise to pay to the order of Hibernia Savings Bank at the Hibernia Savings Bank, of Portland, Oregon, twenty-five hundred dollars in gold coin of the United States of America, with interest at the rate of 8 per cent. per annum from date until paid; value received. Interest payable quarterly, and if not so paid the whole sum, both principal and interest, to become immediately due and collectible at the option of the holder of this note; and I further agree to pay all taxes and assessments which may be levied or assessed to the holder of this note on account thereof; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action." This note was

signed by the corporation and forwarded by the bank to its correspondent at Seattle, Wash., with this writing on the back, to be presented to the plaintiff there for his signature: "For value received, I hereby guarantee the payment of the within note at maturity, or any time thereafter, with interest at 8 per cent. per annum until paid, and hereby waive demand, protest and notice of nonpayment, and consent that the payment of this note may be extended from time to time without affecting my liability thereon." Noble refused to sign the writing last above quoted unless the defendants Julius Beeman, Lewis V. Woodward, and M. G. Smith, who were members of the corporation, would sign the note as makers, and it was returned to the bank. The three individual defendants then signed the note, which was again sent to Seattle, where Noble signed the writing on the back, and, after again receiving it, the bank paid to the corporation \$2,500, the principal of the note. It is admitted by all parties that this money was borrowed by the corporation for its own use, and that neither the plaintiff nor any of the individual defendants received any of it, though the latter were members of the corporation. The interest was paid to March 30, 1909.

The complaint sets out the note and the writing on the back thereof in full, alleges the payment of the interest and that, the defendants having failed to pay the note, the bank compelled the plaintiff to pay the same, and he did pay it to the bank on April 14, 1910. It was agreed that he paid \$2,700 on that date to take up the note, and he alleges that he has been and now is the owner and holder thereof. It is charged also that, by the terms of the note, the defendants promised and agreed to pay the bank the sum of \$2,500 on demand, but that, although demand was made upon them by the bank, they had refused to pay the same or any part thereof; that the plaintiff never received any of the proceeds of the note but indorsed the same as stated for the accommodation of the defendants and to enable them to procure a loan of \$2,500 from the bank. It is also averred that the plaintiff was compelled to employ a firm of attorneys to bring an action upon the note and agreed to pay them a reasonable attorneys' fee therefor, which the plaintiff alleges is \$500. The plaintiff demands the amount paid by him on the note, together with interest at the rate of 8 per cent. per annum from April 14, 1910, and for \$500 attorneys' fees. The summons was served on the corporation and the defendant Woodward respectively May 5, 1910, and May 10, 1910, but neither of them answered. It was served upon the defendant Smith May 20, 1910, and he is the only person who answered in the action. The first answer was filed May 28, 1910. On October 13th of that year, summons having been served upon the defendant Beeman by publication, his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

default was entered and judgment taken against him for the sum demanded in the original complaint. On December 23d Smith filed an amended answer upon which the case was tried. He admitted the execution of the promissory note set out in the complaint, but says that he executed it only as surety for the corporation and without any consideration to himself whatever. The execution and indorsement of the plaintiff's written guaranty of payment of the note as inducement to the bank to loan money to the corporation is also admitted, but Smith denies that it was an inducement to the bank to loan money to any one except the corporation. The answer concedes that the bank compelled the plaintiff to pay the note on April 14, 1910, but denies that he is the owner or holder of it or as such is in possession thereof. The employment of the attorneys and the necessity therefor, the reasonableness of the fee of \$500, or any other sum, are all challenged by the answer. Further answering the complaint, Smith avers, in substance, that the \$2,500 included in the note of March 30, 1908, was loaned to and received by the corporation for its sole benefit, and no part of the same was ever received or used by Smith; that he signed the note as surety only for the accommodation of the corporation and without any consideration whatsoever; and that the plaintiff both before and at the time he executed said written guaranty of payment of the note, and at the time he paid the same on April 14, 1910, had full knowledge and notice and well knew that said \$2,500 was being loaned to the corporation alone for its sole and exclusive use, and that this defendant signed said promissory note as a surety only. As a second defense Smith avers substantially that the corporation borrowed said sum of \$2,500 from the plaintiff for its own use and benefit alone, and gave the note, signed by itself as principal and by the other defendants as sureties, to secure payment of the same, and that, knowing all this, the plaintiff did on or about August 2, 1909, duly enter into an agreement with the corporation and its other creditors that it should assign all its property to S. C. Spencer in trust for the benefit of all said creditors to dispose of and convert the same into money, and, after deducting his necessary expenses in that behalf, to divide and distribute the residue among said creditors pro rata in full payment of their claims against the corporation, and that said assignment of the assets of the corporation to Spencer should release the corporation from all liability on account of all claims of its said creditors against it. He further states that, in accordance with this agreement and with plaintiff's assent thereto, the corporation transferred all its property to Spencer, who has converted and is converting the same into money in execution of the agreement, and that by reason of the premises Smith is released and discharged

from all obligations or liability on the note. The amended answer of Smith was traversed by the reply.

The cause was tried before the court without a jury, and the judge found facts substantially according to the allegations of the complaint, and in addition thereto found that Smith signed the note as surety only, receiving no part of the proceeds of the loan nor any consideration for signing it, and that he executed the same only as an accommodation maker for the corporation. The judge also made this finding: "That on or about August 2, 1909, the corporation turned all of its assets over to S. C. Spencer in trust for the benefit of the creditors of the corporation, and that said Spencer was to reduce the assets of said corporation to money and take out his reasonable charges and expenses therefor and in connection therewith and pay the creditors of the corporation pro rata out of the net amount realized, so that the creditors of the corporation would receive said pro rata share in full of their claims against it, and that a large number of the creditors of the corporation signed this agreement with said Spencer, but that the plaintiff herein never did sign it; that said Spencer entered upon the duties of his trust and has reduced some of the assets to cash, but that he never paid said plaintiff anything for or on account of the note herein nor anything to the Hibernia Savings Bank." The answering defendant made various objections to the findings of the court, but the one principally relied upon is to the effect that it was not determined by the court whether the plaintiff assented to or became bound by the agreement between the corporation and its creditors and the transfer of its assets to Spencer as trustee in accordance therewith. The court disregarded all the objections to the findings and entered judgment against Smith for \$2,700, with interest at 8 per cent. per annum from April 14, 1910, and \$275 attorneys' fees, with costs and disbursements. From this judgment the defendant Smith appeals.

E. B. Watson, of Portland (Watson & Beekman, of Portland, on the brief), for appellant. S. C. Spencer, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). It may be conceded that as to the bank the plaintiff, who signed the writing on the back of the note, and the defendants in this action, all of whom signed the note as makers, were all directly liable. Such is the doctrine taught by all the cases cited in the defendant's brief. *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Hecht v. Acme Coal Co.*, 19 Wyo. 10, 113 Pac. 786; *Walter A. Wood Co. v. Farnham*, 1 Okl. 375, 33 Pac. 867; *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575, and other cases.

The question, however, here to be determined is not between the bank and the parties to this suit, but it is for us to decide what is the relation existing between the plaintiff, who signed the instrument on the back of the note, on the one hand, and the defendants here, who signed as makers, on the other. In the first place it is laid down in the case of *Staver v. Locke*, 22 Or. 519, 524, 30 Pac. 497, 498 (17 L. R. A. 652, 29 Am. St. Rep. 621), that: "In determining the liability of a surety or a guarantor, it must be remembered that he is a favorite of the law and has the right to stand upon the strict terms of his obligation when such terms are ascertained."

[1, 2] It is manifest, upon the face of the writings involved, that at the outset the parties intended to be bound to the bank in different capacities, for, as conceded by all parties, Noble refused to sign the contract of guaranty indorsed on the note, unless the individual members of the corporation, including the answering defendant here, should themselves sign the note, and it was only when the note was again presented to him with the signatures of the individual defendants as makers that he signed as he did. Our Negotiable Instrument Law (Laws 1899, p. 27, § 63) provides: "A person placing his signature upon an instrument otherwise than as a maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Under this section it is plain that Noble was not an indorser, because he indicated by the appropriate word "guarantee" his intention to be bound in that capacity and not as an indorser. Section 5862 L. O. L., says: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him only to be an accommodation party." The Code has thus limited accommodation parties to the four classes of maker, drawer, acceptor, or indorser. True enough it has not made it unlawful for any person to enter into a contract of guaranty as to the debts of another party, but by the law, "the mention of one being the exclusion of the other," such a guarantor is not an accommodation party. Although, by placing his name only on the back of the note, Noble would have been an indorser, he clearly excluded himself from that category by the terms of the writing which he signed, indicating his intention to be bound in a different capacity. So far as anything is concerned in this case, the writing which Noble signed would have been equally efficacious if it had been inscribed on an entirely separate piece of paper, with

appropriate words describing the instrument to be secured.

[3-8] Taking Noble's agreement and the note together, nothing else being shown, his liability is not concurrent with that of those who signed the note as makers, but successive to theirs, and this would be true, in the absence of any other showing, even if Noble had only written his name on the back of the note before it was delivered to the bank and the money advanced thereon. The law of this state says that: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same." L. O. L. § 6023. On the face of the note this is the liability of the defendant Smith. The same section says further: "All other parties are secondarily liable." Even if Noble had merely written his name on the back of the note and thus became an indorser under the terms of section 5896, L. O. L., he would still have been only secondarily liable, as respects the makers, and hence not in the same category with Smith. But if we should treat Noble as strictly an indorser and not a guarantor, as far as appears from the note itself and its indorsements, "It is the established rule that the parties to ordinary commercial paper, negotiated for value in the regular course of business, are liable to each other in succession as their names appear upon the instrument; the acceptor of a bill or the maker of a note being the principal debtor and the indorsers being liable severally in the order in which their names are written. The same rule applies in the absence of special agreement to successive accommodation parties, and a subsequent accommodation indorser, who has been compelled to meet the obligation, may maintain an action upon the instrument against any prior accommodation party and recover the whole amount paid, although he knew that the latter's signature was given for accommodation merely. It follows that successive accommodation parties, acceptor and indorser, maker and indorser, or successive indorsers, are not to be considered as cosureties and therefore they are not entitled to contribution among themselves unless they specially agree that they are to be bound jointly and not severally, but where such an agreement exists, contribution may be enforced and the agreement may be proved by parol or may be evidenced by the circumstances of the case." 1 Am. & Eng. Ency. Law, p. 356. To the same effect is the doctrine taught by the case of *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689. There Montgomery had signed a note as maker which had already been signed by a partnership in its firm name and by the individual partners. Montgomery was in fact a surety, and at the same time, as part of the transaction, the defendant Page wrote on the back of the note and signed these words, "for value received I

hereby guarantee the payment of the within note," and, having been compelled to pay the note, brought an action against Page and alleged that, at the time of the making of the note and the indorsement by Page, it was agreed between them that, in case either should be compelled to pay the note, the other would contribute half of the amount required to be paid. Based upon such an allegation, this court, in an opinion by Mr. Justice Wolverton, held that the agreement could be proved by parol and could be relied upon to take the case out of the natural operation of the law upon the writings embodied in the note and the indorsement thereof. The contract raised by operation of the law between the makers of a promissory note and the indorsers thereof is that the liability is successive. This contract may be overcome and the natural operation of the law be superseded only by a special contract between the parties thus bound to pay the note.

Turning to the answer of the defendant Smith, we find it to be utterly silent about any agreement between himself and Noble about the relation to be sustained between each other as to the note, independent of the effect of the note itself and the contract indorsed thereon by Noble. All that the answer alleges in that respect is that Noble, at the time he executed the written guaranty on the note, knew that Smith was a surety or an accommodation maker and not a principal. Not having alleged any special agreement taking it out of the ordinary category, whereby Noble's liability would be subsequent to that of Smith, the latter could not resist the action of Noble against him on that point. Moreover, if this were an open question on the pleadings, the trial court found in accordance with the allegations of the complaint in that respect, and this amounts to a verdict which we cannot disturb, unless we can affirmatively say there is no evidence to support it. Evidence of a nature tending to support the findings of the court in this particular is found in the circumstance that Noble was a stranger to the corporation, while Smith himself was a director and interested therein; that Smith signed as a maker, while at best Noble was only an indorser. The result is the same whether we consider the matter as one of pleadings or one of evidence.

[9-11] It is next contended that the assignment of the corporation's assets to Spencer, as trustee under the agreement of August 2, 1900, constituted a payment of the debts and a release to the company and of the sureties as to all creditors of the company signing an agreement consenting thereto, and that the assent of Noble was a material issue upon which the court refused to find. This contention is fallacious in at least two features: First, the answer upon which this contention is based alleges that the

corporation borrowed the money directly from the plaintiff, and that the plaintiff accepted the promissory note as security for the payment of the loan, thus placing the plaintiff in the position of an original principal creditor of the corporation. This is manifestly so contrary to the other pleadings of the parties, as well as the testimony in the case, that the court would have been justified in utterly disregarding the contention as sham. In short, there is no testimony whatever tending to show that the plaintiff originally loaned the money to the corporation. On the contrary, all agree that the money was advanced by the bank on the note, signed, as stated in the pleadings, by the defendants here, and the agreement of Noble indorsed thereon. Further, the court did substantially determine the issue in the fourteenth finding of fact, in substance, that a large number of the creditors of the corporation signed the agreement with Spencer to convert the assets of the corporation into cash, but the plaintiff never did sign the agreement, and that nothing has ever been paid by Spencer to the bank or to the plaintiff on account of the note. Secondly, whatever was done with Spencer about realizing upon the assets of the concern was agreed upon before the plaintiff had paid anything on the note and while he was still either guarantor or indorser, as the case might be. He did not and could not release anything of value to the defendant Smith, for he had no control over the assets of the corporation, and was not in a position to exercise any control over them. He could not do anything either favorable or unfavorable to Smith in that connection at that time, and hence it is immaterial to consider whether he assented to the Spencer contract or not.

[12] The defendant also maintains that the default judgment taken against Beeman operates to release Smith from any liability; in other words, that it is a bar to any judgment against Smith. Prior to the rendition of this default judgment against Beeman, the issues had been made up between the plaintiff and the defendant Smith. If he had intended to rely upon the Beeman judgment as a bar to a judgment against himself, Smith should have operated under section 108, L. O. L., reading thus: "The plaintiff and defendant respectively, may be allowed on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply." This is a statutory rule analogous to the common-law plea of *puls darrein continuance*, and, if a party would rely upon anything occurring since the issues were joined, it was his duty to bring it to the attention of the court by a proper plea. 31 Cyc. p. 493; *Trotter v. Stayton*, 45 Or. 301, 77 Pac. 395.

[13-15] Again, the obligation of the defendant, which Noble guaranteed, was a

joint and several obligation, being a note on which the words were, "For value received, I promise to pay." Noble stands in the situation of saying to the defendants: "I guaranteed the performance of your joint and several obligation. Having performed that obligation for you and in your place, I now demand of you that you perform the same to me as you should have done to the bank." Under such circumstances, the obligation which they assumed to him who stood sponsor for them is not materially different from that which they assumed to the bank. In good reason, therefore, the obligation of the defendants to their guarantor Noble is joint and several. It presents a case within the meaning of *Sears v. McGrew*, 10 Or. 48, where it was held that, when the action was upon a contract joint and several, a several judgment would be proper, as the defendant might have been sued alone in said case; therefore judgment might be rendered against one or more without waiting for the the final trial.

[16] It is lastly contended that Noble was not entitled to recover from Smith any attorneys' fees, and this will be considered in determining what judgment should have been entered in the court below, as we are empowered to do under article 7 of the Constitution. Without having taken an assignment of the note, Noble is not the owner or holder thereof in the true meaning and intent of the law. In legal effect he is not bringing an action upon the note. It is said in section 5954, L. O. L., that: "Where the instrument is paid by a party secondarily liable thereon it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument"—with certain exceptions not here material. It is argued that the right of again negotiating the instrument includes the right to bring an action upon it from which it would follow that the present proceeding is directly upon the note entailing the allowance of attorneys' fees. Manifestly this section refers only to indorsers for value and not for mere accommodation. An indorser for value at some time prior to his indorsement owned the note with the right to sue upon it at maturity. With this right he parted when he discounted the paper by indorsement to a purchaser for value, who in turn by like process may transfer the title becoming liable by his indorsement to the new indorsee, and so on without limit until the maturity of the instrument. Then, whichever of the successive indorsers is compelled to pay is restored to his former rights within the meaning of this section, upon striking out his own and subsequent indorsements.

The case is entirely different, in reason, concerning an accommodation indorser or a

guarantor. Neither of them has any "former rights," or, indeed, any right whatever, until he pays the note or bill, and then it is the right of contribution or of reimbursement according to whether he is liable jointly with the others as among themselves or liable after them. So it is with the plaintiff here. He has performed his contract as a guarantor and is contending, not for the principal and interest and attorneys' fees provided for by the note, not for contribution from a cosurety, but for reimbursement or, as some authorities term it, "exoneration" for the amount which he paid for the defendants in execution of his contract of guaranty. As against the apparent makers of the note, he has no cause of action, except that arising upon the contract which he carried out. This contract with them does not provide for an attorney's fee. As we have seen, he is not an accommodation party, being neither a maker, a drawer, acceptor, nor indorser. By his contract he excludes himself from all those classes who alone, under section 5862, are accommodation parties. Strictly speaking, he cannot enforce the terms of the note. He can only rely upon the contract which he himself made and cannot extend its terms to matters not included therein. He is entitled to reimbursement and no more.

[17] The amount he paid became due to him from and after April 14, 1910, the date he paid it. Interest in such cases is reckoned at 6 per cent. per annum. L. O. L. § 6028.

The judgment will be modified and one entered here in favor of the plaintiff and against the defendant for \$2,700, with interest thereon at the rate of 6 per cent. per annum from April 14, 1910.

MOORE, J., took no part in the consideration of this case. BRAN, J., reserves the right to dissent.

UNION PAC. LIFE INS. CO. v. FERGUSON, State Ins. Com'r.

(Supreme Court of Oregon. April 30, 1913.)
INSURANCE (§ 33*)—LIFE INSURANCE COMPANIES—"CASH CAPITAL."

A resolution of the stockholders and directors of a life insurance company which declares that the assets of the company shall constitute its capital set apart as a basis of credit for the policy holders and creditors and not subject to withdrawal converts the assets into cash capital within L. O. L. § 4610, providing that no insurance corporation shall be permitted to do business until it shall have a paid-up cash capital equal to a specified sum, and the assets cannot be withdrawn or diverted by the corporation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 38; Dec. Dig. § 83.*

For other definitions, see Words and Phrases, vol. 1, p. 996.]

Mandamus by the Union Pacific Life Insurance Company against J. W. Ferguson,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as Insurance Commissioner of the State of Oregon, to compel defendant to issue to plaintiff a certificate authorizing it to do insurance business. Demurrer to petition treated as an alternative writ overruled.

J. A. Carson, of Salem, and C. H. Corliss, of Portland (Corliss & Skulason, of Portland, on the brief), for plaintiff. Bert E. Haney, of Portland, and I. H. Van Winkle, Asst. Atty. Gen. (A. M. Crawford, Atty. Gen., and Joseph & Haney, of Portland, on the brief), for defendant.

EAKIN, J. This is an original proceeding in this court by mandamus to compel the defendant Ferguson, as insurance commissioner of the state of Oregon, to issue to the plaintiff company a certificate authorizing it to do an insurance business during the year 1913 in the state of Oregon. By agreement of counsel the petition for the writ is taken and accepted as the alternative writ, which comes on for hearing upon a demurrer interposed thereto on the ground that the writ does not state facts sufficient to constitute a cause of action against defendant; and, after argument and consideration by the court, we deem that the demurrer should be overruled. A former application was made to the insurance commissioner by this plaintiff upon a showing that the corporate stock of the company is \$100,000, namely, 10,000 shares of the value of \$10 a share, of which 7,541 shares had been issued and fully paid up, that much of its stock was sold at a price largely in excess of its face value, which, with other accumulations, was invested in such securities as are authorized by law in the sum total of \$106,600, but it was held in the final decision of that case that profits and surplus are not cash capital within the meaning of section 4610, L. O. L. See *Union Pacific Life Insurance Company v. Ferguson*, 129 Pac. 529. For the purpose of meeting this deficiency in its capital, plaintiff by resolution of its stockholders and board of directors declared that the assets of the company represented by the said securities, which include surplus and profits to the amount of \$24,590, in the sum total of \$106,600 constitutes the capital of said corporation, with like effect as though the said money, mortgages, and bonds represented the proceeds of the \$100,000 capital stock fully subscribed and paid for at not less than par, which is set apart as a basis of credit for the policy holders and creditors of the corporation and is not subject to withdrawal. Thereupon the plaintiff renewed its application to the insurance commissioner for a certificate to do business, in which application the action of the stockholders and directors above mentioned was set forth, being based upon the same investments and

securities as in the first application. This application was denied by the insurance commissioner, and plaintiff brings this suit to have adjudged the sufficiency of the action of the corporation in setting apart its surplus and profits as capital to meet the requirements of the statute, and to require defendant to issue such certificate to plaintiff. We are of the opinion that such dedication of the surplus and profits converted them into cash capital as fully as if they were the proceeds of sales of the capital stock at par, and that they are equally free from the possibility of impairment, and cannot be withdrawn nor in any manner diverted by the corporation. This is the holding in *Sun Mutual Ins. Co. v. Mayor, etc.*, of New York, 8 N. Y. 250, and in *Bailey v. Railroad Company*, 22 Wall. 638, 22 L. Ed. 840, where it is said: "Funds set apart as capital out of which debts are to be paid, it is held, amounts to a contract with those who become creditors on the faith of the transaction that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock." And in *Mutual Ins. Co. of Buffalo v. Supervisors of Erie*, 4 N. Y. 445, it is said: "If the money so paid in as the capital to be employed in conducting the business of the company cannot be withdrawn and divided among the stockholders or members of the company, it constitutes the capital stock or capital of the company." We think the effect of the resolution by the stockholders and directors of the corporation made the surplus and profits in the hands of the company a part of its capital and was a compliance with the statute, making the paid-up cash capital of the corporation equal to \$100,000 of United States gold coin.

The demurrer is overruled.

McBRIDE, C. J., took no part in the consideration of this case.

PAGE v. FORD et al.

(Supreme Court of Oregon. April 29, 1913.)

1. MORTGAGES (§ 218*)—NOTE SECURED BY MORTGAGE—ACTION FOR PERSONAL JUDGMENT.

L. O. L. § 426, which was part of Laws 1903, p. 252, entitled "An act to abolish deficiency judgments upon foreclosure of purchase-money mortgages," and provides that, when judgment or decree is given for the foreclosure of any purchase-money mortgage, the mortgagee shall not be entitled to a deficiency judgment, does not prevent the holder of a note given for the purchase price of land, which was secured by a mortgage, from disregarding the mortgage and bringing an action for personal judgment on the note, since the act abolishing deficiency judgments did not repeal L. O. L. § 429, providing that during the pendency of an action for the recovery of a debt secured by a lien a suit cannot be maintained for the foreclosure of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such lien nor thereafter, unless plaintiff recover judgment and execution be returned unsatisfied.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. § 218.*]

2. BILLS AND NOTES (§ 170*)—NEGOTIABILITY—INDORSEMENT.

Under L. O. L. § 5841, which is part of the negotiable instruments law, providing that an instrument is payable to order where it is drawn payable to the order of a specified person, and that it may be drawn payable to the order of a payee who is not a maker, drawer, or drawee, or the drawer or maker, or the drawee, or two or more payees jointly, or one or some of several payees, or the temporary holder of an office, the indorsement of a negotiable instrument in the alternative does not render it nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 368; Dec. Dig. § 170.*]

3. BILLS AND NOTES (§ 161*)—NEGOTIABILITY—SUM FIXED.

In view of L. O. L. §§ 6033, 6034, providing that when the rate of interest on any obligation is 8 per cent. or under, contracts requiring the debtor to pay the taxes thereon shall be legal and enforceable, a promissory note secured by a mortgage to which it refers is not rendered nonnegotiable because of a provision incorporated in the mortgage that the mortgagor shall pay the interest assessed against the note and mortgage; it being apparent that this provision did not change or render indefinite the amount of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 404; Dec. Dig. § 161.*]

4. BILLS AND NOTES (§ 182*)—INDORSEMENT—SUFFICIENCY.

Where a note was indorsed to two in the alternative, an indorsement by either is sufficient to transfer title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 434-437; Dec. Dig. § 182.*]

5. CORPORATIONS (§ 432*)—NOTES—INDORSEMENT BY OFFICER—PRESUMPTIONS.

Where a note is made payable to a corporation and is indorsed by a person signing as an officer thereof, the indorsement will be presumed to be a corporate act.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

6. BILLS AND NOTES (§ 171*)—INDORSEMENT—NEGOTIABILITY.

Under the direct provisions of L. O. L. § 5871, the indorsement of a note without recourse does not render it nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 415; Dec. Dig. § 171.*]

7. SALES (§ 135*)—CONTRACT—BREACH.

Where the seller of land agreed to deliver the purchaser a fixed number of feet of saw logs within a stipulated period, the fact that he did not own the logs at the time of the sale does not constitute a breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 330, 331; Dec. Dig. § 135.*]

8. BILLS AND NOTES (§ 370*)—BONA FIDE HOLDERS—DEFENSES.

A bona fide holder takes a negotiable instrument free from all latent equities between the parties, and therefore evidence of a defense showing a breach of a contract entered into between the maker and the payee in consideration of which the note was given is not admissible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. § 370.*]

9. CORPORATIONS (§ 414*)—OFFICERS—POWERS.

Where the by-laws of a corporation provided that all notes or other obligations should be signed by the president, vice president, or secretary, each of which officers were authorized to affix the corporate seal, and that the president, vice president, treasurer, or secretary should have authority to sign all drafts, checks, or orders, the president has authority to indorse a promissory note payable to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by C. H. Page against A. H. Ford and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This is an action brought by the appellant, C. H. Page, to recover the amount due on a promissory note executed by respondents to the Oregon-Idaho Company, a corporation, and by it transferred to appellant. The note was executed August 15, 1910, by respondents, and by the terms thereof they promised to pay to the order of the Oregon-Idaho Company the sum of \$15,000 on or before six months thereafter, with interest at the rate of 6 per cent. per annum and a reasonable sum as attorney's fee in case of suit or action. The note was given as part of the purchase price of certain real estate and personal property. On the margin of the note these words were written: "This note is secured by mortgage of even date given to secure the balance of the purchase price of the property described in said mortgage." The real estate consisted of land on which was a sawmill. The personal property consisted of certain tools, machinery, and lumber. The defendants answered: (1) That the note was given as a part of the purchase price of certain real estate sold by the said Oregon-Idaho Company to defendants A. H. Ford and F. F. Williams, and that at the same time and as a part of such consideration said Oregon-Idaho Company entered into a contract with such defendants to furnish and deliver to them 200,000,000 feet of logs, not less than 10,000,000 feet the first year, and from 15,000,000 to 25,000,000 feet each succeeding year, until the 200,000,000 feet should be delivered. That the note had not been transferred to appellant by said corporation or by its authority, and said contract had been breached by said Oregon-Idaho Company and defendants damaged thereby in a sum exceeding the amount of the note; hence the action should abate. (2) That, the note being for the balance of the purchase price of real estate and secured by a mortgage thereon, no personal judgment could be recovered. A copy of the mortgage was set forth, and it appears therefrom that the note was given as a part

of the purchase price of certain real estate and personal property covered by the mortgage. A demurrer to this defense was sustained by the court. (3) It was averred as a defense to the action that the Oregon-Idaho Company had since the execution of such note, mortgage, and contract, been adjudged a bankrupt, and that the note had not been transferred to appellant by authority of such corporation; hence the trustee in bankruptcy was the real party in interest. (4) That plaintiff purchased the note with knowledge of the fact that said contract to supply defendants with logs was a part of the consideration therefor and that such contract had been breached, and alleged damages in excess of the amount due on the note. To the first, third, and fourth defenses appellant replied, denying the same and alleged that prior to any breach of the contract for logs, if any occurred, defendants sold and assigned such contract to the Cow Creek Mill Company, a corporation.

At the trial the court overruled respondents' contention that the holder of a note given for the balance of the purchase price of real estate and secured by a mortgage thereon is confined to the remedy of foreclosing the mortgage, and held that such holder may ignore the mortgage and recover a personal judgment in an action on the note. The note as stated was executed by the respondents to the Oregon-Idaho Company, and was by such company indorsed: "Pay to order of Frank Smith. Oregon-Idaho Co., by L. R. Ferbach, President." Smith indorsed it back in the form following: "Without recourse pay to the order of the Oregon-Idaho Co. or L. R. Ferbach. Frank E. Smith." It was then indorsed to appellant thus: "Pay to Chas. H. Page, or order, this 9th day of September, 1910. L. R. Ferbach, President Oregon-Idaho Co." and "For value received, I hereby guarantee the payment of the within note absolutely without condition and waive demand, notice, or protest for nonpayment. L. R. Ferbach." The court ruled that the indorsement by Smith "to the order of Oregon-Idaho Co. or L. R. Ferbach" was an alternative indorsement and destroyed the negotiability of the note. It was also contended by respondents that at the time the Oregon-Idaho Company entered into the contract to furnish said respondents 200,000,000 feet of logs it did not own land upon which there was any such quantity of timber, and that that fact operated as a breach of the contract at the moment it was made; and the court so held, or at least admitted testimony tending to show, that said company then had not over 40,000,000 feet of timber, and the court refused to instruct the jury that the mere fact, if they so found it, that said company did not own land on which there was 200,000,000 feet of timber at the date the contract was executed would not constitute a breach of the contract.

C. W. Fulton, of Portland (King & Saxton, of Portland, on the brief), for appellant. Robert T. Platt, of Portland (Platt & Platt and J. O. Bailey, all of Portland, on the brief), for respondents Williams. Manning & White, of Portland, for respondents Ford.

McBRIDE, C. J. (after stating the facts as above). There are four questions arising on this appeal, namely: (1) Is one who holds a note given for a balance due on the purchase price of real and personal property secured by a mortgage on such property restricted to the remedy of foreclosing the mortgage and a sale of such mortgaged property? (2) Did the aforesaid alternative indorsement render the note nonnegotiable? (3) Did the provision in the mortgage that the mortgagors should pay taxes assessed against the note or mortgage render the note nonnegotiable? (4) Did the fact that at the time the Oregon-Idaho Company undertook to supply respondents with 200,000,000 feet of logs within a period of years it did not own land containing that quantity of timber constitute a breach of such contract?

[1] A correct solution of the first proposition turns upon the construction to be placed upon section 426, L. O. L., which is as follows: "When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same." That a creditor holding a note secured by mortgage may ignore his security and bring an action upon the note is settled beyond the pale of discussion. Jones on Mortgages (4th Ed.) §§ 1215, 1218, 1220. The section quoted by its terms is applicable only to suits for the foreclosure of mortgages. The plaintiff having brought his action at law upon the note is not precluded by this section from obtaining the usual judgment rendered in such cases. This view is strengthened by an examination of the title of the act abolishing deficiency judgments, which is as follows: "An act to abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance of purchase price of real property." Session Laws 1903, p. 252. By its title as well as by its text the effect of the act is confined to foreclosure suits. It will be noted that the act abolishing deficiency judgments upon foreclosure makes no mention of, nor does it purport to repeal, section 429, L. O. L., which is as follows: "During the pendency of an action at law for the recovery of a debt secured by any lien mentioned in section 422, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment

be given in such action that plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part."

[2] Did the alternative indorsement render the note nonnegotiable? This is a question of much nicety, involving the construction of section 5841, L. O. L., being identical with section 27, uniform negotiable instruments law as it appears in Crawford on Negotiable Instruments, which first-mentioned section reads as follows: "The instrument is payable to order where it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer, or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty." At common law a note so indorsed was non-negotiable. 1 Daniel on Negotiable Instruments (4th Ed.) § 103; Randolph on Commercial Paper, § 155; 1 Parsons on Notes and Bills, p. 34, note; Story on Promissory Notes, § 33. But this rule which was accompanied with many inconveniences, and was supported more by archaic precedent than sound logic, seems to have been abrogated by the uniform negotiable instruments act, now adopted by 34 states of the Union. Crawford on Negotiable Instruments (3d Ed.) p. 20; Selover on Negotiable Instruments (2d Ed.) p. 75; Union Bank v. Spies, 151 Iowa, 178, 130 N. W. 928. The opinion of Mr. Crawford, who prepared the negotiable instruments act, is entitled to great consideration. The act is remedial in its nature, and should be liberally construed. We conclude, therefore, that in so far as it is affected by the alternative indorsement the note was negotiable.

[3] The third proposition raises the question as to whether the provision in the mortgage requiring the mortgagor to pay all taxes that might thereafter be assessed on the note renders the amount due thereon uncertain, and therefore nonnegotiable. It is contended by respondent with much plausibility that the note and mortgage, having been given at one time, and as part of the same transaction, should be construed together as one instrument. The logical effect of this argument would be to incorporate into the note in the case at bar, and into every other note executed simultaneously with and to secure a mortgage every stipulation in the mortgage. While this result does not seem to have been fully apprehended by courts holding the views hereinafter considered, it cannot be denied that the position of counsel for respondents has respectable authority to support it. The first citation is 7 Cyc. 596, wherein it is

stated: "An agreement to pay taxes that may be levied on a note renders it uncertain as to the amount to be paid and nonnegotiable." The first citation in the notes to Cyc. under the text quoted is Walker v. Thompson, 108 Mich. 686, 66 N. W. 584, which supports the text, and which is evidently dealing with the contents of the note, and not with its collateral security. The note there considered provided on its face that the mortgagor should pay all taxes assessed against the real estate described in the mortgage given to secure the note; the infirmity appearing on the face of the note itself. The next case cited under the text is New Windsor First National Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604, which was an action on an unsecured promissory note, payable on a certain day for a certain amount, with exchange on New York and counsel fees for collecting the note if sued upon; the consideration being the purchase of an engine separator which it was stipulated in the note was to remain the property of the payee with power to take possession, and to declare the note due at any time the payee should deem it insecure. These conditions appearing on the face of the note the court seems to have held that the provision as to attorney's fees and the option to declare the note due at any time rendered the note uncertain, first, as to the amount; and, second, as to the term of payment. As to the first reason assigned, this court, in Peyser v. Cole, 11 Or. 39, 4 Pac. 520, 50 Am. Rep. 451, and also in Benn v. Kutzschan, 24 Or. 23, 32 Pac. 763, has held to the contrary; as to the second, the alleged infirmity was patent on the face of the note. Farquhar v. Fidelity Ins., etc., Co., Fed. Cas. No. 4676, and Howell v. Todd, Fed. Cas. No. 6783, are both cases in which the agreement to pay taxes on the notes was incorporated in the note itself. We refer to these cases, not for the purpose of showing that they do not support the text, which they undoubtedly do, but for the purpose of demonstrating that the citation quoted does not refer to provisions contained in a mortgage collateral to a note, but to stipulations contained in the note itself. This is made evident by the concluding sentence in note 75, p. 596, 7 Cyc., which cites the above authorities, in which it is stated: "Such provisions in a collateral mortgage will not render the note secured by it nonnegotiable"—citing a number of authorities. Another authority cited by counsel is Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536. This case appears to sustain counsel's contention, but its force is greatly weakened by the comments of the learned assistant editor of L. R. A., Mr. Farnham, author of Farnham on Waters, from whose notes on this case we quote the following excerpts: "The conflicting opinions of the judges in Brooke v. Struthers and Wilson v. Campbell [110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544] upon this question dis-

close a singular situation. This situation has been approached gradually, apparently with no thought as to the logical conclusions of the rulings made from time to time." And, further speaking of this and other decisions tending in the same direction, he observes: "The tendency of these decisions was pointed out by Hough, J., in a dissenting opinion in *Noell v. Gaines*, 68 Mo. 649, in which he states that, with the exception of *Brownlee v. Arnold* [60 Mo. 79], 'I have been unable to find a single case in the books which holds that the owner of a note secured by mortgage is bound by the terms of the mortgage if he knows of its existence, although he may not wish to resort to or rely upon the mortgage security.' Continuing, he said that the rule that two instruments executed at the same time are to be read together was never intended to be so applied as to make a negotiable promissory note and a mortgage contemporaneously or subsequently executed to secure its payment as much one instrument as if they were one in form. The rule relates to an entirely different class of cases. A note and mortgage do not constitute a single contract. They are separate instruments executed for different purposes and differ in nature. The mortgage is governed by the law of real property, and the note by the law merchant. If the holder of a negotiable note secured by a mortgage chooses to disregard or abandon the mortgage security, undoubtedly he may do so, and the note will then be enforced according to its terms and the law of negotiable paper. If the note and mortgage are but one instrument, the note will lose its character as a promissory note, and become an ordinary contract merely. This difficulty seems to have presented itself very strongly to the Michigan court in the cases of *Brooke v. Struthers* and *Wilson v. Campbell*, and the court seems to be unable to dispose of the question, while no other case has been found which passes upon the exact point upon which this court split. The difficulty appears to be in the attempt to apply the rule governing the construction of different instruments executed at the same time. If that rule is to be applied to such a transaction, the logical conclusion would seem to be that the result of the transaction is simply a contract which cannot be regarded as negotiable. The other alternative is that which appears to have been originally adopted, that the mortgage is simply an incident to the note, and is to be regarded as the pledge of any other collateral security would be regarded, so that the note will be enforced by the holder according to its terms and the law merchant, and for his additional security he will have the right to rely on the collateral mortgage which was executed to accompany the paper." *Garnett v. Myers et al.*, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803, is an opinion supporting defendant's con-

tention. The matter arose upon an action to foreclose a mortgage upon real estate, which mortgage was given to secure a promissory note negotiable by its terms, upon the face of which was written a memorandum similar to that appearing upon the note in the case at bar. The mortgage contained a stipulation as follows: "The said parties of the first part hereby agree to pay all the taxes and assessments levied upon the said premises and all taxes and assessments levied upon the holder of this mortgage for and on account of the same * * * when the same are, respectively, due." It was also stipulated that in case of nonpayment of such taxes the holder of the mortgage might declare the debt due and foreclose the mortgage. Upon the first hearing of the case (91 N. W. 400) the court held that the stipulation to pay the taxes on the mortgage did not affect the negotiability of the note; but upon a rehearing it was held that the note and mortgage, having been executed at the same time, must be construed together, that the provision for the payment of future taxes rendered the amount of the debt uncertain, and that for that reason the note was non-negotiable. The court does not in our opinion draw clearly the distinction between the debt created by the mortgage and the debt evidenced by the note. The note as a note was for a sum certain. The mortgage was a contract to secure that note, and also a contract to secure the mortgagee against the payment of possible future taxes. Here were practically three contracts: One creating a personal liability for the sum mentioned in the note and governed by the law merchant; another to secure payment of the note and interest; and a new contract to pay the taxes on the mortgage. This was called to the attention of the court, who answered by saying: "It is said by the plaintiff that there are two causes of action 'one at law upon the bond, seeking personal liability regardless of the lien; and the other seeking to enforce the security, regardless of the personal liability.' This is true, but in an action at law upon the note, and without seeking to enforce the security, the plaintiff no doubt might allege that in a writing executed with the note, and as a part of the same transaction, it was agreed that the maker of the note should pay taxes that might be assessed against the holder of the note by reason thereof, and that such taxes were assessed, and had been paid by the noteholder; and there is no doubt that such taxes so paid might in such an action be included in the recovery. If such recovery could be had when the agreements to pay such taxes were in an accompanying paper executed for that purpose alone, no reason is perceived why recovery might not also be had in the same manner if such agreements were contained in a mortgage executed at the same time with the note, and as a

part of the same transaction." The statement is faulty as applied to the case then being considered in this, that the mortgage did not provide that "the maker of the note should pay taxes that might be assessed against the holder of the note by reason thereof," but simply provided that he should pay "all taxes and assessments levied upon the said premises and all taxes and assessments levied upon the holder of this mortgage for and on account of the same."

But, waiving this, we may observe that in Nebraska the distinction between legal and equitable procedure is abolished, and legal and equitable remedies may be pursued in the same form of action. However, in this state, where the distinctions are preserved, we opine that a plaintiff who should come into court seeking to enforce the payment of a promissory note and the covenants in a real estate mortgage in an action at law would find himself out of court on one count or the other. The conclusions drawn in the cases noted seem to us to be supported neither by sound logic nor public policy. Their logical result is to make every promissory note secured by a real estate mortgage a part of the mortgage, and subject to all its stipulations and conditions, thereby reducing it to a mere contract not negotiable. They assume that when parties sit down and execute a promissory note negotiable by its terms, and secure it by a mortgage, they intended as a matter of law to do the thing that as a matter of fact they never thought of doing, namely, to make a nonnegotiable note. As a matter of public policy, such holdings tend to discredit and cheapen commercial paper, and to render purchasers thereof suspicious of investing in it when secured by mortgages often held and recorded at a distance from the place where such paper is offered for sale. In this state generally we have been accustomed to regard the words, "this note is secured by mortgage," written upon commercial paper, as in some sense a guaranty of value; but the Michigan and Nebraska decisions make the words a pitfall and possible badge of non-negotiability. Other cases cited by respondents are *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680, and *Consterdine v. Moore*, 85 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620, which follow *Garnett v. Myers*, supra; also, *Iowa National Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237; *Hull v. Angus*, 60 Or. 95, 118 Pac. 284. The Iowa case would seem to hold in accord with Michigan and the later decision from Nebraska. *Hull v. Angus*, supra, is not in point, for the reason that the note in suit in that case expressly and by its own terms was made part of the mortgage. It contained this provision: "This note is given as a part of the purchase price of real property and is secured by mortgage of even date herewith, and subject to all the terms and conditions of said mortgage." By the very terms of the note, every condition of the mortgage was imported in-

to it. By the peculiar terms of the contract, as set out in the opinion in that case and not necessary here to restate, there was abundant reason why the note should be made nonnegotiable, and the parties deliberately made it so. We think that the case of *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872, lays down the true rule in regard to the effect of stipulations in a mortgage upon the negotiability of a promissory note which the mortgage secures. This was a case where a note negotiable in form was secured by a trust deed, which stipulated, among other things, that the mortgagor (such was his legal relation to the payee) should pay all taxes and assessments on the premises and at the request of the mortgagee keep all buildings insured, etc., and in case of refusal so to do the mortgagee might pay such taxes and insure the property, and the sums so paid with interest should become so much additional indebtedness secured by the deed of trust, to be paid out of the proceeds of sale of the lands described therein. It will be seen that there is no logical distinction between the Colorado case and the case of *Brooke v. Struthers*, supra. In neither case were the amounts added to the indebtedness stipulated to become a part of the note; and, as conceded in *Brooke v. Struthers*, they did not become part of the note except by construing the note and mortgage as one instrument. The circumstance adverted to in some of the cases cited that in some instances the stipulation was to pay taxes and insurance on the mortgaged property to protect the security, and that a stipulation to pay taxes on the note itself not being for the protection of the property differentiated the two in some way so that an uncertainty in the amount of the debt, if it arose, from the necessity of protecting the property did not render the amount due on the note uncertain, while an uncertainty in the amount of the debt arising from a stipulation to pay taxes upon the note did render the amount uncertain indicates a certain judicial muddlement of ideas in courts whose opinions are usually clear and convincing. The opinion of the Colorado court is so appropriate to the contentions in the case at bar that we quote at length from it: "Upon its face the note is negotiable. It was made for an amount certain, and was payable at a time certain. It might become payable before that time, but at that time it was in any event payable. It was therefore a negotiable promissory note. The expressed purpose of the trust deed was to secure the payment of this note, and the interest notes attached to it, in whosoever hands they might be, and to indemnify the payee, its successors and assigns. Throughout the entire deed the note is mentioned as something distinct from it, and its covenants and provisions have reference solely to the payment of the note. The general doctrine is that the note is the principal thing and the mortgage an acces-

sory, and that the transfer of the debt ipso facto carries with it the security. And where the debt is in the form of a negotiable promissory note, if it is transferred for value before maturity, the bona fide holder is entitled to the benefit of the security free from any equities arising between the original parties. 1 Daniel on Negotiable Instruments, § 834; 1 Jones on Mortgages, § 834; Fasset v. Mulock, 5 Colo. 466; Carpenter v. Longan, 16 Wall. 271 [21 L. Ed. 313]. Even if this doctrine is denied elsewhere, the cases of Fasset v. Mulock and Carpenter v. Longan, fix it in this state. Were it not for certain stipulations in the trust deed, in virtue of which additions might be made to the debt secured, the case would be beset by no difficulty. But it is argued that these stipulations became part of the note; that as a result the note was nonnegotiable; that, therefore, the payments to the Globe Investment Company, without knowledge by the plaintiffs of the transfer, discharged the note, and some authorities are cited and relied upon to support the contention. The general rule, without doubt, is that where two separate contracts are executed at the same time, affecting the same subject-matter, they are to be construed together as one contract; and where the maker of a note, at the time of its execution, enters into a written agreement, by which he is personally bound, varying, or conditionally varying, the terms of the note, the stipulations of the writing enter into and become part of the note. Munro v. King, 3 Colo. 238. A mortgage may contain a personal covenant so expressed that the terms of the note would be modified and controlled by it. In such case, and upon the same principle, the covenant would be imported into the note; and in determining the obligation and liability of the maker should be construed with the note as part of it. But we do not think that the rule applies to a covenant which is inserted purely for the purposes of security, and for the enforcement of which resort can be had only to the property mortgaged. This deed of trust provided that the plaintiffs should pay all taxes and assessments on the premises conveyed, and keep the buildings thereon insured; that, if they refused or neglected so to do, the trustee, or the holder of the note, might pay the taxes and procure the insurance; and that in such event the moneys expended should become so much additional indebtedness secured by the trust deed; but the instrument also provided that, if the amount so paid should not be refunded by the grantors, the party paying it should be reimbursed out of the proceeds of the sale of the premises. There was no promise by the grantors to refund the money. It is true that it was agreed that the expense should become so much additional indebtedness; but it was also stipulated that, if the grantors did not choose to pay it, it should be paid by the land. It could not have been re-

covered in a suit upon the note. It was chargeable against the land, and the land alone. Furthermore, the deed provided that in any case of a sale the money realized should be applied, first, to the payment of the expenses of the sale, including an attorney's fee and trustee's commission, next to the payment of the money expended for taxes and insurance, and which would constitute the 'additional indebtedness' mentioned, and lastly to the payment of the note and interest. The parties here made a clear distinction between the 'additional indebtedness' and the indebtedness evidenced by the note. It was made a preferred claim, and must be paid before anything could be applied on the note. It was to stand upon its own footing, and be separate from, independent of, and superior to, the note. Hence it could not have been, and was not intended to be, part of the note. It seems evident to us that these several stipulations were introduced into the trust deed for the sole purpose of more effectually securing the debt for which the note was given. They were intended to provide against the impairment of the security by an accumulation of unpaid taxes upon the land, and the destruction of uninsured buildings, which were part of the land, and to enable the holder to protect himself against the consequences of any failure of the grantors to preserve the security intact, by making immediate sale of the property; but the only end to be attained, the end, and no other, which every provision of the deed had in view, was the collection of the note. The deed of trust was therefore simply a security for the payment of the note, and the sole purpose of its several provisions was to render the security available and effective. When the plaintiff took the note, he took the right to resort to the security to make his debt, and for that purpose to avail himself of every provision it contained. Whatever would defeat his remedy upon one would defeat his remedy upon the other; and, if no defense could be interposed to an action upon the note, none could be interposed to a proceeding for the foreclosure of the trust deed. Nothing would be gained by a critical examination of all the authorities to which counsel for the plaintiffs have referred us, and we shall therefore notice only a few of the principal ones. In Donaldson v. Grant, 15 Utah, 231 [49 Pac. 779], the maker stipulated in his note that, upon his failure to comply with any of the conditions or agreements contained in the mortgage given to secure it, the principal sum, with the accrued interest, should, at the option of the holder, become due and payable, and should be collectible without further notice. The mortgage contained covenants for the payment of taxes, assessments, and insurance, and against waste. The court held that the stipulation in the note rendered the instrument nonnegotiable. The conclusion was reached by construing the stipulation as blind-

ing the maker to perform the covenants contained in his mortgage, and therefore to pay, in addition to the principal sum and interest, uncertain and indefinite amounts for taxes, assessments, insurance premiums, and damages for waste. The note by its own terms made the covenants of the mortgage part of it; and, if the court's construction of the stipulation was correct, we do not see that its decision can be assailed. The note in the case at bar contains no such stipulation. It is a complete instrument within itself, and it requires no resort to any other instrument to explain it. The Utah decision is therefore inapplicable. In *Brooke v. Struthers*, 110 Mich. 562 [68 N. W. 272, 35 L. R. A. 536], it was held that a provision in a mortgage binding the mortgagor to pay all taxes and assessments upon the premises, and upon his failure for 30 days to pay any tax or assessment, valid or invalid, making the note due and payable immediately, injected a contract into the obligation; and because it rendered the note uncertain in time of payment, and ingrafted a contract upon it as part of it, the note was rendered nonnegotiable. Mr. Justice Montgomery concurred in the decision for the reason that at the time the note and mortgage were executed the law of 1891 was in force, and the mortgage required the payment by the mortgagor, not only of the taxes levied upon the land, which he was under a legal obligation to pay without contract, but also of the taxes levied upon the mortgage, which were by law chargeable against the mortgagee. We are not advised either by the principal or concurring opinion what the law of 1891 was, and sufficient of the language of the mortgage provisions is not given to enable us to understand the full purport of the decision. But if the court intended to decide that a note, which was by its express terms payable at a time certain, but which, either by its own terms, or in virtue of the provisions of a separate instrument, might, in a contingency named, or upon some condition mentioned, mature earlier, was not negotiable, then the decision is not in accordance with our understanding of the law as it is generally stated, and certainly not in harmony with the doctrine announced by the Supreme Court of this state. *Kiskadden v. Allen*, 7 Colo. 206 [3 Pac. 221]. See, also, *Chicago Railway Equipment Co. v. Merchants' National Bank*, 136 U. S. 268 [10 Sup. Ct. 999, 34 L. Ed. 349]; *Dobbins v. Oberman*, 17 Neb. 163 [22 N. W. 356]; *Ernest v. Steckman*, 74 Pa. 13 [15 Am. Rep. 542], and *Carlon v. Kenealy*, 12 Mees. & W. 139. Neither does it seem to be the doctrine of the Supreme Court of Michigan, for in the later case of *Wilson v. Campbell*, 110 Mich. 580 [68 N. W. 278, 35 L. R. A. 544], it is held that a note which may, upon condition, become due before the period fixed by itself for its maturity, is not therefore nonnegotiable. In *Noell v. Gaines*, 68 Mo. 649, it was decided

that where two promissory notes, maturing at different dates, were secured by a deed of trust which provided that should the maker fail or refuse to pay the debt or interest, or any part thereof when it became due or payable, according to the tenor and effect of the notes, then the whole should become due and payable, the notes and deed constituted but one contract, and the provisions of the deed controlled the language of the notes; so that upon default by the maker in payment of an installment of interest they both became absolutely due, and demand by the holder upon the maker of payment of the second note on the date when it matured according to its terms, followed by notice of dishonor to the payee and indorser, came too late. This decision met with a vigorous dissent from Mr. Justice Hough, and was in direct conflict with previous utterances of the same court. *Morgan v. Martien*, 32 Mo. 438; *Mason v. Barnard*, 36 Mo. 384; *Thompson v. Field*, 38 Mo. 320. We find nothing in the plaintiff's authorities which would tend to produce a change in the views we have expressed, even if they were directly in point. But for the most part they do not reach the questions which are debated here."

To the same effect is *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, wherein the court says: "If all the agreements contained in every mortgage are as matter of law imported into the note, * * * the most simple real estate mortgage would deprive the note which it secures of its negotiable character, because it would import into the note one or more collateral agreements which are not for the payment of money. Fortunately it is not necessary to give so violent a shock to the well-understood principles of law governing the negotiability of notes and mortgages. The appellant's contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instruments relating to the same subject-matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of pay-

ment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. * * * The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant."

Other cases bearing upon this question are *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; *Farmer v. First National Bank*, 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79. It may be also observed that sections 6033, 6034, L. O. L., provide that, when the rate of interest on any obligation is 8 per cent. or under, contracts requiring the debtor to pay the taxes on such indebtedness shall be legal and valid, and enforceable in the courts of this state. It is hardly conceivable in view of these provisions expressly sanctioning such contracts that it was in the legislative mind to render notes or mortgages containing such provisions nonnegotiable, even where the contract appeared on the face of the note, which is not so in this case.

[4, 5] In view of the fact that we here hold that an alternative indorsement is valid and that either indorsee may again transfer the note, the question as to whether the indorsement "L. R. Ferbach, President of the Oregon-Idaho Company," is to be considered as his personal indorsement, or that of the corporation, is unimportant. Both the corporation and Ferbach received it with that indorsement. If the corporation was ever re-invested with title to the note after its indorsement to Smith, such title comes by virtue of the reindorsement, which was made in such a form as to authorize either Ferbach or the corporation to again indorse it to a third party. Had the indorsement been simply "L. R. Ferbach," it would have been sufficient to transfer the property in the note to plaintiff; but the presumption is that, where a note is made payable to a corporation and is indorsed by a person signing as an officer of the corporation, the indorsement is a corporate act. 1 *Daniel on Negotiable Instruments*, § 416, citing *Northampton Bank v. Pepon*, 11 Mass. 288; *Lay v. Austin*, 25 Fla. 933, 7 South. 143; *Elwell v. Dodge*, 33 Barb. (N. Y.) 336; *Falk v. Moebbs*, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266.

[6] The indorsement of the note without

recourse did not render it nonnegotiable. L. O. L. § 5871.

[7] There is no breach of the contract occasioned by the fact that when the Oregon-Idaho Company contracted to deliver to Ford and Williams 200,000,000 feet of logs, to be delivered at the rate of not less than 10,000,000 feet the first year and from 15,000,000 to 25,000,000 feet each succeeding year, they were not the owners of that amount of timber; there being no covenant at the time of the contract that they were such owners. If by purchase from others or by purchase of timber land from time to time they furnished the amount required by their contract each year, the question as to when they obtained it would be immaterial.

[8] In view of our holding that the note was negotiable and passed by indorsement free from latent equities between the parties, the testimony was immaterial in any event. In this view of the case the following instruction given by the court was error: "The note being nonnegotiable, the defendants Ford and Williams are entitled to show any defense thereon which they had against the Oregon-Idaho Company at the time the notice of the assignment of the note was given to them."

[9] Irrespective of any oral testimony or the manner in which the note was indorsed, the following sections of the by-laws of the Oregon-Idaho Company confer ample authority on the president of the corporation to indorse notes of the company. The sections referred to are as follows:

"Section 1. All notes, bonds, mortgages, or other obligations of this corporation shall be signed by the president, vice president, or by the secretary, each of which officers is authorized to affix the corporate seal to any or all such or other instruments requiring the same.

"Sec. 2. The president, vice president, treasurer, or the secretary shall have authority to sign all drafts, checks, or orders for the payment of money, and to disburse money or moneys on behalf of this corporation."

In view of the law as herein set forth, none of the testimony offered by defendants was relevant or material, and the court should have directed a verdict for plaintiff.

The judgment is reversed, and a new trial granted.

WILLIAMS v. PACIFIC SURETY CO. et al.
(Supreme Court of Oregon. April 29, 1913.)

APPEAL AND ERROR (§ 1142*)—AFFIRMANCE—
OVERRULING OF DEMURRER—PERMISSION TO
ANSWER.

In an action at law where the judgment of the trial court overruling a demurrer to the complaint is affirmed, the Supreme Court will not remand the case with directions to permit the defendants to answer on the merits; it hav-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing no authority to determine, on affidavits de hors the record, the question of the existence of possible meritorious defenses which were not interposed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4477, 4478; Dec. Dig. § 1142.*]

On petition for rehearing. Petition denied. For former opinion, see 127 Pac. 145.

McBRIDE, C. J. For the reasons stated in the original opinion (127 Pac. 145), to which we still adhere, the petition for rehearing is denied. It would be contrary to the uniform practice in this court and a precedent for future delay should we in an action at law affirm the judgment of the court below overruling a demurrer, and at the same time remand the case with directions to permit the defendants to answer on the merits. While in equity cases, which are tried de novo in this court, such a procedure has been permitted in a few instances, there is no precedent for a like procedure in a law action. Such cases come to us upon the case made in the court below, and we have no authority to hear and determine on affidavits de hors the record, and filed for the first time in this court, the question of the existence of possible meritorious defenses which the defendant did not interpose when it had an opportunity. The rule may appear to operate harshly in the present instance, wherein a large sum of money is involved; but the result is one which might have been averted had the defendant answered when its demurrer was overruled.

The application to remand with leave to answer is overruled.

GADSBY v. GADSBY et al.

(Supreme Court of Oregon. April 30, 1913.)

DIVORCE (§ 309*)—DECREE—PROVISIONS FOR MAINTENANCE—MODIFICATIONS.

A decree rendered by the Supreme Court on appeal which grants a divorce, and awards the custody of the children, and makes provisions for their maintenance and control, is subject to modification in the circuit court as to maintenance and control to the same extent as if originally entered there.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803; Dec. Dig. § 309.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Suit by Beatrice L. Gadsby against Walter M. Gadsby and another. From a decree for defendants, plaintiff appeals. Reversed and entered.

C. M. Idleman and O. W. Fulton, both of Portland (Beach & Simon, of Portland, on the brief), for appellant. W. P. La Roche and Chas. H. Carey, both of Portland (Schnabel & La Roche and Carey & Kerr, all of Portland, on the brief), for respondents.

McBRIDE, C. J. The testimony in this case is voluminous, and the bulk of it comes from the parties and their immediate relatives, whose interference in the domestic affairs of these young people seems to have been the origin of their difficulties. In view of the interested character of the oral testimony, we rely mostly upon the correspondence between the parties, and this indicates clearly that the defendant refused to be reconciled to his wife, and repudiated her in the strongest language. She does not appear to have an ideal disposition and temperament, but there is nothing in the testimony to justify the extreme measures indicated by defendant in his letters. Taking this testimony in defendant's own handwriting, we conclude that the charge of desertion is made out by plaintiff. There is nothing in the contention that defendant was the owner of the real property described in the complaint or of any interest therein. We refrain from putting permanently into the reports of this court any account of the recriminations and disputes between the parties or their relatives, and content ourselves with merely stating our conclusions.

A decree will be entered here granting plaintiff a divorce from defendant and the custody of the minor child, and requiring defendant to pay to plaintiff \$35 per month toward the support of said minor child. It will be further directed that defendant be allowed to visit the child once a month if he so desires, and that he be respectfully received and treated on such visits. The provisions as to maintenance of and visiting the child are subject to modification in the circuit court to the same extent as if this decree had been originally entered in said court.

SORENSEN v. SMITH.

(Supreme Court of Oregon. April 29, 1913.)

TRIAL (§ 150*)—TAKING CASE FROM JURY—MOTION FOR NONSUIT OR DIRECTED VERDICT.

Motions for a judgment of nonsuit and for a directed verdict in defendant's favor are tantamount to demurrers to the evidence, and the same rule for determining the sufficiency of the testimony is applicable to each.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346-348; Dec. Dig. § 150.*]

On petition for rehearing. Denied.

For former opinion, see 129 Pac. 757.

MOORE, J. It is maintained in a petition for rehearing that, since no exception was taken to the introduction of any testimony tending to establish the plaintiff's cause of action, errors were committed by this court in determining that the contract sued upon was within the statute of frauds and incapable of ratification by the defendant, except

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the execution of some writing adopted for that purpose, and in concluding that the motion for a directed verdict in Smith's favor should have been allowed.

It was said in the former opinion that the request for a directed verdict, made after all the evidence had been reviewed, superseded the denial of a motion for a judgment of nonsuit interposed when the plaintiff introduced her testimony and rested in chief. Based on this deduction the petition states generally that it must be supposed that the court assumed a difference between the two motions and refused to apply to the request for a directed verdict the rules of law governing motions for a judgment of nonsuit. The latter motion probably called attention to the particular defect in the evidence whereby it was asserted that a cause of action had not been established sufficient to be submitted to the jury. The motion for the nonsuit having been denied, the deficiency in the evidence, to which notice had been attracted, would be remedied if possible by the introduction of testimony on the particular subject.

A motion for a judgment of nonsuit and a motion for a directed verdict in the defendant's favor are tantamount to demurrers to the evidence, and the same rule for determining the sufficiency of the testimony is alike applicable to each. A motion for a directed verdict for the defendant, however, is generally less hazardous to the plaintiff's rights than is a motion for a judgment of nonsuit.

In the former opinion the testimony admitted without exception was deemed competent, and it was also considered that the statute of frauds as far as it related to Sorenson's employer was waived by not objecting to the admission of testimony tending to show that the contract sued upon was not evidenced by any writing. From an original examination of the entire transcript of the evidence it was not thought, nor from a re-examination thereof is it now believed, that the testimony so received without objection or exception, together with all the inferences and presumptions reasonably deducible therefrom, was sufficient to establish a cause of action to be submitted to the jury; because George Sorenson, the plaintiff's assignor, was employed by, and was the subagent of, F. A. Kribs, that no privity of contract existed between such substituted agent and the defendant Charles A. Smith, and the latter, never having stipulated in writing to pay a commission to the subagent, did not by negotiating the sale of the lands to C. P. Bratnoler and the Storey-Brocher Lumber Company ratify Krib's employment of Sorenson.

We are compelled to adhere to the former opinion, and the petition for a rehearing is denied.

WAGENAAR v. BEEMAN-WOODWARD CO. et al.

(Supreme Court of Oregon. April 29, 1913.)

1. PLEADING (§ 277*) — ANSWER — SUPPLEMENTAL ANSWER.

Under L. O. L. § 108, providing that plaintiff and defendant, respectively, may be allowed on motion to make a supplemental complaint or answer alleging facts material to the case occurring after the former complaint or answer, a defendant intending to rely upon a default judgment against a codefendant as a bar to a judgment against himself should do so by a supplemental answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 834; Dec. Dig. § 277.*]

2. JUDGMENT (§ 240*)—PARTIES—JOINT OBLIGATION.

Judgment for plaintiff on a joint note should be entered against all the defendants shown to be liable alike as between themselves and the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 423-425; Dec. Dig. § 240.*]

3. APPEAL AND ERROR (§ 1153*)—MODIFICATION—CONSTITUTIONAL PROVISIONS.

Under the authority of Const. amend. art. 7, § 3, approved November 8, 1910, this court, when it can determine that the lower court should have entered a judgment against all the defendants in an action on a note, should change the judgment of the lower court so as to make it one judgment against all the defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4507-4512; Dec. Dig. § 1153.*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Peter Wagenaar against the Beeman-Woodward Company, a corporation, and others. Judgment for plaintiff, and defendant Smith appeals. Judgment of circuit court modified so as to make it one judgment against all the defendants.

This is an action at law to recover the amount due on a promissory note executed by the defendants of which here follows a copy: "\$3000. Portland, Ore., 10-7-1908. One year after date we promise to pay to the order of Peter Wagenaar \$3000 at Ritzville, Washington, value received with interest at 10 per cent per annum. Beeman-Woodward Co., by Rufus O. Holman, Treas. Lewis V. Woodward, Vice Pres. Milton G. Smith. P. F. Clodius. Julius Beeman. Due 10-7-1909." The execution and delivery of the note are substantially admitted by the defendants. Milton G. Smith, the only answering defendant, interposes as his single affirmative defense substantially this: That he signed the note only for the accommodation of the Beeman-Woodward Company, knowing which the plaintiff and other creditors of the company entered into an agreement with it whereby it should surrender all its property to one S. C. Spencer with power to reduce the same to money, and apply it on the debts of the company to the subscribing creditors which should thereby discharge all those debts. Smith claims that this exon-

erates him from all liability on the note. The affirmative defense was traversed by the reply. The circuit court found that the plaintiff never signed the contract or agreement mentioned, although a number of other creditors of the Beeman-Woodward Company did sign it. A judgment was entered for the plaintiff according to the prayer of his complaint, and the defendant Smith appeals.

E. B. Watson, of Portland (Watson & Beekman, of Portland, on the brief), for appellant. S. C. Spencer, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1] It appears in the abstract that the cause was at issue between the plaintiff and the defendant Smith on July 8, 1910, when the reply was filed traversing all the allegations of the answer. The summons was served on the defendant Beeman by publication and on October 10, 1910, the court entered Beeman's default together with a judgment against him as demanded in the complaint with an order to sell certain attached real property belonging to him. It is argued by Smith that, inasmuch as the note sued upon was a joint obligation and not joint and several, the court by rendering a judgment against Beeman on his default discharged Smith, and that the subsequent judgment against the latter was at least erroneous. If Smith had intended to rely upon the Beeman judgment as a bar to a judgment against himself, he should have taken advantage of it by a supplemental answer. By section 108, L. O. L., "plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply." This is a statutory rule analogous to the com-

mon-law pleading of *puls darrein continuance*, and, if a party would rely upon anything occurring since the issues were joined, it is his duty to bring it before the court by a proper pleading. 31 Cyc. 493; Trotter v. Stayton, 45 Or. 301, 77 Pac. 395. This question, never having been presented to the circuit court by proper pleading, cannot be considered here. The circuit court having found as a fact, and very properly too, as we read the testimony, that the plaintiff was not a party to the agreement between the Beeman-Woodward Company and others of its creditors about the disposition of its property in payment of their claims, that contract must be laid out of the case. It is *res inter alios actos*. This is an ordinary action at law to recover the money due on a promissory note signed by the defendants as makers. The only defense interposed by the answer has been overcome as found by the circuit court. We cannot say there is no testimony to sustain this finding. On the contrary, the nonparticipation by the plaintiff in the composition agreement is in our judgment amply sustained by the evidence.

[2] The obligation sued upon, however, was joint, and hence judgment should have been entered against all the defendants as they were all shown to be liable alike as between themselves and the plaintiff.

[3] Equipped with authority to that end, as we are by section 8 of article 7 of the state Constitution in its present form, we hold, upon the data before us, that the judgment of the circuit court should be changed so as to make it one judgment against all the defendants, and the determination of the case by the court below will be modified accordingly.

MOORE, J., took no part in the consideration of this case and BEAN, J., reserves the right to dissent.

McCREA v. HINKSON et al.

(Supreme Court of Oregon. May 18, 1913.)

1. VENDOR AND PURCHASER (§ 31*) — OPTION OF SALE—RESCISSION—CONTRACT—MUTUAL MISTAKE.

Where complainant received from defendants an option for the sale of certain selections of unsurveyed public land, both parties believing that the descriptions when surveyed would contain 400 acres, and by reason of the fact that the land was subsequently included in fractional townships the descriptions contained only 224.41 acres, complainant was entitled to rescission because of a material deficiency in the quantity of land arising from a mutual mistake of the parties, though there was no fraud.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent.Dig. §§ 35-37; Dec.Dig. § 31.*]

2. VENDOR AND PURCHASER (§ 31*) — CONTRACT—RESCISSION—MISTAKE.

Innocent and mutual mistake alone is sufficient to justify rescission of a contract for the sale of land when the mistake is so material that, if the truth had been known to the parties, the agreement would not have been made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent.Dig. §§ 35-37; Dec.Dig. § 31.*]

3. CANCELLATION OF INSTRUMENTS (§ 4*) — MUTUAL MISTAKE.

The party against whom a contract for the sale of real property, made under mutual mistake of material facts, will not be specifically enforced, is generally entitled to rescind.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 48; Dec. Dig. § 4.*]

Appeal from Circuit Court, Lane County; Lawrence T. Harris, Judge.

Suit by J. E. McCrea against A. H. Hinkson and another to rescind an option contract for the sale of realty. Decree for complainant, and defendants appeal. Affirmed.

This is a suit to rescind an option contract. Defendants appeal from a judgment in favor of plaintiff.

The facts appearing from the record are as follows: On August 4, 1909, defendants executed to plaintiff a written contract, whereby, in consideration of the sum of \$200 paid by J. E. McCrea, they agreed to sell him the selections covering the N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 5, and the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 4, all in township 16 S., range 3 E. J. E. McCrea agreed to pay the sum of \$12,000 for the above selections and the lands covered thereby, the \$200 to be applied on the purchase price if the purchase was paid within 30 days from the date of the contract, or within such further time as the parties might mutually agree upon. It was provided and understood that the \$200 should be for an option for 30 days from the date of the contract, and that, in the event that no further payment was made, such sum should then be forfeited. Hinkson and Nicolle agreed to execute assignments of such rights "to the said selections and the lands covered thereby" to J. E. McCrea. On September 3, 1909, plaintiff made a further payment of

\$1,500, in consideration of which defendants extended the time 60 days. Both plaintiff and defendants had examined the lands prior to the time they were surveyed. The townships on the north and west thereof had been surveyed. Settlers had surveyed township 16 S., range 3 E., and had marked lines corresponding to those on the north and west upon the assumption that the township would be of normal dimensions, so that each legal subdivision would be of substantially the usual size. Guided by these surveys plaintiff's agent checked the survey made by the settlers, and estimated the timber on the land in question. The United States survey was made between the 7th and 19th days of July, 1909. This was not known to the parties at the time of the making of the contract. The survey was not approved by the Surveyor General until January 22, 1910, nor accepted by the Commissioner of the General Land Office until May 2, 1911.

Prior to August 4, 1909, the Northern Pacific Railway Company had filed in the United States Land Office its selection list for the lands, which, when surveyed, would be described as the N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 5, in lieu of 240 acres of land theretofore relinquished, and in such selection list the area of the selected lands was stated to be 240 acres. Abraham Meister filed at the land office his application to select the lands which, when surveyed, would be described as the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 4, in lieu of 160 acres relinquished by him, in which application the area of the lands applied for was stated to be 160 acres, these being the selections referred to in the contract between the parties. It appears that they knew that the north line of the township was a line of correction, yet all the parties concerned contemplated that the lands, when surveyed, would be described as in the contract, and that the acreage would approximate that mentioned in the selection list, namely, 400 acres. When the surveys of township 16 S., range 3 E., were finally approved, they showed that the township was so small that, after laying off the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of sections 4 and 5, there remained only 174.76 acres in the N. $\frac{1}{2}$ of section 4, and only 175.76 acres in the N. $\frac{1}{2}$ of section 5, which were divided into four lots in each section. On account of the shortage in the surveys, there were, as described in the contract, 175.61 acres, instead of approximately 400 acres, as contemplated by the parties. It also appears that prior to the Meister application Martin C. Broom, a qualified homestead entryman, pursuant to the homestead laws, made settlement upon the land intended to be covered by the Meister application, and established his residence upon the land afterward designated as lot 3 of section 4, and by reason thereof the Meister application was canceled. The plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

learned of such shortage in acreage subsequent to making the payments. Plaintiff notified defendants that he rescinded the agreement for the purchase of the lands, and on November 4, 1909, demanded the return of such payments. There is no allegation of fraud on the part of defendants. They tendered an assignment of their interest in the applications and the lands described in the option contract.

L. E. Bean, of Eugene (S. P. Ness, Williams & Bean, all of Eugene, on the brief), for appellants. J. C. Veazie, of Portland (Veazie & Veazie, of Portland, and Potter & Bryson, of Eugene, on the brief), for respondent.

BEAN, J. (after stating the facts as above). The contention of the defendants is that at the time the option was given and the payments were made the land had been actually surveyed and the lines marked, and plaintiff by the exercise of reasonable diligence could have ascertained the area; that plaintiff and defendants were familiar with the method of securing surveyed and unsurveyed land with scrip, and were aware that sections 4 and 5 would either be in excess of 640 acres to each section, or that there would be a deficiency in the area; that plaintiff purchased at his hazard as to quantity. The contract of the Northern Pacific Railway Company provided that, in case of failure to obtain title to any portion of the land embraced in its contract, the sum of \$10 per acre should be refunded, and that in the event of an excess in the acreage such amount per acre should be paid for the excess.

[1] In the negotiations plaintiff first offered \$22 per acre, and afterward \$30 per acre, making in the aggregate \$12,000 for 400 acres. It therefore appears that six of the 10 40-acre tracts, or legal subdivisions, which were the subject-matter of the option contract and supposed to be in the north tier of the 40's, were found, except as to a small fraction thereof, not to exist. In so far as the contract is concerned, it does not affect these subdivisions any more than if they had been swallowed up by an earthquake. On account of the townships on two sides of the one in which the land described was expected to be, when surveyed, both parties seem to have anticipated that this one would be about the normal size, and that the land embraced in the option agreement would approximate 400 acres. There was a mutual mistake as to the area of land that could be obtained by virtue of the selections. Under the influence of the error common to both parties, the agreement was entered into. Its prejudicial consequences to the plaintiff are the same as if the defendants had designedly agreed to sell plaintiff 224.41 acres of land to which they had no right whatever. No laches can be imputed to plaintiff in the transaction. It was a

gross mistake, as to the existence of the larger part of the subject-matter of the contract, and entitles the plaintiff to a rescission. *Firebaugh v. Bentley*, 130 Pac. 1129; *Babcock v. Day*, 104 Pa. 4, 8; *Newton v. Tolles*, 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593; *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; 1 Story, *Equity Juris.* (13th Ed.) § 142; 2 *Warvelle on Vendors* (2d Ed.) § 906; *Floeting v. Horowitz*, 120 App. Div. 492, 104 N. Y. Supp. 1037; *Copeland v. Tweedle*, 61 Or. 303, 122 Pac. 302. The purchaser may rescind in case of a material deficiency in the quantity of land contracted for in the absence of acts on his part which amount to an estoppel; and it is not material that there was no fraud on the part of the vendor. Where, however, the deficiency is not material, and is not such as to affect the enjoyment of the land contracted for, the purchaser cannot rescind on that account, at least where there is no fraud on the part of the vendor. 39 Cyc. pp. 1415, 1416.

[2] Relief will be granted when a mistake is so material that, if the truth had been known to the parties, the agreement would not have been made. And if quantity entered into consideration in fixing the price, and the price was fixed upon an estimate of quantity that proves grossly incorrect, relief will be granted. It is not necessary that fraud be shown in order to obtain relief. Innocent and mutual mistakes alone are sufficient grounds for rescission and other relief. *Bigham v. Madison*, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267, 269. The defendants could not maintain a suit for the specific performance of the contract because it would be inequitable. *Pickering v. Pickering*, 38 N. H. 400, 407, 408; *Eastman v. Plummer*, 46 N. H. 464, 479.

[3] A party against whom a contract, made under a mutual mistake of material facts, will not be specifically enforced, is generally entitled to rescind. *Pomeroy on Contracts*, § 250. There may be exceptions to the rule, but this case does not fall within them. When the parties have agreed upon the sale by one and the purchase by the other of about 400 acres of land for \$12,000, it would be inequitable and unconscionable to compel plaintiff to accept 175.61 acres at that price, especially under an executory contract (2 *Warvelle on Vendors* [2d Ed.] § 905), where the price was arrived at by computing it at \$30 per acre. There was really no contract to that effect. 39 Cyc. 1583; 1 Story, *Equity Juris.* (13th Ed.) § 144; *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282; 2 *Warvelle on Vendors* (2d Ed.) § 909; *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757.

It is unnecessary to consider what would have been the effect if there had been a small deficiency in the amount of the land, or the other question referred to in the case. It is clear that the land was what plain-

tiff desired to obtain, and what the defendants intended to sell a certain right to. It was not the mere scrip or applications made for land which did not exist, as described in the option contract.

The decree of the lower court should therefore be affirmed; and it is so ordered.

STEWART v. WILL.

(Supreme Court of Oregon. May 18, 1918.)

1. BROKERS (§ 60*)—SALES—NEGOTIATIONS—PERFORMANCE OF CONTRACT—RIGHT TO COMMISSIONS.

When a broker employed to negotiate a sale of land without fault, fraud, concealment, or other improper practice produces a purchaser with whom the owner makes a valid and enforceable contract for the sale of the premises, the broker has earned his commission, though the contract is never carried out.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 91; Dec. Dig. § 60.*]

2. BROKERS (§ 63*)—EXCHANGE OF PROPERTY—RIGHT TO COMMISSIONS.

Where a broker employed to make an exchange of property represented to defendant, his client, that the other party to the contract had a perfect title to the land he was to convey to defendant, and the contract of exchange was thereupon executed, but was never carried out because such title was not good, the broker could not recover commissions on the theory that he had performed his engagement by producing a person with whom his client executed a contract of exchange.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by S. B. Stewart against George Will. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action by S. B. Stewart against George Will to recover a broker's commission for the alleged negotiation of the sale of real property. The defendant on July 23, 1910, executed to the plaintiff a writing, authorizing him to sell his farm of 275 acres in Marion county, Or., at \$100 an acre, or to exchange the land for other real property, and in case the premises were disposed of Will promised to pay Stewart a commission of 5 per cent. of the stipulated purchase price. The plaintiff secured as a buyer A. M. Abbott, with whom the defendant entered into a written contract for the sale of the farm at \$27,500, in consideration for which Abbott agreed to pay in cash \$2,900, to convey by a good and sufficient warranty deed a farm of 150 acres in Clarke county, Wash., subject, however, to a mortgage of \$4,500, the payment of which the defendant assumed. Abbott further agreed to assign to Will a promissory note of \$6,600 secured by a mortgage of 320 acres of land in Sherman county, Or., and also to execute to Will a promissory note for \$4,500, to be secured by a trust deed of 7 acres of land at Falls City, Polk

county, Or., 10 acres near Mosier, Wasco county, and 3 acres and 1½ lots in Chehalis, Lewis county, Wash. Abbott stipulated to furnish abstracts of the title to the real property which he was to convey in fee, and in trust, and also to the land upon which he held the mortgage for \$6,600. The abstracts furnished pursuant to such agreement did not show a perfect title in Abbott to any of the tracts of land, and also disclosed that the \$6,600 mortgage was a subsequent lien. For these reasons Will refused to execute to Abbott a deed of the Marion county land.

The complaint is based on the theory that, the plaintiff having secured a purchaser with whom the defendant entered into a written contract, the commission was thereby earned. The answer denied some of the averments of the complaint, and for a further defense alleged that the plaintiff had represented to the defendant that Abbott's title to the several tracts of real property was good and merchantable, when the title thereto was imperfect, setting forth the alleged defects therein. The reply put in issue the allegations of new matter in the answer, and the cause being tried resulted in a verdict and judgment for the defendant, and the plaintiff appeals.

M. W. Seitz, of Portland, for appellant. John W. Reynolds, of Portland (Flegel & Reynolds, of Portland, and George G. Bingham, of Salem, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] Several errors are assigned, but none of them will be considered except the request for a directed verdict for the plaintiff. The rule is quite general that when a broker employed to negotiate the sale of land, without fault, fraud, concealment, or other improper practice, produces a purchaser with whom the owner makes a valid, binding, and enforceable contract for the sale of the premises, the commission has been earned, though the contract for the sale of the land is never carried out. 23 Am. & Eng. Law (2d Ed.) 917; Wilson v. Mason, 158 Ill. 304, 42 Pac. 134, 49 Am. St. Rep. 162; Francis v. Baker, 45 Minn. 83, 84, 47 N. W. 452. "When the broker," says Mr. Justice Loring in *Roche v. Smith*, 176 Mass. 595, 599, 98 N. E. 152, 154 (51 L. R. A. 510, 79 Am. St. Rep. 345), "knows that the customer produced by him has not a title, and omits to tell his principal of that fact, he has not acted in good faith, and has not earned his commission."

[2] A. F. Flegel, as defendant's witness, testified that the plaintiff told him that he had stated to Will at the time the exchange of the land was proposed that the title to all of the real property to be conveyed by Abbott was clear, except as to land in Chehalis, Wash. Edward Will, as defendant's wit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ness, in answer to the inquiry: "Were you present in the Bank of Woodburn when Mr. Stewart and Mr. Abbott and your father was present, the time negotiations were being had in reference to this exchange of land? Yes, sir. What, if anything, was said by Mr. Stewart at that time or by Mr. Abbott in Mr. Stewart's presence with reference to the title of the property? To which property? The property of Mr. Abbott. The property was to be clear, clear title, all but that mortgage on the Clark county property." In the case at bar there was testimony received at the trial from which the jury might reasonably have concluded that, in order to secure a contract for the exchange of the land, Stewart represented to Will that Abbott's title to the property to be conveyed or mortgaged to the defendant was free from all incumbrances, except as to mortgages on land in the state of Washington. The abstracts submitted by Abbott disclosed defects in the title. The plaintiff probably supposed the title was perfect, but representing it as such did not make it so, and he is responsible for such declarations. No error was committed in refusing to direct a verdict for Stewart.

All the testimony given at the trial has been attached, and made a part of the bill of exceptions. From a careful examination of the entire testimony, we cannot say there is no evidence to support the verdict. Const. Or. art. 7, § 3.

The judgment is therefore affirmed.

LOVELACE v. MEYER et al.

(Supreme Court of Oregon. April 29, 1913.)

MORTGAGES (§ 400*)—FORECLOSURE—BURDEN OF PROOF.

The burden was upon defendant, in an action to foreclose a mortgage, to prove an alleged agreement to extend the time upon a secured note, and that additional interest was paid and accepted pursuant to such agreement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1348-1352; Dec. Dig. § 460.*]

Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Suit by J. F. Lovelace against Alexander Meyer, Katherine M. Dwyer, and another. From a decree for plaintiff, defendant Dwyer appeals. Affirmed.

This is a suit to foreclose a mortgage given to secure a promissory note for \$1,250, with interest at 6 per cent. per annum. Katherine Dwyer answered, setting up as a defense that before the note became due she agreed with plaintiff that the time of payment should be extended for one year upon the payment of 2 per cent. additional interest, which she alleged she had made. This was denied in the reply. The plaintiff was granted a decree, and defendant Katherine Dwyer appeals.

Christopherson & Matthews, of Portland, for appellant. E. W. Bartlett, of Estacada, for respondent.

McBRIDE, C. J. The burden of proof was upon the defendant to prove that the agreement to extend the time upon the defendant's note was in fact made, and that the additional interest was in fact paid and accepted in pursuance to such agreement. This we do not believe she has established by the preponderance of the evidence. The court below, which heard the testimony and saw the witnesses, and therefore had a better opportunity than we have to judge of their credibility, was of the same opinion. It is unnecessary to discuss the evidence in detail, as it would only consume space in the reports and be of interest to no one. Plaintiff's counsel insists on an increased allowance for attorney's fees because of this appeal; but there is no sufficient datum in the testimony transmitted here upon which to base such an allowance.

The decree will be affirmed.

DAY et al. v. CITY OF SALEM et al.

(Supreme Court of Oregon. April 29, 1913.)

1. ELECTIONS (§ 74*)—RESIDENCE—CONSTITUTIONAL PROVISIONS.

Under Const. art. 2, § 4, providing that, for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or of the state, the question of the voting residence of attendants at a state institution is to be determined by evidence outside of the fact of their mere presence and employment, for the Constitution does not deprive them of gaining a voting residence at the place of the institution.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 71; Dec. Dig. § 74.*]

2. MUNICIPAL CORPORATIONS (§ 29*)—POWERS—EXTENT—STATE TERRITORY.

A municipal corporation, being to an extent an arm of the state, may include within its territorial limits state property, such as a state institution for the insane, so long as the municipal ordinances do not encroach upon the sovereign powers of the state; the laws allowing the extension of the limits of a municipality being general ones.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 66-75; Dec. Dig. § 29.*]

3. MUNICIPAL CORPORATIONS (§ 34*)—PETITIONS—INITIATIVE PETITION.

The constitutional provision that a warning clause prohibiting the signing of an initiative petition by one not a voter, or signing more than once, shall be placed at the head of an initiative petition is not mandatory and its omission does not render the petition void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 98-101; Dec. Dig. § 34.*]

4. MUNICIPAL CORPORATIONS (§ 538*)—INITIATIVE PETITION—SUFFICIENCY.

Where the complaint, in an action to enjoin the collection of assessments upon land in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cluded in the limits of the city upon an initiative petition, averred, after giving the form of the petition, that 295 names followed in consecutive order, it is insufficient to show that more than 20 names on each sheet were counted in violation of the constitutional provision, and that the petition was thus defective.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1194, 1253; Dec. Dig. § 538.*]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by N. Day and another against the City of Salem, a municipal corporation, and others to enjoin the collection of taxes. From a judgment for plaintiffs, defendants appeal. Reversed, and suit dismissed.

In the year 1910, upon petition of a large number of electors of the city of Salem, the common council took steps to extend the boundaries of the city to include, with other property, lots 17 and 21, block 2, in Glen Oak addition, owned, respectively, by the plaintiffs, and to that end gave notice of a special election to take place on March 28, 1910, designated voting places, and appointed judges and clerks of election in each ward and also in the territory proposed to be annexed. The election was held at said time, resulting in a majority vote both in the city and in the territory annexed for the extension of the boundaries; and the common council thereupon, by resolution, declared the result of the election, and that the said new territory "be and is declared annexed to and made a part of the corporate territory of the city of Salem." Plaintiffs complain that the proper officers of the county of Marion and of the city of Salem are threatening to and will list for assessment and tax the property of these plaintiffs for city purposes, and that the city of Salem, on April 4, 1911, by giving notice of said intended improvement, proceeded to provide for the improvement of Asylum avenue with concrete pavements through the said annexed territory and adjacent to the said property of these plaintiffs at the expense of the property owners; that thereafter, on June 27, 1911, the said city adopted an ordinance directing said improvement and assessing the cost thereof to the owners of the abutting property, the apportionment of which assessment to each of plaintiffs' lots above described being \$228.74; that on July 27, 1910, the said council passed an ordinance for the construction of a sewer on said Asylum avenue through said annexed territory and assessed the cost thereof to the owners of the property benefited thereby; and that the lots of plaintiffs, above described, were each assessed in the sum of \$78.30, and bring this suit for the purpose of enjoining the city of Salem from assessing the said lots for taxation and from collecting the amount assessed for said improvements, alleging at length the facts above set out and praying that the proceedings by which

the limits of the city are extended to include plaintiffs' lots be declared void, and that the liens created for said street improvements be canceled, for the reason that all but a small proportion of the said territory attempted to be annexed to the city is property, the title to which is vested in the state of Oregon in fee, and on which is situated the Oregon State Insane Asylum, and for the further reason that all the votes cast in the annexed territory, namely, 42, were so voted by employes at said asylum, alleging that said territory belonging to the state cannot be subjected to municipal jurisdiction, and that said employes are disqualified to vote by reason of such employment. A demurrer to this complaint was overruled by the court, and judgment thereon being rendered in favor of plaintiffs, granting the relief prayed for, defendants appeal.

Grant Corby, of Salem (R. K. Page, of Salem, on the brief), for appellants. W. P. Lord, of Portland, for respondents.

EAKIN, J. (after stating the facts as above). The questions involved here relate to the sufficiency of the complaint to show that the proceedings of the city council in attempting to extend the city boundaries over the plaintiffs' property were void.

[1] A large part of the territory attempted to be annexed to the city is ground occupied by the Oregon State Insane Asylum and other state property; and it is contended that all of the votes cast in the territory to be annexed, namely, 42, were cast by employes at the said asylum, and that therefore they were not residents in the territory sought to be annexed, and were not entitled to vote therein for the reason that by section 4, art. 2, of the Constitution, it is provided: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or of this state; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, at public expense; nor while confined in any public prison."

This court has considered this section of the Constitution in the case of *Wood v. Fitzgerald*, 3 Or. 573, and we should be governed by the construction of that section there given, unless we find that it is erroneous. In that case Mr. Justice McArthur, who wrote the opinion, says: "We cannot see the legal force or propriety of placing such a construction upon that section as would preclude an employe of the United States or state government from making any change in his domicile that he may desire to make. Though such an one cannot gain or lose a residence by reason of his presence or absence when employed in the service, yet he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

can establish his domicile and gain a residence at such a point as he may see fit by taking the proper and appropriate steps so to do, independently of his employment. In *People v. Holden*, 28 Cal. 137, it was decided that section 4 of article 2 of the Constitution of California (the language of which is almost identical with that of article 2, § 4, of the Constitution of Oregon) does not add to or take from the conditions upon which the fact of residence is made to depend; and it was held that that section meant simply that, in determining the fact of residence, presence or absence in the service of the United States shall not be taken into account, or, in other words, neither presence nor absence in the service of the United States is a condition upon which the fact of residence can be affirmed or denied." See, also, *Darragh v. Bird*, 3 Or. 229; *Silvey v. Lindsay et al.*, 107 N. Y. 55, 13 N. E. 444. In the case of *Warren v. Board of Registration*, 72 Mich. 401, 40 N. W. 554, 2 L. R. A. 204, Mr. Justice Campbell, referring to a clause in the Constitution similar to section 4 of article 2, says: "These provisions do not prevent such persons from becoming residents, if such is their purpose, and if they are able to choose." The reasoning and conclusions of the court in *Wood v. Fitzgerald*, supra, are to the same effect as those expressed in the opinion of Mr. Chief Justice Hooker in *Wolcott v. Holcomb*, 97 Mich. 369, 56 N. W. 837, 23 L. R. A. 215, and we think are the correct construction of section 4, art. 2, of the Oregon Constitution. See note to this case in 23 L. R. A. 215, where the annotator, citing constitutional provisions, says: "This leaves the question to be determined by evidence outside of the fact of presence at such institution, although a residence may be gained there." In the case of *Silvey v. Lindsay et al.*, supra, the vote was challenged, and court held as in *Wood v. Fitzgerald*, supra, that the residence of the voter must be determined independently of the fact that he is an inmate of the soldiers' home. Upon investigation of the facts, it was held that his residence was in New York City. In the case of *Powell v. Spackman*, 7 Idaho, 692, 65 Pac. 503, 54 L. R. A. 378, the Chief Justice, in writing the opinion, holds that the voting status of an inmate of the soldiers' home is preserved as it existed when he entered the home. Mr. Justice Stockslager concurs, but Mr. Justice Sullivan dissents in a lengthy opinion in which he holds that it is a matter of intention of the individual. He cites many cases sustaining his contention, and, among others, the case of *Wood v. Fitzgerald*, supra. The Idaho Constitution contains an additional clause: "While kept at any almshouse or other asylum at public expense." Without quoting therefrom, the following cases hold that it is a matter of intention, even in case of inmates of charitable institutions, and fully support the opinion in *Wood v.*

Fitzgerald, supra: *Paine on Elections*, § 69; *Stewart v. Kyser*, 105 Cal. 459, 39 Pac. 19; *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700; *Shaeffer et al. v. Gilbert*, 73 Md. 66, 20 Atl. 434; *Vanderpoel v. O'Hanlon*, 53 Iowa, 248; 5 N. W. 119, 36 Am. Rep. 216; *Putnam v. Johnson et al.*, 10 Mass. 487. That being the effect of the constitutional provision, the qualifications of the employes of the state to vote must be determined independently of the fact of such employment. It does not appear that their right to vote was challenged, and it was not alleged that their residence was elsewhere, nor did the plaintiffs set forth any disqualification other than that the electors were such employes; and that is not a ground for a challenge of their votes. The only question raised here is whether the fact of employment in the asylum ipso facto disqualifies such employes to vote. We conclude that it does not, and that the law as stated in *Wood v. Fitzgerald*, supra, is controlling here. The right to vote depends on the place of residence of the person, and that must be determined independently of and uninfluenced by the fact of employment by the state.

[2] It is also alleged that the territory owned by the state cannot be legally annexed to a municipality, for the reason that the sovereign is not bound by the provisions of a general statute unless expressly named therein or included by necessary implication, and that therefore, as I understand plaintiffs' position, the charter authorizing the extension of the boundaries of the city, or the acts and ordinances of the city attempting to include state property within its bounds, cannot be deemed to authorize the extension of the city boundaries to include state territory. The exemption of the sovereign from the application of the statutes, although stated in many decisions and even by text-writers in general terms, is not so broad as the language sometimes used might indicate. The state is not bound by general statutes which affect its prerogatives, rights, or interests, unless expressly or by necessary implication it is included therein. 26 Am. & Eng. Enc. Law, 644; 36 Cyc. 1171, 1177; *Matter of City of Utica*, 73 Hun, 256, 26 N. Y. Supp. 564. State and county property are often within municipal boundaries, but the municipality can exercise no control over it that will interfere with the sovereign authority; that is, that will tend to restrain or diminish the powers, rights, or interests thereof. *United States v. Herron*, 20 Wall. 255, 22 L. Ed. 275.

The extent and purpose of this exception in favor of the state is well stated by Mr. Justice Barbour in *United States v. Knight*, 14 Pet. 315, 10 L. Ed. 465, where the question related to the right of a United States prisoner to jail liberties, in which the judge says: "It is first objected that whatsoever may be the construction of this section, as now governing executions, in case of other

parties, yet it does not embrace those issued on judgments rendered in favor of the United States; and this upon the ground that the United States are never to be considered as embraced in any statute, unless expressly named. The words of this section being 'that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States,' it is obvious that the language is sufficiently comprehensive to embrace them, unless they are to be excluded by a construction founded upon the principle just stated. In *Bac. Abr. tit. 'Prerogative,'* 3-5, it is said that the general rule is that, where an act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein. But 'where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him. It is a settled principle that the king is not ordinarily barred, unless named by an act of limitations. The principle expressed in the maxim, 'nullum tempus occurrit regi,' rests upon the ground that no laches shall be imputed to him. The doctrine that the government should not, unless named, be bound by an act of limitations is in accordance with that just cited from Bacon, because, if bound, it would be barred of a right, and in all such cases is not to be construed to be embraced, unless named, or what would be equivalent, unless the language is such as to show clearly that such was the intent of the act. The same principle has been decided in New York, Massachusetts, Pennsylvania, and, no doubt, in other states, and all upon the same ground. Not upon any notion of prerogative, for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute for the public good; and the king represents the nation. The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided." *Potter v. Fidelity & Deposit Co. (Miss.)* 58 South. 714; *County of De Kalb v. Atlanta*, 132 Ga. 739, 65 S. E. 72.

In *State v. City of Milwaukee*, 145 Wis. 131, 129 N. W. 1101, 22 Ann. Cas. 1212, it is stated that it is presumed that the Legislature does not intend to deprive the crown of any prerogative, rights, or property unless it expresses its intention so to do in explicit terms or makes the inference irresistible; and in a note to that case in 22 Ann. Cas. 1216, it is said: "The common-law rule as to the construction of statutes has been said to be subject to these exceptions which are likewise applicable to a state: 'If a statute

is intended to give a remedy against a wrong, the king, though not named, shall be bound by it; and the king is impliedly bound by the statutes passed for the public good, the preservation of public rights, and the suppression of public wrongs, the relief and maintenance of the poor, the general advancement of learning, religion, and justice, or for the prevention of fraud.'"

Most of the cases in which the question has been mentioned relate to statutes touching property rights or delegated power, while in this case it relates only to the extension of the municipal jurisdiction over the territory occupied by the state to bring it within the police power of the city. When a city seeks to encroach upon the sovereign or prerogative power of the state, it will be time enough to raise the questions here suggested, which the state can do in its own behalf. It is not suggested that the burdens of the plaintiffs will be increased because the state owns a large part of the territory included in the annexation. The city government within its jurisdiction is a delegation of governmental authority conferred upon the city by the state, and like state laws the city laws may be enforced upon state territory as elsewhere, so long as they do not encroach upon its sovereign rights or powers. We conclude that there is no merit in the contention that the city boundaries cannot be extended over territory belonging to the state.

[3] In the complaint a copy of the initiative petition is set out, but there is no allegation of defects therein nor objection thereto. Therefore we assume that the complaint concedes that the petition was sufficient. The only objection to it urged in the brief is that it does not contain the warning clause; but in the case of *Stevens v. Benson*, 50 Or. 276, 91 Pac. 577, it is held that the statute providing a warning clause to be placed at the head of the petition is not mandatory, and that its omission does not render the petition void.

[4] It is also suggested in the brief that the signatures are not limited to 20 names on each sheet; but that does not appear by the allegations of the complaint. It is only stated, after giving the form, that: "295 names following in consecutive order." Even if on separate sheets they may be said to be in consecutive order, and it is held in *State v. Olcott*, 125 Pac. 303, that each sheet need not contain the petition, overruling *Palmer v. Benson*, 50 Or. 277, 91 Pac. 579, to that extent, and that it is only necessary that the petition shall be attached to a copy of the title and text of the measure; it not being negated that this was done.

The notice calling the election is set out in full in the complaint, and the defect alleged therein is set out in subdivision 17 thereof, which we understand to be that two separate proposed annexations were submitted at one election by one notice. However, in plaintiff's brief it is admitted that the notice call-

ing the election required by section 3209, L. O. L., was duly advertised, and the election regularly held. Therefore we conclude that the complaint does not allege any defects in the proceedings by the city to extend its territory over the territory annexed that render them void, and the demurrer to the complaint should have been sustained.

The decree is reversed, and the suit is dismissed.

STRODE et al. v. SMITH et al.

(Supreme Court of Oregon. April 29, 1913.)

1. DAMAGES (§ 80*)—LIQUIDATED DAMAGES OR PENALTY.

Unless the court can declare as a matter of law from an inspection of the contract sued on that the damages stipulated for therein are so excessive as to amount to a penalty, a demurrer to the complaint on the ground that it demanded enforcement of a penalty should be overruled, and the question determined after the answer is filed.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

2. DAMAGES (§ 77*)—LIQUIDATED DAMAGES OR PENALTY.

The question whether a provision in a contract for damages is a penalty or liquidated damages must be determined upon the facts of each case; the intention of the parties must control, if that can be ascertained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 156; Dec. Dig. § 77.*]

3. PRINCIPAL AND SURETY (§ 59*)—CONSTRUCTION—INTENTION OF PARTIES.

The principal purpose of construing all contracts, including building bonds, is to ascertain the intention of the parties.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

4. DAMAGES (§ 77*)—LIQUIDATED DAMAGES OR PENALTY.

The intention of the parties controls in determining whether damages stipulated for are liquidated damages or a penalty, and if it satisfactorily appears that the damages were stipulated because the parties at the time anticipated the possible injury resulting from the breach, and fixed upon a reasonable sum to cover the damages resulting therefrom, such sum may be recovered as liquidated damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 156; Dec. Dig. § 77.*]

5. DAMAGES (§ 80*)—LIQUIDATED DAMAGES OR PENALTY—BUILDING CONTRACTS.

A bond executed in connection with a lease provided for the future execution by lessee to the lessor of a \$50,000 bond conditioned for the erection of a \$100,000 building on the lot, and provided that, if the lessee failed to execute such bond, he would pay the lessor on demand \$4,000 as liquidated damages, and recited as a reason for such stipulated damages that conditions of the city were favorable for securing advantageous leases, and by the execution of the lease in question lessee had tied the property up so as to lose many good opportunities of making advantageous leases, and that lessees were induced to execute the lease by reason of the provisions for the execution of the building bond, and because the damages were uncertain of estimation, and it might be claimed that the damages could not be estimated until after the expiration of the 35-year term, the sum of \$4,-

000 was agreed upon by the parties as liquidated damages accruing from the failure to deliver the bond. *Held*, that it could not be said as a matter of law that the sum stipulated as for liquidated damages was in fact intended as a penalty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

6. LANDLORD AND TENANT (§ 157*)—IMPROVEMENTS—BOND FOR CONSTRUCTION OF BUILDING.

A lease which required the lessee to execute a \$50,000 bond for the erection of a building on the property not less than 65 days before the commencement of the removal of the old building therefrom was not indefinite as to the time of executing the \$50,000 bond, where it also provided for the commencement of the new building within one year from the date of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 571, 572, 574-582, 584-600, 602-607; Dec. Dig. § 157.*]

7. LANDLORD AND TENANT (§ 157*)—IMPROVEMENTS—BOND FOR CONSTRUCTION OF BUILDING.

Under a lease providing that a bond to be given by lessee to lessors for the construction of a building on the premises "shall be made to the lessors and in form and condition as they may desire and which must be satisfactory to them," lessors could only demand a bond so framed that its conditions would include those specified in the lease, and so plain that there would be no probability of its nonenforcement because of its form, and could not arbitrarily refuse to accept a bond on the ground that it was not satisfactory to them, if, in fact, it met such requirements.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 571, 572, 574-582, 584-600, 602-607; Dec. Dig. § 157.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Kate Strode and others against Frank E. Smith and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

The defendants appeal from a judgment in favor of plaintiffs for \$6,000, damages for the breach of a bond.

The complaint, for the first cause of action, shows the following facts: On the 28th day of May, 1910, the plaintiffs executed a lease to defendant Frank E. Smith of a certain lot in the city of Portland, Or., for the term of 35 years. The lease contained 25 separate stipulations set forth at length in the complaint. The general provisions were: That the lessee should pay a monthly rental of \$1,500 in advance, beginning on the 1st day of October, 1910, also all taxes, charges, and assessments imposed on the property, including water rents, and the general taxes for the year 1910, which were to be paid on or prior to the 15th day of March, 1911; that the lessee should erect a building upon the premises, of the kind specified in the lease, to be of the value of \$100,000; that the erection of such building should be commenced in good faith within one year from the execution of the lease; and that the lessee should keep the same insured for two-thirds of its value. The twelfth stipulation read

as follows: "That the said lessee covenants and agrees that within sixty (60) days from the execution of this lease he will execute and deliver to the lessors a bond with a good, safe and reliable surety company as surety for the sum of six thousand (\$6,000) dollars, to insure the lessee carrying out this lease, which bond shall be made to the lessors and in form and conditioned as they may desire, and which must be satisfactory to them, and continue in force as to such surety for not less than one year. * * * The lessee further covenants and agrees that not later than sixty-five (65) days before the commencement of the removal of the building which now stands upon the said leased real property, he, the said lessee, will execute and deliver to the lessors a bond with a good, safe and reliable surety company as surety for the sum of fifty thousand (\$50,000.00) dollars, covering at least one year and conditioned that said lessee will construct and pay for a building on said leased premises as hereinbefore provided, which bond shall be made to the lessors and in form and conditioned as they may desire and to be satisfactory to them. In the event that the liability of such surety on such last named bond should not continue until the full completion of said building as herein provided, then said lessee shall renew said bond for like time, in the same form and with same or like surety satisfactory to the lessors." Pursuant to the terms of the lease, duplicates thereof were placed with the bank in escrow, to be delivered when Frank E. Smith should execute to the plaintiffs the bond with surety, as provided for.

On August 13, 1910, according to the agreement, defendant Frank E. Smith executed and delivered to plaintiffs the following bond:

"Pacific Surety Company of California.

"Whereas, on May 28th, 1910, a written lease was executed by Kate Strode and Rose Bridges and Anna Herrall and V. K. Strode and J. B. Bridges, Jr., as lessors, and Frank E. Smith, as lessee, in and by which said lessors leased to said lessee lot five (5) in block nineteen (19) of the city of Portland, in the county of Multnomah, and state of Oregon, for the term of thirty-five (35) years from and after October 1, 1910, at the rental and on the terms and conditions therein stated, a copy of which lease is hereto attached and hereby made a part hereof; and

"Whereas, it was and is provided in and by said lease that said lessee will, within 60 days from the date of its execution, execute and deliver to said lessors a bond with a good and safe and reliable surety company as surety for the sum of six thousand (\$6,000) dollars, to insure said lessee carrying out said lease, and that said bond shall be in form and conditioned as said lessors may desire and must be satisfactory to them; and

"Whereas, it is further provided in and by said lease that said lessee shall, at his own

sole cost and expense, erect and place upon said leased property a building of the kind and in the time and manner stipulated therein, and that the erection of said building shall be commenced within one year from the date of the execution of said lease; and

"Whereas, it is further provided in and by said lease that said lessee shall, not later than sixty-five (65) days before the commencement of the removal of the building now standing upon said leased property, which will necessarily be not less than sixty-five (65) days before the commencement of the erection of said new building to be erected and placed by said lessee upon said leased property, execute and deliver to said lessors a bond, with a good and safe and reliable surety company as surety for the sum of fifty thousand (\$50,000) dollars, in form and conditioned as provided for in said lease and particularly conditioned that said lessee will construct and pay for said new building on said leased property as in said lease provided; and

"Whereas, it is further provided in said lease that said lessee shall, in addition to other payments therein provided for, pay the general taxes on said leased property for the year 1910 and pay the same prior to March 15th, 1911; and * * *

"Whereas, conditions in the city of Portland at the time of and ever since the execution of said lease were and still are most favorable for the owners of real property in the same general neighborhood and of the same general character as said leased property securing and making advantageous and profitable leases of their real property, and by reason of said execution of said lease and the giving of this bond said lessors have and do tie up said leased property in such manner and for such time as to lose many favorable opportunities of making advantageous and profitable leases thereof to other parties than said lessee, and said lessors were induced and persuaded to so execute said lease and so place the same in escrow because and by reason of said provision therein for the execution and delivery to them by said lessee of said fifty thousand (\$50,000) dollar bond to secure the erection of said new building on said leased property and said provision therein for the payment by said lessee of said 1910 taxes on said leased property; and

"Whereas, because of the facts recited in the last preceding paragraph hereof and the fact that it might be claimed by said lessee that it could not be determined until at or near the expiration of said thirty-five year term of said lease to what extent said lessors would be damaged by the failure of said lessee to execute and deliver said fifty thousand (\$50,000) dollar bond and erect said new building as provided in said lease, and for many other reasons, the damages which would be sustained by said lessors if said lessee should fail to execute and deliver said

fifty thousand (\$50,000) dollar bond as provided for in said lease would be uncertain and incapable of reasonable estimation or definite calculation, and the damages which would be sustained by said lessors if said lessees should fail to pay said 1910 taxes as provided in said lease would likewise be uncertain and incapable of reasonable estimation or definite calculation; and

"Whereas, it has been and is hereby agreed by and between said lessors and said lessee and the surety hereinafter named that said lessors would be damaged to the extent of not less than four thousand (\$4,000) dollars if said lessee should fail to so execute and deliver said fifty thousand (\$50,000) dollar bond, and said lessors and said lessee and said surety have agreed and do hereby agree upon four thousand (\$4,000) dollars as and for fixed and stipulated and liquidated damages to said lessors arising from a failure of said lessee to so execute and deliver said fifty thousand (\$50,000) dollar bond; and

"Whereas, said lessors and said lessee and said surety have agreed and do hereby agree that said lessors will be further damaged to the extent of not less than the amount of said taxes if said lessee fails to pay said 1910 taxes as provided in said lease and have agreed and do hereby agree upon the amount of said taxes as and for fixed and stipulated and liquidated damages to said lessors arising from a failure of said lessee to so pay said 1910 taxes as provided in said lease:

"Now, therefore, we, Frank E. Smith, said lessee, as principal, and the Pacific Surety Company, a corporation, organized and existing under and by virtue of the laws of the state of California, and authorized and empowered under the laws of the state of Oregon, to become surety on bonds, undertakings, etc., as surety, do hereby jointly and severally covenant and agree with said lessors as follows:

"First. That if said lessee fails to pay said 1910 taxes of said leased property as provided in said lease, we, and each of us, will, on demand, pay to said lessors the amount of said taxes as and for fixed and stipulated and liquidated damages sustained by said lessors by reason of said lessee's failure; but in no event shall said surety be required to pay said lessors more than two thousand (\$2,000) dollars under and by reason of this paragraph of this bond.

"Second. That if said lessee fails to procure the execution and delivery to said lessors of said fifty thousand (\$50,000) dollar bond as provided in said lease, we, and each of us, will, on demand, pay to said lessors the sum of four thousand (\$4,000) dollars as fixed and stipulated and liquidated damages sustained by said lessors by reason and on account of such failure.

"Third. If said lessors should prior to the expiration of the time required by said lease for the execution and delivery of said fifty thousand (\$50,000) dollar bond forfeit or

terminate said lease or evict said lessee from or re-enter or retake possession of said leased property because or by reason or on account of any breach of or default in the performance of any of said lessee's covenants or agreements contained in said lease other than said covenant to pay 1910 taxes and said covenant to furnish said fifty thousand (\$50,000) dollar bond, said forfeiture or termination or eviction or re-entry or retaking of possession shall not release or in any way lessen the liability of said lessee or said surety under this bond or be any defense to any suit or action on this bond; and, notwithstanding any such forfeiture or termination or eviction or re-entry or retaking of possession said lessee and said surety shall be liable hereunder as hereinbefore provided in the sum of not more than 2 thousand (\$2,000) dollars for failure to pay said 1910 taxes and in the sum of four thousand (\$4,000) dollars for failure to furnish said fifty thousand (\$50,000) dollar bond.

"And it is further covenanted and agreed that no granting by said lessors of any waiver of or any extension of time for the performance of any act or payment of any sum required to be performed or paid by said lessee in or by said lease shall be taken or deemed to be a release or discharge of said surety from this bond, and that no failure of said lessors to notify said surety of any breach of said lease by said lessee shall work a release or discharge of said surety from this bond.

"Now, if said Frank E. Smith, as principal, shall faithfully perform the conditions of the above agreement, then this obligation shall be null and void, otherwise to remain in full force and effect.

"In witness whereof, the said principal has hereunto set his hand and seal, and the said Pacific Surety Company has caused these presents to be signed by its attorney in fact and its resident assistant secretary, regularly empowered thereunto, and its corporate seal to be attached hereto, this 13th day of August, A. D. 1910. [Signed] Frank E. Smith. [Seal] Pacific Surety Company, by L. R. Centro, Res. Asst. Secy. and Atty. in Fact. Signed, sealed, and delivered in presence of: Attest: Ernest W. Hardy, Atty. in Fact. H. F. Anthony, Res. Asst. Secy. [Corporate Seal]."

One of the duplicates was delivered to defendant Frank E. Smith pursuant to the terms of the lease. On the 1st day of October he entered into possession of the premises, and retained the same until after the 15th day of March, 1911. There was duly assessed on the real property described in the lease the sum of \$3,220.80 for general taxes for the year 1910, which became due and payable in February, and until and after the 15th day of March, 1911. Defendant Frank E. Smith failed and neglected to pay

such taxes on or prior to the 15th day of March, 1911, or at any time, or any part thereof, on account of which plaintiffs were compelled to and did subsequent to the 15th day of March, 1911, pay the same. Plaintiffs demanded of each of the defendants the payment of \$2,000 as stipulated and liquidated damages upon the failure to pay the taxes, and the same is now due to the plaintiffs for a breach of the covenant for the payment of the taxes provided for in the bond and writing obligatory.

For a second and further cause of action, after setting out the lease and bond, plaintiffs allege that the same were executed and delivered; that the defendant Frank E. Smith failed and neglected to make, execute, or deliver to the plaintiffs 65 days before the time for the commencement of the removal of the building standing on the leased premises at the time of the making of the lease, or 65 days before the time for the commencement of the new building provided for in the lease, to be erected by him thereon, or at any time, or at all, the bond for \$50,000 provided for in paragraph 12 of the lease; that defendant Frank E. Smith did not construct or commence the construction of the building within one year from the date of the lease as provided for therein, or at any time, or at all; that subsequent to the breach of the covenant on the part of defendant Smith to give the \$50,000 bond above referred to the plaintiffs duly demanded that the defendants, and each of them, pay the \$4,000 stipulated and liquidated damages provided for in the bond for the failure to execute and deliver the \$50,000 bond as aforesaid; that the defendants have failed ever since to pay the same, or any part thereof.

Defendants Frank E. Smith and the Pacific Surety Company filed a demurrer to each cause of action, for the reason that the same did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrers. The defendants refusing to plead further, stood upon their demurrers, and the court entered judgment for \$6,000 as prayed for in the complaint.

S. C. Spencer, of Portland, and T. H. Crawford, of La Grande (Wilbur, Spencer & Dibble and C. A. Sheppard, all of Portland, on the brief), for appellants. V. K. Strode and Martin L. Pipes, both of Portland, for respondents.

BEAN, J. (after stating the facts as above). The sole question for our determination is the ruling upon the demurrers. It is contended on behalf of defendants that the provisions in the bond, which are denominated liquidated damages, are as a matter of fact penalties. It will be noticed that the complaint shows a provision in the bond that if the lessee should fail to pay the 1910 taxes on the leased property on or prior to the 15th day of March, 1911, the obligors

would on demand pay the lessors the amount of such taxes as and for fixed and stipulated and liquidated damages sustained by the lessors by reason of such failure. But that in no event should the surety be required to pay more than the sum of \$2,000 by reason of that stipulation in the bond. As a first cause of action the complaint shows that defendant Smith failed to pay the taxes on or before the specified time, or at any time, and that by reason of such failure plaintiffs were compelled to, and did, after that date pay the same, which amounted to \$3,220.80. The bond does not provide that defendants will pay \$2,000 for the failure to pay taxes in any event; but only in case the taxes shall equal or exceed that amount. In other words, the bond stipulates the exact amount of the taxes as damages, limiting the amount, however, to \$2,000. In *Krausse v. Greenfield*, 61 Or. 502, at page 512, 123 Pac. 392, at page 396, Mr. Justice Moore, speaking for this court, said: "In the case at bar, though the damages were liquidated, the compensation agreed upon was just and reasonable. * * * The amount awarded is less than the damages sustained, and, this being so, the stipulation in the contract cannot be construed as a penalty." In view of the fact that, in the case under consideration, it is shown by the complaint that by reason of the failure of defendant Smith to pay the 1910 taxes, the plaintiffs were required to pay the same and were actually damaged in a greater sum than stipulated in the bond, it is not a matter of consequence by what name we designate the damages provided for in such stipulation. *Georgia Land Co. v. Flint*, 35 Ga. 226; *Atl. Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690, 692, 90 C. C. A. 274. The allegations in the first cause of action show a breach of the contract, and the damages sustained equal to the amount agreed upon in that provision of the contract. The demurrer was properly overruled.

The second cause of action is for the recovery of \$4,000 for the failure of defendant Smith to furnish the \$50,000 bond, securing the erection of the building. It is claimed that the complaint is demurrable as to this cause of action, because the \$4,000 denominated in the bond as liquidated damages is a penalty. The complaint discloses that the execution of the \$50,000 bond was the preliminary step to be taken by the lessee for the construction of an eight-story steel frame building to cover an entire city lot in the center of the business district of the city of Portland. The building was to be valued at \$100,000 for insurance purposes, and was to be a modern class A building, with the exposed walls on Third and Alder streets faced with pressed brick. Plaintiffs were to receive \$1,500 rental per month for the term of 35 years, or \$630,000. The building was to be the property of plaintiffs as

part consideration of the lease. In addition to this, the defendants were to pay the taxes, insurance, and city assessments. Failure to give the building bond was in effect a failure to erect the building, for without the bond defendant Smith had no right to remove the old building, nor to proceed to construct a new one, and the execution of the bond for \$50,000 would practically insure the construction of the building. From these facts we are asked to declare as a matter of law from an inspection of the complaint that the damages stipulated in the bond are so excessive as to be a penalty.

[1] Unless the court can declare as a matter of law from an inspection of the contract that the damages are so excessive as to be a penalty, the demurrer should be overruled and the question determined after the answer is filed. *Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 853; *De Graff, Vrieling & Co. v. Wickham*, 89 Iowa, 720, 52 N. W. 503, 57 N. W. 420; *Hoxsey v. Patterson*, 59 Ill. 522; *Wilcox v. Walker* (Tex. Civ. App.) 43 S. W. 579; 19 A. & E. Enc. of Law (2d Ed.) 423. It is usually a difficult question to determine whether stipulations of this kind are in the nature of liquidated damages or penalties. Courts usually go no further in laying down fixed rules for determining in all cases whether the stipulation is liquidated damages or a penalty than is necessary for a decision of the particular case under consideration.

[2, 3] The question must, therefore, be determined in each case upon the facts and circumstances of the given cause. The intention of the parties to the contract, however, must control, if that can be ascertained. In the construction of contracts, the end to be attained is to ascertain the intention of the parties; and the bond in question is no exception to the rule. *Stratton v. Fike*, 166 Ala. 203, 51 South. 874; *Curtis v. Van Bergh*, 161 N. Y. 47, 52, 55 N. E. 398.

[4] This court and others have announced certain rules which in some cases afford a general guide in construing such stipulations in contracts. In *Krausse v. Greenfield*, supra, 61 Or. at page 512, 123 Pac. page 395, Mr. Justice Moore says: "Compensation, and not penalty, affords the measure usually employed to determine the amount of damages to which a party is entitled by reason of a failure of the adverse party to keep or perform the terms of his agreement. The intention of the parties in this respect is controlling, however, when it satisfactorily appears that, when a written contract was effected, they anticipated the possible injury and fixed upon a just and reasonable sum of money as applicable to the entire consequence that might arise from a breach of the agreement, in which case the damages thus determined upon are recoverable." In *Salem v. Anson*, 40 Or. 339, at page 345, 67 Pac. 190, at page 192, 56 L. R. A. 169, 91 Am.

St. Rep. 485, Mr. Justice Bean says: "When the actual damages in case of a breach of the contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract shows, or the circumstances under which it was made indicate, a contrary intention of the parties, or it so manifestly exceeds the actual injury suffered as to be unconscionable." The contract provided for the cancellation of a note and mortgage of \$7,500 as liquidated damages for failure to purchase land valued at \$24,000. In *Hull v. Angus*, 60 Or. 95, at page 107, 118 Pac. 284, at page 288, Mr. Justice Burnett says: "The principle seems to be from a consideration of all the authorities that, where the parties are competent to contract, are equally masters of the situation, and deal at arm's length, the court of equity will not disturb the measure of damages established by the parties themselves, unless it is so grossly unconscionable and oppressive as to shock the conscience of the court and lead it to believe that, although so nominated in the bond, in the letter it is not included within the spirit of the contract, or within the contemplation of the parties." In *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359, there was an agreement to buy land for a purchase price of \$9,000, and the contract provided that, if either party should fail to comply with the contract, he would forfeit and pay to the other the sum of \$2,000. The court held that this was liquidated damages because it was not so disproportionate to the damages which might be sustained that the court ought to interfere with the expressed intention of the parties. In the case of *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, it is plainly declared that the decisions of that court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide in a case where the damages are of an uncertain nature estimate and agree upon the measure of damages which may be sustained from the breach of a contract. See, also, *Williams v. Pacific Surety Co.*, 127 Pac. 145; *Commonwealth v. Ginn*, 111 Ky. 110, 63 S. W. 467; *Malone v. City of Philadelphia*, 147 Pa. 416, 23 Atl. 628; 19 Am. & E. Ency. of Law (2d Ed.) 402; 13 Cyc. 97; 1 *Sutherland on Damages* (3d Ed.) 279.

[5] The bond under consideration in this case recites as a reason for stipulating as to amount of damages that at the time of the execution of the lease, and from then until the execution of the bond, the conditions in the city of Portland were favorable for the owners of real property to secure profitable leases; that by executing the lease to defendant Smith plaintiffs tied up their

property in such a manner and for such a time as to lose many favorable opportunities of making advantageous leases thereof to other parties; that plaintiffs were induced to execute the lease by reason of the provision therein for the execution to them of the \$50,000 building bond; that on account of these circumstances, and because the damages would be uncertain and incapable of reasonable estimation or definite calculation, and because it might be claimed that the damages could not be estimated at all until after the expiration of the 35 years, the sum of \$4,000 was agreed upon by the parties as fixed and liquidated damages that would accrue to the plaintiffs from the failure of the lessee to deliver the \$50,000 bond. The instrument differs from many in which liquidated damages are stipulated, in that it gives the reasons for so doing. There is no showing in this case that the facts recited in the bond were not correct. In *Blunt v. Egeland*, 104 Minn. 351, at page 353, 116 N. W. 653, at page 654, it is said: "The further contention that the damages stipulated by the contract should be treated as a penalty, and hence not recoverable, and further that, inasmuch as the complaint alleges no general or special damages, the plaintiff cannot recover is not well taken. Whether the damages stipulated by the terms of the contract should be treated as penalty can only be determined when issues are framed and the situation and surroundings of the parties are disclosed. The matter will adjust itself, either when defendants answer or upon the trial, when the court is called upon to pass upon the question. Of course, if the damages stipulated are out of all proportion to the actual injury suffered by plaintiff, the stipulation should be treated as a penalty, and plaintiff limited to the recovery of actual loss. *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 527, 86 N. W. 760, 85 Am. St. Rep. 473. But upon the face of the complaint plaintiff is entitled *prima facie* to recover the amount stipulated by the contract. We cannot declare as a matter of law that the damages are so excessive as to justify the conclusion that the stipulation should be treated as a penalty. *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 685." To the same effect is the case of *De Graff, Vrieling & Co. v. Wickham*, 89 Iowa, 720, 52 N. W. 503. In the case at bar the actual damages in the contemplation of the parties were necessarily speculative, uncertain, and perhaps incapable of definite ascertainment. The plaintiffs, by their contract of lease, practically said to the defendant Smith that they would grant him the privileges of the lease as specified on the conditions that he would make the agreed payments, execute the \$50,000 bond, and construct the building provided for; and, in the event of his failure to furnish the \$50,000 bond which was preliminary to the construction of the building, he would forfeit \$4,000. The transaction was a plain

contract which the parties apparently understood and clearly expressed in their writings. Their intention then being plain, there is no good reason for the court to say that the parties meant something other than that expressed in their agreement. The sum fixed does not appear to be, and is not shown to be, disproportionate to either the actual or presumed damages. It does not appear that one party to the contract was a victim of oppression. The loss naturally resulting from nonperformance of the stipulation was vague and uncertain, and as declared in the bond itself was a proper subject of contract between the parties. We cannot declare as a matter of law that the damages agreed upon are so excessive as to justify the court in declaring that the stipulation should be treated as a penalty.

It is strongly urged by counsel for defendants that if a minor condition in the bond had been broken, and the plaintiffs had been damaged in the sum of \$10, or had paid the taxes one day after the time due, according to the language thereof, the plaintiffs would have claimed to be entitled to the \$6,000 as liquidated damages. Suffice it to say that that is not the case under consideration. It is easy to assume that the amount stipulated would be unreasonable and unconscionable in case of the noncompliance with a minor condition of the obligation. Such an assumption, however, is unnecessary for the determination of this case. Each case must depend upon its own particular facts and not upon assumed facts.

[6] It is also contended that the bond is indefinite as to the provision relating to the execution of the \$50,000 bond not later than 65 days before the commencement of the removal of the old building now standing upon the leased property, which would necessarily be not less than 65 days before the commencement of the erection of the new building. But it will be noticed that the bond plainly provides for the commencement of the new building within one year from the date of the lease.

[7] The complaint charges that, after the expiration of the year, the defendant Smith had wholly failed to execute such bond. It was agreed in the lease to execute the building bond with surety, conditioned that the lessee would construct and pay for a building on the leased premises as specified, "which bond shall be made to the lessors and in form and conditioned as they may desire and which must be satisfactory to them." It is contended on behalf of defendants that this is too indefinite for enforcement. It therefore appears that the substance of the condition of the bond is specified in the contract. The plaintiffs, under these terms, would have the right to demand a bond so framed that the conditions would embrace those specified in the lease, and one so plain as to form that there would be no likelihood of nonenforcement on account of form. They

would have been bound to be satisfied with such a bond with a good, safe, and reliable surety. Defendant Smith was given possession of the premises and enjoyed the use thereof for a considerable time, receiving all the advantages from the covenants of the plaintiffs. In determining the question as to the certainty of this contract the court must treat the contract as having been partially performed by the plaintiffs. Defendants have obtained to some extent the advantages of the contract, and are now seeking to avoid the disadvantages. The construction of the building was the main condition of the bond. That condition was expressed with certainty. The plaintiffs could not have arbitrarily refused to accept a bond because it was not in the particular form that they might desire, nor have arbitrarily refused on the ground that it was not satisfactory to them, if, in fact, it did answer the requirements specified.

In the case of Olympia Bottling Works v. Olympia Brewing Co., 56 Or. 87, at page 93, the court, 107 Pac. 986, at page 971, said: "While in the case at bar, taking the contract as a whole, it is manifest that the right to continue the agency for the additional five-year period constituted a very important part of the consideration for the first five years' service, and the contract having been fully executed, and the consideration thereby fully paid for the first period, more latitude should be allowed in determining whether the provision in the contract, whereby the party paying such consideration was to receive the benefit thereof, than in a case where the option or contract is merely executory, or partly executory." See, also, *Livesley v. Johnston*, 45 Or. 30, 46, 47, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. In 9 Cyc. p. 624, the rule is laid down as follows: "In the cases above referred to the promisor must act honestly and in good faith. His dissatisfaction must be actual and not feigned; real and not merely pretended. He must, if a test is necessary to determine fitness, give that test or allow it to be made."

The demurrers therefore were properly overruled. The judgment of the lower court will be affirmed.

STATE ex rel. PROCTOR v. BAY CITY et al.

(Supreme Court of Oregon. April 29, 1913.)

1. MUNICIPAL CORPORATIONS (§ 12*)—INCORPORATION—ORDER—ERRORS—CORRECTION NUNC PRO TUNC.

Where the journal entry of the county court granting a petition for the incorporation of a municipality did not correctly contain the order made in that it did not correctly describe the territory of the corporation, the error may

be corrected by an order nunc pro tunc which will validate the description.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 22-32; Dec. Dig. § 12.*]

2. MUNICIPAL CORPORATIONS (§ 7*)—INCORPORATION—LAND INCLUDED.

Under L. O. L. § 3206, providing that any portion of a county containing not less than 150 inhabitants and not already incorporated as a municipality may become incorporated, the county court, which has the power of granting and denying petitions for incorporation, may grant a petition for the incorporation of a municipality, even though the petition includes agricultural and tide lands within the boundaries of the county.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 11-13; Dec. Dig. § 7.*]

3. MUNICIPAL CORPORATIONS (§ 18*)—ATTACK ON VALIDITY.

Persons aggrieved or desiring to object to the inclusion of their land within the limits of a municipality must present their objections at the hearing on the petition for incorporation and correct any errors of the county court by review or appeal, and cannot subsequently test the validity of the proceedings by quo warranto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 41-44; Dec. Dig. § 18.*]

4. MUNICIPAL CORPORATIONS (§ 43*)—PLATS—VACATION—APPLICATION—NECESSITY.

Under L. O. L. § 3206, providing for the vacation of lots or streets in unincorporated towns, the vacation of a block contained in the original plat of a town cannot be had without the application provided for in the statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 120, 121; Dec. Dig. § 43.*]

5. MUNICIPAL CORPORATIONS (§ 12*)—ORGANIZATION—DESCRIPTION.

The incorporation of a municipality is not invalid for vagueness of description where the beginning point was block 20 and there was only one block 20 appearing on any plat of the town.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 22-32; Dec. Dig. § 12.*]

6. MUNICIPAL CORPORATIONS (§ 12*)—INCORPORATIONS—DESCRIPTION—SUFFICIENCY.

In view of L. O. L. § 873, providing that in construing conveyances of real property, when paramount or visible boundaries are inconsistent with measurements, the boundaries or monuments are paramount, the description of land incorporated in a municipality will be held sufficient where there are monuments which will enable the last call to be run, even though the courses and distances fixed are not correct.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 22-32; Dec. Dig. § 12.*]

7. CONSTITUTIONAL LAW (§ 48*)—INCORPORATIONS—ACT—CONSTITUTIONALITY.

L. O. L. § 3206, providing that any portion of a county, containing not less than 150 inhabitants and not already incorporated, may be incorporated as a municipality, having been on the statute books for many years and been acquiesced in by the public and recognized by the courts, must be held constitutional in the absence of a clear showing of its invalidity.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48;* *Statutes*, Cent. Dig. § 56.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Circuit Court, Tillamook County; William Galloway, Judge.

Action by the State in the nature of quo warranto by John H. McNary, prosecuting attorney, upon the relation of W. E. Proctor, Jr., against Bay City and others. From a judgment for defendants, relator appeals. Affirmed.

This is an action in the nature of quo warranto to determine the legality of the incorporation proceedings of the town of Bay City, located on Tillamook Bay, in Tillamook county, Or. Proceedings in the attempted incorporation were begun in May, 1910, under the general incorporation act, found in chapter 1, tit. 26, L. O. L. The petition herein provided for was filed in the county court of Tillamook county on May 4, 1910, after notice being regularly given as required by statute, and the petition came on for hearing on June 4, 1910. Numerous objections having been filed, a large area of land was eliminated by the court from the proposed limits of the corporation, so that the boundaries of the proposed corporation were finally determined by the court as follows: "Beginning at the southwest corner of block 20 in Bar View addition to Bay City, as the same now appears of record, and running thence east along the south line of said block 20 and an extension thereof to intersect with the east line extended, of Bar View addition to Bay City, according to the present recorded plat thereof; thence north to the north line of said Bar View addition; thence east to the quarter section line running north and south through section 2, in township 1 south, of range 10 west, of the Willamette meridian; thence north to the center of section 35, in township 1 north, of range 10 west, of the Willamette meridian; thence west to the east line of Central addition to the town of Bay City, according to the present recorded plat thereof; thence north to the northeast corner of said Central addition; thence west to the channel of Tillamook bay; thence along said channel to a point due west of the northwest corner of block 13 in Bar View addition to Bay City, according to the present recorded plat thereof; thence east to the northwest corner of said block 13; thence south along the east line of Adams street in said Bar View addition to the place of beginning."

In entering the foregoing order, the clerk, through a clerical error, omitted the following course: "Thence north to the north line of said Bar View addition"—and the effect of this omission was to include 45 acres of land that were not included within the boundaries named in the petition. On that error counsel for appellants have chiefly based the arguments contained in their brief. This error was not discovered until after the case had been brought to this court. Since then the county court has corrected the entry by entering a nunc pro tunc order

reciting what the exact order made by the court was, and entering the order accordingly. By stipulation a certified copy of the corrected order has been filed in this court, and it is agreed that it may be considered by this court the same as if it had been made before the trial of the cause below and had been introduced in evidence on such trial. The nunc pro tunc order aforesaid was entered after the brief of counsel for appellant had been served, hence was not considered therein; but it necessarily eliminates the question raised in appellant's brief relating to a discrepancy between the notice of election and the order of the court fixing the boundaries. The principal irregularities urged by counsel in addition to the one first mentioned are: (1) The inclusion within the boundaries of the alleged corporation of tidelands owned by the state or by persons or private corporations. (2) Inclusion within the boundaries of the corporation of a limited amount of farming and agricultural lands. (3) Vagueness and uncertainty in the boundaries of the territory attempted to be incorporated, by reason of the fact that the place of beginning is given as the southwest corner of block 20, which block had theretofore appeared upon a recorded plat, but the vacation whereof had been attempted by the filing and recording of a so-called "correction plat." (4) Vagueness and uncertainty in the boundaries of the territory to be incorporated by reason of the fact "that the metes and boundaries of the attempted incorporation, as described in all of the notices and orders relating thereto, fall to close at the place of beginning." There was a judgment for defendants, and the state appeals.

Albert B. Ridgway, of Portland (John H. McNary, of Salem, George Willett, of Tillamook, and Ridgway & Johnson, of Portland, on the brief), for appellant. C. W. Fulton, of Portland (Elmon A. Geneste, of Bay City, on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). This case has been so ably and fairly presented that we regret that the pressure of business in this court precludes us from a more extended discussion of the points presented. This omission is not due to the fact that they have not been carefully considered, but because other and urgent business precludes the editorial labor of discussing at greater length the arguments submitted.

[1] As observed in the statement of the case, we consider the correction of the journal entry, fixing the proposed boundaries so as to make them conform to the actual order of the court, was an act entirely within the power of the court and proper under the circumstances. 1 Black on Judgments (2d Ed.) § 131; Allen v. Sales, 56 Mo. 28.

[2] We see no irregularity in the inclusion of certain agricultural land and tidelands adjacent to the shores of Tillamook Bay within the boundaries of the proposed corporation. By section 2572, L. O. L., the whole of Tillamook Bay is included in Tillamook county. The language of this section is certainly broad enough to include all tideland situated along its shores. Section 3206, L. O. L., is as follows: "Any portion of a county in this state containing not less than one hundred and fifty inhabitants, and not already incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may hereafter be conferred by general statutes duly enacted by the legislative assembly of this state." It will be seen from this that the right to incorporate is not granted solely to regularly laid out and platted towns, but may be granted to the inhabitants of any part of a county, and may by necessary implication include any character of land, whether platted or agricultural. The law has wisely left with the county court the power of granting or denying petitions for incorporations, and authorized it to fix the boundaries according to its own best judgment.

[3] As we observed in the case of *State ex rel. v. Port of Bay City*, 129 Pac. 496, persons aggrieved or desiring to object to the inclusion of their land within the boundaries of a corporation are by the published notice of the pendency of the petition called into court to assert their rights and have an easy and simple method by review or appeal by which to correct any errors committed by the county court. Having had their day in court in the original proceeding, they will not be heard to urge, in a proceeding of this character, matters which they might seasonably have urged before the result of the election was declared.

[4, 5] There is no uncertainty as to the beginning point. It appears from the record that, as originally laid out, platted, and dedicated, block 20 was included in and designated on the plat, but that subsequently, and after the plat had been recorded, a new plat and dedication was filed purporting to be a correction of the original, from which new plat block 20 was excluded. It does not appear that any application was made to the county court for the vacation of that part of the original plat omitted in the subsequent plat, as required by section 3276, L. O. L., and it would therefore appear that the subsequent attempted vacation was void. In any event, there is no other block 20 appearing on any plat of Bay City addition, except the block 20 described in the original plat; and the call for the southwest corner of block 20 is therefore sufficiently certain.

[6] Tested by the well-understood rules

of law applied to grants of real property, there is no uncertainty as to the last call in the description, which reads: "Thence south along the east line of Adams street * * * to the place of beginning." A literal compliance with this call would take the line 250 feet east of the place of beginning. The call preceding this takes the line to the east boundary of Adams street. Here there is one fixed and definite monument, and the southwest corner of block 20 is another. The courses and distances must yield to these monuments, and the true course is a straight line from one to the other. Section 878, L. O. L.; *White v. Luning*, 93 U. S. 514, 23 L. Ed. 938; *Sanders v. Eldridge*, 46 Iowa, 34; *Tognazzini v. Morganti*, 84 Cal. 159, 23 Pac. 1085; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. 679. We see no good reason why a description of boundaries sufficient to satisfy the demands of the law in regard to a deed should not be sufficient to designate the boundaries of a municipal corporation. Many of the counties of this state have boundaries upon navigable streams; such boundaries being, of course, the center of the channel, which, while mathematically certain, is in fact often difficult of ascertainment. Others are bounded by the summits of mountain ranges equally indefinite in practice, but capable of mathematical determination by surveys. Here there is nothing to prevent an exact practical ascertainment of the boundary at any time and without delay or survey.

[7] It is suggested that the act authorizing the incorporation of towns (L. O. L. § 3206 et seq.) is unconstitutional; but no sound argument can be brought to sustain this contention. It has been on the statute books for many years, has been frequently invoked, and generally acquiesced in by the public and recognized by the courts. Under its provisions, many towns have been incorporated and have grown into prosperous municipalities. If there existed a reasonable doubt as to the constitutionality of the act, we would under well-known and often-reiterated maxims of the law, be constrained to hold it constitutional; but in this case we can well go further and say that we have no doubt as to its constitutionality.

The judgment of the circuit court is affirmed.

HILL v. SULLIVAN.

(Court of Appeals of Colorado. April 14, 1913.
Rehearing Denied May 12, 1913.)

1. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where the instructions are not in the abstract, and no exceptions were reserved thereto, it will be assumed that the matters in issue were submitted by proper instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. TRIAL (§ 29*)—MISCONDUCT OF JUDGE.

It was reversible error for the trial judge in open court before the taking of testimony had been concluded, and in the presence of the litigants, their counsel, and every one connected with the trial except the jury, to charge defendant's witnesses with perjury, and order them to be placed under bond to await the action of the district attorney, especially where the evidence to establish the cause of action was unsatisfactory, since the act would naturally tend to overawe defendant's other witnesses, and terrorize those in question, and possibly deprive defendant of advantageous testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.*]

Appeal from District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action by Annie Sullivan against Rosaline M. Hill. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John T. Bottom, of Denver, for appellant.
R. D. Rees, of Denver, for appellee.

CUNNINGHAM, P. J. On April 4, 1908, appellee, while walking on the sidewalk on the easterly side of Eighteenth street, between California and Stout streets, in the city of Denver, between 2 and 3 o'clock in the afternoon, caught her foot in an upturned corner of a woven wire mat lying upon the sidewalk in front of the Lewiston Hotel, which was at the time under a lease to and being operated by appellant. As a result of the plaintiff's tripping upon the mat she was thrown to the sidewalk, and sustained serious bodily injury not necessary to be described. The corner of the mat was upturned to the extent of about two inches. The mat was about 22 inches in width by 30 inches in length. Plaintiff was wholly unaware of the existence of the mat upon the sidewalk. The jury returned a verdict in favor of plaintiff in the sum of \$600, upon which judgment was entered, after motion for new trial had been overruled, and the defendant brings the case here on appeal.

[1] No exceptions were preserved to the instructions, nor are the same set forth in the abstract. It must be assumed, therefore, that both the question of negligence and contributory negligence, which were pleaded by the defendant, were submitted to the jury under proper instructions. Each member of the court has given to the record in this case, which is short, much more than the ordinary consideration, because of our unwillingness to disturb the judgments of trial courts. The evidence of negligence in this case is meager in the extreme. There is nothing in the record to indicate, or from which an inference can be drawn, who was responsible for removing the mat from within the hotel, where it belonged, to the place where it was, upon the sidewalk, unless the doctrine of *res ipsa loquitur* is invoked, and this doctrine can be applied only upon the theory that because the mat was the property

of the hotel company, and under its exclusive control, and belonged within the hotel, and was found without the hotel on the walk, its presence in an improper place, under such circumstances, called for an explanation from the defendant; and, she having failed to make any explanation satisfactory to the jury, their finding of negligence was warranted. There was some vague testimony given by one of the employes of the hotel to the effect that baggagemen sometimes in removing trunks from the hotel dragged this mat out upon the sidewalk, but that the mat reached the sidewalk on the day of the accident in this manner the witness did not pretend to say. There was no evidence whatever to indicate how long the mat had been upon the sidewalk prior to the time when plaintiff tripped upon it and received her injuries. The members of the court are not in accord as to whether or not the doctrine of *res ipsa loquitur* can be invoked by the plaintiff in this case, but in view of a certain incident that occurred during the progress of the trial, to which we shall presently advert, it is the unanimous opinion of the court that the judgment ought to be reversed and the cause remanded for retrial.

[2] The case was called for trial on June 10th, and was continued through the 11th, at least, as the verdict was not returned into court until June 12th. On the first day of the trial, and a considerable length of time before the taking of testimony had been concluded (the record showing some fifty-four folios of testimony taken after the incident to which we are about to allude), the trial judge excused the jury, and called two witnesses of the defendant before the bar of the court, and told them that he believed they had committed deliberate and willful perjury, and ordered them to be placed under bond in the sum of \$1,000 to await the action of the district attorney. We are unable to discover anything in the testimony of the two witnesses that would warrant so drastic an action on the part of the trial judge. The effect of the judge's severe arraignment of the witnesses, and his placing them under arrest or bond, would naturally tend to overawe any other witnesses which the defendant might have desired later to call, and could have had no other effect than to terrorize the two witnesses in question, whose further testimony might well have been highly advantageous to the defendant at a later stage of the case. The jury, it is true, was excused at the time of the occurrence we are considering, but it occurred in open court, apparently in the presence of the litigants and their counsel, and, so far as the record discloses, in the presence of every one connected in any way with the trial save the jury. As we have already stated, this transaction occurred during the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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first day of the trial, and the record discloses that one of the evening papers published in the city of Denver on that day contained an account thereof.

We are loathe to criticize the conduct of trial judges, for we recognize that their duties are arduous, and of necessity they are often called upon to hastily determine and summarily perform them. But their very great power and their tremendous influence upon the results if a trial call for extreme caution and great self-restraint, to the end that this power and influence be so exercised as to protect, rather than endanger, the rights of litigants who appear in their courts. Where witnesses of one of the parties to a suit are promptly, upon leaving the stand, and in the midst of the trial, called by the trial judge to the bar of the court and publicly denounced as perjurers, and placed under arrest, it seems probable that the rights of such party would be thereby prejudiced.

In view of the unsatisfactory character of the evidence given in this case on the question of defendant's negligence, it is the more probable that the conduct of the trial judge, to which we have called attention, prejudiced her rights.

For the reasons given above, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

FINDING v. GITZEN.

(Court of Appeals of Colorado. March 10, 1913. Rehearing Denied May 12, 1913.)

1. APPEAL AND ERROR (§ 930*) — QUESTIONS REVIEWABLE—EVIDENCE.

All conflicting evidence on material facts is presumed to have been resolved by the jury in favor of the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

2. MASTER AND SERVANT (§§ 137, 170*)—INJURY TO SERVANT—NEGLIGENCE.

Where an employer, instructing an employé to scrape or varnish and finish the top of elevators in a building on Saturday afternoon or Sunday, knew that the elevators would be running, but knew that there would be fewer passengers desiring to use the elevators on those days, he must exercise at least ordinary care in furnishing a competent pilot for the elevators, and take every reasonable precaution through him to so operate the elevators while the employé was on top as to avoid injury to him, and, where the employé's only protection against slipping from the top was to grasp the cable, the employer and the elevator pilot operating the elevators must give warning of contemplated movements of the elevators.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278, 336; Dec. Dig. §§ 137, 170.*]

3. MASTER AND SERVANT (§ 245*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé working just before and at the time of an accident at the very place and time

the employer had instructed him to work, and doing the very work he had instructed him to do, is not chargeable with negligence by reason of working at the time and place of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 778-788; Dec. Dig. § 245.*]

4. MASTER AND SERVANT (§ 247*)—INJURY TO SERVANT—NEGLIGENCE—DRUNKENNESS.

Drunkenness of an employé is not of itself negligence, unless it is shown that such a condition caused or contributed to the accident complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Where, in an action for injuries to an employé, there is no evidence of contributory negligence, the employer is not entitled to an instruction on that question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

6. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTED INSTRUCTIONS—REFUSAL.

It is not error to refuse an instruction misstating the law or failing to properly define the law as applicable to the subject-matter of the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

7. TRIAL (§ 191*) — INSTRUCTIONS — ASSUMPTION OF FACTS.

It is not error to refuse an instruction which assumes facts within the exclusive province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

8. TRIAL (§ 260*)—INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested instruction included in substance in the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

9. MASTER AND SERVANT (§ 226*)—INJURY TO SERVANT—NEGLIGENCE.

Though an employé assumes the risks ordinarily incident to the service, the employer must use reasonable care in furnishing competent servants, reasonably safe machinery and appliances, and a reasonably safe place in which to work, as well as reasonable care to prevent injuries to the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge. Action by Margaret Gitzen against Charles A. Finding. From a judgment for plaintiff, defendant appeals. Affirmed.

Julian G. Dickinson, A. H. Felkner, and George B. Drake, all of Denver, for appellant. Talbot & Mannix, Thomas Ward, Jr., and G. D. Talbot, all of Denver, for appellee.

HURLBUT, J. November 24, 1909, plaintiff (appellee) filed her complaint against defendant. The complaint alleged, in substance that plaintiff was the widow of Henry Gitzen; that on June 29, 1908, Henry Gitzen was in the employ of defendant as a house

painter and decorator, and under his instructions was on that day scraping the paint from the top of a passenger elevator in what is known as the Railroad Building in Denver; that at the time of the accident he was on the roof of the elevator, engaged in scraping off the paint with a knife, and while so engaged, without warning to him, the elevator suddenly started to rise toward the upper floors of the building; that by reason thereof he was unable to maintain his hold on the top of the cage, and was thereby precipitated and thrown into the shaft of the adjacent elevator with such force and violence and from such a height that he received cuts, wounds, and bruises from the effects of which he died the same day; that the injuries were caused by the carelessness and negligence of said defendant in this, to wit: Defendant, having personal knowledge of the presence of Gitzen on top of the elevator, without warning or notice to him, recklessly, negligently, and carelessly, and not in the exercise of ordinary care and prudence, ordered the pilot of said elevator, who was also the servant of said defendant, to transport him from the ground floor to one of the upper floors of the building; that said pilot immediately obeyed the order of defendant, set the machinery in motion, and caused the elevator to ascend to the upper floors of the building.

The answer contained four defenses: (1) A denial of most of the allegations of the complaint; (2) that, if Gitzen received the injuries alleged in the complaint, they were the result of the ordinary dangers and risks incident to his employment, and were assumed by him; (3) that, if such injuries occurred, the time and manner of doing the work by Gitzen was in direct disobedience of the orders of defendant; (4) that, if the injuries occurred to Gitzen as alleged, they were the result of his carelessness, negligence and recklessness.

The evidence in this case is not voluminous. The appellant earnestly insists that appellee failed at the trial to show by sufficient evidence the negligence charged against him in the complaint. The following is a brief résumé of the evidence, viz.:

The accident occurred Saturday, June 27, 1908, about 4:30 p. m. A few days before Gitzen had been instructed by defendant to scrape the paint off the roof of the two elevators, which were located side by side. One was generally used as a freight elevator, and operated by pulling on a rope. The passenger elevator was operated in the usual way by a lever. The power came from machinery situated in the basement. It was necessary for Gitzen to be on top of the elevator in order to do the work assigned to him by defendant. The freight elevator was not operated for carrying passengers on the day of the accident. The engineer, Seltzer, for about 15 minutes before the accident, had been standing in front of the elevator talk-

ing to Gitzen, who was on top of the same, scraping off the paint. During this time the elevator had not been moved. Shortly after the engineer arrived at the elevator the defendant came in, passed by the front of the two elevators to the rear, and immediately returned, had a brief conversation with the engineer, and soon entered the elevator. The elevator at once ascended, and while so doing Gitzen fell from the roof into the adjoining shaft, and thence to the bottom. The statement of facts so far may be said to be uncontroverted. At this point however a decided conflict in the testimony takes place.

Defendant claims he did not see Gitzen on top of the cage, had no conversation with him, and did not know of his presence there. As opposed to this, the engineer testifies that before stepping into the elevator the defendant had a conversation with Gitzen, who was then on top of the cage. The elevator pilot, Kizer, testifies that just before he started the elevator, and while defendant was entering, he called to Gitzen, telling him he was going up, and that Gitzen replied: "All right. Go ahead." The engineer testifies that no such conversation took place; that he had good hearing, and was within four or five feet of the elevator when it started to ascend. Though defendant was present at the time, he nowhere in his testimony affirms or denies that his pilot warned Gitzen as stated. If the pilot gave the notice or warning, defendant must necessarily have heard it, or it is fair to assume he did; and, his interests being so deeply involved, it is passing strange that he did not verify the pilot's warning, if true. A failure to do so left an apparent conflict between his testimony and that of the pilot. The defendant's testimony that he "had no idea that any one was on top of the elevator" is not consistent with the pilot's evidence that in the presence of defendant he gave notice to Gitzen, and received his reply: "All right. Go ahead."

[1] The disputed facts just stated must have been resolved by the jury in favor of plaintiff. The general rule is that all conflicting evidence upon material facts is presumed to have been resolved by the jury in favor of the successful party.

[2] The defendant's undisputed testimony is to the effect that a few days before the accident he instructed Gitzen to scrape or varnish and finish the top of these two elevators on Saturday afternoon or Sunday, telling him in substance that at such times but few trips were made by the elevators, and but few people were then in the building. It is clear then that defendant knew these elevators would be running at the time he instructed Gitzen to finish the tops, and that defendant's purpose in selecting Saturday afternoon or Sunday for doing this work was because there would then be fewer passengers desiring to use the elevators, and consequently fewer trips would be made by them. This being the case, it became

the unquestioned duty of defendant to exercise at least ordinary care in furnishing a competent and careful pilot for the elevators, and to take every reasonable precaution through such pilot to so operate the elevators while Gitzen was on top as to avoid injury to him. At the best, it was a highly hazardous employment. There was but a small space on top of the elevator suitable for Gitzen to occupy while he was scraping the paint therefrom. It does not appear that any railing or other device was constructed on the top to prevent him from slipping off. The evidence seems to show that Gitzen's only protection against slipping from the top of the elevator was to grasp the cable, which was attached to the center of the cage. This he attempted to do when the elevator started, but failed. The highly dangerous position of Gitzen while scraping off the paint must have been so apparent to the defendant and elevator pilot that in the exercise of the most ordinary kind of care it would seem imperative that the raising or lowering of the elevator while Gitzen was so employed should in every instance have been immediately preceded by a clear notice or warning to him of the contemplated movement.

[3, 4] It must be conceded without dispute that just before and at the time of the accident Gitzen was working at the very time and place the defendant had instructed him to work, and doing the very thing he had instructed him to do, which makes it clear that he cannot be charged with negligence by reason thereof. There was some effort made to show that Gitzen had been drinking prior to the accident, and was intoxicated at the time. The evidence in that behalf was weak and unsatisfactory. Even had it been conclusively shown that he had been drinking or was intoxicated at the time, there is not a word of testimony tending to show that by reason thereof he did anything or omitted to do anything which in any way contributed to the injuries received. In other words, drunkenness of itself is not negligence, unless it is shown that such a condition caused the accident, or in a measure contributed to the same.

[5] We have searched the record critically, but fail to discover any evidence which tends to show Gitzen guilty of contributory negligence. For this reason we do not think defendant was entitled to an instruction upon that question. *U. P. Ry. Co. v. Tracy*, 19 Colo. 331, 35 Pac. 537.

We will now give consideration to the errors claimed in the giving and refusing of instructions.

[6-8] Defendant tendered 31 instructions, of which 28 were refused. We do not think there was any error in the court's rulings in that behalf, for the reason that they either misstate the law, fail to properly define the law as applicable to the subject-mat-

ter of the instruction, or assume facts within the exclusive province of the jury, or instructions given included the substance of those refused. As to the instructions refused, a number were offered upon the question of contributory negligence, but we do not think the court committed any error in excluding them, for the reasons already given.

[9] A number of the instructions refused also related to the question of assumed risk. There was no error committed in this. It is clear from the evidence that the injury was not caused by any of the risks which the deceased assumed. While we recognize the well-settled rule that an employé assumes all risks which are ordinarily and naturally incident to the particular service in which he engages, it does not in any sense relieve the employer from the duty of using reasonable care in furnishing competent servants, reasonably safe machinery and appliances, and a reasonably safe place in which his employés are required to work, as well as using reasonable care to prevent injuries to his employés. Some of the refused instructions in terms instructed the jury as to whether or not the defendant by himself or his employés gave notice or warning to the deceased just prior to starting the elevator. The subject-matter of such instructions was fully and fairly included within the terms of instruction numbered 4, given by the court, which reads as follows: "The court instructs the jury that if they find, by a preponderance of the evidence, that the deceased, Henry Gitzen, was, at the time of or immediately prior to the happening of the injuries complained of, occupying a position on the roof of the cage of the elevator owned and operated by defendant, and that the defendant then knew of the presence of the said Henry Gitzen upon such elevator, and that at such time the defendant entered said elevator and requested or ordered the employé in charge thereof to take him to a higher floor, and that in consequence of such order or request said employé set the elevator in motion, without the defendant or said elevator employé first giving warning, or causing warning to be given, to the said Henry Gitzen, so notifying him of his intention to start the elevator, and by reason thereof the said Henry Gitzen lost his footing on the roof of said elevator and was knocked or thrown down therefrom, in such wise to inflict injuries causing his death, then and in such event you will find the issues herein joined for the plaintiff and against the defendant." The instructions given by the court, taken together, fairly presented to the jury the law applicable to the evidence disclosed by the record, and substantially included all phases of the case which were proper subjects for instruction.

We discover no reason disclosed by the record, justifying a reversal of the judgment. The same will be affirmed.

YOUNG CONST. CO. v. RUTH GOLD MINES CO. et al.

(Supreme Court of Arizona. May 12, 1913.)

APPEAL AND ERROR (§ 391*)—BOND—NEW APPEAL BOND—STATUTES.

Under Civ. Code 1901, par. 1508, as amended by Laws 1912, c. 44, providing that no appeal shall be dismissed or judgment affirmed because of any defect in the appeal bond, if the appellant on such terms as the court may direct file a sufficient bond, it is a condition precedent to the filing of a new bond that there be a bond on appeal, and, where the appellant has filed no appeal bond, the court has no jurisdiction to order a new bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077-2084, 2087-2088; Dec. Dig. § 391.*]

Appeal from Superior Court, Mohave County; Frank J. Duffy, Judge.

Action by the Young Construction Company against the Ruth Gold Mines Company and another. Judgment for defendants, and plaintiff appeals. Dismissed.

E. A. Meserve and Paul H. McPherrin, both of Los Angeles, Cal., and C. W. Herndon, of Kingman, for appellant. E. S. Clark and J. Ralph Tascher, both of Prescott, for appellees.

PER CURIAM. Motion to dismiss appeal for the reason that no bond has been given on appeal as required by law.

The paper relied upon by appellant as the bond on appeal is as follows:

"In the Superior Court of the State of Arizona in and for the County of Mohave.

"Young Construction Company, a corporation, Plaintiff, v. Ruth Gold Mines Company, a corporation, and C. D. Van Deman, Defendant. No. ———.

"Cost Bond.

"Know all men by these presents, that we, Young Construction Company, as principal, and National Surety Company, a corporation authorized to act as surety within the state of Arizona, surety, do hereby acknowledge ourselves jointly and severally bound to Ruth Gold Mines Company, a corporation, and C. D. Van Deman, defendants, for all costs in the above-entitled suit in an amount not to exceed two hundred dollars; conditioned, however, that the said Young Construction Company, a corporation, plaintiff, will pay all costs that may be adjudged against it in said suit, during its pendency, or at the final determination thereof, and judgment for said costs may be entered against us and each of us, in the final judgment of this cause, not to exceed said sum of two hundred dollars.

"Witness our hands this 2d day of January, 1913. Young Construction Company, by

C. W. Herndon, Its Attorney. [Seal.] National Surety Company, by E. J. Mitchell, Its Agent. [Seal.]

"Indorsements:

"964.

"Approved this 3d day of January, 1913. L. M. Teale, Clerk.

"Filed this 3d day of January, 1913, at 9 o'clock a. m. L. M. Teale, Clerk."

The appellant admits that the bond is insufficient as a bond on appeal, but requests that it be allowed to file a good and sufficient bond under the provisions of chapter 44 of the Session Laws of the regular session of the First State Legislature, 1912; this chapter being an act to amend paragraph 1508 of the Revised Statutes of 1901, as follows: "1508. (Sec. 290). No appeal shall be dismissed or the judgment affirmed by reason of any defect or informality of the appeal bond, if the appellant shall, within such time and upon such terms as the court may direct, file a legal and sufficient appeal bond. When the bond, or affidavit in lieu thereof, provided in the preceding sections, has been filed and the previous requirements of this title have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected." The requirements of this chapter are very plain. As a condition precedent to give the relief offered by this amendment there must, of course, be a bond on appeal. The bond recited does not purport to be such. If a bond on appeal be given within the time allowed by law and there be any defect or informality in such bond, the appellant may, upon such terms as the court may direct, cure the defect or informality by filing a legal and sufficient appeal bond. In this case there is no bond on appeal at all, and, of course, this court acquired no jurisdiction upon which to base an order giving the relief mentioned in the statute.

We think the motion to dismiss appeal is well taken. Appeal dismissed.

In re THOMSON'S ESTATE. (S. F. 6,235.) (Supreme Court of California. April 11, 1913. Rehearing Denied May 10, 1913.)

1. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTIONS OF LAW OR FACT.

The construction of a contract is always a question of law, whether arrived at from merely reading the contract or from the face of the contract aided by extrinsic evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

2. CONTRACTS (§ 91*)—VALIDITY—QUESTIONS FOR JURY—CONSIDERATION.

Whether a contract is supported by a sufficient consideration is a question of fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 259; Dec. Dig. § 91.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. GUARANTY (§ 16*)—CONSIDERATION OF CONTRACT—NECESSITY.

A contract of guaranty, which was not made concurrently with the original obligation, must be supported by an additional consideration.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

4. CONTRACTS (§ 73*)—CONSIDERATION—FORBEARANCE.

While forbearance is a good consideration for a contract, it must be under an agreement to forbear; mere forbearance without an agreement being insufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 326, 327; Dec. Dig. § 73.*]

5. CONTRACTS (§ 88*)—CONSIDERATION—BURDEN OF PROOF.

A written contract imports a consideration placing the burden of showing want of consideration upon the party asserting it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 403-405, 407; Dec. Dig. § 88.*]

6. CONTRACTS (§ 88*) — CONSIDERATION OF CONTRACT.

Where the consideration declared in a contract is not negated by evidence, the contract itself sufficiently shows that it is supported by a consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 403-405, 407; Dec. Dig. § 88.*]

7. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST ESTATE—EVIDENCE.

Evidence in a claim on a contract of guaranty held to sustain a finding that a trust deed was executed primarily for grantor's personal indebtedness, as distinguished from his liability as indorser upon certain notes.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the Estate of Thomas Thomson, deceased. From orders allowing a claim of the Italian-American Bank, Otto J. Crossfield, executor, and others, objectors, appeal. Affirmed.

James Alva Watt and John F. Clute, both of San Francisco, for appellants. D. Freidenrich, of San Francisco, for respondent.

HENSHAW, J. Thomas Thomson during his lifetime had given a contract of guaranty to the Italian-American Bank, by which he guaranteed the payment of certain overdue promissory notes, executed by the Hilton Brick Company, a corporation, to and owned by the Italian-American Bank. Thomas Thomson died testate, his will was probated, and his estate is in process of administration. After due publication of notice to creditors, the Italian-American Bank presented to the executor for allowance its verified claim for the sum of \$18,534, with interest, growing out of the above-mentioned guaranty. This claim was allowed and approved both by the executor and by the judge. When the executor filed his first annual account showing claims presented and allowed,

certain heirs contested the allowance of the claim of the Italian-American Bank under written grounds of contest, and a hearing was had. The contest asked that the order of the court approving the claim of the Italian-American Bank be vacated and set aside and the claim disallowed. On January 19, 1911, the court of its own motion, after the hearing of evidence, caused to be entered upon its minutes an order to the effect that "the motion to vacate order allowing claim of Italian-American Bank denied." Thereafter, on January 25th, when the matter of the settlement of the account of the executor was before the court, the attorney for the contestants, appellants herein, asked leave "to file an amendment to the opposition to the allowance of the claim to conform to the proofs already made, before the matter is finally disposed of by the entering of a decree." Leave was granted, and amended exceptions were filed upon February 1st. Thereafter counsel for contestants moved the court to vacate its order of January 19th, and this motion came on for hearing on March 24th. While that motion was pending, counsel for contestants made another motion for permission to file "amended and supplemental exceptions," based upon the ground that since the filing of the original and of the amended exceptions certain acts and proceedings had been done and taken by the bank which it was necessary for contestants to set up in order that the whole matter might be before the court. The motion to vacate the order of January 19th was denied May 25th. The motion for leave to file the "amended and supplemental exceptions" was granted on June 21st. A demurrer was filed to the amended supplemental exceptions, and this came on for argument on August 28th. On November 6th an order was made sustaining the demurrer. Findings were then presented by counsel for the Italian-American Bank, and objections were made by counsel for contestants to the court making any findings, upon the ground that, as the court had sustained the demurrer to the amended and supplemental exceptions, the decision of the court in sustaining the demurrer was a decision of law, to the effect that no legal grounds of contest were shown, and that, while a demurrer to such a contest is not contemplated by law, nevertheless, as the contestants had been sent out of court upon demurrer sustained, the court was not justified in making findings of fact. The proceedings dragged until finally, under the insistence of counsel for appellant, the court permitted the introduction of evidence covering the new matters pleaded in the amended and supplemental exceptions. Those new matters were to the effect that the Italian-American Bank, under a trust deed executed to trustees in its behalf, by E. H. Aigeltinger, had sold all the remaining prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erty so held in trust, and had applied the proceeds of the sale to liquidation of the personal indebtedness owed by E. H. Aigeltinger to the bank. Thereupon the court made findings denying the relief asked for by the contest, and upon the settlement of the executor's account, which settlement was made with the approval of the claim of the Italian-American Bank, this appeal was taken.

Certain additional and uncontroverted facts are that the Hilton Brick Company, a corporation, was indebted to the Italian-American Bank upon its promissory notes, indorsed by E. H. Aigeltinger. The first of these notes was executed in December, 1905, the last in December, 1906. Aigeltinger opened a personal account with the bank. On February 5, 1906, he executed a deed of trust to the bank, and a \$25,000 note which declares upon its face that it is secured by this deed of trust. This \$25,000 note, it manifestly appears, was an evidence of advances made and to be made. An amended deed of trust was executed on the 14th day of February, 1906, and this is the deed of trust which appears in the record. It declares as follows: "Witnesseth: Whereas the party of the first part (Aigeltinger) is indebted in the sum of twenty-five hundred (2,500) dollars unto the party of the third part (the bank) for moneys loaned to him by the party of the third part, and is desirous of borrowing from the party of the third part, further sums of money with the privilege of making payment on account, and of reborrowing from time to time additional sums of money or moneys, and of keeping and maintaining a running account with the party of the third part, it being understood that the total indebtedness of the party of the first part to the party of the third part on said account shall not at any time exceed the sum of twenty-five thousand dollars. Now for the purpose of securing unto the party of the third part all moneys now owing and all indebtedness which at any time hereafter and until the reconveyance of the property hereinafter described by the parties of the second part (the trustees) to the party of the first part as hereinafter provided for, may be owing by the party of the first part to the party of the third part together with all interest due or to grow due thereon, whether said indebtedness be evidenced by promissory note or notes, bills, or bills of exchange, made, drawn, accepted or indorsed by the party of the first part, or by overdraft of his open account, with the party of the third part, or otherwise, including all renewal or renewals of promissory note or notes evidencing such indebtedness and including all and every form of writing evidencing such indebtedness, or any part thereof; and in further consideration of one dollar to him in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, the party of the first part has granted, bargained, sold, conveyed and

confirmed, and does by these presents, grant, bargain, sell, convey and confirm unto the said parties of the second part, in joint tenancy, and to the survivor of them, their successors and assigns, all those certain pieces or parcels of land lying and being in the city and county of San Francisco, state of California, described as follows, to wit:" etc.

On the 17th day of March, 1908, while Aigeltinger was indebted to the bank upon his own notes, and was liable to the bank as an indorser upon the Hilton Brick Company's notes, Thomas Thomson executed his contract of guaranty as follows: "Whereas the Italian-American Bank is the holder of the several promissory notes executed and delivered to it by the Hilton Brick Company, a corporation, which promissory notes are numbered, dated, payable, and are for the sums respectively, as follows: [Here follows a list of the notes with their dates and amounts.] And whereas, said Italian-American Bank has demanded payment of said promissory notes and all thereof and said maker, Hilton Brick Company, has requested said bank to grant to them three months further time for the payment of the principal and interest of said promissory notes and to forbear taking legal proceedings of any kind for the collection of said promissory notes and of the principal and interest due and unpaid thereon, and said bank having agreed to grant such extension provided the payment of said promissory note and the principal and interest due and unpaid thereon be guaranteed by the undersigned: Now, in consideration of the premises and of the promise and agreement of said bank to grant unto said maker, Hilton Brick Company, an extension of three months from date for the payment of said promissory notes and the principal and interest due and unpaid thereon, and to forbear taking any proceedings for said period for the enforcement of payment, the undersigned does hereby guarantee unto said Italian-American Bank, the holder of said promissory note, the payment thereof, and of the principal and interest due and unpaid thereon, three months from and after the date hereof and the undersigned promises and agrees that if default be made by said maker, Hilton Brick Company, in the payment of said promissory notes or any part thereof at the time last mentioned, the undersigned will pay the same and the principal and interest due and unpaid on all of said promissory notes with previous demand, three months after the date of this guaranty."

Subsequently, upon November 6, 1908, Thomas Thomson executed a second contract with the bank as follows: "In consideration of your extending, for a period of five months from date, the promissory notes to you of the Hilton Brick Company, the payment whereof was guaranteed by me, which guaranty is in writing and dated March 17, 1908, I herewith deliver to you the note of the

San Francisco, Oakland & San Jose Consolidated Railway Company to the Thomson Bridge Company for twelve thousand one hundred twelve 50/100 dollars (which note is duly indorsed over to me), as collateral security for my said guaranty to you for the payment of said promissory notes; and I hereby authorize and empower you, upon maturity to collect from said San Francisco, Oakland & San Jose Consolidated Company, the principal and interest owing on said promissory note and apply the same on account of my said guaranty."

Upon default of Aigeltinger to meet the indebtedness directly owed by him to the bank, the trustees executed the trust, sold the property, and applied the receipts from such sales to the extinguishment of that indebtedness.

Under these facts, the contention of appellant is that the guaranty was void because executed without any consideration; that, if not void, the proceeds from the sale of the lands under the trust deed were applicable pro rata to the payment of the Hilton Brick Company notes indorsed by Aigeltinger; and that, as the bank had not made such pro rata application, it had impaired in various ways the rights and remedies of the guarantor, who became thereby exonerated from his contract of guaranty.

The preliminary attack upon the procedure in the probate court has been sufficiently outlined. Whatever irregularities attended it, however inconsistent it may have been to take evidence upon new facts after sustaining a general demurrer, forbidding proof of those new facts, it still remains to be said that no injury was worked to appellants. They were permitted to present their case in full. And, concededly, they come before this court with a record containing all of the material evidence which they had to present. The execution of these various instruments is not questioned; the circumstances surrounding their execution not in dispute. It is conceded that the bank did sell the Aigeltinger property and did apply the proceeds of the sale to the extinguishment of Aigeltinger's direct indebtedness. The questions which are presented are legal ones alone, involving the construction of these contracts. The court made a finding to the effect that Thomson's contract with the Italian-American Bank was entered into upon a sufficient consideration. Appellant contends that this is really a conclusion of law, and that the determination of the scope and meaning of a contract is always a question of law. *Estate of Donnellan*, 127 Pac. 166.

[1, 2] It is perfectly true that the construction of a contract, whether that construction is to be arrived at from a mere reading of the contract itself or from such reading aided by extrinsic evidence of circumstances and the like, is always a construction of law. But, upon the other hand, it is equally true that whether or not there

is a sufficient consideration to support a contract is always a question of fact. But, as concerns the contract under consideration, it is of no consequence how the matter be considered. Appellants rely upon section 2792 of the Civil Code.

[3] This contract of guaranty, not having been entered into concurrently with the original obligation, requires a consideration to support it.

[4] Contestants charge that there was no consideration, but offer no evidence upon this point other than that contained in the contract. Appellants further rely upon the indisputable proposition that, while forbearance constitutes a good consideration, that forbearance must be under an agreement to forbear, and that mere forbearance alone is not sufficient. *Smith v. Compton*, 6 Cal. 24; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403.

[5] But, in support of the view adopted by the trial court, it is to be remembered that a written contract imports a consideration, and that the burden of showing a want of it is upon the party attacking. *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Henke v. Eureka, etc.*, 100 Cal. 429, 34 Pac. 1089; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899. Moreover, there is no question about the forbearance, and the first contract of guaranty declares that that forbearance was under agreement.

[6] The consideration thus declared to exist in this contract is not overcome by evidence, and the contract itself stands as an exponent of the facts set forth in it. *Carpenter v. Shinnors*, 108 Cal. 362, 41 Pac. 473.

[7] Equally do we think the court was justified in its conclusion and determination that the Aigeltinger trust deed was given primarily for Aigeltinger's direct personal indebtedness, as distinguished from his contingent liability upon the Hilton Brick Company notes. The circumstances of the transaction, as well as the internal evidence of the trust deed itself, all bear witness to this. It was Aigeltinger's personal account which he was thus securing. It was the Aigeltinger \$25,000 note which bore upon its face the declaration that it was secured by the trust deed. And while it may be conceded that the terms of the trust deed are broad enough to include the contingent liability of Aigeltinger upon the Hilton Brick Company note, yet it is not without significance that there is no express mention made of that liability, whereas there are many declarations as to the immediate and primary purpose of the trust deed, namely, that it was to secure the personal liability that might arise under his commercial account.

Such being the meaning of the trust deed, it follows that the Italian-American Bank was justified in making first application of the proceeds of the trust property to the extinguishment of Aigeltinger's personal debt. And herein it is to be borne in mind that Thomson was not guaranteeing Aigeltinger's

personal debt, but was guaranteeing the debt of the Hilton Brick Company, upon whose notes Algeltinger was merely an indorser.

The orders appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

BECKWITH v. SHELDON et al.
(Sac. 1,980.)

(Supreme Court of California. April 16, 1913.)

1. NOVATION (§ 4*)—WHAT CONSTITUTES.

Under Civ. Code, § 1531, providing that a novation may be made by the substitution of a new obligation between the same parties with intent to extinguish the old obligation, an agreement made by plaintiff's intestate with defendants, whereby a former contract was rescinded and annulled, a new contract being substituted, constitutes a valid novation, wholly extinguishing the first contract.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. NOVATION (§ 10*)—EFFECT.

Where the parties effect a complete novation, extinguishing the original contract, the failure of one of the parties to perform the new contract will not revive the original one upon any theory of rescission, so as to permit the injured party to sue on the first obligation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 10; Dec. Dig. § 10.*]

3. CONTRACTS (§ 269*)—RESCISSION—RIGHT.

A party cannot rescind a contract where the rights of others have intervened, and circumstances have so changed that the rescission cannot be made without injury to those parties; consequently a contract whereby plaintiff's intestate transferred his water rights to defendants and to a corporation duly organized by them cannot be rescinded where the corporation, whose stock was sold to third persons, expended large sums of money in improving the appropriations, and perfecting them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1205; Dec. Dig. § 269.*]

4. CONTRACTS (§ 265*)—RESCISSION—RIGHT.

Where plaintiff's intestate transferred his water rights to defendants, who expended large sums of money in perfecting them and building an irrigation system, plaintiff cannot rescind the contract; it being impossible to place defendants in statu quo.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1187; Dec. Dig. § 265.*]

Department 2. Appeal from Superior Court, Yolo County; M. T. Dooling, Judge.

Action by B. De La Beckwith, as administrator of Byron D. Beckwith, deceased, against Willard M. Sheldon and others. From a judgment for insufficient relief, plaintiff appeals. Affirmed.

A. L. Shinn, J. W. Dorsey, and R. M. F. Soto, all of San Francisco, E. M. Weyand, of Colusa, S. C. Denson, of San Francisco, and A. C. Huston, of Woodland, for appellant. Frank Freeman, of Willow, Frank H. Gould, of San Francisco, Frank H. Short, of Fresno, and C. W. Thomas, of Woodland, for respondents.

HENSHAW, J. This is an appeal upon the judgment roll, appellant insisting that under the findings made by the court he is entitled to other and greater relief than that which the court awarded him. This is a second appeal. The first will be found reported in Beckwith v. Sheldon et al., 154 Cal. 393, 97 Pac. 867. The decision upon the former appeal was in favor of the defendants, and it was reversed principally for the reason that certain material findings of fact were held to be contrary to and unsupported by the evidence, and herein especially the finding of fact that confidential relations did not exist between Beckwith, Sheldon, and Schuyler. In this, his fourth amended complaint, which is very voluminous, plaintiff sets up all his intestate's dealings, transactions, and contracts with Sheldon and Schuyler and the corporations, named as parties defendant, charging as to the latter that one and all they took with notice of plaintiff's rights and equities. We need not at this time detail all the allegations of the complaint. Such of them as are necessary for this consideration will be set forth in their proper places. It is sufficient now to state that the complaint in effect charges that every one of these transactions and contracts were fraudulently conceived by Sheldon and Schuyler and fraudulently entered into for the purpose of defrauding Beckwith of his rights. What those rights are, as plaintiff and appellant conceive them to be, is evidenced by the prayer of the complaint, which asks that it be adjudged not only "that all property and rights conveyed by deed from plaintiff to Willard M. Sheldon and J. D. Schuyler" be decreed to be held in trust by the present owners for the benefit of Beckwith, but that "all other property, rights, and contracts acquired by defendants or any of them in pursuance of the promotion of said irrigation system and enterprises and all profits thereof" be held under the same trust. And, further, that "plaintiff be substituted to the rights, property, and contracts of the Central Canal & Irrigation Company (the main corporation), and, as well, to all the "rights, properties and contracts of the defendant Sacramento Valley Irrigation Company, Sacramento Valley West Side Irrigation Company, and the American Water Works & Guarantee Company." Finally, and in addition to all this, that plaintiff recover \$50,000 as compensatory damages and \$5,000 in addition as punitive damages. There is the usual prayer for "other and further relief."

In 1901 Byron D. Beckwith, whose personal representative is the plaintiff here, conceived the project of making large diversions of water from the Sacramento river for irrigating purposes. He needed financial assistance and entered into an agreement with Sheldon and Schuyler, under which he conveyed to them all the property rights that he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had acquired in connection with his scheme and was to receive from them \$10,000 and one-third of the capital stock of a corporation to be formed, with a capital stock of a million dollars. This capital stock he, in turn, agreed to sell to Schuyler and Sheldon, or their assigns, for \$75,000 cash, or for that amount of the bonds of the corporation to be formed, the bond issue not to exceed a million dollars, and the price to be the market price of the bonds at the time of the sale and purchase of his stock. This contract was entered into on the 20th day of September, 1902. Thereafter a later agreement was entered into on April 8, 1903. This agreement declared in terms that the agreement of September 20, 1902, was "rescinded, canceled and annulled," in consideration of which rescission, cancellation, and annulment "and of other good and sufficient considerations, including a conveyance by said party of the first part (Beckwith) to the parties of the second part (Sheldon and Schuyler) or to the said corporation hereinafter agreed to be organized, the parties of the second part hereby agree and promise that they will, with all convenient dispatch, proceed to the organization of a corporation under the laws of California to be named 'Sacramento Canal Company' with a capitalization of one million dollars." It was then provided that to this corporation should be conveyed all the water rights, rights of way, "and all other things held by the party of the first part and parties of the second part or in their interest, connected with the said canal scheme," and, finally, that the parties of the second part undertook that Beckwith should receive bonds of the corporation in the sum of \$50,000, the total bond issue of the corporation not to exceed \$1,000,000, and the bonds to bear a rate of interest of 5 or 6 per cent., "which shall be in full extinguishment and payment of all rights and demands of the party of the first part upon the said corporation, or upon the parties of the second part, or upon the property or rights so to be conveyed to the said corporation." Through no fault of defendants the Sacramento Canal Company was not organized as a corporation. There was in existence a corporation known as Central Canal & Irrigation Company which the court finds was, "with the exception of its name, identical with the corporation provided for" in the contract. This corporation was accepted as a substitute for the Sacramento Canal Company, and to it were conveyed all of the rights and properties contemplated to be conveyed to the Sacramento Canal Company. The Central Canal & Irrigation Company refused to deliver to Beckwith, after demand, the \$50,000 worth of bonds contemplated by the contract. The refusal was based upon the following facts, as stated in the answer: That Beckwith had represented to his associates that he had means whereby he could secure all the neces-

sary rights of way for the construction of the canal without cost, and that Beckwith did not have such means and did not so secure these rights of way. The court finds, in accordance with this allegation, "that the said rights of way were afterward purchased by said defendant Central Canal & Irrigation Company at a very large cost," but finds, further, "that Sheldon and Schuyler were not misled by said misrepresentations." This finding, then, is a declaration that Beckwith did misrepresent to his associates what he could and would do, but that no charge of fraud could be predicated thereon and no assertion of a failure of consideration, by reason of the fact that the associates were not misled, and that there were other considerations sufficient to support the agreement. It should be added that every allegation of fraud and every intimation of fraud charged and imputed in the complaint against the defendants is negatived and repudiated by the findings.

[1, 2] The court's conclusions of law and judgment decreed to plaintiff the bonds of the Central Canal & Irrigation Company in accordance with the terms of the contract hereinabove set forth, with accrued interest thereon. This judgment plaintiff repudiates, insisting that he is suing to have declared and enforced a trust as evidenced by his pleading and the prayer of his complaint, and that the court has given him, in effect, a lien for a monetary judgment, which he has not asked, and which is without the issues of the action. He bases his contention upon the argument that, by the failure of the defendants to comply with the contract of April, 1903, the option was open to his intestate to rescind it and he did rescind it; that this rescission revived the previous contract of September, 1902, by which he was entitled to one-third of the stock of the corporation; and that he is therefore suing to enforce his rights under the latter agreement.

But there are two completely satisfactory answers to appellant's contention. The first of these is that by the substitution of the contract of April, 1903, for the contract of September, 1902, the latter determining all rights and covering the whole subject-matter of the former, a novation resulted, and that through this novation, by the very terms of the 1903 contract declaring the agreement of 1902 to be rescinded, canceled and annulled, as well as by operation of law (Civ. Code, § 1531, subd. 1), the earlier agreement was extinguished. And this extinguishment does not mean that the earlier contract was held in abeyance or in suspense. It does not mean that it could be revived upon a mere failure to perform the new obligation. It means that it was canceled and obliterated as completely as though it had never had existence. It means that saving in the exceptional cases which are indicated by section 1533 of the Code, and of which this is not one, all rights are to be measured and

determined under the new substituted obligation as completely as though it had never been preceded by an earlier contract. It matters not, as has been said, that the new agreement is itself executory. Indeed, generally speaking, all the cases arise when the substituted agreement is executory, for, if executed, there could seldom or never be cause of complaint or ground of action. The courts have felt themselves compelled to look no further than to determine whether a novation has taken place; or, in other words, whether the new contract was entered into without fraud and with an agreement of minds that it was to be substituted for the existing obligation. When that point has been reached, they have found no difficulty in declaring that the rights of parties to the agreement are to be governed by the new contract alone, and that a failure to perform does not, under any theory of rescission or revivor, operate to breathe new life into the dead and extinguished obligation. *Spier v. Hyde*, 78 App. Div. 151, 79 N. Y. Supp. 702; *Morehouse v. Bank*, 98 N. Y. 503; *Kromer v. Helm*, 75 N. Y. 576, 31 Am. Rep. 491; *Dean v. Skiff*, 128 Mass. 174; *Huggins v. Safford*, 67 Mo. App. 469; *Howard v. Scott*, 98 Mo. App. 509, 72 S. W. 709; *Oakley v. Ballard et al.*, 18 Fed. Cas. 515.

[3, 4] The second and equally satisfying reason is that this action presents facts and features which would make it to the last degree inequitable to decree a rescission and a revivor of the 1902 contract. It is, of course, fundamental that, where the rights of others have intervened and circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining party left to his other remedies. *Meyers v. Merfillion*, 118 Cal. 352, 50 Pac. 662. Equally is it fundamental that upon rescission the other party must be restored to the condition he was in when the contract was made, or, in other words, as a condition of rescission the rescinding party must first place the other in statu quo. 2 *Warville on Vendors* (2d Ed.) p. 1028; *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774; *Fountain v. Semi-Tropical L. & W. Co.*, 99 Cal. 683, 34 Pac. 497; *Chitty, Contracts*, p. 722; 9 *Cyc.* 437; 3 *Am. & Eng. Ency. of Law*, 931; *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119. When consideration is paid to the nature of the rights which Beckwith conveyed to his associates and which were by them conveyed to the Central Canal & Irrigation Company; that these rights were principally rights arising under notices of appropriation of waters; that to perfect these rights a vast amount of labor was required as well as the acquisition of other rights of way, canals

and ditches; that Beckwith himself, having insufficient means, was not prosecuting the work up to the measure required by the law for the perfection of his rights under his notices of location; that the corporation expended large sums of money to perfect these rights, and to secure other properties necessary for the development of its irrigating system; that the rights of innocent stockholders and bondholders have intervened; that all the transactions between these parties are found to have been without fraud; and that the single legal result is that the corporation did not give its bonds to Beckwith under the belief declared by the court's findings to have been mistakenly held, namely, that Beckwith had parted with no, or an inadequate, consideration for them; and, finally, that under the agreement of 1903 Beckwith has fairly and advisedly put a full value upon everything with which he parted—it requires, we think, no comment upon this recital to show that when the court gave him that, it gave him everything to which he was entitled.

For these reasons, the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

YOUNG v. BENTON. (Civ. 1,073.)

(District Court of Appeal, Third District, California. March 6, 1913. Rehearing Denied by Supreme Court May 5, 1913.)

1. NOVATION (§ 1*)—REQUISITES.

The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

2. NOVATION (§ 11*)—ACTIONS—COMPLAINT.

A complaint which alleges that a corporation was indebted to plaintiff on a note, that after the maturity of the note the corporation transferred all its property to defendant, who assumed the existing obligations of the corporation, and that immediately thereafter plaintiff released the corporation from liability and accepted the agreement of defendant in lieu thereof, states a cause of action on the theory of a novation within Civ. Code, § 1531, subd. 2, though it may be construed as stating a cause of action within section 1559, on a contract for the benefit of third persons.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 11; Dec. Dig. § 11.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADINGS.

The error in overruling a demurrer to a complaint on the ground of uncertainty as to its allegations is not prejudicial to defendant who was not misled; and a judgment for plaintiff rendered after a trial on the merits will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4069-4105; Dec. Dig. § 1040.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. NOVATION (§ 12*) — ACTIONS — PREVIOUS VALID OBLIGATION—EVIDENCE.

In an action founded on the theory of a novation, evidence *held* to show a prior valid obligation constituting one of the essential requisites of a novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

5. NOVATION (§ 2*)—ACTIONS—AGREEMENT—CONSTRUCTION.

An agreement by a transferee of all the property of a corporation "to assume any and all existing obligations * * * of the company as shown by its books and to discharge the corporation from liability thereon" embraces a note given by the corporation as shown in the book of minutes, and in the book of notes and bills payable.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 2; Dec. Dig. § 2.*]

6. NOVATION (§ 12*) — ACTIONS — EVIDENCE — SUFFICIENCY.

In an action founded on the theory of a novation, whereby defendant, obtaining the property of a debtor, agreed to pay plaintiff a debt due him from the debtor, evidence *held* to support a finding that after the execution of the agreement plaintiff released his debtor, and accepted the agreement of defendant in lieu thereof.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

7. NOVATION (§ 12*) — ACTIONS — EVIDENCE — ADMISSIBILITY.

In an action founded on the theory of a novation based on defendant obtaining the property of a debtor, agreeing to pay his debts, the agreement binding defendant to pay the debts and the conveyance by the debtor to defendant of his property was admissible as constituting the basis for the novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

8. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ERRONEOUS RULING ON EVIDENCE.

Where evidence was admissible for specified purposes, the refusal of the court to state for what purpose it admitted the evidence was not prejudicial, for the court on appeal will assume that the trial court considered the evidence only for a competent and relevant purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

9. EVIDENCE (§ 314*)—HEARSAY EVIDENCE.

In an action on a novation, evidence that plaintiff, in the absence of defendant, stated that he was willing to accept defendant in lieu of his debtor, was admissible, and was not hearsay as against defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

10. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—FAILURE TO RULE ON EVIDENCE.

The error, if any, in failing to rule on a motion to strike out evidence, is without prejudice to the party complaining, where the ruling should have been adverse to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by James Young against T. H. Benton. From a judgment for plaintiff, defendant appeals. Affirmed.

Bush & Hall, of Redding, for appellant. Charles H. Braynard, of Redding, for respondent.

BURNETT, J. The complaint is framed upon the theory of a novation. It appears therein that on the 19th day of December, 1904, the Redding & Big Bend Lumber Company, a corporation having its principal place of business in Redding, Shasta county, executed and delivered to plaintiff its promissory note for \$3,500, payable one year after date, with interest at 9 per cent. per annum; that on April 24, 1908, the defendant agreed in writing with Herbert Bass, J. H. Buick, and M. Wengler, the owners of more than two-thirds of the capital stock of said corporation, providing among other things, that the corporation was to transfer all its property of whatever kind to Benton, and the latter "to assume any and all valid and existing obligations and indebtedness of the company, as shown by its books, and to discharge the corporation from liability thereon"; that at the time of said agreement there was due plaintiff on said note, of the principal, the sum of \$2,500, and interest thereon from January 6, 1908; that this was a valid and existing obligation of the corporation to plaintiff, and so shown by and from its books; that immediately after the execution of said agreement of April 24th plaintiff released and discharged said corporation from all liability growing out of said indebtedness and accepted the substitution and agreement of defendant in lieu thereof; that on the 15th day of May, 1908, said corporation transferred and assigned all of its property to said Benton pursuant to its by-laws and said written agreement of April 24th; that all the terms and conditions of said agreement, which were the consideration for the signature of said T. H. Benton thereto and for his written promise therein contained, were duly and fully performed and executed by all the parties thereto.

The foregoing facts are set forth in legal and appropriate phraseology and they manifestly constitute the essential elements of a novation as contemplated by the Code (Civ. Code, § 1531, sub. 2) and the authorities.

[1] Novation, strictly speaking, implies four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one. 29 Cyc. 1130.

[2] Plaintiff, indeed, going beyond the requirement of a good pleading for novation, alleged that he "is now the lawful owner and holder of the said promissory note, made, executed and delivered to said plaintiff as aforesaid." This gave rise to a special demurrer on the ground "that it cannot be ascertained therefrom whether or not plaintiff is suing upon the liability alleged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to have been incurred by reason of the promissory note set forth in said amended complaint, or upon a liability created by reason of any agreement made or entered into by the defendant with the plaintiff, or with the Redding & Big Bend Lumber Company." Manifestly, upon the theory of a novation, the promissory note is not the basis of defendant's obligation. Said theory involves, as we have seen, an entirely new contract, and the note is of significance only as the measure of that obligation. The allegation in reference to the note in connection with the other averments of the complaint might be construed as the exemplification of the condition contemplated by section 1559 of the Civil Code providing for the enforcement of contracts made expressly for the benefit of third persons.

[3] There is thus some plausibility in the claim of uncertainty as to the theory upon which the complaint was framed, but it is entirely clear that appellant was not misled nor prejudiced thereby; and, if we assume that the ruling was erroneous as to the demurrer, the case should not be reversed after a full trial upon its merits. Indeed, appellant seemed to be in no uncertainty as to the grounds upon which the action was based, for during the trial he stated: "Now, the only thing before the court under the issues raised by the pleadings in this case is as to whether or not the Redding & Big Bend Lumber Company owed to the plaintiff, Young, a certain sum of money; if at a certain time T. H. Benton agreed to pay that particular amount; and, if, at that particular time, the plaintiff, Young, accepted Benton and released the Redding & Big Bend Lumber Company from their liability. Now these are the material points in a novation and they have been pleaded, and properly and fully pleaded, constituting a novation in this case." And it may be said that upon this theory the case was tried. It is true that plaintiff retained in his possession the note which he had received from the corporation, but his explanation of this circumstance obliterated any apparent inconsistency in his position. In view of the record, it is rather strange that appellant should gravely and seriously question the sufficiency of the evidence to support certain material findings of the court. They are all amply supported, as a careful reading of the whole transcript has disclosed. Each is upheld by the testimony of more than one witness, while the documentary evidence as well as the testimony of several witnesses constitute the sure foundation for some of the challenged findings.

In consequence of the earnest contention of appellant, it seems advisable, however, at the risk of prolixity, to exhibit some of this evidence.

[4] 1. That the corporation was indebted to plaintiff on its promissory note there

can be no kind of controversy. It purported to be the note of the corporation for \$3,500, properly signed by its president and attested by its secretary, dated December 19, 1904, and payable to the order of plaintiff and carrying the indorsements of \$1,000 paid on account of the principal and of interest to January 1, 1908. The check of plaintiff for \$3,500, dated on said December 19, 1904, payable to the Redding & Big Bend Lumber Company, with an indorsement thereon showing that the check was paid at Redding on December 20, 1904, was received in evidence. The minutes of the corporation showed that a meeting of the board of directors was held December 19, 1904, and the following resolution was unanimously adopted: "Resolved that it is for the best interests of this corporation to negotiate a loan of three thousand five hundred dollars, paying not to exceed nine per cent. interest thereon and the president and secretary of this corporation are hereby directed to borrow such sum of money at not to exceed the rate of nine per cent. interest, from James Young of Redding, Cal., and to make, execute and deliver to the said James Young the promissory note of this corporation therefor." The book of notes and bills payable of the company disclosed a record of this note together with an unpaid balance on another note in favor of James Young. Herbert Bass, the president, Mathias Wengler, the secretary, and J. H. Bulck, a director, of the corporation, each testified that the said note was executed by the company "in accordance with and pursuant to the resolution adopted by them," and that the consideration therefor was received and used by the said corporation.

[5] 2. There is no less certainty that the evidence supports the conclusion that this was one of the obligations assumed by appellant. His agreement was to pay "any and all valid and existing obligations and indebtedness of the company as shown by its books and to discharge the corporation from liability thereon." Herein the only possible controversy is or can be as to whether this indebtedness was "shown by the books." No particular book or books being designated, we must look to the books ordinarily kept by such corporations, and in which are customarily recorded such transactions. We have already observed the record in the book of minutes and of notes and bills payable.

Mr. Wengler testified: "I saw those entries in the ledger under Mr. Young's account. The entry showed the indebtedness by a note to Mr. Young, the \$3,500. I saw that on the books of the Redding & Big Bend Lumber Company shortly before we made the deal, in 1906, and before Mr. Benton took charge. The books were afterwards sent to Redding at the request of Mr. Benton." Winfred Wright, an expert bookkeeper, examined the books of the company in 1906, and with reference to the \$3,500 note he testified: "I

found it entered upon the original book of entry, the old journal. I traced it to the ledger, checked it through to the ledger, whereupon I found entered upon the credit side of the ledger, on the credit side of Mr. Young's account, a \$3,500 credit. I also traced this from the credit side of the ledger of Mr. Young's account to the depository account, charging the depository with \$3,500. Then I found a further entry on this original journal of \$3,500 charged to Mr. Young on a note account, with the proper explanations, and on note account, or bills payable, I found bills payable credited with \$3,500 as against this entry, making the entry very clear in my mind."

There is testimony of other witnesses to the same point and effect. Indeed, it is difficult to understand why it should be urged that this indebtedness was not shown by the books. In explanation it probably should be stated that the ledger referred to and probably some of the other books were destroyed, and therefore secondary evidence, as to what was contained therein, was received. The expert witness also declared that the books were not kept according to the most approved methods, and that a degree of obscurity existed as to some of the details of the transaction, but it is entirely clear that the indebtedness was sufficiently shown by "the books of the corporation." It further appears that appellant had actual knowledge of this indebtedness, and it is a fair inference from the testimony that he knew this indebtedness was shown by the books of the corporation.

Mr. Bass testified that "Mr. Benton knew of this outstanding obligation, because he was paying the interest on the note, had to pass on all checks that went out, and had charge of the financial affairs of the concern prior to this proposition advanced and made by Mr. Benton and the acceptance thereof."

Mr. Wengler testified that "Mr. Benton knew what the indebtedness was better than we did, because he kept the books when he was manager of the company. Mr. Benton had a bookkeeper and Mr. Benton had charge of the books. I heard Mr. Benton say that the company owed Mr. Young \$2,500. That was talked about several times. Mr. Benton told us several times how much we owed and what the indebtedness was."

[8] 3. We may consider together the two elements of the finding "That upon the 24th day of April, A. D. 1908, and immediately after the execution of said agreement by said defendant, plaintiff released and discharged said corporation Redding & Big Bend Lumber Company of and from all liability to pay said indebtedness due upon said promissory note, and accepted the substitution and agreement of defendant herein, in lieu thereof."

James E. Isaacs, an attorney at law, testified that he "acted as attorney for the Redding & Big Bend Lumber Company in the

transaction wherein the property of the company was transferred to T. H. Benton," and Thomas B. Dozier represented Mr. Benton. He detailed the various conferences between the parties and the final interview when a settlement was reached. As to this last he said: "There was quite a little talk; and finally Mr. Young says, 'Mr. Dozier, is my claim—my note secured by this agreement?' and Mr. Dozier says, 'Certainly, your note is a valid claim against the Redding & Big Bend Lumber Company.' Mr. Young says, 'Well, when will it be paid?' and Mr. Dozier kind of turned towards Mr. Young and smiled, and says, 'I can't tell you that, Mr. Young, I don't know; but I presume that it will be paid when the other creditors will be paid.' And thereupon, in the presence of Mr. Dozier, Mr. Benton's attorney, myself, and all the others present, Mr. Young got up and says: 'That settles it. That is all I want to know. I am satisfied. I am willing to take Mr. Benton, if the transfer is made for the indebtedness and that is all I care about.'"

Other witnesses, including the plaintiff, testified similarly. It is quite apparent, indeed, that the corporation had in view this claim of Young's as well as of others, and that it transferred all of its property to appellant upon the understanding among all the parties that the novation should be effected.

[7] 4. The court committed no error in receiving in evidence Exhibits B and C. The former contained the terms agreed upon by appellant and by Bass, Bulck, and Wengler as stockholders of the corporation and owning more than two-thirds of its capital stock, in accordance with which terms said stockholders were "to proceed immediately to call the requisite stockholders' meetings," and thereby said Bass, Bulck, and Wengler agreed "to vote all stock now standing in our names upon the books of the company in order to carry out the terms" prescribed therein. That this agreement contemplated the transfer of the corporation's property to Benton and the assumption by him of the corporation's liabilities is too plain for argument. Exhibit C was the corporation's deed to Benton. That it was made in pursuance of the agreement contained in Exhibit B was alleged in the complaint and not denied by the answer. It was also so found by the court and the finding is not assailed. In fact, these two instruments constituted the basis for the novation relied upon by respondent and without them in evidence his case would not have been complete.

[8] 5. The appellants suffered no possible injury by the declination of the court to state upon what ground and for what purpose it admitted the said promissory note in evidence. Appellant conceded that it was admissible for the purpose of marking the extent of the new obligation. It was also evi-

dence of a valid and existing indebtedness of the corporation at the time of the execution of said agreement of April 24, 1908. We must assume that the court considered it only for a competent and relevant purpose. It is difficult to conceive how it could have been otherwise regarded.

[8] 6. Of a large number of declared errors, the action of the court in overruling appellant's objection to the following question may be taken as an example: "What if anything did Mr. Young have to say concerning the acceptance of this proposition?" The ruling is questioned for the reason "that it is affirmatively shown from the record that the defendant Benton was not present when any statements were made by the plaintiff, and that said statements were self-serving declarations which in no wise bound the defendant. *Bell v. Staacke*, 141 Cal. 186 [74 Pac. 774]." The witness answered substantially that Mr. Young said that he was satisfied with the contemplated arrangement, and that he was willing to accept Mr. Benton for the corporation's indebtedness. If it was important to prove that Mr. Young agreed to the novation, it is not perceived why it was not proper to show what he did and said in reference to the proposition. Since it is not contended that his acquiescence was or required to be reduced to writing, it would seem that the court followed the only method of ascertaining whether Young agreed to the substitution of the new debtor and the release of the old. The evidence was not hearsay for the reason that the issue involved the very statement that Young made. It appears that it was somewhat difficult to get all the creditors of the corporation to accept Benton for the debt, and after some considerable controversy this final meeting was held, and at that time the last obstacle seems to have been removed, and the purpose of the evidence, as already indicated, was to show Young's acquiescence in the final consummation of the negotiations. It was not necessary for Benton to be present. He had already submitted the proposition to assume certain liabilities, of which this was one. As far as he was concerned he had already agreed to the novation upon the consideration that the corporation would transfer its property to him. As to whether Young would agree to it or not was of moment to said Young and the Redding & Big Bend Lumber Company, and so we find that shortly thereafter the corporation, satisfied, no doubt, with the agreement of its creditors, made said transfer. Besides, without detailing the evidence, it may be said that it justifies the inference that Mr. Dozier was authorized to represent Mr. Benton in the transaction. The conduct and declarations of these gentlemen certainly create that impression although probably no express authority was conferred.

[10] It is true that the court seemed to be in doubt whether said evidence was admissible if Mr. Benton was not actually present at the conference, and, upon a motion to strike it out on the ground of his absence, the court declared that, unless it was shown later that Mr. Benton was present, "this testimony of the witness will go out on that score."

Appellant complains that the court never ruled upon the motion. Even so, it was without prejudice as the ruling should have been adverse to appellant. Again, it was agreed, as stated by him, "at the time we take up the argument that we can point our motion to strike out the particular evidence we desire to strike out." The record is silent as to what was done in the premises at the time of the argument, and we certainly cannot presume that appellant called the attention of the court to the matter.

7. Particular objection is made to the testimony of various witnesses to the effect that at the final conference hereinbefore referred to Mr. Dozier declared that the claim of Mr. Young was included in those assumed by Mr. Benton. This point might be dismissed, like the last, with the suggestion that it was covered by the motion to strike out to be determined at the argument, but the ruling was warranted on the ground of agency; and, besides, it may be said that the evidence could not have affected the result as it appears, substantially without conflict, that this indebtedness was shown by the books of the corporation.

After a careful examination of the record we can see no reason for interfering with the action of the court below, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

SMITH v. J. R. NEWBERRY CO. et al.
(Civ. 1,271.)

(District Court of Appeal, Second District, California. March 11, 1913.)

1. VENDOR AND PURCHASER (§ 229*)—BONA FIDE PURCHASER—NOTICE.

The grantor in a deed, absolute in form, but in fact a mortgage, who, through an intermediary, notifies a third person that he has an equity in the property and still owns it, puts the third person on inquiry as to the title, so that where the third person subsequently purchases the property from the grantee without inquiry, he is not a bona fide purchaser for value without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.*]

2. VENDOR AND PURCHASER (§ 242*) — BONA FIDE PURCHASER—BURDEN OF PROOF.

Where the grantor in a deed, in fact a mortgage, showed that he had, through an intermediary, notified a third person that he owned the property, the third person, on subsequently purchasing from the grantee, had the burden of showing that he paid the price in good faith

without notice, actual or constructive, of the grantor's claim.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

3. QUIETING TITLE (§ 14*)—RELIEF—TENDER.

Where a tender is a condition precedent to a decree quieting title, payment to the party entitled thereto must be provided for or made before a decree is entered, but a personal tender is not requisite to the bringing of the action.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.*]

4. QUIETING TITLE (§ 14*)—RELIEF—TENDER.

Where the grantee in a deed, in fact a mortgage, conveyed the property to a third person, who, though put on inquiry, insisted that he purchased without notice of the grantor's claim, and no assignment of the debt secured by the deed was intended, the grantor, suing to quiet title, need not tender the debt to the third person, but a judgment directing the payment of the amount thereof, paid into court to the original grantee was sufficient.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.*]

5. TRIAL (§ 397*)—ISSUES—FINDINGS.

Where there is no evidence that the action was barred by limitations, a finding thereon is unnecessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Frank H. Smith against the J. R. Newberry Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Adams & Mahan and M. E. C. Munday, all of Los Angeles, for appellants. Drew Pruitt and Fred N. Arnoldy, both of Los Angeles, for respondent.

ALLEN, P. J. The action was one to quiet title. Findings and judgment went in favor of plaintiff, and defendants appeal from such judgment and an order denying a new trial.

The court finds that in February, 1906, plaintiff was indebted to J. R. Newberry Company, a corporation, in the sum of \$135; that on said date plaintiff, being the owner and in possession of certain described premises, in order to secure the payment of said sum, executed to said J. R. Newberry Company an instrument, in form a grant deed, conveying the premises in controversy; that notwithstanding the form of the deed it was intended to be by way of mortgage to secure the debt; that such instrument was duly recorded, and on the 3d day of December, 1906, J. R. Newberry Company, in consideration of the sum of \$300, granted the premises to J. K. McGinnis; that McGinnis purchased said premises with knowledge of the fact that said instrument from plaintiff to Newberry Company was a mortgage and intended as such; that in June, 1910, plaintiff tendered to defendant Newberry Company \$200 in cash, being the amount of the principal and interest of the mortgage debt, and demanded

a reconveyance, which was refused; that plaintiff thereupon paid into court the sum of \$200 for the benefit of defendant Newberry Company, the same being the principal of said debt and interest, and the sum of \$9.85, the amount of the taxes assessed against said lands advanced and paid by McGinnis.

[1] Appellants specify as error the insufficiency of the evidence to support the findings with reference to the character of the deed, and as to the fact of McGinnis' acquirement of the premises with notice. An examination of the record satisfies us that there is to be found therein ample evidence to support the findings of the court, not only from the circumstances of the case, but from admissions. It is very clear that the deed to the Newberry Company was by way of mortgage. There is evidence tending to show that in October, 1906, plaintiff notified McGinnis, before he purchased the premises through an intermediary, that he still held an equity in the land and still owned it. This was sufficient to put McGinnis upon inquiry as to the condition of title.

[2] The rule is that the burden is upon the one claiming to be a bona fide purchaser under the circumstances of this case to show that he paid the purchase money in good faith without notice, actual or constructive, of plaintiff's claim. *Kenniff v. Caulfield*, 140 Cal. 45, 73 Pac. 808, and authorities there cited. There is nothing to show any effort on McGinnis' part to ascertain the true facts in relation to the title after having received this notice, and he cannot be said, under the established rule, to be a bona fide purchaser without notice. The findings of the court must be accepted as being based upon evidence clear and satisfactory. It is for the trial court to determine the weight and effect of the evidence.

It is claimed by appellants that the findings do not support the judgment as against them. We see no merit in this contention. The judgment with reference to the cancellation of the deed may be ignored, but there still remains in the judgment an adjudication that plaintiff's title and possession of the premises be quieted against all claims or demands of the defendants, and that they each be enjoined and restrained from asserting any claim thereto adverse to plaintiff. We regard the complaint as sufficient.

[3] The principal contention of appellants is that McGinnis, under any view of the case, was entitled to the money due upon the mortgage, that the tender to him was a condition precedent to a decree quieting title. We do not understand the rule to be that a personal tender is requisite to the bringing of the action, but simply that payment to the party entitled thereto must be provided for or made before a decree be entered.

[4] We think, however, that under the

record in this case no tender or payment to McGinnis was necessary. Nor is there any error, under the pleadings and evidence, in directing the payment of the \$200 deposited in court to the Newberry Company as the holder of the debt. We are not unmindful of the fact that our Supreme Court in Hooper v. Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 50, following Halsey v. Martin, 22 Cal. 645, has determined that a conveyance by one holding the legal title by way of security carries with it an equitable assignment of the debt secured thereby. The decisions affecting the question as to the effect which a court of equity should give such a conveyance are not harmonious. As early as *Peters v. Jamestown Bridge Co.*, 5 Cal. 335, 68 Am. Dec. 184, and afterwards in *Dutton v. Warschauer*, 21 Cal. 623, 82 Am. Dec. 765, it was determined that an attempt to assign a mortgage without a transfer of the debt was without effect, and that a conveyance of the mortgaged premises did not operate as an assignment of the mortgage, nor of the mortgage debt. Subsequently, in *Halsey v. Martin*, 22 Cal. 645, the contrary was held. Thereafter, upon the adoption of the Civil Code, section 3540 was added thereto, which section provides, "The incident follows the principal, and not the principal the incident," which was the doctrine of *Peters v. Jamestown Bridge Co.* However, we are confronted with *Hooper v. Young*, supra, wherein it is said that, "whatever the true character of the conveyance" was, the grantee "succeeded to all of the grantor's rights and interest. If such conveyance was in fact a mortgage, she succeeded to all rights as mortgagee." This opinion was by a divided court, and rests undoubtedly upon the theory that where a conveyance of premises held by way of mortgage is made to one with knowledge of the character of the title, nothing to the contrary appearing, it will be presumed that it was the intention of the parties to transfer all interests, the principal as well as the incident. Accepting such decision as based upon that theory, it is scarcely applicable to this case. Under the record presented here, there can be no presumption that there was any intention on the part of Newberry Company to transfer the debt. In the first place, Newberry Company denies and strenuously insists that the conveyance to it was not by way of mortgage; and in the second place McGinnis insists that he took a good title by virtue of the purchase, and that he bought without knowledge of the debt, believing that Newberry Company was the owner of the premises free from any claim of third parties. Nowhere is there any suggestion or any fact from which it could be reasonably inferred that it was the intention of the Newberry Company to assign the debt, or of McGinnis to receive an assignment thereof. The case under consideration

strongly suggests an attempt to deprive plaintiff of his property rights, and not an effort upon the part of Newberry Company to transfer its interest in the debt and the mortgage securing the same to McGinnis. Under these circumstances, we are of opinion that the conveyance by the Newberry Company to McGinnis, under the facts, was a nullity and conveyed nothing. It was a plain attempt to transfer the incident and the grantor to retain the principal. Aside from all this, however, the unquestioned amount due from plaintiff was paid into the treasury of the court, and there remains for the benefit of whomsoever may be entitled thereto. Upon such payment, and under the facts found by the court, plaintiff was entitled to his decree quieting title. We do not see how it could be well claimed that McGinnis was entitled to the \$200, for he nowhere claims to be entitled thereto. If such claim had been made by him, and were there anything in the record indicating an intention to assign the debt when the conveyance was made, we think a modification of the judgment, directing payment of the \$200 to McGinnis, would be proper, but under the pleadings and the facts and circumstances of the case we do not see how we would be warranted in directing such modification.

[8] There being no evidence tending to show a bar to the action through the statute of limitations, no finding was necessary. Plaintiff's right to redeem existed until five years' adverse possession be shown, which is not done here.

We see no prejudicial error in the record either in relation to the admission or rejection of evidence, or otherwise; nothing at least which would entitle defendants to a reversal on account thereof.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

JOLLY v. ATCHISON, T. & S. F. RY. CO.
(Civ. 1,145.)

(District Court of Appeal, First District, California. March 5, 1913. Rehearing Denied by Supreme Court May 3, 1913.)

1. CARRIERS (§ 46*)—FREIGHT—PLACE OF CONTRACT.

A contract of carriage made in one state, for delivery in another, is governed with respect to delivery by the laws of the latter state.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 220; Dec. Dig. § 46.*]

2. CARRIERS (§§ 108, 114*)—FREIGHT—CARRIER'S LIABILITY — LIABILITY BEFORE DELIVERY.

Under Civ. Code, § 2194, providing that unless consignor accompanies the freight and retains exclusive control thereof, the carrier is liable from the time he accepts until he relieves himself of liability, pursuant to sections 2118 to 2222, for loss from any cause, and section 2118 requiring a carrier to deliver the property to the consignee at the place to which it is addressed in the manner usual at that place, a

railroad company is liable for freight, as an insurer, until delivery to the consignee as provided.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 471-495, 608-620; Dec. Dig. §§ 108, 114.*]

3. CARRIERS (§ 85*)—FREIGHT—DELIVERY—NOTICE OF ARRIVAL.

A telephone message and a postal card, sent to the consignee on the morning the goods arrived, stating that the car would be delivered in the usual course of business, was at most a notice of intention to make delivery in the future, which should have been followed by actual notice of delivery within business hours.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 816-821; Dec. Dig. § 85.*]

4. CARRIERS (§ 114*)—FREIGHT—BILL OF LADING.

A bill of lading providing that property destined to a station at which there is no regularly appointed agent shall be entirely at the risk of the owner when unloaded from cars or until loaded into cars, and, when received from or delivered on private or other sidings, shall be at the owner's risk until the cars are attached to and after they are detached from trains, only applies to deliveries at stations where there are no regularly appointed agents.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

5. CARRIERS (§ 51*)—CONSTRUCTION OF BILL OF LADING.

Stipulations in bills of lading should be construed most strongly against the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 148, 149; Dec. Dig. § 51.*]

6. CARRIERS (§ 159*)—FREIGHT—ACTIONS—NOTICE OF CLAIM.

Civ. Code, § 2176, provides that a consignee, by accepting a bill of lading with a knowledge of its terms, assents to the time, place, and manner of delivery therein stated, and also to limitations therein upon the carrier's liability, but his assent to any other modification of the carrier's obligations contained in the instrument can be manifested only by his signature to the same. A bill of lading for goods was signed neither by the shipper nor consignee, and the consignee was informed of the loss of the goods within a reasonable time thereafter, and inspected the car in which the goods were lost and damaged immediately after the fire which destroyed them. *Held*, that it could not be claimed, under the circumstances, that the consignee was required to file a written claim within 30 days, as a condition precedent to recovering from the carrier for loss of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.*]

7. CARRIERS (§ 114*)—FREIGHT.

A contract between the carrier of freight and a consignee provided that the carrier should not be liable for loss or damage by fire to the property, buildings, or property therein, located upon any land owned or leased by the consignee, whether belonging to the consignee or permitted by him to remain upon the land or in any building thereon, from whatsoever cause; it being understood that all risk of such loss should be assumed by the consignee and that he should not make any demand against the carrier on account of any such loss. *Held*, that the contract did not exempt the railroad company from liability for injury by fire to freight remaining in its possession as a carrier in a car standing on a switch track on a public street in front of the consignee's warehouse

while on its siding adjacent to the consignee's warehouse.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by E. J. Jolly against the Atchison Topeka & Santa Fe Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

E. W. Camp, of Los Angeles, and H. D. Pillsbury and Chas. L. Brown, both of San Francisco, for appellant. Albert H. Elliott and Clarence E. Todd, both of San Francisco, for respondent.

MURPHEY, Judge pro tem. The action was brought to recover damages accruing because of injury by fire to certain goods while said goods were yet in a freight car belonging to appellant. The plaintiff is the assignee of certain insurance companies that liquidated the claim for damages made by the George H. Tay Company, the consignee of the goods. This merchandise came into the possession of the appellant as a common carrier at Denver, Colo., having been shipped to that point from Trenton, N. J., over the Pennsylvania Railroad, which latter railroad issued a bill of lading, signed by its agent, but not signed by the shipper or consignee or any person in their behalf. The goods arrived in San Francisco on the morning of August 8, 1908, and the consignee was notified that the car would be set on the siding next to its warehouse in the due course of business. The car was actually placed on the siding without notice to the consignee some time after 5 o'clock and after office hours on the afternoon of the date above named. Notwithstanding it was the custom of the switching crew of the appellant to ask for and receive instructions as to the placing of freight cars consigned to the George H. Tay Company, in this particular instance the car was spotted on the siding without instructions having been asked or received from any one. The said siding was on a public street of the city, and was the property of appellant, and was used by it for delivering freight to several business houses stationed along its course. About two hours after the car was left in front of the warehouse (which at the time of the leaving was closed for the day), it was discovered to be on fire, and the contents were damaged in the sum of \$1,143.29, for which plaintiff had judgment. The car inspector of the defendant was present at the fire, and the defendant was subsequently notified of the loss and requested to adjust the same.

[1] It seems to be a settled law that a contract of carriage made in one state where delivery is to be had in another is to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

governed, so far as the delivery is concerned, by the laws of the latter state.

In the case of *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274, it was held that: "The goods here were deliverable in Philadelphia; and what would be an effectual delivery thereof in the sense of the law (which is sometimes a nice question), would, on question, be settled by the law of Pennsylvania."

In the case of *Southern Express Co. v. Gibbs*, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24, it was held that a contract as to its nature, obligation, and validity, is governed by the law of the state where made, unless it is to be performed in another state, in which case it will be governed by the laws of the place of performance.

In *Hughes v. Penn. R. R.*, 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713, it was held that if a contract, containing a stipulation limiting liability for negligence by a common carrier, is made in one state but with a view to its performance by transportation through or into one or more other states, it must be construed in accordance with the law of the state where its negligent breach causing injury occurs. Such contract, though valid in the state where made, must be declared void in the state where the injury occurs, if contrary to the policy of the laws of the latter state.

The Civil Code of this state provides (section 2194): "The Liability of Inland Carriers for Loss.—Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time he accepts until he relieves himself of liability pursuant to sections 2118 to 2222, for the loss or injury thereof from any cause whatever, except"—then follow three or four subdivisions of exceptions having no bearing whatever upon the case at bar.

[2] The trial court found that there had been no delivery of the goods to the consignee at the time of the fire, and that the common carrier's responsibility at that time was in full force and effect; and we are disposed to hold from what has been said above that the appellant was liable for the goods as an insurer until such time as it relieved itself from responsibility by delivering the same to the consignee in the manner and mode required by law; and in this connection we quote section 2118 of the Civil Code as follows: "A [common] carrier of property must deliver it to the consignee, at the place to which it is addressed, in the manner usual at that place." It is in evidence that it was the custom of the appellant's switching crew to ask the George H. Tay Company for instructions as to the placing of cars, but on the occasion of the present shipment no such instructions were asked and none were given. On the contrary, the switching

crew placed the car on the siding in front of the warehouse of the consignee after 5 o'clock Saturday afternoon, at a time when the place of business of the consignee was closed.

[3] It is not contended that the consignee had any notice of the delivery other than such as was conveyed by a telephonic message and a postal card sent on the morning of the arrival of the goods and stating that the car would be delivered in the usual course of business. This, at most, was a notice of intention to make delivery in the future, and should have been followed by some actual notice of delivery within business hours. Under this state of the facts, we are disposed to agree with the conclusion of the trial court that there was not such a delivery of the goods as would relieve the appellant of its responsibility as a common carrier.

In the case of *Reeder v. Wells Fargo & Co.*, 14 Cal. App. 790, 113 Pac. 342, the court says: "The statute contemplates undoubtedly that, before the carrier shall be permitted to change the extent of his liability to the consignee to that of warehouseman, the consignee shall actually have notice of the arrival of the goods. Where the mails are permitted to be resorted to for the purpose of giving such notice, then, surely, before a change is worked in the responsibility of the carrier, a reasonable time must elapse after depositing in the mails of the notice before the consignee shall be charged with the effect thereof."

An illuminating case bearing upon a state of facts strikingly similar to the case at bar is to be found in *Missouri Pac. R. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525, 40 Pac. 899. In that case two car loads of sugar were placed on the consignee's siding on Sunday and were burned before business on the following Monday. The court said: "Did the defendant deliver the sugar to the plaintiff? It is earnestly insisted that when the railroad company placed the cars at the rear of plaintiff's warehouse, at the exact place where the plaintiff was accustomed to receive and unload its freight, it had performed its whole duty, and that from the time it uncoupled its engine from the cars the property was in the possession of the plaintiff and at its risk. It is shown that the plaintiff was accustomed to break the seals of the cars so placed and remove the freight without the presence of, or special permission from, any employé of the railroad company. And it is claimed that under those circumstances the defendant had fully performed all the services which it undertook to perform, and was discharged from all further liability. There are authorities which give some support to this contention. * * * We think, however, that the facts of this case fail to show a delivery of the sugar to the plaintiff. It is true that the cars were

placed in the proper position for unloading, and that the plaintiff was privileged to proceed to take out the sugar as soon as it pleased to do so. But the cars were so placed on Sunday. They were consumed by fire before business hours on Monday morning. The plaintiff was under no obligation to work on Sunday; nor was it bound to receive goods in the nighttime, especially as it is not shown that it was accustomed to do so. The property remained in the custody of the railroad company until the plaintiff could reasonably be required to receive it."

[4] Appellant contends that, by reason of the following provision in the bill of lading, it was relieved from liability: "And when received from or delivered on private or other sidings shall be at owner's risk until the cars are attached to and after they are detached from trains." Giving the words "delivered on" the construction contended for by appellant, this language, standing alone and disconnected from the context of which it forms a part, would compel a conclusion favorable to appellant. However, the entire sentence reads: "Property destined to or taken from a station at which there is no regularly appointed agent shall be entirely at the risk of the owner when unloaded from cars or until loaded into cars, and, when received from or delivered on private or other sidings, shall be at the owner's risk until the cars are attached to and after they are detached from trains."

[5] In view of the rule that stipulations in contracts of the character under discussion are to be most strongly construed against the carrier (*Hooper v. Wells Fargo*, 27 Cal. 11, 85 Am. Dec. 211; *Pierce v. Southern Pacific Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350), we are strongly disposed to agree with respondent's construction of the language to the effect that it refers only to deliveries of goods at stations "where there is no regularly appointed agent." However, according to our interpretation of the law, no different conclusion would result from the adoption of appellant's construction; its contention being that the word "delivered" must be construed as being used in the sense of "placed," and that the latter part of the sentence is independent and complete in itself. Even if that were true, it would be a harsh and unjust construction that would not require the "placing" or "delivery" to be made within working hours and on reasonable notice to the consignee of the fact of such delivery.

[6] We are disposed to think that the claim of appellant that the filing of a written claim within 30 days as a condition precedent to a recovery against the carrier is without merit. Section 2176 of the Civil Code, in connection with the conduct of the parties as the same was found by the trial court, we regard as controlling on this phase of the case. Section 2176 of the Civil Code

reads as follows: "A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same."

It will be observed that the question as to the time of filing claims is not one of the matters assented to by the consignee, consignor, or passenger without his signature. The bill of lading in this case was signed neither by the shipper nor by the consignee; and with respect to the conduct of the parties the court found as follows: "That the defendant was informed of the loss or damage to the said goods within a reasonable time after said loss, and that the defendant knew of said loss and damage, and inspected the car in which said goods were lost and damaged immediately after the said fire."

[7] It is finally contended by the appellant, as a reason for the reversal of the judgment, that it is not liable by reason of the following provision found in a contract of agreement entered into between appellant Atchison, Topeka & Santa Fé Railway Company and the George H. Tay Company, the consignee: "(6) That the first party shall not be held liable for or on account of any loss or damage by fire to the property, buildings, or structures, or property therein located, upon any land owned, leased, or controlled by the second party (including the said plant and its contents), whether belonging to the second party or permitted by the second party to be or remain upon said land or any part thereof, or in any building or structure situated thereon, from whatever cause arising; it being understood that all risk of such loss or damage shall be and is hereby assumed by the second party, and that neither the second party nor any one claiming through or under the second party shall make any demand against the first party for or on account of any such loss or damage from any cause whatever."

The trial court concluded, and incorporated its conclusions in its findings of fact herein, that the provisions of this agreement have no application to the property described in the complaint. By its express terms the agreement excludes from liability on account of loss or damage by fire "property, buildings, or other structures or property therein located upon any land under lease or con-

trolled" by the party of the second part. It is conceded that the goods burned were consigned to the George H. Tay Company and were at the time of the fire in a car belonging to the appellant, which car was standing on a public street and at a siding used for serving the George H. Tay Company and other industries, and that the car was near the property of the George H. Tay Company. Clearly this does not bring the burned property within the express provisions of the agreement; and we are entirely satisfied, from a mere reading of the paragraph above set out, that it must be manifest that it was not within the contemplation of the parties that property yet remaining in the possession of the railroad corporation, as was the property here in question, should be included in property exempt from loss by fire. The corporation was unquestionably protecting itself from loss by fire likely to result from the operation of its engines on the siding adjacent to the plant of the party of the second part, and that it should be applied to a contingency such as is here developed did not, we apprehend, remotely suggest itself to either of the parties at the time this agreement was entered into.

From an inspection of the entire record, we are satisfied that the judgment of the trial court was correct and should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; HALL, J.

HILL et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY
et al. (Civ. 1,322.)

(District Court of Appeal, Second District, California. March 8, 1913.)

1. PROHIBITION (§ 3*)—ADEQUACY OF OTHER REMEDY.

Prohibition does not lie to restrain the superior court which had enjoined the directors and officers of a corporation from preventing the carrying on of the corporate business under the management of another from proceeding to determine whether the officers and directors have violated the injunction, on the ground of want of jurisdiction to issue the injunction, because they have an adequate remedy by writ of review in case of an adverse judgment.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

2. PROHIBITION (§ 3*)—ADEQUACY OF OTHER REMEDY.

Prohibition ordinarily will not issue where certiorari lies, unless the applicant for prohibition will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

3. PROHIBITION (§ 12*)—ALTERNATIVE WRIT OF PROHIBITION.

A District Court of Appeal will not issue an alternative writ of prohibition to restrain the superior court from proceeding to determine whether petitioners are guilty of contempt for violating an injunctive order, because under the Constitution the writ may continue for 60

days notwithstanding an adjudication by the Court of Appeal at the final hearing that the petitioners are not entitled to a peremptory writ.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 61; Dec. Dig. § 12.*]

Application by Frank C. Hill and others against the Superior Court in and for the county of Los Angeles and another, judge thereof. Denied.

Frank C. Hill and George S. Hupp, both of Los Angeles, for petitioners. Flint, Gray & Barker, of Los Angeles, for respondents.

PER CURIAM. Application for an alternative writ of prohibition. The proceeding grows out of an action brought in the superior court of Los Angeles county wherein W. C. McEvilly was plaintiff and J. J. Haggarty, Frank C. Hill, and James C. Haggarty were defendants, in which said defendants, individually and as officers, directors, and stockholders of the Paris Cloak, Suit & Millinery House, a corporation, were enjoined from "obstructing, impeding, or preventing in any way the carrying on of the business of said corporation under the management of said W. C. McEvilly." After the issuing of said injunction petitioners were cited to appear in court, and show cause why they should not be adjudged guilty of contempt for violating said injunction.

[1] The contention of petitioners is that in making the order granting the injunction upon which the proceedings for contempt are based the court exceeded its jurisdiction, in that the effect of the injunction was to take from its board of directors the corporate power vested in it by law. The real purpose sought by petitioners in making this application is to obtain a review of the action of the lower court in granting the injunction. In our opinion, however, the question which it is sought to have reviewed does not necessarily arise, and we are not inclined to encourage a procedure which, to say the least, is irregular. If the court could in any case make an order enjoining persons from obstructing, impeding, or preventing the carrying on of the business of a corporation under the management of another person, and as to which we make no decision, we must assume that facts were presented to the court which justified its action in this case, and, if such facts were not made to appear, the action of the court in making the order was error to be reviewed on appeal therefrom. Whether or not petitioners have violated the order is a question of fact, to be determined by the court upon the hearing of the matter. Upon its own interpretation of the order, the court might conclude that the acts which petitioners are alleged to have committed did not constitute contempt, in which case they would not be aggrieved. In any event, and assuming an adverse decision,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

we do not think the writ should issue for the reason that petitioners would have an adequate remedy in the ordinary course of law by a writ of review.

[2] "The writ of prohibition should not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed." *Town of Santa Monica v. Eckert*, 33 Pac. 880; ¹ *Hayes v. Board of Trustees*, 6 Cal. App. 520, 92 Pac. 492. If the decision of the trial court should be favorable to petitioners, they would have no cause for complaint. If, on the other hand, it should be adverse and the adjudication void for want of jurisdiction, the enforcement of the judgment may be prevented and the judgment declared void under a writ of review.

[3] Another cogent reason for the application of the rule is that, under the Constitution, the judgments of this court are not final until the expiration of 30 days, after which at any time within the next succeeding 30 days the Supreme Court may, upon petition, order the case transferred to that court for decision. Hence, after staying the trial court in the exercise of its jurisdiction by issuing the alternative writ, such restraint must continue for a period of 60 days, notwithstanding an adjudication by this court at the final hearing that the petitioner is not entitled to the peremptory writ prayed for.

The application is denied.

BOOTH v. A. LEVY & J. ZENTNER CO.
(Civ. 1,170.)

(District Court of Appeal, First District, California. March 10, 1913. Rehearing Denied by Supreme Court May 9, 1913.)

1. FRAUDS, STATUTE OF (§ 112*)—CONTRACTS OF SALE—SUFFICIENCY OF WRITING.

A written order for goods signed by the agents of the parties, which declares that it is subject to confirmation by the buyer when "opening price is made by the shipper," does not bind the buyer until he has agreed to the price, and it is not a sufficient memorandum of sale within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 238; Dec. Dig. § 112.*]

2. FRAUDS, STATUTE OF (§ 112*)—CONTRACTS OF SALE—SUFFICIENCY OF WRITING.

A written contract of sale that leaves the price to be subsequently fixed by agreement of the parties is not sufficient within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 238; Dec. Dig. § 112.*]

3. FRAUDS, STATUTE OF (§ 87*)—CONTRACTS OF SALE—DELIVERY AND ACCEPTANCE—STATUTES.

Code Civ. Proc. § 1973, as amended by St. 1907, p. 563, providing that a contract for the

sale of personalty may be valid where the buyer "accepts or receives" part of the goods, does not repeal or modify Civ. Code, § 1739, requiring a buyer to "accept and receive" a part of the goods or pay a part of the price, to make a valid contract, unless in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 162; Dec. Dig. § 87.*]

4. STATUTES (§ 158*)—REPEALS—IMPLIED REPEALS.

Repeals by implication are not favored.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 228; Dec. Dig. § 158.*]

5. FRAUDS, STATUTE OF (§§ 89, 90*)—DELIVERY AND ACCEPTANCE—SUFFICIENCY.

A delivery of goods to a carrier for transportation and delivery to a buyer is not such a receipt and acceptance by the buyer as obviates the necessity of a writing containing the terms of the contract as required by Civ. Code, § 1739, unless the buyer accepts and receives part of the goods or pays part of the price.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 162, 165-179; Dec. Dig. §§ 89, 90.*]

6. FRAUDS, STATUTE OF (§ 89*)—SALE OF GOODS—ESTOPPEL.

Where a seller in a parol contract of sale within the statute of frauds ships goods to a distant buyer, who refuses to accept them, the buyer is not estopped from relying on the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.*]

7. JUDGMENT (§ 948*)—ISSUES—FINDINGS.

A judgment cannot be supported on a theory of estoppel, where the issue of estoppel is not presented by the pleadings, and where the court makes no findings thereon.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1787-1793; Dec. Dig. § 948.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frank E. Booth against the A. Levy & J. Zentner Company. From a judgment for plaintiff, defendant appeals. Reversed.

Fred L. Dreher, of San Francisco, for appellant. Henry J. Brodsky, of San Francisco, for respondent.

HALL, J. Plaintiff obtained a judgment against defendant in the sum of \$671 as damages for its refusal to accept and pay for a car load of cranberries, consisting of 215 barrels, alleged to have been sold and delivered by plaintiff's assignor to defendant at an agreed price of \$5.50 per barrel f. o. b. at shipping point. Defendant among other things pleaded and relied at the trial upon the statute of frauds as a defense to the action, and the vital question presented by this appeal arises out of this defense. The question is not only raised by the answer, but is presented by timely objections to certain of the evidence, a motion for a nonsuit, and attacks upon the sufficiency of the evidence to support the findings.

The facts are that plaintiff's assignor, National Fruit Exchange, and defendant signed

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 99 Cal. xix.

and executed a written memorandum as follows:

"Cranberry order placed with National Fruit Exchange. S. F. May 19, 1910.

"Buyer: A. Levy & J. Zentner Co.

"Address: San Francisco, Cal.

"One car load Monarch cranberries.

"220 barrels cranberries.

"One car load Monarch cranberries.

"220 barrels cranberries.

"Shipment about: 1 car ship early as possible, other to follow about 14 days.

"Destination of car: San Francisco.

"This order is given subject to confirmation by the purchaser when opening price is named by the shipper.

"If, by reason of short crop or other unavoidable cause, shipper's holdings of cranberries are short, shipper reserves the right, when he names price, to accept only such portion of above order pro rata with other orders actually booked. If the buyer approves of price within twenty-four (24) hours after same is quoted by the shipper, Sundays excepted, the shipper agrees to confirm this order in full before, and in preference to accepting any order received thereafter.

"If, after the order has been confirmed and the price agreed upon, cranberries held by the shipper shall be destroyed or injured in such a way as to make the fruit unsafe to ship, or of unmerchantable quality, by fruit worm, hailstorms, or other unavoidable causes, the shipper shall pro rata his remaining holdings of good merchantable stock among unfilled orders actually booked and confirmed at time of such occurrence.

"Terms: Net cash; sight draft with bill of lading, draft to be held by bank until arrival of goods; inspection permitted before payment of draft."

Defendant by its agent signed as "purchaser," and plaintiff's assignor, by its agent, signed as "shipper." Subsequently plaintiff's assignor, through its agent, orally informed defendant that the opening price of the cranberries was \$5.50 per barrel, and defendant orally ordered the cranberries to be shipped. This testimony was admitted over the objection of defendant. One car load of cranberries was shipped to defendant, but upon its arrival in San Francisco defendant refused to accept the same, and the shipper subsequently sold them at a loss of \$871.

Plaintiff contends: First, that the writing signed by the parties is a sufficient memorandum of a sale to take the transaction out of the statute of frauds; and, second, that the delivery of the cranberries to the common carrier was a sufficient receipt of the same by defendant to effectuate the same purpose. Neither of these positions is sound.

[1] By the writing the parties did not agree upon any sale at all. The order was expressly subject to confirmation by the pur-

chaser when "opening price is named by the shipper." The buyer, until it had agreed to the price, was not bound by the agreement at all, and it had the right to refuse to bind itself, no matter what price should be named. The price was still a matter yet to be determined by agreement. No meeting of the minds of the parties had yet occurred upon the question of price, but the question of price was wholly reserved for future agreement. It was not left to be determined by a third party, or by the market rates, or in any manner other than by future agreement of the parties. Until such an agreement has been reached and reduced to writing, no sufficient written contract can be said to have been executed to take the case out of the statute of frauds.

[2] A writing that leaves the price to be subsequently fixed by agreement of the parties is not sufficient to meet the requirements of the statute of frauds. *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154; *Baume v. Morse*, 13 Cal. App. 456, 110 Pac. 350; *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800; *Thurlow v. Perry*, 107 Me. 127, 77 Atl. 641; *Cameron v. Tompkins*, 72 Hun, 113, 25 N. Y. Supp. 305. All of the cases cited by respondent as to the sufficiency of the contract are cases where the matter of the price was left to be fixed by future agreement or negotiation of the parties, and are not in point. In fact, the whole argument of plaintiff upon this head is predicated upon the assumption that by the terms of the writing defendant agreed to purchase at the figure which should be fixed as the "opening price." The writing is not open to such a construction. The buyer was not bound to pay the "opening price," unless it subsequently agreed to do so. It never did so agree in writing, and therefore no valid agreement was ever entered into under the statute of frauds.

[3] The contention of plaintiff that the delivery of the cranberries to the common carrier is sufficient to take the case out of the statute of frauds is predicated upon the contention that under section 1973, Code of Civil Procedure, as it was amended in 1907 (St. 1907, p. 563), either the acceptance or receipt of the goods by the buyer is sufficient to make a valid and binding contract of sale of personal property at a price amounting to \$200. But this section is not the section that lays down the substantive law as to what shall constitute a valid contract of sale of personal property. Only the opening sentence can be said to lay down a rule of substantive law. It is: "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent." This is followed by a rule of evidence, which only implies that a contract for the sale of personal property

at a price of \$200 or more may be valid if the buyer "accepts or receives" part of the goods. In such a section the substitution of the word "or" for the word "and" by the amendment of 1907, between the words "accepts" and "receives," cannot be held to have repealed or modified the substantive law as to a sale of personal property as laid down in section 1739, Civil Code. This section is a section dealing solely with the matter of sales of personal property, and lays down the requisites of a valid contract as to such sales. As it now exists, and as it has ever existed since the adoption of the Codes in 1872, it requires that the buyer both *accept and receive* a part of the goods or pay a part of the price to make a valid contract, unless it be in writing. Such has been the uniform construction put upon this section (1739, Civ. Code) by the courts of this state. *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502; *Terney v. Doten*, 70 Cal. 399, 11 Pac. 743; *Dauphiny v. Red Poll Creamery Co.*, 123 Cal. 548, 56 Pac. 451. These cases lay down the rule that under section 1739 of the Civil Code there must be both a receipt and acceptance by the buyer to avoid the necessity of a written contract. While these cases were decided prior to the amendment to section 1973 of the Code of Civil Procedure of 1907, they recognize that section 1739 of the Civil Code is the section which fixes the substantive law upon the subject with which it deals. There is certainly some difference in the wording of the two sections; but it is only by implication that it can be said that section 1973 of the Code of Civil Procedure repeals the express and direct rule as laid down in section 1739 of the Civil Code.

[4] Repeals by implication are not favored.

[5] We therefore hold that, even if it be conceded that the delivery to a common carrier for transportation to the buyer worked a receipt of the goods by the buyer, such a receipt does not meet the requirements of the law as to an acceptance by the buyer. There must be both a receipt and acceptance by the buyer to obviate the necessity of a writing containing the essential terms of the contract. Civ. Code, § 1739; *Jamison v. Simon*, supra; *Terney v. Doten*, supra; *Dauphiny v. Red Poll Creamery Co.*, supra.

[6] We see nothing in the record to support the contention that defendant is estopped to rely upon the statute of frauds. It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer, who refuses to accept the goods, is estopped to rely upon the statute would be to practically abrogate the statute of frauds. *Hicks v. Post*, 154 Cal. 22, 96 Pac. 878.

[7] Furthermore, the court made no findings upon any issues of estoppel, and no such issue was presented by the pleadings. The

judgment, therefore, cannot be supported upon any theory of estoppel. *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 230, 41 Pac. 1017, 45 Pac. 252.

The judgment and order are reversed.

We concur: LENNON, P. J.; MURPHEY, Judge pro tem.

BLAUSTEIN et ux. v. PINCUS.

(Supreme Court of Montana. April 1, 1913.)

1. LANDLORD AND TENANT (§ 172*)—USE OF PREMISES—EVICTION.

Under a lease of premises for use as a lodging house, the act of the lessor in building a garage on adjoining property, and cutting off the light and air from one side of the house, and leasing such garage to a tenant who kept it open day and night, so that the noises, smells, and smoke therefrom destroyed the quiet enjoyment and profitable management of the lodging house, was tantamount to an eviction, and justified the tenant thereof in quitting the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

2. LANDLORD AND TENANT (§ 173*)—USE OF PREMISES—EVICTION BY THIRD PERSONS.

Acts of third persons impairing the usefulness or enjoyment of demised premises do not amount to an eviction by the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 705-707; Dec. Dig. § 173.*]

3. LANDLORD AND TENANT (§ 180*)—TENANT'S ACTION FOR EVICTION—EVIDENCE—DAMAGES.

Evidence in a tenant's action for eviction from premises leased for use as a lodging house by the lessor's act in erecting and leasing a garage on adjoining premises held sufficient to sustain an award of damages of \$3,395.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

4. LANDLORD AND TENANT (§ 180*)—TENANT'S ACTION FOR EVICTION—ADMISSIBILITY OF EVIDENCE—DAMAGES.

In a tenant's action for eviction from premises leased for use as a lodging house by the lessor's erection and leasing of a garage on the adjoining premises, evidence as to loss of business and profits disclosing a permanent business with an average income which for no apparent cause except the presence of the garage dropped to less than one-half was admissible.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

5. TRIAL (§ 261*)—REQUESTED INSTRUCTIONS—ERROR IN THEORY OR PHRASEOLOGY.

Requested instructions framed on an erroneous theory or inaccurate in phraseology were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

6. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

Requested instructions covered by instructions given were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from District Court, Silver Bow County; J. Miller Smith, Judge.

Action by Max Blaustein and Rosa Blaustein against Adolph Pincus. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. L. Wines and T. J. Harrington, both of Butte, for appellant. Harry Meyer and William Meyer, both of Butte, for respondents.

SANNER, J. The admitted facts in this case are: That from March 1908, to April 1, 1910, the respondents, Max and Rosa Blaustein, were tenants under lease from the appellant, Pincus, of what is known as the Casino Theater in Butte. On March 1, 1909, these parties entered into another lease for the same premises to run for five years after April 1, 1910. This lease was in the usual form, except that it contained provisions to the effect that the premises should be used as a lodging house and not otherwise, and that the lessees might make alterations as they saw fit, at their own expense, and should keep the plumbing in repair. Among the avenues through which light and air were admitted into this building were five windows in the east wall which was exposed. It was understood by all the parties that the lessees contemplated changes and improvements in the interior and the installation of furniture in order that the premises should be suitable for lodging house purposes. These improvements were made and the furniture was installed by the lessees. In May, 1910, Pincus bought the lots adjoining the Casino, and thereafter erected thereon a two-story garage, using the east wall of the Casino as the west wall of the garage; and in July, 1910, leased the garage to Angell & Zobell, by whom it has since been occupied. It is alleged in the complaint, and denied in the answer, that at the time Pincus commenced the erection of the garage the plaintiffs were enjoying a profitable lodging house business at the Casino; that he intended to, and did, so erect the garage as to cut off the light and air theretofore furnished to the Casino on that side, and so as to admit into the Casino the noises, smells, and fumes necessarily incident to the running of a garage; that the tenant of Pincus kept said garage open day and night, and the noises, smells and fumes emanating therefrom were of a character to, and did, injure the plaintiffs in the quiet and peaceable possession of the Casino, rendered it unfit for lodging house purposes, and so disturbed the plaintiffs' customers and lodgers that they quit, so that plaintiffs ceased to be able to conduct a profitable lodging house business therein; that in consequence of all this plaintiffs were evicted from the leased premises, to their damage as follows: Lost profits, \$5,000; improvements rendered worthless, \$4,042; furniture rendered worthless, \$2,025. The case was tried to a jury, which returned a verdict for the plaintiffs, awarding them damages

in the sum of \$9,500, and judgment was entered accordingly. Defendant presented his motion for new trial, and the trial court ordered that the same be granted unless the plaintiffs would submit to a reduction of the judgment to \$3,895, in which case to stand denied. Plaintiffs accepted the condition imposed, and from the judgment as reduced, as well as from the order denying his motion for new trial, defendant Pincus has appealed.

That the jury were entirely warranted in finding for the respondents there can be no question. The evidence in their behalf alone, and it finds material support in appellant's case, abundantly shows that after the lease of March 1, 1909, was executed, and in contemplation of a peaceable and quiet tenure for the term thereof, they made material improvements in the Casino at a very considerable cost; that they installed furniture necessary to the running of a lodging house, and had worked up a profitable patronage. For several days prior to the 20th day of May, 1910, Pincus had made persistent efforts to get them to surrender the lease and give up the premises, in order that he might apply them to other and more profitable uses. The following extract from the testimony of Max Blaustein will illustrate the attitude of Pincus in this regard: "Mr. Pincus came across to me, and said: 'Blaustein, I have something to talk with you. * * * I would like you to surrender the lease; turn me over the building back. * * * I will tell you the reason why. I want to build up here a garage which will bring me about \$250 a month.' I said, 'Where will I hunt for my investments in the place?' and he says, 'Now here, Blaustein, there is no use to chew the rag about, if you don't surrender me the lease on the building, I will drive you from the place.' I said, 'How is that, Mr. Pincus?' and Mr. Pincus said: 'Now here. You remember I told you I owned some ground east of the building.' I said, 'Yes, I do.' He said, 'I am going to buy the rest of the ground, what I need for a garage, from the Centennial Brewery, and I build up a garage, and you shall know for the smoke and the noise of all automobiles and the bad odor, the only thing that was made for to allow light and ventilation, and that is the way I will drive you out of the place.'" Within a week after this conversation the construction of a garage on the adjoining lots was commenced. In the construction the windows in the east wall of the Casino, which formed the west wall of the garage, were not walled or boarded up, but were nailed down so that they could not be moved. As to the character and effect of the noises, smells, and fumes which found their way into the lodging house from the garage the testimony is quaint, but clearly founded upon personal experience.

Max Blaustein testified: "I do not know how to explain the noise, but I have seen

the men getting out and cranking the machinery and then jumping in the machine and going out, and that would take only a half a minute sometimes. And then I have seen them going ahead and cranking the machine, turning it around three or four times, having a hold of a crank or a handle in the front; then he would go and open the hinges and start to look on the inside, and that thing would be working away, and there is no question about it, but what sometimes the automobile it is shaking, and it stands in one place and shakes, and then he goes off for a hammer or a screw driver or some other kind of a tool to fix something, and the machine stands there and raises the dickens. Of course, I could hear it when I was looking at it. I could also hear it when I was in the lodging house on the second floor, but I won't say I could hear it just as plain as when I was standing there looking at it."

Rosa Blaustein testified: "I would see smoke in the lodging house. I knew it came from the garage. This smell that was there was from the gasoline, and there were all kinds of smells, and I could hardly catch my breath when I used to go in. Sometimes I used to count the clothes for the laundry man; * * * the linen was full of gasoline and full of smoke; full of the smell of gasoline and the smoke. I heard noises while I would be in the lodging house. Any time the automobiles would come in at night there was all kinds of noises; the automobile horns would be blowing, and when they go out—there is [a] floor upstairs—it was clear upstairs—driving the automobiles was something terrible. And I used to stay sometimes at night in the lodging house, and used to go in the office and sometimes Bulgarians, I couldn't make out what they want; they make all kinds of noise and I should give back their money, and sometimes they used to be upstairs, the most room you know upstairs, and they want I should give them back their money; they couldn't stay."

Joseph Blaustein testified: "After the garage was built, I noticed that there was considerable noise, a smell, and a peculiar odor. The noise which I noticed there was the tooting of the horns, combined with the cranking of the automobiles, and the continuous loud and bolsterous noise. It was the after effect of the cranking of the automobiles. This noise was going on when I went on shift, and it would continue as long as I was there. There would be intervals between the noise. It was a very loud noise. It was plainly heard in the lodging house, and that is where I heard it. * * * The odor was a sort of nauseating, occasioning a sort of peculiar sickness of the stomach as though you were about to vomit. * * * I have noticed smoke in the lodging house. It would be coming through the windows downstairs. As to being thick or otherwise, I will say that smoke would vary; sometimes it was thick,

other times it was not. It was so that you could notice it. This continued from the time the garage was built until we finally left the place."

Jim Mike testified: "I used to room there when the garage was built. I remained there as a lodger about four weeks after it was built and opened for business. * * * After the garage moved in there and opened for business there was a lot of noise and smell. * * * There was an awful smell of gasoline there; it was hard to stay in there on account of the smell. * * * The effect it had upon me and the other lodgers was to make us sick, and we couldn't stand it. * * * I couldn't get any rest there after the garage was built. * * * The reason I left there was on account of the noise and smell. I remained in the city after I left there."

Similar testimony was furnished by other witnesses who had lodged with the plaintiffs, but who were compelled to leave on account of the noises, smoke, and smell from the garage; and this condition became so serious that the plaintiffs, having lost most of their patronage and being no longer able to profitably conduct a lodging house in the Casino, were obliged to and did quit the premises in December, 1910. In the interim, however, they made complaints of the condition to Pincus and requests of him for relief, and his invariable answer, it seems, was: "Blaustein, I told you what would be the result of it," or, "Mrs. Blaustein, I told you the consequence, what it will be."

[1, 2] Appellant concedes that in the lease in question there is implied a covenant for quiet enjoyment. That the circumstances disclosed by the evidence were such as to destroy the quiet enjoyment of the Casino by the respondents were sufficient to justify them in quitting the premises and were tantamount to an eviction is too clear for discussion. *York v. Steward*, 21 Mont. 519, 55 Pac. 29, 43 L. R. A. 125; *Osmers v. Furey*, 32 Mont. 559, 81 Pac. 345; *Wade v. Herndl*, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591; *McCall v. New York L. Ins. Co.*, 201 Mass. 223, 87 N. E. 582, 21 L. R. A. (N. S.) 38; *Adams v. Werner*, 120 Mich. 432, 79 N. W. 637; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 750; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 555; *Fish v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; *De Palma v. Weinman*, 15 N. M. 68, 103 Pac. 782, 24 L. R. A. (N. S.) 427. We are unable to appreciate the argument of appellant that because the tenants of the garage owned no machines, and the noises, fumes, and smells were occasioned by the acts of private owners who merely rented stalls in the garage, there was no such privity with Pincus as to render him responsible. Doubtless it is the rule that the acts of third persons impairing the usefulness or

enjoyment of demised premises do not amount to an eviction by the lessor (24 Cyc. 1132); but nothing is shown to have occurred that might not be expected to occur in a garage, the getting of the machines in and out of the garage, whether by private owners or others, was a necessary incident in the business of the garage, as was also whatever noises, smells, or fumes might arise out of that process. It was to accommodate the business of a garage that Pincus designed, built, and rented the building, with full knowledge of the annoyance it might cause to the respondents. It is not at all clear that all the noises, fumes, and smells were generated by the acts of private owners, or that the lessees of the garage were in every instance innocent of actual participation therein; but, whether this be so or not, it would be the refinement of artificiality to hold Pincus blameless for a result so clearly contemplated and foreseen.

[3] 2. It is insisted, however, that the damages allowed were not proven. There was evidence to show that, after the execution of the lease and before the disturbances complained of, the respondents made important changes in the interior of the Casino, besides installing a heating plant, all of considerable cost and value; also, that as the result of the operation of the garage the business of respondents was, as an instrument of profit, practically destroyed. From these two elements alone, omitting furniture, it is not difficult to compute a sum equal to, or in excess of, the amount finally allowed by the trial court. If any one has cause to complain in this regard, it is not the appellant.

[4] But it is urged the only evidence of damage on account of the loss of business and profits was incompetent, speculative, and remote. This has reference to the fact that as a basis of computation the court admitted evidence of profits which actually had been realized in the period of respondents' occupancy of the premises prior to the erection of the garage. This evidence, instead of lacking the fundamentals of admissibility, was singularly complete; it disclosed a permanent business of a stable and certain character, in which the daily income and expense maintained a consistent average throughout the period from March, 1909, to July 1, 1910, commencing with July, 1910, and for no apparent cause except the garage, the income dropped to less than one-half, although no corresponding reduction in the expense of operation was possible. We think this evidence was properly admitted (First Nat. Bank of Portland v. Carroll, 35 Mont. 309, 88 Pac. 1012; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059; Schile v. Brokhahus, 80 N. Y. 614; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. [Unof.] 340, 96 N. W. 487; Di Palma v. Weinman, 16 N. M. 302, 121

Pac. 40; Alden v. Mayfield, 127 Pac. 45; Mensing v. Wright, 86 Kan. 98, 119 Pac. 374), and that it fairly sustained the burden assigned to it.

[5, 6] In view of the above conclusions, none of the rulings complained of in the admission and exclusion of evidence presents any error prejudicial to appellant. Nor do we think the given instructions which are assigned as error are open to the objections urged against them on the trial. It is also clear that under the circumstances of this case the court was correct in modifying appellant's instructions numbered 1, 4, 7, and 17, and in refusing appellant's proposed instructions Nos. 2, 3, 6, 8, 11, 13, 15, 16, 19, and 20, since they were either framed on an erroneous theory or were inaccurate in phraseology, or were covered.

What is intended for an assignment of errors in appellant's brief covers 28 pages, and is a potpourri of random narrative, rulings (unnumbered) of the trial court, explanatory statements, and argumentative matter. This condition, counsel for respondents urge, entitles them to have the appeal dismissed, since it is unfair to them and has rendered their task of replying very difficult. An indisposition on our part to go to this length without warning has occasioned us much needless work in the effort to fairly review the trial proceedings. The rules relating to briefs, as promulgated November 20, 1911, are neither hard to understand, nor laborious to follow; and we shall not again, in a similar situation, take the trouble that we have taken here to ascertain the character and value of appellant's contentions.

Finding no prejudicial error, the judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

BENNETT v. QUINLAN.

(Supreme Court of Montana. April 15, 1913.)

1. WATERS AND WATER COURSES (§ 152*)—ACTION TO DETERMINE RIGHTS—COMPLAINT—SUFFICIENCY.

In an action to determine the rights of plaintiff and defendant in certain water rights, a complaint alleging title and right to an undivided one-half interest thereof and an adverse claim by defendant which was without right stated a cause of action.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 153, 157; Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*)—DETERMINING RIGHTS OF DEFENDANT AS BETWEEN THEMSELVES—STATUTORY PROVISIONS.

Rev. Codes, § 4852, providing that in any action for the protection of water rights the plaintiff may make any or all persons who have diverted water from the same stream or source parties thereto, and the court may in

one judgment settle the relative priorities and rights of all parties, is permissive, and not mandatory as to the adjudication of the rights of defendants *inter sese*.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

3. JUDGMENT (§ 956*)—MATTERS ADJUDICATED—EXTRINSIC EVIDENCE.

Under Rev. Codes, § 7917, providing that that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually or necessarily included therein or necessary thereto, where in a suit to determine the rights of various parties to divert water from a stream it was found that three certain defendants had appropriated 400 inches thereof, and adjudged by a decree reciting that the cause was heard on the complaint, the separate answers of the several defendants, and a stipulation on file that such three defendants were the owners and entitled to use 400 inches, there was no presumption that the rights of such defendants as between themselves were adjudicated, and the record, except the findings and decree, having been lost or destroyed, the court properly admitted parol evidence to show that such defendants made common cause as against the other parties, and raised no controversy whatever as between themselves.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1822-1825; Dec. Dig. § 956.*]

4. JUDGMENT (§ 956*)—MATTERS ADJUDICATED—EXTRINSIC EVIDENCE.

If such decree furnished a basis for the presumption that each of such defendants was entitled to a one-third interest, in an action between them or their grantees with knowledge of the extent of their rights, the presumption was *prima facie* only, and could be overturned by evidence.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1822-1825; Dec. Dig. § 956.*]

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Action by James H. Bennett against H. J. Quinlan. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

J. H. Duffy, of Anaconda, and W. A. Pennington, of Butte, for appellant. S. P. Wilson, of Deer Lodge, and John H. Tolan, of Missoula, for respondent.

BRANTLY, C. J. This action was brought to have determined the extent of the respective interests of the plaintiff and defendant in a water right acquired by their predecessors by appropriation for agricultural purposes from Race Track creek, formerly in Deer Lodge, now in Powell, county. The original appropriation was small, and was made by John Duncan in 1871. It was enlarged to 400 inches by Duncan and L. Strickland in 1872; the diversion being completed on June 5th of that year. They each held a possessory right upon the public lands lying along the south side of the stream. They made the appropriation jointly, and constructed a ditch which they used in common to a point at which a change in the direction became necessary in order that each might convey the amount of water

needed to his own lands. From this point each constructed his own ditch. Title to the lands held by them, respectively, was subsequently acquired by them or their respective successors by patent directly from the federal government or by deed from the Northern Pacific Railroad Company. In 1881 one Magone succeeded Strickland in his right to a portion of the lands then held by him, and to his entire interest in the water right and ditch. Magone subsequently acquired other lands. On April 1, 1910, the plaintiff purchased substantially all of his holdings, including his interest in the water right described in the conveyance as an undivided one-half interest. In 1884 John and Henry Quinlan succeeded by purchase to the rights and interests of Duncan, including that held by him in the ditch and water right. The defendant, a son of Henry Quinlan, thereafter became, and when this action was brought and tried was, the owner of the Duncan interests by conveyance from his father and John Quinlan. In 1887 Magone and the two Quinlans, desiring to cultivate portions of their land lying upon the slope above the Strickland-Duncan ditch, jointly constructed a second ditch from a point on the creek about $3\frac{1}{2}$ miles above the head of the Strickland-Duncan ditch. They used this in common, just as they did the old ditch, down to a point at which it became necessary for each to construct a branch for his own use. The diversion through this ditch was not, nor was it intended to be, an additional appropriation. The water diverted through it was used under the old right. In 1890 an action was brought by one P. H. Meagher, who owned lands lying on Race Track creek near the Magone and Quinlan lands, and also claimed prior right to the use of water from the creek, to have the relative priorities of all the rights appropriated from it settled and determined. This case is referred to in the pleadings and evidence under the title of *Meagher v. Glover et al.* All the claimants of rights from the creek were made parties defendant, including Magone and the Quinlans. The court found the dates and amounts of the respective appropriations, and on July 22, 1890, rendered a decree determining the rights and priorities of all of the parties accordingly. With reference to the Magone-Quinlan right the court found: "(1) That the said defendants in the year 1871 appropriated of the waters of Race Track creek, described in plaintiff's complaint, 400 inches thereof, measured as provided by the statutes," etc. "(2) That said water was appropriated by means of a ditch of sufficient capacity to convey said amount of water." The decree, after reciting that the cause was heard upon the complaint, the separate answers of the several defendants, and "the stipulation on file herein," adjudged that "the plaintiff and each of the defendants are the owners and entitled to

the use of the waters of Race Track creek, * * * said waters to be diverted from said creek * * * in the order and manner hereinafter named: * * * (8) John Quinlan, Henry Quinlan, and Ed Magone, four hundred inches. * * * That the water be measured according to the statutes of the state of Montana for the measurement of water." It further ordered and adjudged "that the plaintiff and each of the defendants, in the order named, have the right to the use of the waters of Race Track creek for the purposes of irrigation, domestic use, and for watering stock. That the defendants and each of them are hereby enjoined and restrained forever from diverting or interfering with the waters of said creek, except that each of said defendants may in the order named make reasonable use thereof in the amount named and for the purposes mentioned, and until each defendant has used the water in the manner and amount mentioned [and] each other defendant is restrained from using or diverting the same."

The complaint contains two counts. In the first the plaintiff bases his claim to an undivided one-half interest upon the decree. He alleges that defendant claims adversely to him, and under such claim is interfering with the use and enjoyment of his right. In the second count he alleges title and right to the use of an undivided one-half interest, and an adverse claim by defendant which is without right. The prayer is for a decree declaring that the plaintiff is the owner of an undivided one-half interest, and that defendant's adverse claim be adjudged to be without foundation. In his answer to the first count defendant admits the existence and validity of the decree; but denies that plaintiff by the terms thereof is entitled to an undivided half interest in the amount awarded therein to the predecessors of the plaintiff and defendant, or any other or greater interest than one-third, or 133⅓ inches. He denies all of the allegations of the second count, except that he asserts an interest adverse to plaintiff to the extent of the difference between a one-half and a one-third interest, and pleads the decree as an adjudication that Magone and the two Quinlans were each the owner and entitled to a one-third interest, and alleges that defendant is estopped thereby to claim any other or greater interest. There was issue by reply.

The substantive question presented to the district court for determination was whether the decree of July 22, 1890, was to be taken as a conclusive adjudication of the extent of the rights of Magone and the two Quinlans inter sese, and hence those of plaintiff and defendant, their successors, or whether it should be construed by the aid of extrinsic evidence and their rights declared accordingly. The court held that, since the decree

does not upon its face appear to have adjudicated the rights of these parties and such adjudication was not actually or necessarily included in it, their respective interests were to be ascertained from evidence of the facts as they actually existed when the right was initiated and when the decree was rendered. Accordingly, over objection of defendant, it heard the evidence, found in favor of plaintiff, and adjudged him to be the owner of an undivided one-half interest. The defendant has appealed from the decree and an order denying him a new trial.

[1] The integrity of the decree is assailed on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; and (2) that the former decree was an adjudication of the interests of the parties inter sese, and that the court erred in not accepting it as such. The first contention may be dismissed with the remark that, whatever may be its merits when referred to the first count in the complaint, it must be overruled as to the second count. As appears from the foregoing statement, it is alleged therein that the plaintiff is the owner of the property described, that defendant claims an interest therein adverse to that of plaintiff, and that such claim is without right. This is sufficient to put the defendant upon his defense. *Montana Ore. Pur. Co. v. Boston & Mont. C., etc., Co.*, 27 Mont. 288, 70 Pac. 1114; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; 17 Ency. Pl. & Pr. 326; 2 Pomeroy's Eq. Remedies, § 741.

[2, 3] The second contention is equally without merit. Section 7917, Revised Codes, provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Section 4852 is in part as follows: "In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action." If this latter provision were to be taken as mandatory, the defendant might well insist that the decree in the case of *Meagher v. Glover* was to be accepted, not only as an adjudication of the amounts and priorities of the different appropriations mentioned therein, but also of the rights of joint owners in any appropriation inter sese. But, as pointed out in *Sloan et al. v. Byers et al.*, 37 Mont. 503, 97 Pac. 855, the terms of this provision are permissive only. Therefore, though the rights of all the parties—whether arising out of joint or independent appro-

prations—may be adjudicated in a single decree under the rule declared by section 7917, *supra*, no presumption attaches that any such adjudication has in fact been had unless the fact appears upon the face of the decree itself, or, in any event, from the judgment roll. True, it was said in *McNinch v. Crawford*, 30 Mont. 297, 76 Pac. 698, that in an action brought under section 4852, *supra*, each party is an antagonist of every other party. This statement was made with reference to the condition of the issues presented in that case and is to be so taken and understood, and not to mean that in such an action every possible right touching the subject-matter in controversy is to be presumed to have been adjudicated by the final decree, whether it was put in issue or not, or whether it was necessarily involved in the issues tried. As was suggested in *Sloan et al. v. Byers et al.*, *supra*, it is doubtful whether the Legislature has power to compel parties to litigate their rights when neither questions that of the other nor has committed a wrong with reference to it, for which the other is demanding redress. Hence in *Sloan et al. v. Byers et al.*, inasmuch as neither the decree nor the judgment roll in a former controversy over the water in the same stream showed that the extent of the interests of joint owners *inter sese* in the particular right in question had in fact been adjudicated, it was held that the decree in the former action did not estop the parties thereto from having these rights adjudicated in a second action. In that case the entire record in the former action was before the court at the hearing. In the case at bar it was shown that the record in the case of *Meagher v. Glover*, except the findings and decree, had been lost or destroyed. It cannot be determined from an examination of these remnants of the record that Magone and the Quinlans interpleaded each other, or that there was any controversy between them as to the extent of their rights *inter sese*. Indeed, so far as they furnished a basis for any inference, it is that the court adjudicated to them a common right in the ditch and water both, without regard to the extent of their individual interests. The findings refer to the right as a single entity—the property of all of these defendants. The decree refers to it in the same way; whereas, if they had interpleaded each other and had submitted their rights to the court for adjudication, the decree would undoubtedly have said so in unmistakable terms. It is true that the introductory recitals in the decree state that the cause was heard upon the complaint, the separate answers of the defendants, and “the stipulation on file herein,” but when we note that in the enumeration of the several rights adjudicated—35 in all—several of them were jointly awarded to two or more persons, we do not think that statement imports into the adjudging

portion of the decree any greater certainty. The court, having found itself thus left without evidence in the record to enable it to ascertain the issues made and tried, properly refused to accept the decree as conclusive, and held that recourse must be had to parol evidence to ascertain what in fact had been adjudicated by it, and that, if the Magone and Quinlan rights had not been determined, it was incumbent upon it to determine them. *Kleinschmidt v. Binzel*, 14 Mont. 31, 35 Pac. 460, 43 Am. St. Rep. 604.

In *Russell v. Place*, 94 U. S. 608, 24 L. Ed. 214, in speaking of the admissibility of parol evidence to show what issues had been tried in a former controversy, said: “It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudications actually made, when the record leaves the matter in doubt, such evidence is admissible.” This case is cited, with others to the same effect, in *Kleinschmidt v. Binzel*, and the above paragraph is therein quoted with approval.

There was scarcely any conflict in the evidence as to what the facts were, either as to the issues tried in *Meagher v. Glover*, or as to what the relative rights of Magone and the Quinlans *inter sese* were, and hence what are those of the plaintiff and the defendant. The court found that Magone and the Quinlans made common cause as against all the other parties, but that as among themselves there was no controversy whatever. There is no complaint, nor is there any foundation for any, that the findings are not supported by the evidence. Counsel say in their brief that, inasmuch as the decree in *Meagher v. Glover* adjudged the right to Magone and the Quinlans jointly, the legal presumption attaches that their shares were equal, and that, since the defendant acquired the Quinlan interests by purchase, the presumption is conclusive that he thus became the owner of a two-thirds interest. They invoke the rule recognized generally in this country that when two or more parties acquire an estate by the same act, deed, or devise, and

no indication is therein made to the contrary, they are presumed to hold as tenants in common (Washburn on Real Property, § 878), and insist that the decree should, for this reason, have been accepted as conclusive. As we have already pointed out, the decree does not on its face purport to adjudicate the rights of the parties inter sese. This made it incumbent upon the district court to ascertain what issues were determined, and to determine such as it appeared were not within the issues tried in that case. The title of the parties did not vest under the decree in any sense of the term "vest." The question as to the extent of the interests of the parties was thus left at large, to be determined by reference to the evidence showing the inception of the interests, viz., the original appropriation, and the rights claimed and conceded by each of the joint owners up to the date of the decree and subsequent to that time. The court found, in effect, that the extent of the interest acquired by the predecessor of plaintiff under the original appropriation was an undivided one-half. There is no conflict in the evidence on this point. While the findings are not specific as to what the course of conduct observed by the parties subsequent to the date of the appropriation was, the evidence is clear that Duncan and Strickland each claimed for himself, and conceded to the other, a one-half interest; that Magone on the one hand, and the Quinlans on the other, after they had acquired the interests of these appropriators, made the same claims and concessions, and that no claim was made by any one to the contrary until long after the decree was rendered. Indeed, neither Henry nor John Quinlan ever questioned the extent of Magone's right. It was first seriously questioned by the defendant after he had succeeded to the Quinlan interests, and then only after the plaintiff had acquired the Magone interest.

[4] Let it be assumed, however, that the decree furnished a basis for the presumption that Magone and the Quinlans were entitled to a one-third interest each. As between them, this presumption was *prima facie* only, and could be overturned by evidence showing the facts. *Shiels v. Stark*, 14 Ga. 429; *Edwards v. Edwards*, 39 Pa. 369; 38 Cyc. 74. Though a different rule might apply to persons who purchased from them without notice of the actual condition of the title, and on this point we express no opinion, the evidence shows that both the plaintiff and the defendant at the date of the conveyances under which they hold had full knowledge of the extent of the rights of their predecessors. Therefore the presumption was only *prima facie* as to them.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

MOSS v. GOODHART et al.

(Supreme Court of Montana. April 15, 1913.)

1. APPEAL AND ERROR (§ 171*) — CHANGING THEORY ON APPEAL.

Where a cause was tried upon the theory that it was a suit in equity, the appellant was bound by the theory he adopted in the court below, and could not urge for review matters not reviewable in equitable suits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

2. TRIAL (§ 373*)—JURY—INSTRUCTIONS.

In suits in equity, no instructions, except the formal ones, should be given, and no general verdict submitted, and error cannot be predicated upon the giving or refusal of instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 883; Dec. Dig. § 373.*]

3. APPEAL AND ERROR (§ 931*) — PRESUMPTIONS TO SUPPORT JUDGMENT.

On appeal in suits in equity, the trial court is presumed to have disregarded incompetent testimony, unless it appears that it influenced the decision in some material aspect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

4. CORPORATIONS (§ 211*) — STOCKHOLDER'S ACTION—PETITION.

In a stockholder's action, whenever a demand on the corporation or its receiver to bring an action is necessary, the allegation that it was made and refused is an essential ingredient to the statement of a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. § 211.*]

5. BANKS AND BANKING (§ 246*)—NATIONAL BANKS—STOCKHOLDER'S ACTION—EVIDENCE.

In a stockholder's action against a former receiver of a national bank for effecting a sale of property on which the bank had a chattel mortgage for an inadequate price, he was not entitled to recover for the benefit of the bank, its stockholders and creditors, where it was not shown that any demand to bring the action was made on the board of directors, the then receiver, or the comptroller of the currency.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 911, 912; Dec. Dig. § 246.*]

6. BANKS AND BANKING (§ 246*)—NATIONAL BANK RECEIVERS — LIABILITY TO STOCKHOLDERS.

A stockholder of a national bank was not entitled to recover from a former receiver for effecting a sale of property on which the bank held a chattel mortgage at an inadequate price for his own benefit, on the ground that under the federal statutes he would be liable for an assessment equal to the par value of his stock, and therefore had a financial interest in the collection of the assets of the bank, where it did not appear that he had paid anything to the receiver, or that any assessment had been or would be levied on his stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 911, 912; Dec. Dig. § 246.*]

7. PLEADING (§ 433*)—AMENDMENT—TREATING AS AMENDED AFTER JUDGMENT.

Where a complaint fails to allege a fact necessary to a cause of action, but evidence to prove such fact is received without objection, the complaint will be treated after judgment as amended to admit such proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

8. WITNESSES (§ 268*) — CROSS-EXAMINATION — SCOPE.

It was error to restrict defendant's cross-examination of plaintiff's witnesses as to matters tending to throw light upon any of the issues involved.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by P. B. Moss against Richard W. Goodhart and another. From a judgment for plaintiff, the defendant named appeals. Reversed and remanded.

W. M. Johnston and H. J. Coleman, both of Billings, for appellant. O. F. Goddard and F. L. Tilton, both of Billings, for respondent.

HOLLOWAY, J. On July 2, 1910, P. B. Moss was president of and principal stockholder in the First National Bank of Billings, when by order of the comptroller of the currency the bank was closed. Richard W. Goodhart was appointed receiver and immediately took possession of the bank's books and assets, and continued to act as such receiver until superseded by Philip Tillinghast, on October 25, 1910. When Goodhart took possession, C. D. Prather was indebted to the bank upon a promissory note for \$15,000. The indebtedness was secured, in part at least, by a chattel mortgage upon certain range horses and cattle. Prior to the maturity of the Prather note, and about September 19, 1910, a sale of the mortgaged property to R. D. Currier was effected for \$5,000, which amount was paid to the receiver and by him credited on Prather's note. After Tillinghast succeeded to the receivership, this action was commenced by Moss against Goodhart and Currier. The complaint recites the facts above more in detail, and alleges that the mortgaged property was reasonably worth \$11,700; that Goodhart and Currier entered into a conspiracy to force Prather to sell the property to Currier for a sum much less than the fair value; and that Goodhart, by threats and menaces, succeeded in compelling the sale, to the injury of the stockholders and creditors of the bank in the sum of \$6,700. It is further alleged that on or about November 22, 1910, the plaintiff "made demand upon the said Tillinghast, as receiver of the said bank, to bring suit against the said defendant Goodhart and the said defendant Currier to set aside said sale of said property, and for an accounting to the said trust for the value thereof, which demand was by the said Tillinghast, receiver of the said bank as aforesaid, then and there refused." The concluding paragraph of the complaint and the prayer read as follows: "This suit is brought and prosecuted in the interests of this plaintiff and of the other stockholders of said bank, as well as in the interests of all of

the creditors of said bank, to the end that justice and equity may be done in the premises. Wherefore the plaintiff demands that the said sale, or pretended sale, of the said horses and cattle made by the said C. D. Prather to the said Currier be declared null and void, and that the bill of sale executed on such sale by the said C. D. Prather to the said Currier be declared null and void and of no effect, and that the defendant herein be required to account to, and pay over, to the said Philip Tillinghast, the receiver of the said First National Bank of Billings, and to said trust, the said sum of \$6,700, to be by the said Tillinghast treated as other funds and assets of the said trust, and for such other and further relief as the court may find meet and agreeable to equity, and for costs of suit." To this complaint a demurrer, general and special, was interposed and overruled, and the defendants then answered, denying all the allegations of conspiracy, intimidation, or wrong conduct on the part of either of them, and alleging that the sale of the mortgaged property was made in good faith for the reasonable value thereof and for the best interests of the bank and its creditors. The affirmative allegations of the answer were put in issue by reply.

The cause was tried to the court sitting with a jury. At the close of the testimony, instructions upon the questions of law involved were settled and submitted to the jury. A general verdict in favor of the plaintiff and against the defendants for \$3,312.50, and also 12 special findings, were returned. Counsel for the defendants moved the court to adopt four of the findings as made, to reject the general verdict and the other special findings, and also to find in favor of the defendants upon some eight questions which were presented. The court denied the request, rejected the first two special findings made by the jury, adopted the others and the general verdict as against defendant Goodhart, but in favor of defendant Currier, and further found: "That the defendant Richard W. Goodhart carelessly, negligently, and wantonly failed to represent the best interests of his trust, the said plaintiff, the First National Bank of Billings and its stockholders and creditors, and sold the property described in the complaint for a sum less than its reasonable market value to the damage of the said First National Bank, its creditors, and the said P. B. Moss in the sum of \$3,312.50." The conclusion of the trial court was that the plaintiff should recover the amount of the verdict for the benefit of the bank, its receiver, creditors, and stockholders. The judgment rendered recites that: "P. B. Moss do have and recover of and from the said defendant Richard W. Goodhart the sum of \$3,312.50 together with interest thereon at the rate of 8 per cent. per annum from the date hereof until paid, and together with costs and dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bursements incurred in said action, amounting to the sum of \$——." It is from that judgment and from an order denying him a new trial that defendant Goodhart appeals.

[1-3] 1. The errors assigned upon the instructions given and refused, and upon the rulings of the court admitting evidence, are not available to appellant. It is unnecessary for us to determine the character of this action; whether it is a suit in equity to set aside the sale of the mortgaged property, or for an accounting, or an action at law for damages. It appears from the record that the cause was tried upon the theory that it is a suit in equity, and appellant is bound by the theory he adopted in the court below. *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *Dempster v. Oregon Short Line Ry. Co.*, 37 Mont. 335, 96 Pac. 717. Upon that theory no error can be predicated upon the giving or refusal to give instructions. No instructions except the formal ones should be given; no general verdict should be submitted; and, if evidence be admitted which should not be, the presumption prevails that the trial court disregarded it, unless it appears that it influenced the decision in some material aspect. *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25; *Rumping v. Rumping*, 41 Mont. 33, 108 Pac. 10; *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749.

[4, 5] 2. The principal controversy is over the right of plaintiff Moss to maintain this action. The plaintiff's allegation that before commencing this action he demanded of Tillinghast that he bring it and that this demand was refused is denied in the answer. There was not any proof whatever offered in support of the allegation. Counsel for respondent concede the general rule to be, as heretofore stated by this court, that a stockholder cannot prosecute an action for redress for an injury to a corporation, unless it appears that a demand has been made and refused or a situation is disclosed from which it is manifest that an appeal to the corporate authorities would be useless. *Brandt v. McIntosh*, 47 Mont. —, 130 Pac. 413. If the corporation is in the hands of a receiver, the demand should be made upon that officer. *Boston & Mont., etc., Co. v. Montana Ore Pur. Co.*, 24 Mont. 142, 60 Pac. 990. This is the rule applicable to ordinary, private corporations. If, however, the corporation which is in the hands of a receiver be a national bank, the demand and refusal are still necessary, though there is some diversity of opinion as to whether the demand should be made upon the corporation (*Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840), or upon the receiver, or the comptroller of the currency. *Brickerhoff v. Bostwick*, 23 Hun (N. Y.) 237. Our Code declares that every action must be prosecuted in the name of the real party in interest. There is not any right in Moss to act for the

creditors of the bank, and he can only act for the bank itself by showing that he has made demand upon the corporation (that is, upon the board of directors) or the receiver in charge, or the comptroller of the currency, and that his demand has been refused. 4 *Thompson on Corporations*, 4180, 4181; 10 *Cyc.* 965. The complaint in this instance does not proceed upon the theory that demand was excused, but upon the theory that a demand was necessary and was actually made. Whenever a demand is necessary, the allegation that such demand was made and refused is an essential ingredient to the statement of a cause of action by the stockholder. *O'Connor v. Power Co.*, 184 N. Y. 46, 76 N. E. 1082; *Flynn v. Brooklyn C. R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Cogswell v. Bull*, 39 Cal. 320; *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244; *Coble v. Beal*, 130 N. C. 533, 41 S. E. 793; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; 10 *Cyc.* 983.

In their brief, counsel for respondent also concede that there was not "any right of action in the plaintiff below because of the loss to and decrease in the value of his stock in the bank. A right of action based upon this ground would unquestionably be in the corporation, or in the receiver thereof"—citing *Howe v. Barney* (C. C.) 45 Fed. 670; *Hirsh v. Jones* (C. C.) 56 Fed. 138; *McMullen v. Ritchie* (C. C.) 64 Fed. 262. If, then, this action is brought on behalf of the corporation or its creditors, or because of depreciation in the value of plaintiff's stock, the plaintiff, in failing to prove demand and refusal, failed to make out a case, and there is not any attempt to defend against this conclusion. It is unnecessary for us to determine upon whom the demand should be made in an action brought on behalf of the First National Bank of Billings, for, notwithstanding the complaint alleges that a demand was made upon Tillinghast, plaintiff now repudiates the idea that this is a derivative action at all. It is insisted that since plaintiff, as a stockholder of the bank, is liable for an assessment equal to the par value of his stock, under section 5151, U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3465), he "had a financial interest in the collection of the assets of the bank, which interest was personal and independent of and separate from the interest of the corporation itself. A sacrifice of any of the assets of the bank meant an equal personal and individual loss to the stockholders thereof, entirely distinct from the loss to the corporation." And again: "The plaintiff is under a personal liability to the amount of the par value of the stock, and in bringing this suit he brought it for his own personal benefit." We have taken these excerpts from the brief of respondent in an effort to state his theory of the nature of his claim. If we understand his contention aright, it is that Goodhart, while receiver, sacrificed the security

held for the Prather note, with the result that \$6,700, the difference between the amount realized by Goodhart and the alleged actual value of the mortgaged property, has been lost to the funds of the bank, which sum this plaintiff, as a stockholder, will or may be required to make good in the proportion that his stock bears to the total capital stock of the bank.

We would be reasonably certain that we have stated respondent's position correctly, but for the many changes which appear to have occurred in his theory of his case from its inception to the final submission in this court. As indicated in the quotation from his complaint above, he brought this action in the interest of himself and other stockholders and the creditors of the bank. After hearing the evidence, the trial court concluded that the recovery should be for the bank, its receiver, its creditors and stockholders, while the judgment entered was an ordinary money judgment in favor of plaintiff Moss personally. The alleged demand upon Tillinghast was to institute a suit "to set aside the sale" of the mortgaged property, and the prayer of plaintiff's complaint is that the sale "be declared null and void." If the purpose of this suit was to set aside the sale, the finding in favor of Currier, who was a party to the sale, amounted to a denial of the relief sought, while the judgment entered in favor of Moss personally takes no account of the rights of the other stockholders or the creditors of the bank. Apparently the judgment is in complete harmony with the theory of respondent at this time, as indicated by the excerpts from his brief above, but it is without any foundation whatever in the pleadings and contradictory of the trial court's conclusion. Of course, if respondent is right now in asserting that he brought this action for his own personal benefit and for an injury which he suffered independently of the bank and its creditors, then it was not necessary to allege or prove a demand, and for the very obvious reason that it was not a matter of concern to the corporation at all. Upon this the authorities are uniform. 4 Thompson on Corporations, § 4590.

[8] If the action was brought on behalf of the bank, plaintiff has failed because he has not shown a demand and refusal, or any excuse for not making demand. If it was brought to redress a grievance peculiarly plaintiff's own or to recover for plaintiff's own benefit, then his complaint does not state a cause of action, and the general demurrer should have been sustained. The mere fact that under section 5151, U. S. Revised Statutes, he may be called upon to respond to an assessment upon his stock is not sufficient to give him a cause of action. He cannot anticipate that he will be injured. The bare possibility that he will be damaged is not sufficient to entitle him to a judgment.

Courts cannot adjudicate with reference to events which may or may not transpire. There is not any allegation that an assessment has been or will be levied upon plaintiff's stock; neither is there any allegation that plaintiff has paid into the receiver's hands any sum whatever, or that he ever will be required or able to do so. And in passing it may be said that there is not any suggestion in the evidence either that plaintiff has paid, or been requested to pay, any assessment upon his stock. If he has not paid, he has not been injured; and, if he is never required to pay, he never will be injured.

[7] 3. Counsel for appellant also insist that the complaint fails to state a cause of action in that it fails to disclose that Prather is insolvent or that any loss will result from the sale of the mortgaged property to Currier for the price received; and this argument would be unanswerable but for the fact that without objection evidence was introduced from which it is fairly inferable that Prather was insolvent at the time of the sale, and that this mortgaged property was the only resource from which to obtain payment of his indebtedness to the bank. Under such circumstances, after judgment, this court will treat the complaint as amended to admit the proof. *Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325; *Post v. Liberty*, 45 Mont. 1, 121 Pac. 475; *O'Brien v. Corra-Rock Island M. Co.*, 40 Mont. 212, 105 Pac. 724.

[8] 4. Because of the uncertainty as to the theory upon which plaintiff has proceeded, we would be unable to make final disposition of this case, if there were not any other errors appearing. On the one hand, there is much evidence in the record dealing with the management of the bank which is wholly immaterial upon any theory of the case, while on the other we think the trial court committed error in unduly restricting defendant in the cross-examination of plaintiff's witnesses. The issues presented related to the conspiracy alleged to exist, but which the trial court impliedly found did not exist; the fair market value of the mortgaged property; whether defendant Goodhart exercised reasonable care to ascertain the value; and whether by coercion he forced Prather to sell the property at a sacrifice. Any evidence, if otherwise competent, which would tend to throw light upon any of these issues should have been received. Courts exist to administer justice as nearly as may be, and to this end the tendency of modern practice is to liberalize the procedure in order that the very truth respecting the controversy may be disclosed.

In *Knuckey v. Butte Electric Ry. Co.*, 45 Mont. 106, 122 Pac. 280, this court said: "We think the court unduly restricted the cross-examination, and again suggest the propriety of allowing the fullest scope for such ex-

aminations, to the end that the jury may be advised of all facts having a legitimate bearing upon the issues presented." And in *State v. Biggs*, 45 Mont. 400, 123 Pac. 410, these observations were made: "The right of cross-examination is a substantial one and may not be unduly restricted. It may extend, not only to facts stated by the witness in his original examination, but to all other facts connected with them which tend to enlighten the jury upon the question in controversy. *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Hefferlin v. Karlman*, 30 Mont. 343, 76 Pac. 757; *State v. Howard*, 30 Mont. 518, 77 Pac. 50; Rev. Codes, § 8021. The rule necessarily includes questions, the purpose of which is to bring out facts illustrative of the motives, bias, and interest of the witness, or as reflecting upon his capacity and memory. The right would be of little value if inquiry into these matters were not permitted."

Without stopping to consider separately each particular error predicated upon rulings of the trial court restricting defendants' counsel in their cross-examination, we think the foregoing will suffice.

The judgment and order are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

HENGST v. THOMPSON OIL & GAS CO.
(Supreme Court of Oklahoma. Sept. 12, 1912.
Rehearing Denied May 6, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564*)—CASE-MADE—TIME OF SERVICE.

A purported case-made, which is not served within three days after the judgment or order appealed from is entered or within an extension of time duly allowed, is a nullity, and cannot be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 614*)—VOID CASE-MADE AS TRANSCRIPT—CERTIFICATE BY CLERK.

Where a case-made has been held void because not signed, settled, and allowed in time, and where the clerk of the trial court has failed to attach any certificate thereto, but instead attests the signature of the trial judge to the judge's certificate to the case-made, such record cannot be considered as a transcript of the record of the court below, and this court cannot consider the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713; Dec. Dig. § 614.*]

Commissioners' Opinion, Division No. 1.
Error from District Court, Creek County;
W. L. Barnum, Judge.

Action by the Thompson Oil & Gas Company against William C. Hengst, as curator of Joseph A. Hengst, a minor. Judgment for plaintiff, and defendant brings error. Dismissed.

Frank L. Mars, of Sacramento, Cal., George L. Burke, and W. Morris Harrison, both of Sapulpa, for plaintiff in error. Preston C. West, of Muskogee, for defendant in error.

SHARP, C. On May 11, 1910, in the district court of Creek county, judgment was rendered in favor of the defendant in error against the plaintiff in error for \$2,263.75 and interest on account of a refund due plaintiff for moneys advanced on an oil and gas mining lease upon a portion of the allotment of said Joseph A. Hengst, the lease never having been approved by the Secretary of the Interior, and no title therein or rights thereunder ever having vested in the said oil and gas company. Upon the rendering of judgment in favor of plaintiff, defendant asked and obtained an extension of 60 days in which to prepare and tender a case-made.

[1] A purported case-made was served upon counsel for defendant in error August 5, 1910, 26 days after the expiration of the extension of time fixed in the decree of the court. No application for a further extension of time was asked or granted. As has been repeatedly held by this court, a party desiring to appeal has three days by statute in which to serve a case-made after the judgment or order appealed from is entered, and unless such case-made is served within that time, or within an extension of time allowed by the judge or court within said time, the case will not be considered in this court. *Board of Com'rs v. Porter et al.*, 19 Okl. 173, 92 Pac. 152; *Devault et al. v. Merchants' Exchange Bank*, 22 Okl. 624, 98 Pac. 342; *Bettis v. Cargile et al.*, 23 Okl. 301, 100 Pac. 436; *Ellis v. Carr et al.*, 25 Okl. 874, 108 Pac. 1101; *Lankford v. Wallace*, 26 Okl. 857, 110 Pac. 672; *Carr v. Thompson et al.*, 27 Okl. 7, 110 Pac. 667; *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388; *London & Lancashire Fire Ins. Co. v. Cummings et al.*, 23 Okl. 126, 99 Pac. 654; *McCoy v. McCoy et al.*, 27 Okl. 371, 112 Pac. 1040; *Maddox v. Drake*, 27 Okl. 418, 112 Pac. 969; *Willson v. Willson*, 27 Okl. 419, 112 Pac. 970; *Arnold v. Moss*, 27 Okl. 524, 112 Pac. 995.

The judge's certificate recites that the case-made was duly served in due time; but this is not sufficient, as a certificate of a trial judge to the case-made imports only the truthfulness of the preceding statements in the case-made. In the absence of an order of the court extending the time in which the plaintiff in error could serve a case-made, service thereof could not be made beyond the time originally fixed; and a failure to serve within that time renders the case-made void, and this court is without jurisdiction to re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

view any question attempted to be presented thereby.

[2] The case-made contains no certificate of the clerk, but instead merely an attestation of the trial judge's certificate, hence cannot be considered as a transcript of the record, and we cannot therefore review such errors as might appear upon the record proper. *City of Wagoner et al. v. Gibson et al.*, 32 Okl. 14, 121 Pac. 625.

For the reason stated, the petition in error should be dismissed.

PER CURIAM. Adopted in whole.

SMYSER & McCORMICK v. HUDSON.

(Supreme Court of Oklahoma. March 11, 1913.
Rehearing Denied May 6, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 823*)—PARTIES—DISMISSAL.

A petition in error by one of several defendants against whom judgment was entered jointly for the recovery of a specified sum, to which the other defendants are neither made parties plaintiff nor defendant in error, must be dismissed for want of necessary parties.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. § 323.*]

Error from District Court, Pawnee County; *L. M. Poe, Judge.*

Action by Frank Hudson against Smyser & McCormick and others. Judgment for plaintiff, and from an order denying motion of defendants named for new trial they alone bring error. Dismissed.

Henry S. Johnston, of Perry, for plaintiffs in error. W. L. Eagleton, of Norman, for defendant in error.

DUNN, J. This case presents error from the district court of Pawnee county. November 1, 1910, the said court rendered a joint judgment against the Arkansas Valley Townsite Company and H. C. Hanna, who were held liable upon a certain promissory note. From an order of the court denying a motion for new trial of Smyser & McCormick, appeal has been lodged in this court.

The defendant in error now moves to dismiss the cause upon the ground of nonjoinder of proper parties. The record shows that the motion which was denied was filed on behalf of Smyser & McCormick, and time to make and serve case was granted to them alone, and the case-made was served upon the defendant in error, Frank Hudson, only, and that the time and place of settling and signing the case-made was not served upon nor waived by any of the other defendants. Hence it follows from the uniform holding of this court in a large number of cases that the motion to dismiss must be sustained. *Bullen v. Hudson et al.*, 31 Okl. 818, 124 Pac.

1; *Seton v. Hudson*, 31 Okl. 820, 124 Pac. 1. The appeal is accordingly dismissed.

HAYES, C. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., absent.

JOHNSTON et al. v. CHAPMAN et al.
(Supreme Court of Oklahoma. April 22, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 428*)—OBJECTION—EVIDENCE.

Where the sufficiency of a petition is challenged solely by an objection to the introduction of evidence thereunder, such objection, not being favored by the courts, should generally be overruled, unless there is a total failure to allege some matters essential to the relief sought, and should seldom, if ever, be sustained when the allegations are simply incomplete, indefinite, or conclusions of law.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428; * *Trial*, Cent. Dig. § 219.]

2. SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to support the verdict and judgment rendered thereon.

Error from the County Court of Washington County; *A. S. Dumenil, Judge.*

Action by A. Chapman and another against H. G. Johnston and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Veasey & Rowland and J. D. Talbott, all of Bartlesville, for plaintiffs in error. **J. R. Charlton and A. F. Vandeverter**, both of Bartlesville, for defendants in error.

KANE, J. This was an action upon an account stated, commenced by the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below. Upon trial to a jury there was a verdict for the plaintiffs, upon which judgment was rendered, to reverse which this proceeding in error was commenced.

[1] The first assignment of error is to the effect that the court erred in overruling an objection to the introduction of any testimony, upon the ground that the petition does not state facts sufficient to constitute a cause of action. After setting out the allegation claimed to be defective counsel says: "This is merely the statement of a conclusion by the pleader." In *Hogan v. Bailey*, 27 Okl. 15, 110 Pac. 890, it was held that, "where the sufficiency of a petition is challenged solely by an objection to the introduction of evidence thereunder, such objection, not being favored by the courts, should generally be overruled, unless there is a total failure to allege some matters essential to the relief sought, and should seldom, if ever, be sustained when the allegations are simply incomplete, indefinite, or conclusions of law." To the same effect is *Marshall et al. v. Homier et al.*, 13 Okl. 284, 74 Pac. 368.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] The next assignment of error is to the effect that the court erred in overruling the demurrer to the evidence. We have examined the record, and are of the opinion that the evidence reasonably supports the verdict of the jury.

Other contentions advanced in the brief of plaintiff in error have been considered, and found so far untenable that their discussion will serve no useful purpose.

The judgment of the court below is affirmed. All the Justices concur.

COLONIAL JEWELRY CO. v. BROWN
et al.

(Supreme Court of Oklahoma. April 22, 1913.)

(Syllabus by the Court.)

EVIDENCE (§ 444*)—PAROL—CONTRACTS.

Evidence offered for the purpose of showing that a written instrument was delivered conditionally does not constitute contradicting or varying a written instrument by parol. Such evidence does not tend to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. A written contract must be in force to make it subject to the parol evidence rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.*]

Error from the County Court of Pontotoc County; Conway O. Barton, Judge.

Action by the Colonial Jewelry Company against J. W. Brown and another, doing business under the firm name of Brown & Johnson, etc. Judgment for defendants, and plaintiff brings error. Affirmed.

Thomas P. Holt, of Ada, for plaintiff in error. I. M. King and J. W. Dean, both of Ada, for defendants in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, upon a jewelry contract or order. At the commencement of the action, an order of attachment was issued upon an affidavit of the plaintiff, to the effect that the defendants were attempting to dispose of and otherwise conceal their property with intent to hinder and delay plaintiff in collecting its debt, and was otherwise violating the Bulk Sales Law of the state of Oklahoma (Comp. Laws 1909, §§ 7908-7910). The defendants admitted the execution of the contract sued upon, but alleged that the same was placed in the hands of the defendants under an agreement, whereby it was not to become effective until five days after its execution, during which time the defendants were at liberty to cancel the order. They further alleged that the goods were shipped before the expiration of the five days, notwithstanding the defendants in the meantime had notified the plaintiff that they did not want

the goods described in the order, and requested it to cancel the same. They further alleged that they had in no way violated the Bulk Sales Law of the state of Oklahoma, and that no grounds for attachment existed, and that by reason of the wrongful suing out of the same they had been damaged in the sum of \$500. Upon a trial to a jury upon the merits, a verdict was returned for the defendants in the sum of \$100 and the dissolution of the attachment, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Counsel for plaintiff in error presents his grounds for reversal under three heads, as follows: "(1) The trial court erred when it permitted defendants to introduce parol evidence to contradict and vary the terms of a written contract, by which evidence a verbal agreement was shown different from the written, but not incorporated therein, and made prior to and contemporaneous with the written instrument. (2) The trial court erred in giving the instructions that were given. (3) The trial court erred in refusing to give the special instructions asked for by the plaintiff." Counsel states his position in his brief in effect as follows: When defendants signed the contract sued upon, the same became and was a binding obligation, and was not subject to countermand, especially after the order had been received and the goods delivered to an express company for delivery to defendants as per order; and defendants are estopped from setting up a different verbal agreement made prior to and contemporaneous with the written contract, whereby the contract was not to take effect until the member of the partnership who signed the same could see the other partner and discuss with him the deal, and parol testimony tending to prove said agreement was unquestionably inadmissible and this one proposition involves the whole case.

We do not understand that evidence offered for the purpose of showing that a written instrument was delivered conditionally constitutes contradicting or varying a written instrument by parol. Such evidence does not tend to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. A written contract must be in force to make it subject to the parol evidence rule.

Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. *Tovera v. Parker*, 128 Pac. 101; *Horton v. Birdsong*, 129 Pac. 701. In *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280, it was held: "When an unconditional note is given for the purchase of certain property, parol evidence is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

admissible to show an option on the part of the purchaser to rescind the sale within a certain time, as this does not contradict the note, but sets up an independent agreement made at the same time, that upon a condition or contingency the note was to become void." Mr. Joyce in his Defenses to Commercial Paper (section 812) makes the distinction between the two classes of cases very clear: "No rule is more elementary than that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument. This is not to vary or contradict a written instrument, but to prove that no contract was ever made; that its obligation never commenced." As the instructions refused and given are objected to upon the theory that the first contention of plaintiff in error is correct, what we have already said disposes of such assignments of error. Counsel for plaintiff in error in conclusion says that "we submit there was no evidence to sustain a verdict of \$100 against plaintiff for the wrongful suing out of said attachment." We have examined the evidence, and are of the opinion that it reasonably tends to support the verdict of the jury.

The judgment of the court below is therefore affirmed. All the Justices concur.

FT. SMITH & W. R. CO. v. SOLSBERGER et al.

(Supreme Court of Oklahoma. April 22, 1913.)

(Syllabus by the Court.)

PLEADING (§ 290*)—AGENCY—VERIFIED PETITION—ADMISSIBILITY OF EVIDENCE.

Where the petition positively alleges the appointment and authority of an agent, and the reply thereto is an unverified general denial, the allegations of appointment and authority of the agent are taken to be true, and evidence tending to dispute such allegation is properly excluded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863, 886½; Dec. Dig. § 290.*]

Error from the County Court of Okfuskee County; T. T. Doyle, Judge.

Action by John Solsberger and others against the Ft. Smith & Western Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

C. E. & H. P. Warner, of Ft. Smith, Ark., and J. B. Patterson, of Okemah, for plaintiff in error. W. A. Huser and C. B. Conner, both of Okemah, for defendants in error.

KANE, J. This was an action commenced by the defendants in error, plaintiffs below,

against the plaintiff in error, defendant below, to recover a certain sum alleged to be due the plaintiffs for services rendered by them in attending an injured employé of the defendant, in pursuance of an oral contract made by a section foreman of the defendant. Upon trial to a jury there was a verdict for plaintiffs, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The petition contained an allegation to the effect that the section foreman was the agent of the defendant, with full authority to bind the railway company in the manner stated in the petition. The answer was an unverified general denial. Upon trial the defendant attempted to introduce evidence tending to limit the scope of the section foreman's authority, as alleged in the petition; whereupon, an objection was sustained to the introduction of such evidence, upon the ground that by virtue of section 5648 of the Compiled Laws of Oklahoma 1909 the question of the appointment and authority of the agent must be taken as true. This objection was well taken. The statute provides that: "In all actions, allegations of the execution of written instruments and indorsements thereon of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." The statute itself seems to constitute a complete answer to the contention of counsel for plaintiff in error. The unverified general denial did not put in issue the question of the appointment or authority of the agent, and therefore, as the statute provides, it "shall be taken as true." The cases of Long v. Shepherd, 130 Pac. 181, and Hughes v. Carlton, 5 Kan. App. 386, 48 Pac. 444, are exactly in point. In the latter case it was held: "Where the answer positively alleges the appointment and authority of an agent to collect money due upon the note and mortgage sued upon and a plea of payment to such agent, and the reply thereto is a general denial without any verification, the allegations of appointment and authority of the agent are taken to be true and no evidence in support thereof is necessary."

The judgment of the court below is affirmed. All the Justices concur.

KINNEY v. HEATHERINGTON et al.
(Supreme Court of Oklahoma. Jan. 21, 1913.
On Rehearing, May 6, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 32*)—DEEDS.

Under section 12, c. 8, p. 95, Sess. Laws 1897, section 1196, Comp. Laws 1909, a deed absolute upon its face, but intended to be de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

feasible, is a mortgage, and a court of equity is required to so decree it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

2. MORTGAGES (§ 32*)—DEED—"DEFEASIBLE."

A quitclaim deed absolute upon its face, reciting receipt of a consideration of \$3,000, was executed and delivered by the ward of plaintiff to a grantee who afterwards died and whose administrator and heirs claimed the land under and by virtue thereof. On the trial of a case brought to set the same aside, and to have the title restored to the grantor, the facts and findings of the court disclosed that the grantor had been having trouble with a concern which claimed rights upon and were crossing the premises against the owner's will, and, believing that some indefinite advantage might come to him by reason of the conveyance, he executed the same to the grantee, who was at that time and had been for a long time prior thereto his confidential friend. No consideration whatsoever was in fact paid for the land, and the transfer was not intended by either of the parties to be a sale nor a gift; the grantee never had nor made any claim of right, title, nor interest in the land, but distinctly and specifically disavowed having any interest therein; nor did he take possession of the same nor of any part thereof, but the grantor continued in its complete possession and had continued to improve and pay the taxes and the interest on the mortgage thereon. Held, that it was not the intention of either of the parties that the grantor was to be divested of any of the beneficial interest in the land nor the grantee to receive it, and that the deed was intended by both to be defeasible, and upon timely application on these facts, there being found nothing due grantee, his estate or his heirs, it is the duty of a court of equity to hold the deed to be a mortgage and cancel it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 2, p. 1931.]

On Rehearing.

3. APPEAL AND ERROR (§ 1100*)—Necessity of DECISION—LOSS OF JURISDICTION.

Section 5, art. 7, of the Constitution (paragraph 190, Williams' Ann. Const. Okl.), is directory, and this court does not lose jurisdiction to determine and render judgment in a case after the lapse of six months from the date of its submission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4380; Dec. Dig. § 1100.*]

Error from the District Court, Pawnee County; L. M. Poe, Judge.

Action by Michael J. McNeal, by his guardian, David Kinney, against J. F. Heatherington, as administrator, etc., and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, and petition for rehearing denied.

Charles J. Wrightsman, of Tulsa, Victor O. Johnson, of Shoshone, Idaho, Louis S. Wilson, of Raton, N. M., and Devereux & Hildreth, of Guthrie, for plaintiff in error. Wm. Blake, of Tulsa, for defendants in error.

DUNN, J. This case presents error from the district court of Pawnee county. February 29, 1908, Michael J. McNeal, by and through his duly appointed guardian, David

Kinney, brought his action against J. F. Heatherington, as the administrator of Henry A. Gifford, deceased, and against the surviving heirs of the said decedent. The object of the suit and the primary facts upon which reliance is based for recovery are best set forth in the petition of plaintiff, which in part reads as follows: "That on December 16, 1907, by the consideration of the county court of said county, Michael J. McNeal was found and adjudged mentally incompetent to manage his property, and the plaintiff was fully and regularly appointed as his guardian. That thereafter, on December 27, 1907, the plaintiff gave bond as required by law and letters of guardianship issued to him and the plaintiff thereby became, ever since has been, and still is, the duly appointed, qualified, and acting guardian of the person and the estate of the said Michael J. McNeal. * * * That on and for some time prior to the 13th day of February, 1907, the said Michael J. McNeal was of unsound mind and was possessed of and under the influence of delusions in reference to the said land, one of which delusions was that he (the said McNeal) was encompassed by enemies who were lying in wait, seeking to destroy the buildings upon said premises by setting them on fire, and the said McNeal was possessed of and under the influence of delusions persuading him that his neighbors were enemies and were plotting against him (the said McNeal) and against his property, and were seeking opportunity to injure him and to destroy his property. That said fears and apprehensions were without foundation in fact and without any reasonable foundation whatsoever, but were mere delusions and were due to the unsoundness of mind of the said McNeal. That on and for some days prior to said February 13, 1907, there was pending certain litigation between the said McNeal and certain other parties having a lease on the aforesaid premises, for oil and gas. That said litigation was commenced February 1, 1907, by said lessee to enjoin the said McNeal from interfering with a right of way, claimed by the said lessee over and across the premises aforesaid and sought to be used by the said lessee in going to and from other leaseholds. That at the commencement of said litigation an injunction was obtained by said lessee against the said McNeal, which writ of injunction was served upon McNeal February 4, 1907. That thereby the said McNeal was frightened and intimidated by threats which he believed had been made to arrest and imprison him (the said McNeal) for alleged violations of the said injunction. That said fears and conduct of the said McNeal were due to his unsoundness of mind and his inability to understand the nature and force and effect of said proceedings and to the delusions possessing, controlling, and influencing the mind of the

said McNeal. For the reasons aforesaid, McNeal was in fear of being arrested, and that upon being arrested he would not be able to give bond for his release, and that he would be kept and confined in jail, and that during said confinement his property would be wasted and destroyed. That all said fears and apprehensions were without foundation in fact and had no reasonable foundation whatsoever, but were incident to the unsoundness of mind of the said McNeal, and induced by the excited and distorted imagination of the said McNeal, and by the delusions controlling and influencing him, and by his lack of comprehension and his inability to understand the proceedings and facts hereinbefore mentioned. That on the 13th day of February, 1907, the said Michael J. McNeal, because of the aforesaid unsoundness of mind and induced by the delusions, fears, and apprehensions aforementioned and for the purposes hereinafter set forth, executed a certain quitclaim deed of conveyance purporting to quitclaim and convey the aforesaid premises to the aforesaid Henry A. Gifford. * * * That the expressed consideration in said deed was the sum of \$3,000, but in truth and in fact said conveyance was merely colorable and wholly without consideration, except as hereinafter stated, and no sums of money or other thing of value was ever paid or promised therefor by the said Henry A. Gifford, nor was any sum of money or other property or thing of value received therefor by the said Michael J. McNeal. That the purpose of the said Michael J. McNeal in executing said deed, in so far as the said Michael J. McNeal was competent and able to entertain a purpose, was to place said property of record in the name of the said Henry A. Gifford to indemnify the said Gifford against any loss which said Gifford might sustain by becoming a surety for the said McNeal in the event that the said McNeal should be arrested and imprisoned in accordance with the fears and apprehensions hereinbefore mentioned, and the further purpose of the said McNeal in executing said conveyance was to divert the hostility of the supposed enemies of the said McNeal from the said premises and to remove the danger that the buildings on said premises might be burned by the said supposed enemies of the said McNeal."

To this petition the defendants filed an answer which, admitting the conveyance, denied generally the balance of the allegations therein contained. A trial was had to the court without the intervention of a jury, which on request made special findings of fact and its conclusions of law as follows:

"That said deed was executed on the 13th day of February, 1907, by the said M. J. McNeal to F. M. Gifford, covering the land described in the petition. That said deed recited a consideration of \$3,000 as the purchase price of said land, and acknowledged

receipt of the same in the face of the deed. That on the 30th day of August, 1907, the grantee named in said deed was killed in a railroad accident at or near Cleveland, Okl. That his death was subsequent to the execution of said deed, and prior to the commencement of this action. That at the time of the conveyance the said McNeal was not insane. That at the time of the execution of the deed, and in the presence of the justice of the peace who took the acknowledgment, the grantee, Gifford, delivered to the grantor, McNeal, a roll of money. That the same was not counted either by the grantor or the grantee. That the justice and another person, who were present at the time, had their attention called to the payment of the money by McNeal, the grantor, and that the deed was delivered to the grantee in their presence by the grantor. That said deed was afterwards duly recorded with the register of deeds within and for Pawnee county; the same being delivered to Case Wear by the grantor, McNeal, and afterwards left at the place of Gifford, the grantee. That grantor and grantee were confidential friends and had been for some time prior to said transaction. That there was no fraud or deception practiced by the grantee in the procuring of said deed, or any inducement held out by him for such purpose. That after the execution of the deed the said McNeal remained in the actual possession of the land and was in possession of the same at the commencement of this action. That at the time of the conveyance there was a mortgage on the premises conveyed, and that the said McNeal paid interest on the mortgage after said conveyance and before the death of Gifford, also the taxes. That Gifford exercised no control over said land prior to his death and after the execution of said deed, and had disclaimed any interest in said land to two or more witnesses. That the Paola Oil & Gas Company had commenced a suit against McNeal a short time before the conveyance to Gifford, and McNeal had been personally served with process. That he (McNeal) had been having some slight trouble with said company prior to this suit on account of their men and teams crossing a portion of the land described in the deed, and that McNeal ordered them to refrain from crossing said land. The evidence does not disclose any motive for making the deed herein sought to be canceled, outside of the consideration stated in the face of the deed, except that McNeal was having trouble with said Paola Oil & Gas Company and might have believed that some advantage would come to him by reason of the conveyance.

"The above and following facts are all that the court can find as being predicated upon relevant testimony adduced in this cause, and for the purpose of said findings I have eliminated all of the evidence given by the said McNeal who was permitted to

give testimony in detail in this case, not for the purpose of affecting the consideration or conveyance, but for the prime purpose of testing his mentality, or arriving at a conclusion as to his sanity or insanity. That there was in fact no consideration to support the conveyance, and that the money which passed between the grantor and grantee at the time of the execution of the deed was for the purpose of giving color to the transfer. That at the time of the conveyance the grantor was a man of average mentality, as measured by the general community in which he lived. That just prior to the death of the grantee, Gifford, McNeal had had a deed prepared reconveying the land in question to him, but that same was never executed by Gifford. That, after the deed of conveyance was executed, the grantee remained in the actual possession of the premises conveyed, and continued to improve said place, paid the taxes thereon. That at the time of the conveyance there was no obligation of any kind owing by the grantor to the grantee, and that grantor was not nor had not been called upon to make bond. That said conveyance was made by grantor without any inducements being held out by the grantee, and purely a scheme which originated in the mind of the grantor, and the grantee acted purely for the accommodation of the grantor.

"Conclusions of Law.

"That the deed which acknowledges receipt of the sum of \$3,000 as the purchase price for the land described therein, in the absence of fraud on the part of the grantee, is conclusive as between the grantor and the grantee or those claiming under him. That the deed of conveyance in this case was a personal transaction between the deceased, Gifford, and the said McNeal. That the suit is an action brought by McNeal, through his guardian, and against the administrator of the grantee, Gifford, who defends on behalf of the next of kin and survivors of the said Gifford, deceased, and that, as a matter of law, under section 2829, *Curtiss' Digest of the Law of Oklahoma*, the said McNeal's testimony was wholly inadmissible for the purpose of impeaching the consideration of the said deed. That the said McNeal voluntarily placed himself in the position that he now finds himself, without any inducement or fraud or deception having been practiced upon him by the grantee. That, having done so, a court of equity will not upon his testimony alone, as to the main transaction, set aside a deed thus voluntarily made, as against the administrator or surviving heirs of the said Gifford, deceased."

On the denial of a motion for new trial, the plaintiff, as plaintiff in error, has filed the cause in this court and among other grounds asserts that the court erred in not finding the deed was a mortgage. Because of the conclusion to which we have come in refer-

ence to this proposition, we do not deem it necessary or essential to set forth or discuss the numerous other assignments of error.

The averments of the petition and the findings of the court, in so far as they relate to the conveyance, the fact that it was made without consideration and was not a gift, seem to be abundantly supported by the evidence. Not only did Gifford never make any claim of right or interest of any kind or character in the land prior to his death, but he distinctly disavowed having any interest therein, and his widow, one of the present claimants on numerous occasions after his death, asserted that the land was not theirs and that her deceased husband had not purchased it. The learned trial court seems to have come to the conclusion that the terms of the deed were conclusive and could not be disputed, and hence, notwithstanding the fact that the land clearly and unquestionably belonged to McNeal and did not belong to the decedent, his estate or his heirs, a condition disputed by no one, the court was powerless to grant relief, but was compelled by the law to adjudge and decree the land from one who did own it to the defendants, whom everybody admits did not. In our judgment this conclusion on his part was clearly error and ought not to stand.

[1] It is common doctrine that, although a deed may be absolute in form, it will be deemed and considered a mortgage if it is given merely as security, and, to determine its import, all the relations existing between the parties at the time of its execution may be considered. The administration of this relief is always applied where it carries out the real intention of the parties to prevent fraud and imposition and to promote justice, and courts have uniformly, to effect these ends, looked through the form and method adopted by the parties and effectuated the real object and intent of the transaction. *De Bartlett v. De Wilson et al.*, 52 Fla. 497, 42 South. 189, 11 Ann. Cas. 811; *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775. And this jurisdiction has been exercised independent of the statute of frauds; the courts in the administration of the rule refusing to allow this statute to be used as an instrument of fraud where it could be prevented. *Bork v. Martin*, 132 N. Y. 280, 80 N. E. 584, 28 Am. St. Rep. 570. The trial court was manifestly and properly impressed with the force of this doctrine, and in our judgment would have given relief thereunder if it could have found that McNeal was in any wise indebted to Gifford, for in his eighteenth finding of fact he states that, at the time of the conveyance, there was no obligation of any kind owing by the grantor to the grantees, and that the grantor was not or had not been called upon to make bond. This finding was evidently upon the theory that, had McNeal

been indebted to Gifford or had Gifford been called upon to make bond for McNeal, then the deed might have been construed as a mortgage to secure any liability incurred thereby and under such a condition a reconveyance could be decreed, but, finding that neither of these conditions existed, concluded against the mortgage theory.

As above noted, and to be further commented on, it was not the intention of either party that a gift was to be made or received and no claim that there was to be a sale and purchase. Every conclusion, except that this deed was intended to be defeasible, even though not given as security for money or other substantive thing, is excluded. Neither McNeal nor Gifford intended that the grantor should be divested of the beneficial interest in the land nor that the grantee should receive it. Under these circumstances, our statutes require that a court of equity declare this deed a mortgage, and, if there is no liability due the grantee, to cancel it.

[2] Section 12, c. 8, p. 95, Sess. Laws 1897, section 1196, Comp. Laws 1909, provides as follows: "Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such." "Defeasible," according to Webster's International Dictionary, means, "Capable of being or liable to be avoided, annulled, or undone."

The instrument purported to be an absolute conveyance but clearly under the facts and findings of the court was intended to be defeasible, and therefore should be deemed or, what is the same thing, adjudged to be a mortgage. There being nothing found due thereon to the grantee, his estate or his heirs, the same should be canceled. And why not? It would be a pitiable commentary upon the impotency of a court of equity to do justice and equity if, in view of the facts established in this case, it were powerless to render relief. Let us note the facts which no one denies and all admit: McNeal owned this land; it had always been his; he had originally entered it as raw government land, had settled thereon, established his residence, improved it, and transformed it from a wilderness to a habitation and a home. From the early history of the territory to the date of the trial, he had continued in its occupation and improvement; he had never ceased to pay the interest on the mortgage which it bore, nor the taxes assessed against it by the state. He had never sold it nor given it away, and he still desired to continue its retention. Being in trouble and having an indefinite notion that some fanciful or actual advantage would accrue to him and without any fraudulent intent, he executed and delivered this deed,

relying upon the integrity and honesty of purpose of this friend when the day of trouble had passed, to reconvey to him the land. Neither anticipated that death by accident would intervene and prevent, and certainly neither anticipated that in such event any one could be animated by so vile a purpose as to take advantage of such situation, the outgrowth of trust and confidence, to strip from him his home. When anybody is deprived of property in one way, it is called robbery; in another, burglary; in another, stealing. The facts involved in defendants' keeping Michael McNeal's land and home would not bring this case within either of the classifications mentioned, but the effect on him and the result to those who thus despoiled him would be precisely the same, and this court, with its fuller opportunity for investigation and, because thereof, a better understanding of the law than was enjoyed by the trial court would be abashed to sit in judgment and award success to such villany.

The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to set the same aside and enter one canceling the deed.

TURNER and KANE, JJ., concur. HAYES, C. J., and WILLIAMS, J., not participating.

On Rehearing.

DUNN, J. [3] Aside from the questions already considered and determined in the foregoing opinion, counsel for defendants in error urge in a motion for rehearing that the court had lost jurisdiction of this action at the time judgment was rendered because of the provisions of section 5 of article 7, par. 190, Williams' Ann. Const. Okl., which reads as follows: "The Supreme Court shall render a written opinion in each case within six months after said case shall have been submitted for decision." This question has several times been considered by the court, and, while in each instance denied, no opinion was written thereon, and, as this case presents it again, it is deemed wise to now state our judgment thereon.

It is to be first observed that there is no language which provides that, in the event of the failure of the court to conform thereto, jurisdiction is lost. The remedy which counsel seeks to have applied to be allowed would of necessity, therefore, by the court be written into the law and would impose a most grievous burden upon a litigant, to relieve himself of which he would have absolutely no power, and hence, to carry out the insistence made, would be to cause righteous litigants to lose their rights through conditions which they had not brought about and could not prevent. To allow the claim made would be to punish parties to actions because of a failure of the court, and in our judgment no such intention existed in the minds

of the framers of the Constitution or those who adopted it. It may be said in this connection that, under the rules of the court, a great number of cases are submitted at each of its regular terms, such a number as in the judgment of the members of the court can be disposed of prior to its next regular sitting. The number of cases submitted is of course within the control of the court, but the character thereof is usually entirely unknown until after the submission has been made and the cases investigated. The Constitution and laws of the state require precedence given to cases involving certain questions, and these often arise after the regular submission has been made. In addition thereto, cases involving questions publici juris are uniformly advanced, and all of this character of litigation exacts under the laws at the hands of the court its consideration prior to the consideration of cases where merely private rights are involved. Moreover, in the rare instances where decisions are delayed longer than six months after the submission, in virtually every case the propositions presented are novel and require extended investigation by the different members of the court prior to the time when a satisfactory conclusion can be reached thereon, and in such instances it will be seen that to literally carry out this provision of the Constitution would or might often result in injustice.

The foregoing are some of the reasons which occasion delay and over which the court is almost if not entirely without control. Counsel for neither party in this case cite authority in point and we know of none. See, however, *Haskell, Governor, v. Reigel et al.*, 28 Okl. 87, 108 Pac. 367; *Town of Grove v. Haskell et al.*, 24 Okl. 707, 104 Pac. 58.

We therefore hold that section 5, art. 7, of the Constitution (paragraph 190, Williams' Ann. Const. Okl.), is directory, and this court does not lose jurisdiction to determine and render judgment in a case after the lapse of six months from the date of its submission.

The other questions presented have had our full consideration, and, finding no error in the conclusion to which we have heretofore come, the petition for rehearing is denied.

TURNER and KANE, JJ., concur. HAYES, C. J., and WILLIAMS, J., not participating.

PIGEON et al. v. BUCK et al.

(Supreme Court of Oklahoma. April 15, 1913. Withdrawn, corrected, and refiled April 23, 1913. Rehearing denied May 6, 1913.)

(Syllabus by the Court.)

INDIANS (§ 18*)—"NEW ACQUISITION"—WHAT CONSTITUTES—INDIAN ALLOTMENT.

Mansfield's Digest of Ark. c. 49, § 2531, provides that, on the death of a person intestate, unmarried, and leaving no children, the estate, if it come from the father, shall go to the father, and if from the mother shall go to the mother, "but if the estate be a new acquisition it shall ascend to the father for his lifetime and then descend in remainder to the collateral kindred of the intestate." Held, that the allotment of a full-blood citizen of the Creek Nation, duly enrolled as such, who died on July 12, 1905, after receiving her certificates and patents thereto, was not a new acquisition, but came to her by the blood of her tribal parents, who on her death took full title thereto to the exclusion of the brothers and sister of the deceased; all of full blood. Following *Shulthis v. McDougal et al.*, 170 Fed. 529, 95 C. C. A. 615.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.* For other definitions, see *Words and Phrases*, vol. 5, p. 4783.]

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.*

For other definitions, see *Words and Phrases*, vol. 5, p. 4783.]

Error from District Court, Hughes County; John Caruthers, Judge.

Action by Lena Pigeon and others against William Buck and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Charles F. Bliss and Lewis C. Lawson, both of Holdenville, for plaintiffs in error. Crump & Skinner, of Holdenville, for defendants in error.

TURNER, J. On September 18, 1910, plaintiffs in error, Lena Pigeon, Jimmie Larney, Joseph Pigeon, and Jakeman Pigeon, the two last-named minors, by John Pusley, their guardian, sued, in the district court of Hughes county, the defendants in error, William Buck, Willie Harjo, John Pigeon, and Mate Pigeon, to clear their title.

The petition substantially states that Lowiney Harjo, a full-blood citizen of the Creek Nation and duly enrolled as such, on July 12, 1905, after receiving her certificates and patents thereto, died intestate, seised of her allotment (describing it) in the Creek Nation; that she left no child or children or their descendants her surviving, leaving her surviving plaintiffs, Lena Pigeon, Jimmie Larney, Joseph Pigeon, and Jakeman Pigeon and her father and mother, John Pigeon and Mate Pigeon, also her husband, Willie Harjo, all full-blood citizens of the Creek Nation and duly enrolled as such; that thereafter the father and mother and the husband of deceased conveyed said land by warranty deed to the defendant William Buck, which was duly approved by the county court of Hughes county and filed for record; that the plaintiff's brothers and sister of deceased are her sole heirs, and as such entitled to inherit the property, because they say the same was a new acquisition; and prayed that the court so adjudge and decree and clear their title of the deeds made by the father and mother to said Buck. To the judgment of the court sustaining a demurrer to their petition, plaintiffs bring the case here.

Both sides agree that the devolution of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this allotment is governed by chapter 49 of Mansfield's Digest of the statute of Arkansas, and particularly subsection 2 of section 2522, construed in connection with section 2531. Said subsection reads: "If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts."

And section 2531: "In cases where the intestate shall die without descendants, if the estate comes by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis v. McDougal*, 170 Fed. 529, 95 C. C. A. 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed blood, and Clementine Berryhill, his wife, a noncitizen of that tribe, died seised of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased, and in passing said: " * * * But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme, it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by the act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership to the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands, not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to his father the land should pass. If the mother had been a member of

the tribe, then the land should properly pass to the parents equally.

Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there (*De Walt v. Cline et al.*, 128 Pac. 121; *Ma-Harry v. Eatman*, 29 Okl. 48, 116 Pac. 935; *Duff et al. v. Keaton et al.*, 83 Okl. 92, 124 Pac. 291) we hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein. For that reason the court did not err in sustaining the demurrer to their petition. The judgment is affirmed.

WILLIAMS. J., not participating.

CONTINENTAL CASUALTY CO v. OWEN.

(Supreme Court of Oklahoma. Feb. 4, 1913.
Rehearing Denied May 6, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 139*)—DIRECTION OF VERDICT—WEIGHT OF EVIDENCE.

In trials by jury in this jurisdiction, it is only where the facts, although undisputed, are such that all reasonable men must draw the same conclusion from them that the court is authorized to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

2. INSURANCE (§ 668*)—ACTION ON POLICY—QUESTION FOR JURY.

Generally the question of the falsity of the statements contained in a life or accident insurance policy, and the intent of the applicant in making them, are for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

3. INSURANCE (§ 668*)—ACTION ON POLICY—QUESTION FOR JURY—EVIDENCE.

In an action on an accident insurance policy, there was a sharp conflict in the evidence as to whether the insured was suffering from acute or chronic nephritis about 30 days prior to the issuance of the policy. A physician who was called into the case at that time, and who attended the insured until a few days prior to his death from an accidental gunshot wound inflicted about 30 days after the issuance of the policy, testified that he found the insured suffering from an acute attack of nephritis; that he responded readily to treatment for that disorder, and within a few days commenced to show marked improvement; that within two or three weeks he was practically restored to health; that "his color was as good and he was as healthy looking as anybody during the latter part of the time I was treating him;" that an examination of the urine and the symptoms indicated that his recovery was complete. Held, that whether the insured was suffering from a "defect in the body," within the meaning of that phrase in a statement of the insured indorsed on the policy to the effect that he had no "defect in body," was a question for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. INSURANCE (§ 646*)—ACTION ON POLICY—FALSE REPRESENTATIONS IN APPLICATION—BURDEN OF PROOF.

Under section 3784, Comp. Laws 1909, statements made in an application for insurance, where the policy was issued without previous medical examination, shall, in the absence of fraud, be deemed representations and not warranties, and in an action upon such policy, where the falsity of such statements is relied upon as a defense, the burden is upon the insurer to show that such statements "are willfully false, fraudulent, or misleading."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

5. INSURANCE (§ 250*)—APPLICATION—REPRESENTATIONS—STATEMENT.

A statute which provides that statements made in an application for insurance shall be deemed representations and not warranties is remedial in its nature, and quite within the police power of the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 539; Dec. Dig. § 250.*]

6. EVIDENCE (§ 506*)—ACTION ON POLICY—EXPERT TESTIMONY—MATTER IN ISSUE.

Evidence is inadmissible to show that facts suppressed or falsely represented in an application for insurance would have been deemed material by the insurance company, and that the company would not have issued the policy or would have canceled same if issued, had it known the truth in regard thereto, but insurance experts may state the usages of insurance companies generally in respect to charging higher rates or premiums or in rejecting risks or in canceling policies, if issued, when made aware of the particular facts in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

7. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

It is not reversible error for the trial court to refuse to give an instruction based upon incompetent evidence introduced over the objection of the adverse party, when it does not appear that the party who requested such instruction was deprived of any substantial right thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

8. TRIAL (§ 261*)—ACTION ON POLICY—INSTRUCTION.

Where, in an action on an insurance policy, a requested instruction was correct in so far as it defined the duty of the jury if they found certain facts to exist in relation to statements made by the insured in his application, but was erroneous in stating that such statements were entitled to the status of executory stipulations or promissory warranties, and that a breach thereof rendered the policy void from its inception, whether the thing warranted is material or not, it was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

9. INSURANCE (§ 655*)—ACTION ON POLICY—EVIDENCE—ADMISSIBILITY.

That part of section 3784, Comp. Laws 1909, which provides: "In any claim arising under a policy which has been issued in this state by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, however, that the

company shall not be debarred from proving as a defense to such claim that said statements are willfully false, fraudulent or misleading, and, provided, further, that every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence"—does not prevent proof that statements made in the application are willfully false, fraudulent, or misleading by the introduction of the application in cases where the policy contains no reference thereto either as a part of the policy or as having any bearing thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1681, 1682-1685; Dec. Dig. § 655.*]

10. INSURANCE (§ 250*)—STATEMENTS IN APPLICATION — CONSTRUCTION — INDORSEMENT ON POLICY—EFFECT.

Under section 3784, Comp. Laws 1909, statements made by the insured in his application must be construed as representations and not warranties, and this requirement of the statute cannot be evaded by indorsing such statements upon the policy which also contains a provision to the effect that the policy is issued in consideration of such statements, each of which the insured by accepting the policy warrants to be full, complete, and true.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 539; Dec. Dig. § 250.*]

11. INSURANCE (§ 147*)—POLICY—WHAT LAW GOVERNS.

Where the insured was a resident of this state, where the policy was signed, delivered, and the premiums paid, the policy is an Oklahoma contract and governed by the laws of this state, though the insurer was a foreign corporation, doing business in this state, and the policy was executed at the home office of the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. § 147.*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Lula Owen against the Continental Casualty Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Manton Maverick and M. P. Cornelius, both of Chicago, Ill., and Shartel, Keaton & Wells, of Oklahoma City, for plaintiff in error. F. E. Riddle, of Chickasha, for defendant in error.

KANE, J. This was an action on an accident insurance policy commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was entered, to reverse which this proceeding in error was commenced. The policy was issued to Edward G. Owen, husband of the plaintiff, on the 10th day of October, 1910. On the 14th day of November of the same year the insured injured his left foot by the accidental discharge of a shotgun, from which injury, two days later, he died.

For convenience, the parties will be called

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

plaintiff and defendant, respectively, as they were designated in the court below, and Edward G. Owen will be called the insured.

The contentions of the defendant are: (1) That the court should have directed a verdict in its favor, for the reason that the evidence showed conclusively that certain statements contained in the application for insurance were material to the risk and were false, and that certain statements contained in a schedule of warranties indorsed on the policy were untrue and false and therefore material to the risk. (2) That the court committed error in giving certain instructions wherein, in effect, it charged the jury that, to defeat the claim of the plaintiff, the burden was upon the defendant to show that the statements contained in the application for insurance of which the defendant complains were false and made with the intent to deceive and defraud defendant, and for the purpose of procuring the insurance. (3) That the court committed error in refusing to give a certain instruction requested by the defendant, to the effect that the statements indorsed on the policy to the effect that the insured would notify the defendant if he applied for insurance in any other company or companies are what are known in law as executory stipulations or promissory warranties, and if they found from the evidence that the insured did not comply therewith, and that if he had, the defendant would have canceled his policy, the verdict should be for the defendant.

It is admitted that the policy was issued upon the application by the insured for insurance, without a previous medical examination. The application contains certain statements concerning the insured, and the policy also has indorsed thereon what is termed a schedule of warranties, statements covering the same information, as follows:

"This policy is issued in consideration of the following statements, each of which the insured by accepting the policy warrants to be full, complete, and true; and in further consideration of the payment of premium as hereinafter provided. * * *

"G. Except as here stated I have no other accident health insurance in this or any other company. (Give name of company and amount of any other insurance.) No ex.

"J. Except as here stated I have not had nor am I now suffering from tuberculosis, rheumatism, paralysis, nor any chronic, periodic, mental or physical ailment or disease, nor have I any defect in hearing, vision, mind, or body. No ex."

[1] The first contention of defendant is based upon the theory that the evidence conclusively shows that the insured at the time the policy was issued had a defect in body within the meaning of that term as used in statement J indorsed on the policy. This contention cannot be sustained. In trials by jury in this jurisdiction, it is only where the facts, although undisputed, are such that all reasonable men must draw the same con-

clusion from them that the court is authorized to direct a verdict. *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153.

[2] Generally the question of the falsity of the statements contained in a life or accident insurance policy and the intent of the applicant in making them is for the jury. *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, 69 N. W. 135; *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 836; *Henn v. Metropolitan Life Ins. Co.*, 67 N. J. Law, 310, 51 Atl. 689; *Fidelity & Casualty Co. v. Alpert*, 67 Fed. 460, 14 C. C. A. 474; *Peterson v. Des Moines Life Ass'n*, 115 Iowa, 668, 87 N. W. 897; *Globe Mut. Life Ins. Ass'n v. Wagner*, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169; *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 72 Fed. 413, 19 C. C. A. 236, 38 L. R. A. 33, 70; *Royal Neighbors of America v. Wallace*, 64 Neb. 330, 89 N. W. 758; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778.

[3] The undisputed evidence showed the insured to have been suffering from nephritis on the 12th day of September, immediately prior to the issuance of his policy. There was a sharp conflict as to whether the disease was chronic or acute, and there is no serious contention as to the propriety of submitting that question to the jury. As to whether the insured had a defect of body, was also, under the circumstances, a question for the jury. Dr. Corbin, an osteopath, who was called in to the case on the day last above mentioned, and who continued to attend the insured until a few days prior to the accident, testified that he found him suffering from an acute attack of nephritis; that he responded readily to his treatment for that disorder, and within two or three days commenced to show marked improvement; that within two or three weeks after he commenced his treatment he was practically restored to good health; that his color was "as good as and he was as healthy looking as anybody, during the latter part of the time I was treating him." In answer to the question, "And you state to the court that from your judgment he had fully recovered from this kidney trouble when you quit treating him?" A. Yes; the examination of the urine and the symptoms would indicate that the recovery was complete." After Dr. Corbin was called into the case, no other physician attended the insured professionally, except the one who attended him for the gunshot wound of which he died, so his evidence as to the convalescence of his patient and the permanency of the cure effected stands uncontradicted. Even treating the statement of the insured as a warranty, the burden was upon the insurance company to show that it was breached, and we are not prepared to say that it has sustained this burden to the extent that from the evidence adduced all reasonable men must reach the conclusion that the insured had a defect in body at the time this accident policy was issued.

In *Woodmen v. Prater*, 24 Okl. 214, 103

Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287, it was held that: "The term 'serious illness,' as used in an application for a life insurance policy, means such an illness as permanently or materially impairs, or is likely permanently or materially to impair, the health of the applicant." After stating in effect that in that case whether the illness of the deceased was a serious illness was a question for the jury, Justice Hayes continues: "Not every illness is serious. An illness may be alarming at the time, or thought to be serious by the one afflicted, and yet not be serious in the sense of that term as used in insurance contracts. An illness that is temporary in its duration, and entirely passes away, and is not attended, nor likely to be attended, by a permanent or material impairment of the health or constitution, is not a serious illness. It is not sufficient that the illness was thought serious at the time it occurred, or that it might have resulted in permanently impairing the health." The same may be said as to what constitutes a defect in body. If it had been conclusively shown that, as some of the physicians testified, the insured was suffering from chronic nephritis, which the authorities agree is an incurable disease, it is safe to say that every reasonable man would at once say that he had a defect in body, within the meaning of that term as used in the policy; but where there was evidence to the effect that he was suffering from acute nephritis, a curable disease, about a month prior to the issuance of the policy, from which he had practically recovered at the time the policy was issued, and from which he was completely cured within a week or two thereafter, the question of whether he had a defect in body was properly submitted to the jury.

[4, 5] The instruction given of which the defendant complains was to the effect that the burden is upon the defendant to prove that the statements contained in the application were false and fraudulent and made with the fraudulent intention of deceiving and defrauding the company, and that said company and its managing officers were deceived by said statements and thereby induced to issue the policy. The statement alleged to be untrue was to the effect that the insured had no other accident or health insurance. Counsel for defendant rely upon *Woodmen v. Prater*, supra, and cases of that class to support their contention. In the *Prater* Case it was held that: "An applicant for a life insurance policy warranted in her application that her answers to the medical examiner on the reverse side of her application were 'true and accurate,' and that they should constitute the basis for the covenant. The policy recited that it was executed in consideration of the warranties made in the application, and that the application should be made part of the covenant. Held, that the answers of the insured to the medical

examiner were her warranties, and that a false statement made therein by her rendered the policy void." That, undoubtedly, was the rule at common law, and it applies to the case from which the above excerpt is taken, for the reason that the policy issued in that case was not one to which the statute herein-after referred to applies. Whilst from the terms of the statute its scope as to the exact classes of policies it is intended to embrace is not entirely clear, as the parties by common consent seem to agree that it does apply to the policy issued in the case at bar, a general discussion of that question is not necessary.

At common law the warranty of the truth of the answer to a specific inquiry in the application implied the agreement that the subject-matter of the question and answer is to be regarded as material, and that an untrue answer thus warranted avoids the policy, whether the answer be made in good faith or not. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. Several states, amongst them our own, have passed statutes for the purpose of relieving against the hardships arising from the strict enforcement at common law of warranties in insurance policies concerning matters having no real or proximate relation to the risk assumed by the insurer. By the aid of such warranties, and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no real merit and of the purest technicality. That such statutes are remedial in their nature and quite within the police power of the Legislature is no longer an open question. *Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, supra; *White v. Conn. Mut. L. Ins. Co.*, 4 Dill. 177, Fed. Cas. No. 17,545; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Wall v. Equitable L. Assur. Soc. (C. C.)* 32 Fed. 273; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Insurance Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45. Our statute (section 3784, Comp. Laws 1909) reads as follows: "In any claim arising under a policy which has been issued in this state by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, however, that the company shall not be debarred from proving as a defense to such claim that said statements are willfully false, fraudulent or misleading, and, provided, further, that every policy which contains a reference to the application of the insured, either as a part of

the policy or as having any bearing thereon must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence." The evident purpose of this statute is to strike down warranties in insurance policies of this class and to provide a rule of construction for the purpose of preventing injustices. *Hermany v. Fidelity Mut. L. Ass'n*, 151 Pa. 17, 24 Atl. 1064. This is accomplished by giving to the statements contained in an application the status of representations and providing that the insurance company shall not be debarred from proving as a defense that such "statements are willfully false, fraudulent, or misleading."

A leading case in support of the principle that in case of representations, knowledge, and good faith of the applicant are of paramount importance is *Moulton v. American Life Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447. Indeed, it may be said that it is well settled that, to avoid a policy for misrepresentation, the false statement must have been made willfully and with intent to deceive, and must have been relied on by the insurer. *Metropolitan Life Ins. Co. v. Larson*, 85 Ill. App. 143; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Northwestern Mut. Life Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Kettenbach v. Omaha Life Ass'n*, supra; *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 39 App. Div. 251, 56 N. Y. Supp. 1005; *Metropolitan Life Ins. Co. v. Howie*, 62 Ohio St. 204, 56 N. E. 908; *Alden v. Supreme Tent of Knights of Maccabees of the World*, 78 App. Div. 18, 79 N. Y. Supp. 89; *Provident Savings Life Assur. Soc. v. Cannon*, 103 Ill. App. 534; *Id.*, 201 Ill. 280, 66 N. E. 388; *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa, 203, 94 N. W. 568.

But, for the statute heretofore considered, the provisions of the policy involved herein would render the answer to each question of the application material with all the consequences thereby imposed by the law of insurance, but it was the chief purpose of the statute to destroy such conventional materiality and to open to judicial investigation the question on its merits. The general rule undoubtedly is that under statutes of this kind questions as to the materiality of the statements and the intent of the insured to deceive are for the jury. *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, supra; *Price v. Standard Life & Accident Ins. Co.*, 90 Minn. 264, 95 N. W. 1118; *Levie v. Metropolitan Life Ins. Co.*, 163 Mass. 117, 39 N. E. 792; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *March v. Metropolitan Life Ins. Co.*, 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; *Murphy v. Prudential Ins. Co.*, 205 Pa. 444, 55 Atl. 19; *Fidelity Mut. Life Ass'n of Philadelphia, Pa., v. Miller*, 92 Fed. 63, 84 C. C. A. 211.

Under our statute, the statements made in an application for insurance must be shown to be willfully false in order to constitute a defense to an action on the policy. The Pennsylvania statute, which was under consideration in *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, supra, provides in effect that any misrepresentation in the application shall not avoid the policy unless it was either made in bad faith or is material to the risk. It was contended that a misrepresentation in bad faith within the meaning of the statute is an untrue statement made under such circumstances that it would, if resulting in injury, support a recovery in an action for deceit at common law, and that in such an action, if the fact misrepresented is one concerning the defendant's own affairs of which he must at some time have had personal knowledge, he is held to a knowledge and recollection of it at the time of the statement, and cannot be heard in defense to say that inadvertently and through forgetfulness he made the statement in the honest belief of its truth. Therefore it is said that the court below should have instructed the jury that, as the insured must have known of the omitted policy when he took it, he is conclusively presumed to have known it when he signed his application, and so to have made the statement concerning his other insurance in bad faith. Judge Taft, who delivered the opinion for the court, said: "The argument is unsound. We have here to deal with the statutory meaning of the phrase 'misrepresentation in bad faith.' 'In bad faith' is not a technical term used only in actions for deceit. It is an ordinary expression, the meaning of which is not doubtful. It means 'with actual intent to mislead or deceive another.' It refers to a real and actual state of mind capable of both direct and circumstantial proof. A man may testify directly to his knowledge and intention if they are in issue, and they may also be inferred from circumstances. If a man makes a statement in the honest belief that it is true, he does not make that statement in bad faith, even if his honest ignorance of the truth is the result of the grossest carelessness. The fact that he could only be ignorant through gross carelessness may be evidence to show that he was not ignorant, and therefore spoke in bad faith; but grant his honest belief in his statement, and there cannot be bad faith on his part in the ordinary sense in which those words are used in the English language. This is the sense in which they are used in the Pennsylvania statute. Therefore it would clearly not have been bad faith in the insured if he made the statement concerning his other insurance in the honest belief in its truth, and omitted the \$5,000 policy through forgetfulness and inadvertence." The same may be said of the phrase "willfully false, fraudulent, or misleading," as used in our statute. Statements to be willfully false, fraudulent, or

misleading must be made with actual intent to mislead or deceive another. It does not seem to us that the instruction complained of goes further than that.

[8-8] The instruction requested, the refusal of which the defendant complains, was submitted for the purpose of covering certain expert evidence introduced by the defendant over the objection of the plaintiff, to the effect that if the insured had notified the defendant of certain applications for additional insurance which it was alleged he made, as by the statements contained in his application he agreed to do, the defendant at once would have canceled the policy sued upon. This evidence was inadmissible and the plaintiff's objection to it should have been sustained. The rule is that: "An insurance expert cannot be permitted to give his opinion that certain undisclosed facts increased the risk of a life policy, but he may state the usage of insurance companies as to rejecting risks when made aware of such facts." *Penn Mut. L. Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, supra.

The general rule is stated in 25 Cyc. 937, as follows: "Evidence is inadmissible to show that facts suppressed or falsely represented in the application would have been deemed material in passing upon the application, and that the company would not have issued the policy, had it known the truth in regard thereto. But insurance experts may state the usage of insurance companies generally in respect to charging higher rates of premium or in rejecting risks when made aware of the particular fact in question."

It is true the court below permitted this evidence to be introduced over the objection of the plaintiff, and counsel for defendant now contends that, even though it was inadmissible, the plaintiff cannot urge that fact in this court in defense of the action of the trial court for the reason that he has not filed a cross-petition in error for the purpose of reviewing the ruling of the trial court on his objection. We cannot agree with this contention. It would be tantamount to saying that, because the court committed the initial error of admitting such evidence, it is required to still further err by basing an instruction upon it. In our opinion this court would not be justified in reversing a judgment upon that ground. Moreover, that part of the instruction to the effect that the statements made by the insured are what are known in law as executory stipulations or promissory warranties, as defined by the authorities cited by counsel upon that question, is not a correct statement of the law applicable to insurance policies of the class under consideration in this jurisdiction. In *Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74, one of the cases cited by counsel for defendant, the court, speaking of an executory stipulation or promissory warranty, says: "An execu-

tory stipulation, or promissory warranty, inserted in a policy, and which became a binding condition on the insured, requires strict performance. The breach of it, whether the thing warranted was material or not, renders the policy void from its inception." As stated elsewhere in this opinion, under our statute such statements must be construed as representations, and in order for misrepresentations in relation thereto to avail the insurer as a defense, it must show that they were willfully false, fraudulent, or misleading. In *Pelican v. Mutual Life Ins. Co.*, supra, it was held: "Where, in an action on a policy, a request to charge was correct in so far as it defined a surgical operation, but was erroneous in assuming that the answers of insured were warranties, and not representations, it was properly refused." Another question raised by counsel for defendant in error, which also has a bearing upon the question last under discussion, is that the application was not admissible in evidence, for the reason that a correct copy of the application was not attached to the policy, and therefore under the last proviso of the statute heretofore referred to, should not have been received in evidence.

A statute couched in the same language was construed by the Supreme Judicial Court of Massachusetts in *Holden v. Prudential Life Ins. Co. of America*, 191 Mass. 153, 77 N. E. 309. In that case, as in this, the policy contained no reference to the application of the insured as a part of the policy or as having any bearing thereon. Delivering the opinion of the court, Mr. Chief Justice Knowlton says: "The plaintiff brought suit upon a policy of life insurance issued to her intestate, and the defendant answered that the policy was procured by fraud practiced upon the company in regard to the risk. It is elementary law that this, if proved, would be a good defense. Proof might be made by showing material false and fraudulent representations, whether oral or in writing, and reliance upon them as an inducement to the issuing of the policy. The defendant offered in evidence a written application of the plaintiff's intestate for insurance, containing representations alleged to be fraudulent. There is no doubt of its competency on this issue, unless the statute prevents the use of it. The statute relied on by the plaintiff is as follows: 'Every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence.' * * * The policy in this case has no reference to any application of the insured, either oral or written. The policy and this application are therefore not within the terms of the statute. The object of the statute is to

prevent companies from holding insured persons bound by a contract in writing of which they have no copy. While the language of the statute is broad enough to prevent the use of an application to prove fraud, when the policy refers to an application and it is not attached to the policy, there is no reason for extending the statute by construction, so as to make it prevent the proof of fraud by an application, when the policy contains no reference to an application. It is not the policy of the law to create unnecessary obstacles to the proof of fraud. It has recently been decided that a provision in a policy of insurance, making it incontestable for fraud from its inception, is void as against public policy. *Reagan v. Union Mutual Life Insurance Co.*, 189 Mass. 555, 76 N. E. 217 [2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362]. We are of opinion that this statute does not prevent the proof of fraud by the introduction of an application in writing in cases where no application is referred to in the policy."

[9] As the reasoning of the Massachusetts court is satisfactory, we apply it in construing our statute and hold that part of section 3784, Comp. Laws 1909, which provides: "In any claim arising under a policy which has been issued in this state by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, however, that the company shall not be debarred from proving as a defense to such claim that said statements are willfully false, fraudulent or misleading, and, provided, further, that every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence"—does not prevent proof that statements made in the application are willfully false, fraudulent, or misleading by the introduction of the application in cases where the policy contains no reference thereto either as a part of the policy or as having any bearing thereon.

[10] It is further contended that because some of the statements contained in the application were also indorsed upon the policy, which contains a further provision that the policy is issued in consideration of such statements, each of which the insured, by accepting the policy, warrants to be full, true, and complete, such statements must be construed to be warranties, and not representations. We do not believe this contention can be sustained. This would afford

the insurer an easy method to accomplish indirectly what the law will not permit it to do directly. It has often been attempted without success to evade the effect of such statutes by similar means, usually by stipulations in the policy to the effect that all the statements and declarations of the applicant shall be considered material, notwithstanding the provisions of any statute to the contrary. The question as to the validity and effect of such stipulations was raised in the early case of *White v. Connecticut Mut. Life Ins. Co.*, 29 Fed. Cas. 1011, where it was held that, if the provisions of the policy are in conflict with the statute, the latter controls, and that no waiver of the benefits of the act could arise by implication. In *Hermany v. Fidelity Mut. Life Ass'n*, supra, the statute was held to be of binding effect, though the application expressly provided that every statement therein should be material, notwithstanding any law to the contrary. In *Fidelity Mut. Life Ass'n v. Miller*, supra, involving the construction of the Maryland statute, the court held that the company could not contract with the insured that matters ordinarily regarded as immaterial should be construed as material.

[11] In *Keatley v. Insurance Co.*, 187 Pa. 197, 40 Atl. 808, where it was attempted to evade the provisions of the Pennsylvania act by reciting in the policy that the contract should be construed by the laws of Connecticut, the court held that such an agreement was against public policy, and that the contract must be governed by the Pennsylvania act. This doctrine was approved in *McClain v. Provident Savings Life Assurance Society*, 110 Fed. 80, 49 C. C. A. 31. In *Dolan v. Mutual Reserve Fund Life Ass'n*, 173 Mass. 197, 53 N. E. 398, the court held that where parties are contracting within the commonwealth in regard to a matter which without their contract would plainly be governed by the laws of the state, enacted on grounds of public policy, it is at least doubtful whether they can be permitted to nullify those laws by a stipulation that the contract shall be governed by the laws of another state. To the same effect are *Insurance Co. v. Sickles*, 23 Ohio Cir. Ct. R. 594; *Fidelity Mut. Life Ass'n v. Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193, and *Fletcher v. New York Life Ins. Co.* (C. C.) 13 Fed. 526. In *Equitable Life Assurance Soc. v. Clements*, supra, affirming *Wall v. Equitable Life Assur. Soc.* (C. C.) 32 Fed. 273, it was held that where the insured was a resident of Missouri, and the application for the policy was signed there, the policy being delivered and the premiums paid in Missouri, the policy is a Missouri contract and governed by the laws of that state, though the insurer was a New York corporation doing business in Missouri, and the policies were executed in New York. To the same effect are *Lovell v. Alliance Life Ins. Co.*, 15 Fed. Cas. 1000.

and Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193.

Finding no reversible error in the record, the judgment of the court below is affirmed. All the Justices concur.

OWEN v. UNITED STATES SURETY CO.
(Supreme Court of Oklahoma. Feb. 4, 1913.
Rehearing Denied May 6, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 291*)—PROOF OF EXECUTION—NECESSITY—PLEADING.

Where an action is founded on a written instrument, and the petition sets forth the same in full, an answer not verified does not put in issue the execution of such written instrument, and there is no necessity for proving the same on the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864, 865, 866½-879; Dec. Dig. § 291.*]

2. INSURANCE (§§ 256, 267*)—VALIDITY—BREACH.

A misrepresentation renders the policy void on the ground of fraud, whilst noncompliance with a warranty operates as an express breach of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549, 567; Dec. Dig. §§ 256, 267.*]

3. FRAUD (§ 58*)—PROCUREMENT OF CONTRACT—QUANTUM ON PROOF.

In this jurisdiction, where fraud is alleged in the procuring of a written instrument, the proof must sustain the allegations by a preponderance of the evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. INSURANCE (§ 646*)—FRAUD IN PROCUREMENT—BURDEN OF PROOF.

Under section 3784, Comp. Laws 1909, the burden of proof to establish the materiality of a misrepresentation or concealment, as well as the fraudulent intent of the insured, is upon the insurance company, and the burden is not shifted where it is shown that the insured made an untrue answer concerning other insurance, for, if there be a presumption that his failure to mention it was intentional, this is met by the presumption that a man does not make a fraudulent misstatement, and the question is therefore for the jury, upon all the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Lula Owen against the United States Surety Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

F. E. Riddle, of Chickasha, for plaintiff in error. Shartel, Keaton & Wells, of Oklahoma City, for defendant in error.

KANE, J. In the trial court it was agreed by counsel that the issues in the above-entitled cause were practically the same as in Continental Casualty Co. v. Lula Owen, 131 Pac. 1084, just handed down. In this court the action of the trial court in directing a verdict in favor of the defendant rais-

es a few additional questions of law, which were not involved in the case of Continental Casualty Co. v. Lula Owen, and it will be such questions only that will be noticed herein. The additional contentions may be stated as follows: (1) As the original policy of insurance was only attached to plaintiff's petition as an exhibit, the court could not consider the provisions contained in the schedule of warranties thereof, unless said policy had been introduced in evidence, and, as this was not done for the purpose of showing the provisions of the schedule of warranties, the court should not have considered such warranties and taken the case from the jury upon the ground that the evidence showed a breach thereof. (2) The defendant's evidence did not show that Edward G. Owen had other accident insurance at the time of the execution and delivery of the policy sued on herein, and therefore there was a failure to show a breach of clause 10 of the schedule of warranties indorsed on the policy sued on to the effect that the insured had no accident insurance and no health insurance, except \$5,000 accident in the Continental Casualty Company.

[1] The first contention is not well taken. The original policy was attached to plaintiff's petition, marked Exhibit A. Defendant's answer admitted the execution and delivery of the policy, and alleged that it was not liable to plaintiff in any sum thereon, for the reason that the insured made certain false representations of material facts to defendant for the purpose of procuring the issuance of said policy. The answer was not verified, and plaintiff filed an unverified reply, wherein she denied that insured made any false or fraudulent representations in regard to the amount of his insurance or of any application for insurance or as to the condition of his health, but did not deny the written statements set up in defendant's answer, which it was alleged were contained in the policy itself. Section 5648, Comp. Laws 1909, provides: "In all actions, allegations of the execution of written instruments and indorsements thereon of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

In *Mo. River, Ft. Scott & G. R. Co. v. Wilson*, 10 Kan. 87 (star page 105), it was held: "Where an action is founded on a written instrument, and the petition sets forth the same in full, an answer not verified does not put in issue the execution of such written instrument, and there is no necessity for proving the same on the trial." Other Kansas cases to the same effect are *Reed v. Arnold*, 10 Kan. 85 (star page 102); *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Board of Education v. Shaw*, 15 Kan. 35

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(star page 33). There are several Oklahoma cases which follow the decisions of Kansas, from which state we borrowed the statute; the latest ones, where all the authorities are cited being *Long v. Shepherd*, 130 Pac. 131, and *Tate v. Stone*, 130 Pac. 296, both handed down at the December, 1912, term.

[2] The second contention must be sustained. The evidence offered tending to show a breach of the warranties was as follows: "Judge Keaton: Before we read any more depositions, I believe we will offer this other insurance policy. We now offer in evidence, just for the purpose of showing the date of issuance and the amount and kind of policy, the Maryland Casualty Company of Baltimore, Md., accident policy, in the principal sum of \$5,000 in the event of death caused by accidental injuries, issued October 10, 1910; issued to Edward G. Owen. Mr. Riddle: Plaintiff objects to it as incompetent, irrelevant, and immaterial to the issues in this case. By the Court: Overruled. Mr. Riddle: Exceptions. By the Court: There is no question raised as to the fact of the policy having been issued? Mr. Riddle: No, sir; no question about that."

As held in *Continental Casualty Co. v. Lula Owen*, supra, the materiality of representations made by the insured in his application for insurance is a question for the jury. In *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778, it was held: "Where insured represented that he had not suffered a surgical operation prior to making his application, and there was no controversy in the evidence that he had sustained an aspiration of his chest prior to that time, the court should have instructed, as a matter of law, that such treatment was a surgical operation and left it to the jury to determine insured's good faith." Moreover, the evidence was not such that all reasonable men would say that the insured had no accident insurance and no health insurance except that stated in clause 10. A misrepresentation renders the policy void on the ground of fraud, whilst noncompliance with a warranty operates as an express breach of the contract.

[3] In this jurisdiction, where fraud is alleged in the procuring of a written instrument, the proof must sustain the allegations by a preponderance of the evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith. *Moore v. Adams et al.*, 26 Okl. 48, 108 Pac. 392.

[4] The policy sued upon was dated October 18, 1910, or eight days subsequent to the policy in the Maryland Casualty Company referred to in the agreement of counsel. Even if we accord to the word "issued" the broad meaning contended, we would not be justified in saying that the evidence conclusively shows that the insured had insurance other than that set out in his statement at the time the policy sued on was issued. Discussing a similar proposition in *Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank &*

Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70, Judge Taft says: "It is urged for the defendant, however, that, because it was admitted that Schardt made an untrue answer concerning his other insurance, the presumption was that his failure to mention it was intentional, and that the court should have so instructed the jury. Had the defendant requested such a charge, the question would then have been presented for decision. But, instead of requesting such an instruction, defendant framed a single charge, which instructed the jury that they should presume, not only that the failure to mention the fact was intentional, but also that it was material. This was erroneous, and the court rightly refused to give it. But we do not think that the defendant was entitled to the instruction that the admission that Schardt had a policy in the New York Life Insurance Company, and failed to mention it, raised the presumption that his omission was intentional, or, what is the same thing, that it was fraudulent. There is a natural, and perhaps a legal, presumption of the continuance of a state of knowledge as of the state of sanity or marriage, and, it being admitted Schardt once knew that he had taken this policy for \$5,000, that he continued to know, and so remembered that he had the policy when he answered the question as to other insurance. But the presumption is not conclusive. Men do forget entirely a fact previously known to them, and they do forget it temporarily, so that they may make an untrue statement inadvertently about it, though recently known to them. The possibility or probability of their doing so depends on the character of the fact in question, and all the circumstances under which the misstatement concerning it is made. There is also a presumption that a man does not make a fraudulent misstatement, but men frequently do, nevertheless, make such statements; and the question whether the presumption is overcome depends on the evidential weight to be given to all the circumstances, including possible motive, together with the positive evidence of witnesses. The two presumptions in this case covered the same ground and were conflicting. Neither was conclusive, and it was for the jury to determine from all the circumstances what the truth was. It would seem proper that an instruction referring to one of these presumptions should also refer to the other, and should point out the duty of the jury to weigh the facts and circumstances in the light of both."

The statement attributed to the insured, which it is alleged was false, was made eight or ten days subsequent to the issuance of the policy by the Maryland Casualty Company. To merely show the issuance of that policy does not to our mind sustain the charge of fraud by such a preponderance of the evidence as to overcome all opposing evidence and repel the opposing evidence of good faith on the part of the assured.

The judgment of the court below is accordingly reversed, and the cause remanded for a new trial. All the Justices concur.

RAGAN v. CITIZENS' STATE BANK OF FORAKER et al.

(Supreme Court of Oklahoma. April 29, 1913.)

(Syllabus by the Court.)

1. PROPERTY (§ 9*)—OWNERSHIP OF PROPERTY—POSSESSION.

Possession of personal property, if unexplained, is prima facie evidence of ownership in the possessor.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9; Evidence, Cent. Dig. § 2457.]

2. EVIDENCE (§ 273*)—OWNERSHIP OF PERSONALTY.

Acts and declarations of the possessor of personal property concerning the same are admissible in evidence to determine the nature of such possession, although not made in the presence of the one claiming ownership in the property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

Error from Osage County Court; C. T. Bennett, Judge.

Action by D. M. Ragan against the Citizens' State Bank of Foraker and G. R. Maddox. Judgment for defendants, and plaintiff brings error. Affirmed.

Grinstead, Mason & Scott, of Pawhuska, for plaintiff in error. Joseph D. Mitchell and H. P. White, both of Pawhuska, for defendant in error Citizens' State Bank.

WILLIAMS, J. The plaintiff in error, D. M. Ragan, as plaintiff, sued the defendants in error, Citizens' State Bank of Foraker, and G. R. Maddox as defendants, in replevin to recover possession of four horses, two of which were called roans. The defendant bank with its codefendant, G. R. Maddox, as constable, claimed said horses by virtue of a mortgage to the said bank by B. L. Ragan, the son of the plaintiff. By answer they put in issue (1) the plaintiff's ownership of said horses; and (2) further pleaded estoppel against said plaintiff.

Over the objection of the plaintiff, at the instance of the defendant, one W. C. Heaton testified as follows: "Q. Were you acquainted with B. L. Ragan in his lifetime? A. I was. Q. I will ask you whether or not you know two certain roan ponies specified in a chattel mortgage given by B. L. Ragan to the Citizens' State Bank of Foraker, Okla., under date of the 27th day of January, 1910? A. I do. Q. State whether or not if you ever had any conversation with B. L. Ragan with reference to the ownership of such property. (Objection; overruled; exception.) A. I did. Q. State what such conversation was. (Objection; overruled; exception.) A. B. L. Ragan stated to me that he was the sole owner of the butcher shop, ice wagon, and two roan ponies specified in said mortgage." Under the issue of estoppel the declarations

of the said B. L. Ragan, out of the presence of his father, D. M. Ragan, were clearly inadmissible, unless shown to have thereafter been brought to his knowledge. First National Bank v. Kissare, 22 Okl. 545, 98 Pac. 433, 132 Am. St. Rep. 644; Holt v. Holt, 23 Okl. 639, 102 Pac. 187.

[1, 2] As to the issue of ownership, there was evidence tending to prove that Oscar L. Graham negotiated a trade between B. L. Ragan and W. C. Brooks, by which the said B. L. Ragan received the two roan ponies, the said Brooks taking therefor a gray mare. The evidence of Heaton seems to be competent on this issue as a part of the res gestæ. A mere declaration, when a part of the act of possession, is evidence; in other words, a part of the res gestæ. Possession of personal property, if unexplained, is prima facie evidence of ownership in the possessor; but, as it is consistent with ownership in another, it is not conclusive. Whether the person in possession is the owner depends not upon the mere fact that he is in possession, but upon the nature and character of that possession. These are evinced by his conduct with regard to it. The nature of such conduct is indicated by the declarations accompanying it. Such declarations are not received as declarations of third parties to prove the truth of what is asserted, but as being of themselves acts or things done by them, and which explain or characterize the acts which they accompany, and show their true character. Lockwood Bros. v. Frisco Lumber Co., 22 Okl. 31, 97 Pac. 562; Avery v. Clemons, 18 Conn. 306, 46 Am. Dec. 323; Abbott v. Hutchins, 14 Me. 390, 31 Am. Dec. 59; Darling v. Bryant & Walker, 17 Ala. 11, 52 Am. Dec. 162; Nelson v. Iverson, 17 Ala. 216. In Avery v. Clemons, supra, it is said: "It is stated in the motion that the testimony we are considering was unaccompanied with any evidence that the declarations of Simmons were made in the hearing or with the knowledge of the plaintiff, or that said acts were authorized or assented to by the plaintiff, unless this might be inferred from the fact that he lived some four or five miles from Simmons, and had, without objection or interference, permitted Simmons to use and occupy the property since the plaintiff claimed to have purchased it. Proof of these circumstances was admissible to show that the plaintiff knew of the conduct of Simmons in relation to the property and assented to it. We cannot on this motion say that those circumstances were insufficient for that purpose; it was the province of the jury to determine their weight." The property in the Connecticut case was a wagon. The syllabus is as follows: "Possession of personal property is, if unexplained, prima facie evidence of ownership in the possessor. Acts and declarations of the possessor of personal property, concerning the same, are admissible in evidence to determine the nature of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such possession, although not made in the presence of the one claiming ownership in the property." It is not contended that the case was not submitted to the jury under proper instructions. We think that the evidence presented a case for the determination of the jury.

The judgment of the lower court is affirmed. All the Justices concur.

HOCKER v. JOHNSON et al.

(Supreme Court of Oklahoma. April 29, 1913.)

(Syllabus by the Court.)

JUDGMENT (§ 495*)—JURISDICTION—PRESUMPTION.

Under the laws in force in the Indian Territory prior to the erection of the state when the judgment of a domestic court of record comes collaterally into question, the presumption that the court had jurisdiction of the subject-matter and parties is irrefragable and conclusive, unless want of jurisdiction distinctly appears on the face of the record, following *Plummer v. M. D. Wells & Co.*, 6 Ind. T. 189, 90 S. W. 303.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.*]

Error from District Court, McClain County; R. McMillan, Judge.

Action by L. C. Hocker against E. B. Johnson and John Madden. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Rennie, Hocker & Moore, of Purcell, for plaintiff in error. J. F. Sharp, of Oklahoma City, and J. B. Dudley, of Norman, for defendants in error.

WILLIAMS, J. The plaintiff in error, L. C. Hocker, as plaintiff, sued the defendants in error, E. B. Johnson and John Madden, as defendants, in a replevin action to recover possession of a certain house which had been removed by the said defendants from a certain tract of land allotted to Arennie Lewis as a member of the Choctaw Tribe of Indians. The heirs of said Lewis conveyed said land to L. C. Hocker. In 1904 one Lindsay brought suit against E. B. Johnson and those claiming under him for the possession of the same. By agreement Johnson received the rents for 1904 and was to occupy said land for the year 1905, paying as rent thereon \$2.50 per acre for all of the land that was in a state of cultivation. Johnson held the land for the year 1905, letting the same to the said John Madden as his tenant. At the end of his said term Madden refused to vacate, and L. C. Hocker instituted an ejectment action against said Johnson and his tenant, Madden, in the United States Court for the Southern District of the Indian Territory, at Purcell. On November 12, 1906, judgment was rendered for the possession of the same against the said E. B. Johnson; the cause having been dismissed as to said Madden. The house in question was occupied

during 1905 by Madden holding under Johnson and in 1906 by Lee Dover under Madden. During 1907 Lee Dover occupied under contract with John C. Adams, as tenant of L. C. Hocker.

The plaintiff specially pleaded the relation of landlord and tenant and the judgment in the ejectment action. The defendants by answer pleaded that the judgment was fraudulently obtained in that Johnson had been informed by the plaintiff that the case would be dismissed, and for that reason did not appear. To this answer a demurrer having been filed was overruled and then a reply filed. The case was tried to the court without a jury. The issues were found in favor of the defendant, and judgment rendered accordingly.

The judgment rendered against the defendant E. B. Johnson recited as follows: "On this day comes the plaintiff, by his attorney, J. W. Hocker, and dismisses the same as to the defendant John Madden and announces ready for trial as to the defendant E. B. Johnson, and said defendant comes not, and the court finding that said defendant E. B. Johnson has been legally served with summons herein, and not having answered herein, and having been called three times, still comes not but wholly makes default, and the plaintiff introduces his testimony as to right of possession to the land sued for and waiving damages, the court finds for the plaintiff that he is entitled to the possession of the lands in controversy."

The controlling question in this case is as to whether the trial court erred in overruling plaintiff's demurrer to the answer of defendants. The judgment upon which plaintiff in error relied having been rendered in the United States Court for the Indian Territory under the laws then existing, the rights thereunder were not affected by the change in the form of government. *Armstrong, Byrd & Co. v. Phillips*, 28 Okl. 808, 115 Pac. 870; section 365, Williams' Anno. Const., and citations thereunder.

Under the authority of *Southern Pine Lumber Co. et al. v. Ward et al.*, 16 Okl. 131, 85 Pac. 459, this judgment is sought to be attacked in this manner on the ground of fraud on the theory that the plaintiff in error in claiming the benefit under such proceeding, the validity of the proceeding under which the judgment was rendered may be inquired into. Regardless of what may be the rule here now, that was not the case under the laws in force under which the judgment was rendered.

In *Plummer v. Wells & Co.*, 6 Ind. T. 189, 90 S. W. 303, the judgment relied on was presented to Plummer, administrator, for allowance as a claim against the estate of his intestate. Objection was made to its allowance on the ground that the judgment was rendered without any service either having been had upon or any appearance made by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his intestate. The cause was referred to a probate commissioner, who found such to be the facts and so reported to the court. Judgment, however, was rendered against the administrator on the ground that, the judgment having been rendered by a court of record, service and jurisdiction were presumed, and such presumption was irrefragable and conclusive, unless the want of jurisdiction appears in the face of the record.

Again, where the party relies upon the verbal assurances of the attorney of the opposing party that no judgment would be taken, but that the cause would be dismissed, and in violation of this verbal agreement judgment is taken by default, it is a serious question as to whether the party relying upon such verbal assurances is so free from laches as to be able to show such diligence as is required to avoid the judgment. *Norman v. Burns*, 67 Ala. 248; *Ex parte Wallace*, 60 Ala. 267; *Collier and Wife v. Falk*, 66 Ala. 223; *Collier v. Parish*, 147 Ala. 526, 41 South. 772. However it is not essential to determine that question here.

The judgment of the trial court is reversed, and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion. All the Justices concur.

RUMPH, County Treasurer, v. JOINES et al.
(Supreme Court of Oklahoma. May 14, 1912.
Rehearing Denied April 15, 1913.)

(Syllabus by the Court.)

COLLECTION OF TAXES—INJUNCTION.

Reversed and remanded, with directions to dismiss the bill upon the authority of *In re Appeal of J. W. McNeal from the Action of the State Board of Equalization*, 128 Pac. 285, and *Ira Williams, as Co. Clerk of Garfield Co., v. Garfield Exchange Bank*, 132 Pac. —, handed down this term.

Williams, J., dissenting.

Error from District Court, Carter County; S. H. Russell, Judge.

Action by U. S. Joines and others against D. M. Rumph, County Treasurer. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions to dismiss.

James H. Mathers and W. R. Bleakmore, both of Ardmore, for plaintiff in error. Cruce & Potter, of Ardmore, for defendants in error.

KANE, J. This was a suit in equity, commenced in the district court of Carter county by the defendant in error and 29 others, as plaintiffs, against the plaintiff in error, as treasurer of said county, for the purpose of enjoining him from enforcing the collection of taxes assessed and levied against the property of the plaintiffs according to an alleged unlawful increase in the assessed valuation of such property made by the State Board of Equalization. The petition

alleges, in substance, that the plaintiffs are residents and owners of property, real and personal, in Carter county; that they rendered their property for taxation at its actual value, estimated from what it would bring at a fair sale; that, after the assessments had been made and equalized by the county board of equalization, the list of assessments was sent to the State Board of Equalization; that the total valuation of the property in said county was not less than the fair average valuation which the property of said county bore to all the other property in the state; that the State Board of Equalization increased the valuation of every county in the state, claiming that the same was not fixed at its fair valuation, and raised the valuation in Carter county from \$10,886,443 to \$14,693,285, an increase in said county of about 45 per cent. over that made by the county board; that the county clerk of Carter county, upon receiving the certificate of the State Board of Equalization, increased the valuation of each of the defendants in error upon the real or personal property or both, and extended such increase upon the tax rolls against their property; that such taxes and assessments so increased were by plaintiff in error extended upon his books as treasurer and levied against the property of defendants in error, and as such are a lien and incumbrance upon their property; that the action of the State Equalization Board in raising the assessed valuation of the several counties of the state, including Carter county, was not for the purpose of equalizing the assessment of the several counties, but for the purpose of increasing the assessment in order to create a greater revenue; and that such action of the State Equalization Board was unlawful and void. The prayer of the plaintiffs is that the plaintiff in error and all persons acting by, through, or under him be perpetually enjoined from the collection of the taxes levied against the property of the defendants in error according to such increased valuation. A demurrer to the petition was overruled by the court, and, the defendant declining to plead further, a peremptory injunction was issued in accordance with the prayer of the petition to reverse which this proceeding in error was commenced.

It is apparent that the questions herein involved are identical in principle with those decided by this court in *Re Appeal of J. W. McNeal from the State Board of Equalization*, 128 Pac. 285, and *Ira Williams, as County Clerk of Garfield County, v. Garfield Exchange Bank*, 132 Pac. —, handed down at the present term.

Upon the authority of those cases, the judgment of the court below must be reversed, and the cause remanded, with directions to dismiss the bill. All the Justices concur, except WILLIAMS, J., who dissents.

† Rehearing pending.

SHALLENBERGER et al. v. BRADY.
(Supreme Court of Oklahoma. Feb. 18, 1913.
Rehearing Denied May 13, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 2*)—ACTION ON AGREED STATEMENT OF FACTS.

A court has the right to grant a new trial during the term where it has rendered a judgment upon an agreed statement of facts.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

2. MASTER AND SERVANT (§ 5*)—COMPENSATION—RELATION OF PARTIES.

A contract between a construction company and B. provided that the company should construct a building according to plans and specifications; that it should furnish all necessary machinery and tools; that it should purchase material for the building, and should employ labor, and receive as compensation 6 per cent. of the total cost of all labor and materials furnished. The twelfth article of the contract provided: "That the contractor shall keep a constant supervision of said work to the end that there be no delay by reason of being out of material, and shall see that there is no delay by reason thereof, and shall see that the labor is efficient and kept at work. The owner and her agent may continuously inspect the labor and material for that purpose and require the discharge of any laborer that is incompetent or inefficient, and shall at all times have free access to inspect all the invoices for materials and all the orders therefor, and the pay roll and time books of the contractor." *Held*, that a foreman, whose duty it was to "supervise the work of the laborers on said building, accelerate, direct, and control same, and see that the same is performed in accordance with the plans and specifications, and to keep the time of the laborers on said building," was engaged in duties imposed upon the company by the contract, and was not a laborer for whose compensation B. was responsible under the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 5; Dec. Dig. § 5.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; L. M. Poe, Judge.

Submission of controversy between F. E. Shallenberger and J. F. Shallenberger, doing business as the Shallenberger Construction Company, against R. C. Brady. Judgment for defendant, and plaintiffs bring error. Affirmed.

Woodson Norvell, of Tulsa, and W. O. McNary, of Chamberino, N. M., for plaintiffs in error. Biddison & Campbell, of Tulsa, for defendant in error.

ROSSER, C. This was a proceeding under section 6051, Comp. L. 1909, by which the parties submitted a controversy to the district court of Tulsa county. The facts agreed upon are that the Shallenbergers are engaged in business as a construction company, and as such take contracts for the building of houses; that as such company they entered into a contract with the defendant, R. C. Brady, to build for her a certain building in the city of Tulsa. The contract entered into is attached to the agreed state-

ment of facts. This contract provides that the construction company shall, under the directions of the architect, construct a certain building in the city of Tulsa, according to plans and specifications prepared; that the company shall furnish all necessary machinery and tools and do everything necessary to carry out the contract.

The sixth article of the contract is as follows: "The contractor shall purchase the material for said building at not to exceed the lowest price at which the same can be purchased, quality or equal quality being considered, and shall employ labor at not exceeding the standard and current scale of wages in Tulsa at the time, and shall not purchase material for such construction without conferring with the owner or her agent for the determination of the price and quality thereof, and shall not purchase such material at a price in excess of that at which the owner can purchase, nor shall the contractor employ labor that is inefficient or at a price in excess of that at which the owner can employ equally skilled and efficient labor."

The twelfth article of the contract is as follows: "The contractor shall keep a constant supervision of said work, to the end that there be no delay by reason of being out of material, and shall see that there is no delay by reason thereof, and shall see that the labor is efficient and kept at work. The owner and her agent may continuously inspect the labor and material for that purpose and require the discharge of any laborer that is incompetent or inefficient, and shall at all times have free access and inspection of the invoices of material and of the orders therefor, and the pay roll and time books of the contractor."

Article 13 of the contract is as follows: "The owner shall pay for all material when due, and shall pay the labor weekly, and in addition shall pay the contractor as compensation to him for the full performance of this contract, 6 per cent. of the total cost of all labor and material by him furnished, used or employed in the performance of his contract, not including any machinery or tools, and said payments shall be paid as follows: Six per cent. of the weekly pay roll for labor to be paid on the first of each month and 6 per cent. of the cost of all labor and materials used in the construction of building when bills for same become due."

There are a number of other provisions in the contract, but they are not material to the question involved. This agreed statement of facts contained the following paragraph: "The plaintiff has employed in the construction of said building a foreman whose duty it is to supervise the work of the laborers on said building, accelerate, direct, and control same, and see that the same is performed in accordance with the plans and specifications, and to keep the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time of the laborers on said building. That the said foreman has performed the said services on said building at the agreed compensation between himself and the plaintiff at \$5 per day, so that the amount actually earned by said foreman, at said rate, is \$369.10 for services actually performed as herein set out. That the defendant refuses to pay said foreman, and contends and claims that she is not liable therefor. That the duties performed are duties provided for under said contract, and the plaintiff claims that the wages of said foreman are part of the total cost of the labor furnished by him, and that the services performed by said foreman are necessary and a customary part of the labor on said structure."

The trial court rendered a judgment in favor of the construction company for the amount of the foreman's wages. The defendant, Brady, filed a motion for new trial. The company moved to strike the motion for new trial from the files for the alleged reason that a new trial cannot be granted where a judgment is rendered upon an agreed statement. This motion was overruled, and the action of the court in overruling it is assigned as error.

[1] The company takes the position that the court had no right to set aside the judgment because the facts were agreed upon. This contention is without merit. The judgment was set aside at the same term at which it was rendered. A court has control of its proceedings during the term and may set aside a judgment upon motion or upon its own motion, in proper cases, at any time during the term. When a court sets aside a judgment during the term at which it was rendered, the only question upon appeal is whether the judgment should have been set aside, not whether the court had jurisdiction to set it aside. Of course, in order for a party to take advantage of the court's refusal to set aside a judgment, he must have complied with the statute with reference to motions for new trials, but his failure to do so does not affect the jurisdiction of the court to act.

In this case the parties agreed on a statement of facts which the company asserted entitled it to recover, and which the defendant denied entitled it to the relief sought. The court, therefore, acted upon it exactly as if the company had brought an action in the ordinary way, had stated in its petition the same facts contained in the agreed statement, and Brady had demurred to the petition. The court would have had the right, after overruling the demurrer, and upon further consideration, to set aside the judgment overruling the demurrer and to enter a judgment sustaining it. It would be a reproach to the law if the trial court had no power to correct a manifest error at the term when committed.

The main question in this case involves

simply the construction of the contract under which the company was employed. The twelfth article of the contract seems clearly to require the contractor to perform the same duties which the third paragraph of the agreed statement shows were actually performed by the foreman. The foreman supervised, directed, and controlled the laborers and saw that the labor was performed in accordance with the specifications. He also kept the time of the laborers. The twelfth paragraph of the contract required the contractor to keep a constant supervision of the work and to see that the labor was efficient and kept at work, and contemplated the keeping of time books by the contractor; and other portions of the contract required him to do the work according to the specifications. It is true that the third paragraph of the agreed case contains the statement that plaintiffs claim the wages of a foreman are part of the total cost of the labor furnished by them, and that the services performed by the foreman are a necessary and a customary part of the labor. But no proof that it is customary for the owner to pay a foreman in such cases was made, and that fact was not agreed to.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

MISSOURI, O. & G. RY. CO. v. SMITH.
(Supreme Court of Oklahoma. Nov. 26, 1912.
Rehearing Denied May 13, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*) — SERVICE OF CASE-MADE—REVIEW.

Where a case-made is not served within the three days allowed by statute (section 6074-6075, Comp. Laws 1909), and no order is made within that time extending the time for service of the same, a purported case-made served out of time is a nullity, and presents as such nothing for this court to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; John H. King, Judge.

Action by Oscar L. Smith against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Dismissed.

E. R. Jones, of Muskogee, for plaintiff in error. W. W. Gresham, of Wagoner, for defendant in error.

BREWER, C. This case was filed in the district court of Muskogee county, Okl., on the 17th day of November, 1909. It was tried on the 13th day of September, 1910, resulting in a verdict for the defendant in error, who was plaintiff below. A motion for new trial was filed September 16, 1910, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was overruled on October 1st thereafter, and judgment entered on that day.

The record fails to show that any order was made extending the time for serving a case-made at the time or within three days after the time the motion for new trial was overruled. It is true that on November 18, 1910, an order was made which purports to be a further extension of time and a similar order was again made December 30th, purporting to grant a further extension of time, but both of these orders were made without authority of law, for the reason that the court at the time they were made is not shown to have had any power to make them. Under section 6074 and 6075, Comp. L. 1909, a case-made must be prepared and served upon the adverse party within three days of the date of the judgment in the case, unless for good cause shown the time therefor is extended by the court. The case-made in this appeal was not prepared and served within three days, nor does the record show that within that time an order was made extending the time, and as this has been held to be jurisdictional, and as the only errors assigned and complained of here are errors occurring at the trial, we are without authority to examine and pass upon the questions raised. *Saxon v. Hardin*, 29 Okl. 17, 118 Pac. 264; *Latham v. Schlack*, 27 Okl. 522, 112 Pac. 968; *Bettis v. Cargile et al.*, 23 Okl. 301, 100 Pac. 436; *Willson v. Willson*, 27 Okl. 419, 112 Pac. 970; *Carr v. Thompson*, 27 Okl. 7, 110 Pac. 687; *First National Bank of Shawnee v. Oklahoma National Bank of Shawnee*, 29 Okl. 411, 118 Pac. 574.

Therefore for the reasons given this case must be dismissed.

PER CURIAM. Adopted in whole.

TRAVIS v. WAKEN.

(Supreme Court of Oklahoma. April 29, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*) — DISMISSAL — FAILURE TO FILE BRIEFS.

Same as in *Leavitt et al. v. Commercial National Bank*, 26 Okl. 164, 109 Pac. 71.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from District Court, Garfield County; A. L. Zinser, Judge pro tem.

Action between Frank C. Travis and Sam P. Waken. From the judgment, Travis brings error. Dismissed.

Sturgis & Manatt, of Enid, for plaintiff in error. H. G. McKeever, of Enid, for defendant in error.

WILLIAMS, J. On May 24, 1911, the petition in error, with transcript attached, was filed in this court. On the same date the de-

fendant in error entered appearance and waived issuance of summons. On December 12, 1912, the cause was set for submission on March 18, 1913. No brief has been filed pursuant to the requirement of rule 7.

The proceeding in error is dismissed. All the Justices concur.

WILEY v. COBB et al.

(Supreme Court of Oklahoma. April 29, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*)—NECESSARY PARTIES.

All persons who are parties to proceedings in the trial court, whose interest will be adversely affected by a reversal of the judgment, must be made parties, either as plaintiff or defendant in error in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Genevieve Wiley, by Hattie G. Wiley, her guardian, against Henry C. Cobb and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Kenneth S. Murchison and Edward C. Griesel, both of Muskogee, for plaintiff in error. James L. Allen, of Muskogee, for defendant in error Maggie E. Edmondson.

WILLIAMS, J. This proceeding in error, by means of a transcript, seeks to review the judgment of the trial court wherein Genevieve Wiley, by her guardian, Hattie G. Wiley, as plaintiff, sued Henry Cobb individually, and also as executor of the estate of Walter Wiley, deceased, and Maggie E. Edmondson and Oscar Meyers, defendants, to have set aside and vacated a certain judgment made and entered in the superior court of Muskogee county, Okl., on June 19, 1910, between the same parties, in which judgment said plaintiff recovered of and from the said defendant Maggie E. Edmondson the sum of \$300, and the title to the possession of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 9, township 14 north, and range 18 east, was quieted in plaintiff as against all of said defendants, Henry C. Cobb, as an individual, Henry C. Cobb, as executor of the estate of Walter Wiley, deceased, Maggie E. Edmondson, and Oscar Meyers, and said defendants were forever enjoined from setting up any claim thereto adverse to the title of the plaintiff, said plaintiff being adjudged to be the owner in fee simple thereof; and further said plaintiff recovered of and from Henry C. Cobb, executor of the estate of Walter Wiley, deceased, the sum of \$64, and it was further decreed that the title and possession of the said Maggie E. Edmondson to the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 9, township 14 north, and range 18 east, be quieted as against the plaintiff, Genevieve Wiley, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the other defendants, and each and all of them, and all persons claiming under them or any of them, and they were forever enjoined from setting up any claim to said premises, or any part thereof, adverse to the title and possession of the said Maggie E. Edmondson, the said Maggie E. Edmondson being adjudged to be the owner in fee simple of said property; and it was further decreed that the said Maggie E. Edmondson do have and recover of Henry C. Cobb, as executor of the estate of Walter Wiley, deceased, the sum of \$104, and further that the defendants Henry C. Cobb and Oscar Meyers do have and recover their costs therein expended. Said judgment was rendered responsive to issues as framed, except as to Oscar Meyers, which was by default.

It is stated in the brief on the part of the defendant in error, which is not denied, and it seems to be conceded by the plaintiff in error, as no contrary contention has been made in this court, that Henry C. Cobb, as an individual, and Henry C. Cobb, as executor of the estate of Walter Wiley, and Oscar Meyers have not been made parties to this proceeding either as plaintiffs or defendants in error. Neither does it appear that they or either of them have waived the issuance of summons in error, nor have they in any way entered an appearance in this court. Counsel for Maggie E. Edmondson, the defendant in error, have therefore moved that this proceeding be dismissed on the ground that this court has not acquired jurisdiction for want of necessary parties. The time in which a proceeding in error may be commenced in this court to review the judgment of the lower court has already expired, so if all the necessary parties have not been brought in, this proceeding must be dismissed. Obviously Henry C. Cobb, as executor of the estate of Walter Wiley, is interested in the judgment, as there is a decree both for and against him as executor. Likewise Henry C. Cobb, as an individual, and Oscar Meyers have recovered judgment for their costs. It follows that, necessary parties having been omitted, this proceeding must be dismissed. *Billy v. Unknown Heirs of Grey*, 130 Pac. 533; *Appleby et al. v. Dowden*, 132 Pac. 349; *Cook et al., Adm'rs, v. State*, 130 Pac. 300.

In *Gwinnup et al. v. Griffins et al.*, 124 Pac. 1001, it is said: "The court has repeatedly held that 'all persons who are parties to the proceedings in the trial court, and whose interests will be adversely affected by a reversal of the judgment, must be brought into the appellate proceedings. If the interest of those who are brought into the appellate proceedings as parties will be injuriously affected by a reversal or modification of the judgment complained of, without a reopening of the case as to the other parties as to whose interest the judgment has become final by the failure to appeal, the

appeal will be dismissed.' *Seibert v. First National Bank*, 25 Okl. 778, 108 Pac. 628, and cases cited therein. See, also, *Humphrey v. Hunt*, 9 Okl. 196, 59 Pac. 971. Also *Trugeon v. Gallmore*, 28 Okl. 73, 117 Pac. 797, and authorities there cited. Also *Price v. Covington*, 29 Okl. 854, 119 Pac. 628; *Merrell v. Walters* [30 Okl. 173] 119 Pac. 1122." In that case a judgment was rendered in the trial court in favor of *Gwinnup et al. v. J. F. Griffins, James Robinette, W. A. Crosby, T. F. Crosby, F. L. Martin, and C. W. Turner jointly*. Thereafter, on motion for a new trial, the same was sustained, and, from the order of the court awarding the same, the proceeding in error was prosecuted, but the case-made was served only on *F. L. Martin, T. F. Crosby, and James Robinette*. However, *F. L. Martin* was the only defendant in error ever served with summons, and the only one named in the summons in error.

The motion to dismiss will be sustained. All the Justices concur.

HENRY v. STATE.

(Criminal Court of Appeals of Oklahoma.
March 15, 1913.)

Appeal from District Court, Canadian County; John J. Carney, Judge.

William Henry was convicted of grand larceny, and appeals. Affirmed.

Roberson & Roberson, of El Reno, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. The plaintiff in error, Wm. Henry, was convicted in the district court of Canadian county of the crime of grand larceny, and was sentenced to serve a term of three years' imprisonment in the state penitentiary. The judgment and sentence was entered June 1, 1911. An appeal was perfected by filing in this court, November 25, 1911, a petition in error, with case-made. No briefs have been filed, and when the case was called on the regular assignment, this term, no appearance was made on behalf of plaintiff in error. The Attorney General has filed a motion to affirm the judgment for failure to prosecute the appeal.

Where no briefs have been filed, or oral argument made, we do not consider it the duty of this court to make an examination of the transcript of the testimony to determine whether or not the trial court erred in the admission or rejection of testimony. We have examined the information, the instructions of the court, and the judgment and sentence, and we find no prejudicial error.

The motion to affirm is sustained, and the judgment of the district court of Canadian county is affirmed.

BEATS v. STATE

(Criminal Court of Appeals of Oklahoma.
May 3, 1913.)

Appeal from Superior Court, Pittsburg County; W. C. Liedke, Judge.

Dan Beats was convicted of assault with intent to murder, and he appeals. Cause abated and stricken from the docket.

Wilkinson & Keith, of McAlester, for appellant. C. J. Dayenport, Asst. Atty. Gen., for the State.

PER CURIAM. Appellant was convicted in the superior court of Pittsburg county for an assault with intent to murder, and his punishment was assessed at two years' confinement in the penitentiary. From this judgment he appealed.

The Attorney General has suggested to the court the death of appellant and that this cause be abated. It is therefore ordered by the court that this cause be abated and stricken from the docket.

HOWARD v. STATE

(Criminal Court of Appeals of Oklahoma. May 3, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 59*)—LARCENY (§ 55*)—PRINCIPAL AND ACCESSORY—PROSECUTION.

(a) The fact that a person who is concerned in the commission of a felony may attempt to conceal or to aid another person who may also be concerned in the commission of such offense to escape from arrest will not make such person so aiding his codefendant an accessory, but he still will be liable to be tried and punished as a principal offender.

(b) For facts which do not show that a defendant who was charged with larceny should have been acquitted upon the ground that he was only the receiver of stolen goods, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.* Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—POSSESSION OF STOLEN GOODS.

The contemporaneous possession of recently stolen goods may be admitted in evidence for the purpose of throwing light upon a particular larceny for which a defendant was then upon trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1510; Dec. Dig. § 369.*]

3. LARCENY (§ 28*)—ACCUSSION—ALLEGATION OF PLACE.

The right of possession as well as the right to the property remains at all times in the owner as a matter of law where property has been stolen in another state and brought into this state, and it may be alleged in an information or indictment that such larceny was committed in any town, or city, or county into or through which such stolen property had been brought.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 59, 62, 99, 101; Dec. Dig. § 28.*]

Appeal from District Court, Washita County; James R. Tolbert, Judge.

Walter Howard was convicted of larceny of a horse, and he appeals. Affirmed.

It was proven that on the night of the 14th day of January, 1910, there was stolen from the ranch of W. E. Tandy in Roberts county, Tex., two horses and a saddle, the property of said Tandy. The animals were traced from Texas into Oklahoma. About 60 days after the theft some officers of Washita county, Okl., went to the house of Gus Howard in said county about 9 o'clock at night. Gus Howard was called to the door and informed that he was under arrest. He requested permission to go back in the house to dress himself before accompanying the officers. He also informed the officers that no other persons were present. The house was dark on the inside. The officers entered the house with Gus Howard. Some difficulty was experienced in getting a light. When the lamp was finally lighted, R. F. Graham and appellant covered the officers with their pistols, and forced them to permit themselves to be disarmed. Prior to this time the officers did not know that any one was present except Gus Howard. The officers informed appellant and Graham that they only desired to arrest Gus Howard, and requested to be permitted to take him and leave. But they were not allowed to do this by appellant and Graham. Graham and appellant held their pistols on the officers until they were dressed. They then marched the officers out of the house about 200 yards when Graham and appellant permitted the officers to return to the house. They then started off on foot. The officers returned to the house and remained there that night. They found on the premises of Gus Howard the two horses and the saddle stolen from Tandy, and also a considerable quantity of other stolen property. As soon as it was light the next day, the officers, having obtained blood hounds, took the trail of appellant and Graham, and followed them about 16½ miles to the house of Bob Howard. They there found appellant and Graham concealed in a well about 3½ feet square which had a plank covering. Appellant and Graham were armed with automatic pistols and a Winchester, and abundantly supplied with ammunition. After some persuasion and seeing that escape was impossible, appellant and Graham finally passed their arms out, and came out of the well and surrendered. It was also proven that Graham stated that he and appellant had gotten together about the 1st of January, and that he, Graham, had been at the house of appellant some time in January. The record fails to show that an exception was reserved to this testimony. On the contrary, some of it was drawn out by questions asked by counsel for appellant. Tandy testified that he had never seen Graham until after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the theft was committed, but that he had known appellant for two or three years, that he had seen appellant in Canadian, Tex., a time or two, and that some time in November prior to the theft of his horses and saddle appellant said he had helped witness take a bunch of cattle up the river.

Appellant did not testify in his own behalf, but produced a number of witnesses who testified that they saw him in Roger Mills county on the 14th day of January, 1910.

Echols & Merrill, of Elk City, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First. It is not claimed that appellant did not have a guilty connection with the stolen property, but it is earnestly contended that the evidence does not sustain a verdict for grand larceny, but that it makes out a case showing that appellant was merely an accessory to the crime committed, or, at most, that he was guilty of knowingly receiving stolen property. We cannot agree with either of these contentions. Section 2046, Comp. Laws 1909, with reference to accessories, is as follows: "All persons who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, are accessories." The testimony in this case clearly shows that when the appellant aided his codefendant, Graham, in escaping from the officers, he was not trying to aid and protect Graham any more than he was trying to aid and protect himself. It is impossible to explain his conduct on this occasion upon any other hypothesis than that he was as much a party to the crime as Graham was. In fact, at this time no charge was pending against either Graham or appellant. Gus Howard was then the only person the officers were after. The conduct of appellant therefore was not prompted by a desire to prevent the arrest of Graham, for no one then wanted to arrest him. His action cannot be considered other than as a tacit confession of his guilt. Therefore the law of accessory does not apply. There is not proof that appellant received the stolen property from Graham, or from any one else. All of the testimony points clearly to the conclusion that appellant and Graham were acting together as copartners in a general plan or scheme of theft. It is true that appellant did attempt to establish an alibi by proving that he was at home on the 14th day of January when the horses and the saddle were stolen, but his evidence on this subject is not different from that which could be produced by any thief on such an occasion, and the force of his testimony on this subject is entirely destroyed by his own conduct when found in possession

of the stolen property. The proof is undisputed that appellant was acquainted with Tandy, and had been on Tandy's place in Texas, and claimed to have assisted Tandy in driving a bunch of cattle. There is no proof in the record that Graham was ever on Tandy's place, or ever in the state of Texas. The defense of knowingly receiving stolen property, if applicable to either of these defendants as against this information for larceny, could be made with a much greater showing of reason and justice in favor of Graham than in behalf of appellant. Where there is no question as to the guilt of an appellant, this court does not feel called upon to make nice hair-splitting distinctions as between different offenses. We are far more concerned in the enforcement of substantial justice, the punishment of criminals, and the suppression of crime in Oklahoma, and thereby protecting honest people in their property and rights, than we are in establishing a fine-spun system of criminal jurisprudence.

[2] Second. Over the objection and exception of appellant, the state was permitted to prove that three sets of harness, two saddles, three horses, a cook stove, and some clothing were found at Gus Howard's place in Washita county at the time when the arrest in this case was made, and it was proven without objection that this property was pointed out to the officers as belonging to appellant and his codefendant, Graham. It was also proven that all of this was stolen property. We think that evidence of these contemporaneous thefts and the contemporaneous possession of such other stolen property was competent. See *Davis v. State*, 7 Okl. Cr. 322, 123 Pac. 560. All of this evidence strongly tended to show that a partnership in crime, of which the larceny of the horses in question was a part, existed between appellant and Graham.

[3] Third. The evidence shows that as a matter of fact the horses and saddle were stolen in Roberts county, Tex., and were brought into Washita county, Okl., while the information alleges that the property was stolen in Washita county, Okl. This was permissible under our statute. Section 2605, Comp. Laws 1909, is as follows: "Every person who steals the property of another in any other state or country, and brings the same into this state may be convicted and punished in the same manner as if such larceny had been committed in this state; and such larceny may be charged to have been committed in any town or city into or through which such stolen property has been brought." Discussing this very question in the case of *Bivens v. State*, 6 Okl. Cr. 529, 120 Pac. 1037, Judge Doyle said: "The right of possession, as well as the right of the property, remained in the owner all the time as a matter of law, if the original taking and transportation of the property was under such circumstances as constituted a

larceny." The instructions in this case are open to criticism; but, owing to the conclusive character of the testimony, appellant could not have been injured thereby, for no honest and intelligent jury could come to any other conclusion but that appellant had a guilty connection with the larceny of the property in question. To our minds it is plain that, if appellant was not the original thief, he was a party to the entire transaction, and was sharing in the fruits of the theft, and we are not willing to place a strained construction upon the law in order that Oklahoma may become a refuge or asylum for those who deplete upon the property of the people of an adjoining state. The reversal of this conviction would in our judgment amount to a miscarriage of justice.

The judgment of the lower court is in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

PRICE v. STATE.

(Criminal Court of Appeals of Oklahoma. May 10, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 71*)—CONSTRUCTION OF INDICTMENT—SUFFICIENCY.

(a) The common-law doctrine of a strict construction of criminal law and all proceedings in criminal cases, and that an indictment should be certain to a certain intent in every particular, is not in force in Oklahoma.

(b) If an indictment is framed in such language as to enable a person of common understanding to know what is intended thereby, and sufficiently certain to enable a defendant to prepare his defense, and to plead a judgment of acquittal or conviction in bar to a subsequent prosecution for the same offense, such indictment is sufficient.

(c) Judges are naturally in sympathy with lawyers, and are always anxious to do all that they reasonably can to please them and to promote the interests of the legal profession, but it is a gross misconception to suppose that they should allow a desire to make business for lawyers to in the least influence their decisions. Courts are established and supported by the people for the sole and exclusive purpose of administering justice, and thereby giving equal protection to all classes, occupations, and professions. The judge who does not recognize and live up to this ideal is a disgrace to the position which he occupies, and is a menace to the state in which he holds office.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. § 71; * Embezzlement, Cent. Dig. § 38.]

2. WITNESSES (§ 48*)—COMPETENCY—CONVICTION OF CRIME.

The fact that a person may have been convicted of any felony except that of perjury does not disqualify him from testifying as a witness in the courts of Oklahoma.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109-115; Dec. Dig. § 48.*]

3. RECEIVING STOLEN GOODS (§ 8*)—EVIDENCE—ACCOMPLICE.

Where the evidence clearly shows that a defendant is guilty of knowingly receiving stolen property, a conviction will not be reversed because there may be some evidence in the record which tends to establish the fact that he was a principal in the original larceny.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 15-18; Dec. Dig. § 8.*]

4. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

An instruction applicable to the law of circumstantial evidence should only be given in cases where the state relies entirely upon such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

5. RECEIVING STOLEN GOODS (§§ 4, 8*)—ELEMENTS OF OFFENSE—POSSESSION—EVIDENCE.

(a) In order to sustain a conviction for knowingly receiving stolen property, manual possession by the defendant of such property is not necessary. It is sufficient if such property be received by an authorized agent or representative of the defendant.

(b) Where a defendant receives stolen property under such circumstances that he must have believed that it was stolen, a conviction for knowingly receiving stolen property will not be reversed for want of evidence.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 6, 15-18; Dec. Dig. §§ 4, 8.*]

Appeal from Superior Court, Pittsburg County; P. D. Brewer, Judge.

J. W. Price was convicted of receiving stolen property, and he appeals. Affirmed.

W. J. McCully testified that he was a policeman in the city of McAlester; that on the 30th of March, 1911, he visited the meat market of appellant in the city of McAlester; that a negro named Vaughn was there working for appellant; the purpose of witness was to search for some meat which had been stolen; that he found some meat there that was fresh, and some that was put up in narrow strips and wrapped in paper; that he also found some ham and some sausage; he also found a number of crates which were not opened; that they were marked Morris & Co., Oklahoma City; that some of the meat found in the butcher shop of appellant was found laying on the floor in a box, some was on the counter, and some was in the refrigerator; witness testified that he telephoned for appellant; witness says, "What about this meat proposition?" appellant replied, "What meat?" witness said, "This meat that has been coming here at night?" he said, "When I go down of mornings about 8 o'clock my butcher tells me that there is some stuff he found here when he opened the door this morning;" appellant and witness went into the butcher shop together, and witness said to Vaughn, "Tell us what he said before Dr. Price came down." Vaughn replied that he had been suspicious of this work for some time because some of the meat had dirt on it and

some of the bottoms of the buckets were bursted, and that he, Vaughn, had stated to appellant that sooner or later some of them were going to get into trouble about this, and that appellant said to him that he, appellant, was paying Vaughn for his work, and for him to cut and sell the meat found in that shop; witness then asked appellant what, if anything, he had to say to this; appellant replied he did not have anything to say. Appellant stated, further, that he had arrangements with a white man and a negro boy named Len Wallace; that the white man would send the negro boy to collect, and that sometimes, when meat would be found in the shop, the negro boy would come and collect for it; he said this arrangement had been on for two or three weeks; he said he did not know who the white man was; appellant also said the negro Vaughn kept the key to the shop; witness also testified that Len Wallace, the negro boy referred to, had pleaded guilty to the theft of this meat.

E. M. Rounsaville testified for the state that he was constable of Pittsburg county; that on the morning in question it was his duty to watch the train on the Rock Island Railroad going east from Oklahoma City; that the train had some Morris & Co. refrigerator cars to it; that when the train passed he noticed the side door of one of these refrigerator cars open; he saw a man in the car rolling out boxes of meat; afterwards two men came along and picked it up, both of whom were negroes; witness heard them talking about getting the stuff away, but could not understand what they said; a third man was present, but witness was not able to see him so as to identify him; that witness arrested one of the negroes and took him to jail; witness then returned to the place where the meat had been taken from the car, and found only empty boxes marked Morris & Co. from which sausage had been taken; witness then testified substantially to all of the facts testified to by W. J. McCully.

Len Wallace testified for the state that he was then confined in the penitentiary at McAlester on his plea of guilty to having burglarized a Morris & Co. car in McAlester on the night of March 30th; that witness was 19 years old, and was acquainted with appellant, and had known him for two years; shortly before the crime was committed when witness was passing appellant's butcher shop he was called in by appellant, and asked by appellant if he could bring him some more of that stuff witness had already sold to appellant; witness replied that he could; appellant told him to bring some around that same night; this was Tuesday night; appellant told witness he wanted ham, bacon, and lard; that witness attempted to get this stuff the following night, but some one was watching the cars, and he was unable to do so; that on Friday night witness got the stuff out of the car, and carried and delivered it to the market place of appellant; that

he was assisted by Dave Coleman and Arch Johnson; that witness got the key to the market from Vaughn, and placed the stuff in the market; that witness had told appellant where he was getting the stuff from; that appellant told witness he would pay him one-half of what the stuff would cost him at the packing house.

Earl Martin testified that he was in the employment of the railroad company at Halleyville as seal clerk; that on the morning of March 30th he found a freight car from Oklahoma City with the seal broken; this was a Morris & Co. car.

J. E. Padgett testified for the state that on the morning of the 30th of March he was a freight conductor, and went out of Shawnee on No. 92, and passed through the city of McAlester; that he had with his train some cars belonging to Morris Packing Company; that, when he got to Halleyville, he was informed that one of the meat cars had been broken open and robbed.

W. H. Huntley testified that he was beef scaler for Morris & Co. at Oklahoma City, and that his duty was to receive and check into cars whatever might be going out in them; that on the date in question the cars were loaded with meat belonging to Morris & Co. consigned to Memphis, Tenn.

A number of other witnesses were introduced by the state whose evidence corroborated the testimony already introduced.

Sam Tucker testified for appellant that he was in appellant's place of business about the middle of February; that a white man and Len Wallace came into the butcher shop, and were talking to appellant, and told him they could put the meat in cheaper; that appellant figured with them and told them he would see them later.

Appellant testified that some time before the 30th of March a white man and Len Wallace came to appellant's place of business, and asked him what he was paying for meat; appellant replied he was paying packing house prices; they replied they could save him a cent or cent and a half a pound; that appellant gave them an order for bacon; the understanding was that Len Wallace was to deliver the goods; that Len Wallace did deliver some meat and appellant paid him for it; that there was no agreement to these parties stealing the meat, and appellant had no suspicion of the kind.

Appellant introduced a number of witnesses who testified that his previous reputation for honesty was good. A number of other facts were proven by both sides which have no direct bearing upon the guilt or innocence of appellant.

Wilkinson & Keith, of McAlester, for appellant. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

FURMAN, J. (after stating the facts as above). First. The charging part of the information in this case is as follows: "Comes

now Robert Tarter, the duly qualified and acting county attorney in and for Pittsburg county, state of Oklahoma, and gives the superior court of Pittsburg county, state of Oklahoma, to know and be informed that J. W. Price and Isaiah Vaughn did, in Pittsburg county, and in the state of Oklahoma, on or about the 30 day of March, in the year of our Lord one thousand nine hundred and eleven and anterior to the presentment hereof, then and there unlawfully, feloniously, and knowingly receive and buy from Len Wallace, Dave Coleman, and Archie Johnson the following described property, to wit: Certain salt and fresh meats, consisting of sausages, neck bones, and bacon, of the value of \$50.00, the property of and taken from the possession of the Chicago, Rock Island & Pacific Railway Company, a corporation, the said J. W. Price and the said Isaiah Vaughn then and there well knowing the said property to have been then and there recently stolen from the said Chicago, Rock Island & Pacific Railway Company, a corporation, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state." To this information appellant demurred upon the ground that the facts set forth in the information do not constitute a public offense, and that said information is indefinite and uncertain. This demurrer was by the court overruled, to which appellant excepted.

[1] Under the old common-law doctrine of strictly construing criminal law and all proceedings in criminal cases, and that an indictment or information should be certain to a certain intent in every particular, the objection now urged to this information would undoubtedly be good. But these doctrines have long since been repudiated in the state of Oklahoma. It is true that an indictment should be reasonably certain as to the offense charged in order that the defendant may not be surprised and may be able to prepare to make his defense, and also to enable him to plead a judgment of acquittal or conviction in bar to a subsequent prosecution for the same offense. This is all that a defendant is in reason and justice entitled to. If an indictment is couched in such language as to enable a person of common understanding to know what is intended, it is all that the law requires. See section 6696, Comp. Laws 1909. See, also, section 6704, Comp. Laws 1909. See, also, *Bowes v. State*, 8 Okl. Cr. 277, 127 Pac. 883. The prosecution in this case was based upon section 2603, Comp. Laws 1909, which is as follows: "Every person who buys or receives, in any manner, upon any consideration, any personal property of any value whatsoever, that has been stolen from any other, knowing the same to have been stolen, is punishable by imprisonment in the State prison not exceeding five years, or in the county jail not exceeding six months, or by fine not exceeding two hundred

and fifty dollars, or by both such fine and imprisonment." The essential elements of this crime consists in receiving property that had been stolen from any other person, knowing such property to have been stolen. We do not see how it is possible for any person of common understanding to read this information and not understand exactly what appellant was charged with. We also think that the offense is sufficiently described to enable appellant to plead this judgment in bar of a second prosecution for the same offense, and we think the information is sufficient.

An instructive case in support of our views is that of *State v. Whitton*, 72 Wis. 18, 38 N. W. 331. The information in that case was as follows: "I, J. W. Wegner, district attorney for said county, hereby inform the court that on the third day of September, in the year one thousand eight hundred and eighty seven, at the said county, the said defendant, Richard Whitton, feloniously did buy, receive, conceal, and have, and did then and there aid in the concealment of goods, chattels, and property, to wit, one hunting-case gold watch of the value of forty dollars, the said property, goods, and chattels being then and there the property of one J. P. Johnson, he, the said Richard Whitton, then and there knowing the said goods, chattels, and property had theretofore been feloniously stolen, taken, and carried away, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin." And the court sustained its sufficiency, and said: "There can be no doubt but that the district attorney intended to inform against the defendant for the crime of receiving stolen property as defined by section 4417, Rev. St. 1878. There is certainly enough stated in the information to inform both the defendant and the court of the intention of the district attorney in that respect. That being admitted, can it be said that the defendant has been, or can be, prejudicated by the lack of definiteness in the information, after having a fair trial upon the merits of the charge as intended to be made by the prosecuting attorney? We certainly think he has not been prejudicated by a lack of a more full statement of the charge in the information; and, unless there be some well-settled rule of law which forbids sentence upon this information, judgment ought not to be arrested. * * * The only possible objection to the information under that section is that it omitted to state in the language of the statute that the defendant received, etc., 'stolen money, goods, or property,' that being the language used in said section 4417, Rev. St. We think that the allegation that he received the goods of a stranger, knowing that they had been theretofore stolen, is a substantial statement of the offense defined by section 4417. We do not think there could have been any doubt either in the minds of the court or of the de-

fendant as to what offense he was charged with."

In *State v. Allemand*, 25 La. Ann. 525, the court in the first paragraph of the syllabus held: "An indictment charging that defendants received the property stolen with a felonious intent knowing the same to have been stolen at the time is in sufficient conformity with the statute." In the body of the opinion the court said: "The first, second, and fourth grounds of the assignment of errors are substantially the same—that the indictment was fatally defective in not stating that the defendants received the property feloniously taken or stolen. The charge in the indictment is that defendants 'unlawfully and feloniously did receive and buy a cow, of a red color,' etc.; 'they, the said Charles Allemand, Louis Allemand, and Joseph Allemand, then and there, well knowing that the aforesaid cow had been taken, stolen, carried away or killed, contrary to the form of the statute,' etc. The object of an indictment is to advise the party accused of the charge against him, to enable him to prepare his defense, and to enable him to plead autre fois acquit or convict in any subsequent proceedings against him for the same offense."

In *People v. Gough*, 2 Utah, 70, the indictment charged that defendant "did unlawfully and feloniously buy and receive, for his own gain, and to prevent the owners from again possessing their property, sixteen pounds of gold ore of the value of one hundred and twenty-five dollars, of the goods and chattels and personal property of Samuel McIntyre, William McIntyre, James Cunningham, Moroni Edwards, Haskell V. Shirliff, Jacob Weller, Elijah M. Weller, Herman Barrett, and Oliver Dise; he, the said Richard Gough, then and there well knowing the said property to have been feloniously stolen, taken and carried away, contrary," etc. And the court said: "(1) The appellant urges that the indictment is defective in not alleging the property to have been stolen. All of the facts or acts have been alleged in the indictment which were specified by the Legislature in defining the offense charged, and we think this was sufficient. The indictment fully informed the defendant as to the charge against him. The common-law strictness is not required under our practice. Some offenses could only be described by giving circumstances, but this is not such a case, and is therefore governed by the general rule; the definition or description of the offense being given in the statute. *People v. Murphy*, 39 Cal. 56; *People v. Cronin*, 34 Cal. 201, 208; *People v. Parsons*, 6 Cal. 487; *State v. Carr*, 6 Or. 133; *People v. Rodriguez*, 10 Cal. 51."

If we were to sustain the objections now urged to this information, we would attach more importance to shadows than to substance, and we would elevate forms and cere-

monies above justice. While lawyers are not to be blamed for advancing every possible argument in behalf of their clients, yet the courts in the past have gone entirely too far in sustaining frivolous objections. The result is that the uncertainty in the administration of criminal law in the United States has become a reproach to the American people, and the reputation of the profession and the integrity of the courts have been seriously called in question. There is no use in trying to dodge or disguise the truth. This evil lies at the very bottom and foundation of many of the complaints which are now heard about the delays of the law and the inefficiency of the courts and the growing demand for the recall of the judiciary. The courts must redeem themselves, or there is no telling what the result will be. Public confidence can only be restored by a fearless, honest, and independent judiciary. Judges must understand that it is their sole and only duty to serve the people and administer justice. They are being weighed in the balances by an intelligent, justice loving, and long suffering public; and if they are found wanting the fault will be theirs alone. Judges are naturally in sympathy with lawyers, and are always willing to do all that they reasonably can to please and assist the legal profession, but it is a gross misconception, dishonoring alike to the bar and to the bench, to suppose that judges should allow a desire to make business for the lawyers to in the least influence their decisions. They have a far higher duty than this. Courts are established and supported by the people for the sole and exclusive purpose of enforcing justice, and it is their duty to see that justice is never divorced from the law, and that no class, occupation, or profession is favored at the expense of other classes, occupations, and professions, and that justice is thereby sacrificed. The judge who does not recognize and live up to this high ideal is not only a disgrace to the position which he occupies, but he is a menace to the good order of society.

We are of the opinion that the information in this case substantially complies with the law, and that the trial court did not err in overruling the demurrer thereto.

[2] Second. When the state's witness Len Wallace was placed upon the stand, counsel for appellant objected to his testifying upon the ground that he had been convicted of the crime of burglary, and was thereby rendered incompetent to testify. The court overruled this objection and permitted the testimony of this witness to be received, to all of which counsel for appellant excepted. Counsel in their brief say: "The fourth assignment of error is directed at the admissibility of the evidence of Len Wallace and at his competency as a witness. Our statute provides that a person who is confined in the penitentiary is civilly dead and the contention of the plaintiff in error was

that on account of that statute he was not a competent witness." This objection would be good in some jurisdictions, but it is not now and never has been the law in Oklahoma. This question is settled by our statute and by the previous adjudication of our appellate court. In the case of *Martin v. Territory*, 14 Okl. 598, 78 Pac. 88, this question was decided adversely to the contention made by counsel for appellant in a well-considered opinion by Judge Burwell. The court there said: "During the trial one Brady, who had been convicted of a felony and sentenced to imprisonment for life in the territorial prison, was called as a witness for the prosecution, and the appellant insists that this was reversible error, for the reason that, under the provisions of section 2578, he was civilly dead, and therefore incompetent to testify. This section reads as follows: 'A person sentenced to imprisonment in the territorial prison for life is thereby deemed civilly dead'—and authorities are cited to establish that such an one at common law was not a competent witness. Were the section of the statute just quoted the only statutory provision on the subject, there might be some force in the contention, but counsel have overlooked other provisions which apply to the case at bar. The statute on which appellant relies has no application to the right of such a person to testify as a witness, but applies to other civil rights. Section 4209 provides (section 5838, Comp. Laws 1909): 'No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime, but such interest or conviction may be shown for the purpose of affecting his credibility.' And under section 5207 (section 6834, Comp. Laws 1909) of the same statutes, the rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in the chapter on Procedure Criminal, and nowhere in that chapter is one who has been convicted of a felony disqualified to testify as a witness. Brady was a competent witness." There is only one exception to the law as stated by Judge Burwell. Section 2190, Comp. Laws 1909, is as follows: "No person who has been convicted of perjury, or of subornation of perjury, shall thereafter be received as a witness in any action, proceeding or matter whatever upon his own behalf; nor in any action or proceeding between adverse parties against any person who shall object thereto, until the judgment against him has been reversed. But where such person has been actually received as a witness contrary to the provisions of this section, his incompetency shall not prejudice the rights, innocently acquired, of any other person claiming under the proceeding in which such person was so received." The trial court therefore did

not err in overruling the objection made to the witness Wallace upon the ground that he had been convicted of a felony.

[3] Third. It is urged on behalf of appellant that the trial court erred in not advising the jury to acquit appellant upon the ground that the evidence showed that appellant was guilty of the crime of grand larceny, in that he was a party to the original taking. We believe that appellant might have been convicted for grand larceny on the evidence in this case, but it does not necessarily follow that the evidence does not also sustain a verdict for knowingly receiving stolen property. It is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed; but, if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a less degree of punishment, a defendant cannot be heard to complain that he should have been charged with and convicted of the higher offense included in the same acts, because the error of the county attorney inured to his benefit and he is bound thereby.

In discussing this very question in the case of *Walter Howard v. State*, 131 Pac. 1100, decided at the last term, this court said: "Where there is no question as to the guilt of an appellant, this court does not feel called upon to make nice, hairsplitting distinctions as between different offenses. We are far more concerned in the enforcement of substantial justice, the punishment of criminals, and the suppression of crime in Oklahoma, and thereby protecting honest people in their property and rights, than we are in establishing a fine-spun system of criminal jurisprudence." There are two views to take of the facts of this case. From the standpoint of the state the testimony shows that appellant should have been prosecuted for and convicted of grand larceny. From the standpoint of appellant's testimony he had nothing to do with the larceny of the property in question. But he purchased it under such circumstances as would put an honest man upon inquiry, and as would render him liable on his own testimony to prosecution for receiving stolen property. Under either of these conditions, a conviction for either offense would have been sustained by the testimony.

In the case of *Jinks McGill v. State*, 6 Okl. Cr. 512, 120 Pac. 297, Judge Doyle states the case as follows: "The testimony in the case conduces to show that 60 gallons of paint in cases of 6 gallons each were stolen on the night of January 2, 1910, from the warehouse, in Guthrie, of the Arkansas Lumber Company, a corporation. About a week afterwards, 18 gallons of this paint was found concealed in the defendant's house. John McGrue and Charlie French testified that they stole three of the cases from the warehouse of the Arkansas Valley Lumber

Company, and, assisted by Willie Guess, carried them to the defendant's home about 11 o'clock that night; that they talked with him before they stole it, and when they delivered it that he paid John McGrue \$1.50 for the three cases. There was no testimony offered on the part of the defendant." And after discussing some other questions Judge Doyle, continuing, says: "Our conclusion is that the appeal in this case is without merit."

In *Anthony v. State*, 44 Fla. 2, 32 South. 819, the seventh paragraph of the syllabus reads as follows: "On the trial of a person charged with receiving stolen property, testimony on the part of the state tending to prove an arrangement or plan made between the alleged thief and the defendant, whereby the thief was to steal and the defendant was to receive from him a certain kind of property, as the defendant should need it, is admissible, where the testimony tends to show that the particular property charged in the indictment was received by defendant in pursuance of such arrangement or plan." And in the opinion the court says: "The tenth assignment is that the court erred in denying the motion to strike out the testimony of witness Conroy as to the shortage of pork loins at or about gala week, 1900. The witness was interrogated as to what Anthony said about an arrangement between him and Moore in reference to the delivery of meat by the latter to the former, and stated that Anthony said there was a shortage of pork loins; and at this point counsel for defendant moved to strike out the answer on the ground that it was too vague, indefinite, and uncertain, and did not give defendant sufficient notice of the offense with which he was charged. This motion, was denied, and exception taken. The witness then completed his answer by stating that Anthony said during the last gala week there was a shortage of pork loins in Jacksonville, and he went to Moore and asked him if he could not take care of him and Moore said he could. Anthony said that was the time he started this arrangement with Moore, and it was because he could not get pork loins anywhere else. The gala week referred to was in 1900. We do not think there was any ground of objection on the part of the accused to the introduction of this evidence. It tended to show the beginning, not too remote, of the very arrangement under which the pork loins alleged in the information to have been stolen were received by the accused, and bore on the question of his guilty knowledge. *Copperman v. People* [56 N. Y. 591]; and *Coleman v. Same*, supra [58 N. Y. 555]."

In *Sisk v. State* (Tex. Cr. App.) 42 S. W. 985, Sisk was convicted of receiving stolen property. There was evidence in the case from which the jury might have concluded that the defendant was a party to the original taking of the stock; and, although the

evidence in the case would have sustained a conviction for larceny, the judgment was affirmed. Judge Henderson said: "We have examined the record carefully, and in our opinion the proof is unquestioned that appellant at least received the stolen animal from Ed McCoy, if, indeed, he did not, in connection with said Ed McCoy, steal the same. The jury, however, found him guilty of receiving said animal from McCoy knowing at the time he so received her that she was stolen property."

We therefore hold that the appellant was not injured or deprived of any right by being convicted of knowingly receiving stolen property, although the evidence would have sustained a verdict of guilty of grand larceny, and that, therefore, the trial court did not err in refusing to give the instruction requested.

[4] Fourth. Counsel for appellant complain at the action of the trial court in refusing to instruct upon the law applicable to circumstantial evidence. Such an instruction should only be given where the state relies solely upon circumstantial evidence. See *S. S. Star v. State*, 131 Pac. 542, decided at the last term of the court; *John Hendrix v. United States*, 2 Okl. Cr. 244, 101 Pac. 125. In this case the evidence of appellant's guilt is positive and direct, and an instruction upon circumstantial evidence would only have tended to confuse the jury. The court therefore did not err in declining to give the instruction requested.

[5] Fifth. Counsel for appellant complain at the action of the trial court in refusing to give the following instruction: "The court instructs the jury that if you believe from the evidence that the goods named in the information were stolen by Len Wallace in the nighttime, and that the defendant was at home and knew nothing of the larceny and knew nothing of the existence of such goods, and if you further believe that Len Wallace, together with others, placed said goods in the butcher shop of the defendant without the knowledge of the defendant, and that said goods were taken possession of by the officer before defendant knew that said goods were in his shop, or knew of any larceny being committed, or knew of the existence of said goods, then it is your duty to acquit the defendant." This instruction was not applicable to the evidence. The testimony plainly shows that the stolen goods were placed in appellant's butcher shop with the knowledge and consent of Vaughn, who was the employé of appellant, and that there was an agreement between appellant and Vaughn on the one side and the thieves on the other that such property would be received at appellant's butcher shop by Vaughn and paid for by appellant. Therefore the possession of Vaughn was the possession of appellant. Speaking on this very subject, 1 Wharton's Cr. Law (10th Ed.) par. 990, is as follows: "Reception

must be substantively proved. Manual possession or touch is unnecessary in order to sustain conviction; it is sufficient if there is a control by the receiver over the goods. A person is said to receive goods improperly obtained as soon as he obtains control over them from the person from whom he receives them; and the mere aiding in the secreting or disposal of the goods constitutes the offense. When the goods were unlawfully received by a servant or wife of the party charged, it is necessary, in order to make him a receiver, that he should have done some act in the way of joining in the reception. The reception of the produce of the goods, however, is not the reception of the goods." 2 Bishop's New Cr. Law, § 1139, is as follows: "Sec. 1139. The act of Receiving: (1) Under Control.—The leading doctrine here is that the goods must come under the control of the receiver; yet the control need not be manual. For instance—(2) Subordinate—Deposit.—If they are in the hands of a person whom he can command in respect of them, they may be deemed to have been received. And one who allowed a trunk of stolen goods to be sent on board a vessel in which he had taken passage, was held to have received them. But—(3) Personal Possession—by the receiver of the goods, is necessary to have been acquired where he has no control over their custodian. And—(4) Receiving.—Besides possession, there must be something which may be deemed a receiving of the goods."

Under these authorities and upon every principle of reason and justice, both as a matter of fact and of law, appellant is clearly guilty of receiving stolen goods. Part of them were found in his refrigerator and part upon the counter of his butcher shop, placed there by his employé Vaughn and by his orders. The court therefore did not err in refusing to give the instruction requested.

A number of other exceptions were reserved to instructions given by the court, and also exceptions were reserved to the action of the court in refusing to give certain instructions requested. As far as applicable to the evidence in this case, the requested instructions were all incorporated in the general instructions of the court, and we find the general instructions to be an admirable exposition of the law in which all of the rights of appellant were properly protected. The testimony presents as clear a case of receiving stolen property knowing it to have been stolen as could be made out. Conceding all that counsel for appellant could claim in behalf of their client, based upon his own testimony, and that is that appellant was not a party to the original theft, yet his own testimony shows that he must have believed and known that the property was stolen. The man who purchases property from entire strangers and receives it at

night under such unusual circumstances as those testified to by appellant himself does so at his peril, and cannot be heard to say that he did not believe that the property was stolen. If he did believe he was receiving stolen property, he was just as guilty as if he had positive knowledge of that fact. 2 Bishop's New Cr. Law, § 1138, is as follows: "As foundation for the criminal intent, without which there can be no crime, and by the statutory terms, the receiver must know the goods to have been stolen. And this knowledge must exist at the very instant of the receiving. It need not be such direct knowledge as comes from witnessing the theft; but in the words of Bramwell, B., 'it is sufficient if the circumstances were such, accompanying the transaction, as to make the prisoner believe' the goods had been stolen." We regard this as as clear a case of guilt of knowingly receiving stolen property as could be made out by human testimony.

We find no error in the record, and we believe that justice has been done in the conviction of appellant. The judgment of the lower court is therefore affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

Ex parte SIZEMORE.

(Criminal Court of Appeals of Oklahoma. May 17, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 87*)—COUNTY COURT—JURISDICTION.

The jurisdiction of a county court in criminal cases is the same in all respects, whether its sessions are held at the county seat or at a county court town.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 126; Dec. Dig. § 87.*]

2. CRIMINAL LAW (§ 83*)—JURISDICTION.

When there is jurisdiction of the party and of the offense for which he was tried, the decision of all other questions arising in the case is but an exercise of that jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 112–114; Dec. Dig. § 83.*]

3. CRIMINAL LAW (§ 104*)—COUNTY COURTS—JURISDICTION—PRESUMPTION.

County courts are entitled to the same presumption of jurisdiction as are the district courts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 214, 215; Dec. Dig. § 104.*]

Application of Theo. Sizemore for a writ of habeas corpus. Application denied.

Jess L. Ballard, of Grove, for petitioner.

DOYLE, J. This is a petition for writ of habeas corpus filed in this court March 3, 1913, wherein petitioner, Theo. Sizemore, avers that he is unlawfully imprisoned and restrained of his liberty by Bud Thomason, sheriff of Delaware county, and for the rea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sons stated therein petitioner prays that a writ of habeas corpus be allowed, and that he be discharged.

It appears from the petition that petitioner was by information filed in the county court of Delaware county charged with the commission of the crime of unlawfully transporting intoxicating liquor, that upon his trial at the county court town of Grove in said county he was convicted and sentenced to pay a fine of \$120, and to serve a term of 30 days in the county jail, and on commitment duly issued was placed in the custody of the respondent and committed to jail.

[1, 2] It is further averred that said county court had no jurisdiction in said cause for the reason that said court was not convened and sitting at the time and place by law prescribed for holding court, in that the said court should have convened at Jay, the county seat, for the January, 1913, term instead of at Grove.

The petition does not contain a copy of the judgment of conviction nor of the commitment, nor is a copy of the records of the court showing when and where said court opened or convened, attached thereto and made a part thereof. Under numerous decisions of this court it has been held that in habeas corpus proceedings the burden is upon the petitioner to show that the judgment of conviction under which he is imprisoned is void.

[3] County courts are courts of record, and jurisdiction of this class of misdemeanors is derived directly from the Constitution and all presumptions, in the absence of anything to the contrary appearing from the record, will be in favor of the regularity of their proceedings. *Ex parte Brown*, 3 Okl. Cr. 329, 105 Pac. 577.

The petition in itself is insufficient to show that the judgment of conviction is void, and no proof has been offered in support of the averments therein.

The application for writ of habeas corpus will therefore be denied.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

COX v. STATE.

(Criminal Court of Appeals of Oklahoma. May 17, 1913.)

(*Syllabus by the Court.*)

1. INDICTMENT AND INFORMATION (§ 161*)—AMENDMENT.

By leave of court, an information may be amended as to matters of substance or form after a plea of not guilty has been entered and before the trial has begun.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516-523; Dec. Dig. § 161.*]

2. CRIMINAL LAW (§ 1151*)—APPEAL—REFUSAL OF CONTINUANCE.

An application for continuance is addressed to the discretion of the trial court; and its action thereon will not be reviewed, unless there appears to have been a clear abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

3. CRIMINAL LAW (§ 1160*)—APPEAL—REVIEW OF EVIDENCE.

Where the verdict of the jury has been approved by the trial court, and there is evidence in the record to sustain the verdict, or where the evidence is conflicting, the judgment will be affirmed in the absence of prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1160.*]

Appeal from Choctaw County Court; W. T. Glenn, Judge.

Wirt Cox was convicted of violating the prohibitory law, and appeals. **Affirmed.**

Spriggs & Barrett, of Hugo, for plaintiff in error. Chas. West, Atty. Gen., and Smith O. Matson, Asst. Atty. Gen. (Monroe Osborn, of Purcell, of counsel), for the State.

DOYLE, J. Plaintiff in error, Wirt Cox, was convicted of unlawfully selling whisky, and was on December 5, 1911, sentenced to serve a term of 60 days in the county jail, and to pay a fine of \$100. An appeal was perfected.

Three assignments of error are relied upon to reverse the judgment. The first relates to an alleged amendment of the information which counsel insist constituted a bar to any further prosecution. The only recital in the record which we have been able to find relating to an amendment of the information is as follows: "Now, upon this 12th day of September, 1911, this cause comes on for trial. The state appears by B. D. Jordan, assistant county attorney, and asks leave to amend the information herein, which is granted, and on motion of the defendant said cause is continued until the next term of this court."

[1] As to what said amendment was the record does not disclose. It would seem, therefore, that, under the repeated rulings of this court, plaintiff in error is in no position to ask this court to review the trial court's action thereon. Under section 5307, Rev. Sts. (1903), an information charging a misdemeanor may be amended after plea on order of the court where the same can be done without material prejudice to the right of the defendant. *McCord v. State*, 2 Okl. Cr. 209, 101 Pac. 185; *Rose v. State*, 3 Okl. Cr. 12, 103 Pac. 1066; *Brown v. State*, 5 Okl. Cr. 567, 115 Pac. 615.

[2] The second is that the court erred in overruling an application for continuance. It appears that said application is insufficient, in that it fails to show the residence or whereabouts of said absent witness, or any probability of procuring his testimony within a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reasonable time. We think the application was properly overruled. *Vance v. Territory*, 3 Okl. Cr. 208, 105 Pac. 307; *Rhea v. Territory*, 3 Okl. Cr. 230, 105 Pac. 314; *Reed v. Territory*, 1 Okl. Cr. 481, 98 Pac. 583, 129 Am. St. Rep. 861.

[3] Finally it is contended that the evidence is insufficient to warrant a conviction. There is direct and positive testimony that the sale was made by plaintiff in error as charged in the information. Where the evidence is conflicting, and there is evidence in the record to support the verdict, and the verdict has been approved by the trial court, this court will not review the evidence to determine its weight or sufficiency. The jury had the witnesses before them and could see their manner of testifying and they no doubt in determining the truth took into consideration all the attending circumstances of the case.

Finding no error in the record, the judgment of the county court of Choctaw county is affirmed, and the cause remanded thereto, with direction to enforce its judgment and sentence therein.

ARMSTRONG, P. J., and FURMAN, J., concur.

COE v. McGRAN.

(Supreme Court of Idaho. March 29, 1913.)

1. SUFFICIENCY OF EVIDENCE.

Evidence examined and held sufficient to support the verdict and judgment.

2. BILLS AND NOTES (§ 92*)—CONSIDERATION—SUFFICIENCY.

Where it appears that C., in whose favor a check was executed, performed services in caring for G., who executed the check, and in taking him into her home, which she would not have performed except for promise made by G. that he would either buy C. a farm or compensate her by money consideration, held, that a consideration is shown for the execution and delivery of a check from G. to C. on which action is subsequently brought.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-206, 208-212; Dec. Dig. § 92.*]

3. BILLS AND NOTES (§ 105*)—VALIDITY—UNDUE INFLUENCE.

Preference and good will from one toward another, growing out of kindnesses and attentions paid an aged person, are not sufficient to show undue influence, in the absence of proof of imposition or fraud practiced by the one upon the other.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 105.*]

Sullivan, J., dissenting.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by Nellie W. Coe against Phil McGran. From judgment for plaintiff, defendant appeals. Affirmed.

Ira E. Barber, of Boise, for appellant. S. E. Blaine and Good & Vaughan, all of Boise, for respondent.

AILSHIE, C. J. This is an appeal from a verdict and judgment on a check issued by the appellant in favor of the respondent. The defense interposed is want of consideration and undue influence.

[1, 2] The appellant had been living in respondent's home from time to time for several months and had been taken care of by respondent at times when he was very ill. He was an old man, some 70 years of age, and apparently in easy financial circumstances and had no family or relatives. He appears to have taken a liking to the respondent and, indeed, called her his adopted daughter and introduced her on some occasions as his adopted daughter. It could serve no good purpose for us to review and discuss the evidence in a written opinion. It is sufficient to say that there is evidence in the record sufficient to support the verdict and judgment. It is quite clear that the respondent performed services for appellant in caring for him and taking him to her own home, which, in all probability, she would not have performed except for the promises he repeatedly made her to compensate her either in buying her a farm or in giving her a money consideration.

[3] The record fails to show any undue influence having been exercised by respondent over this old man. That he was exceedingly fond of her is conceded on all sides, and that she was kind to him and took every care of him while in her home is equally clear. It is well established, however, and this court has so held, that "influence gained by kindness and affection will not be regarded as 'undue,' in the absence of any proof of imposition or fraud being practiced" by the one upon the other. *Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33; *Shaughnessy v. Hood*, 21 Idaho, 709, 123 Pac. 641. See, also, *Goodwin v. Goodwin*, 59 Cal. 560.

The appellant has assigned a great many errors, but they all revolve about the two propositions above mentioned. We fail to find any ruling or action of the court or conduct of the jury that would call for a reversal of the judgment.

This case is an apt illustration of the rule that an appellate court will not reverse the verdict of a jury where there is a conflict in the evidence and the jury have seen and heard the witnesses as they testified. In this case both the appellant and respondent testified in person before the jury; the jury had abundant opportunity to see them and observe their manner and demeanor and to judge of their veracity and truthfulness. If the appellant was laboring under senile dementia or was so advanced in age as to be incapable of transacting his own business or

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protecting his own interests, this jury would undoubtedly have discovered that fact and rendered a verdict accordingly. On the contrary, many witnesses and some experts testified that he was entirely capable of taking care of his own business, and that he was laboring under no disability whatever. These matters have been passed upon by the verdict of the jury, and we are not inclined to disturb their finding.

The judgment should be affirmed, and it is so ordered, with costs in favor of respondent.

STEWART, J., concura.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. The complaint alleges the delivery of the check involved in this case, for value, its indorsement and presentation by the plaintiff, and the refusal of the bank on which it was drawn to pay it. The answer denies the execution and delivery of the check; denies any memory or remembrance of ever signing the check; avers that, if signed, it was procured to be signed by fraud and undue influence on the part of the plaintiff exercised over the defendant at a time when he was seriously ill and near unto death, and without sufficient exercise of mind to know or understand the purport or meaning thereof; denies that any consideration whatever was ever given for said check; avers that, as soon as the existence of such check was discovered, the defendant repudiated the same, and that, if in his unbalanced state of mind he gave or delivered such check, it was as an incomplete gift, fraudulently and unlawfully obtained, and without any consideration whatever, and was by the defendant, upon his regaining consciousness of mind and his senses, revoked and repudiated.

The defendant is a man 70 years of age or more, was greatly enfeebled in health, and on and prior to December 29, 1911, the evening said check was given, was seriously ill; so ill that it was thought by all who knew his condition that he could not recover.

Plaintiff and defendant first met in October, 1910, at which time plaintiff rented a dwelling house from the defendant. The defendant, at the time plaintiff rented the dwelling, contemplated going to California very soon and remained with plaintiff and family about a month, or until the latter part of November, 1910, during which time he lived with the family of plaintiff and paid his board. On his return from California the latter part of March, 1911, he lived and boarded with plaintiff and her family until the fore part of August, 1911, during which time he was to receive his board, etc., for the rental of the house. Early in August the defendant informed the plaintiff that he had sold the house in which they were living,

and the parties to whom he had sold it wanted possession of it, and thereupon plaintiff and her family removed from said house and plaintiff and defendant met only once or twice until the following December. Some time in December, 1911, the defendant and plaintiff entered into an agreement whereby the plaintiff was to rent a house from defendant and pay one-half of the rent therefor, and defendant was to stand the other half, and also furnish one-half of the provisions, etc., for the board of the family consisting of plaintiff, her husband and two daughters, under which arrangement the plaintiff took possession of the house referred to on December 20, 1911, and defendant had a room in said house and boarded with the family.

About 3 or 4 o'clock on the morning of December 28th, the defendant was taken violently ill and plaintiff and her husband went to his room to administer to and care for him, and found him very sick; so sick that it was thought he would die. A priest was called to administer to him, and his banker was called who procured an attorney to draw his will, which was done about 4 o'clock on the afternoon of December 29th. About 9 o'clock of that evening, when the defendant was in a very exhausted condition from his violent sickness, and when no one was present but plaintiff and defendant, the plaintiff went into his room and procured him to sign said check. She wrote the check herself and procured his signature to it, for \$3,000, and next morning, between 10 and 11 o'clock, took the check and presented it for collection, not to the bank in Boise City on which it was drawn, but to another bank. The bank on which it was drawn was nearer to her home than the bank to which she presented the check, still she went to another bank to deposit said check for collection. At the time said check for \$3,000 was drawn or presented, the defendant had but \$400 to his credit in that bank. In the forenoon of December 30, 1911, as soon as the defendant discovered that said check had been issued, he demanded its return, which was refused by plaintiff, and he thereupon advised his banker not to pay it.

The record shows that the plaintiff is an intelligent and an experienced business woman, having been stenographer for a Texas congressman for two years; that her husband had served as deputy sheriff for many years; and that they were both keen, shrewd, business people. The evidence clearly shows that the check was cajoled out of this feeble-minded old man at a time when plaintiff had reason to believe, and no doubt did believe, that he would die in a very short time.

As to the consideration given for said check, the plaintiff testified as follows: "Q. What did you give or were you to give for this \$3,000? A. Why, I was to make him a home. Q. You were to make him a home in

the future? A. Or rather, he was to make his home with us and I would take care of him as I was doing for the balance of his life. Q. That was why he gave you the check, is it? A. That is all he gave it to me for. Q. Yes. What, if any, past care had you given to him? A. Why, it wasn't a case of past at that time, it was present. There has never been any subject of past care until December. Q. What did he give you that \$3,000 check for in December? A. Why, Mr. Hawley, I told you that, when we came back from Huntington and failed to get a ranch there, Mr. McGran said he would give me \$3,000 to buy a ranch in New Mexico and that he was to make his home with us the balance of his life. Q. This \$3,000 check then was given; he was to receive a home for the balance of his life with you? A. If he cared to make it. Q. Was there anything in writing which would have—whereby he would be protected? A. There was no writing on his side or mine." It clearly appears from her whole testimony that there was no consideration whatever for said check. There was no obligation on the part of plaintiff to care for or support the defendant during his life, and the evidence shows that defendant had paid plaintiff for all care and board she had given him. If he ever promised to give her \$3,000, it was nudum pactum and void for want of mutuality. It was not for past care that the plaintiff had given defendant that the check was given, as she positively testifies that it was not. The whole record shows the influence of a scheming, strong-minded, designing woman over a weak, senile old man, persisted in during a very short acquaintanceship. The plaintiff's own testimony shows that she was to give nothing and did not obligate herself in any way for said \$3,000 check, nor was she obligated or to be obligated to do or perform any services for the defendant in consideration of said check. The culmination of the scheme to secure this check from this weak-minded old man was at a time when it was believed by the defendant and his friends that he was in a dying condition, and then when she was alone with him, no one else present, she persuaded him to sign a check for \$3,000 drawn by herself.

His last will had only been executed a few hours before said check was drawn, and he did not mention plaintiff in his will; she having signed said will as an attesting witness. If he owed her the \$3,000, why did she not present the matter to his banker and the priest and the lawyer who were there at the time the will was drawn, as any fair-minded person would have done? She waited until the still hours of the night, evidently preferring darkness rather than light, when she was alone with the weak-minded old man, then procured him to sign the check, and the next morning, at early banking

hours, she hastened to the bank and deposited the check for collection, when the old man had only \$400 cash in the bank with which to pay the check.

The plaintiff heard said last will of defendant read and signed it as a witness. This of itself is significant as indicating that she did not want it known that she was attempting to inveigle this feeble-minded and weak old man into giving her \$3,000. It seems that she approved the making of said last will, disposing of all of defendant's property to others, and was willing to take a chance on procuring the old man to give her a check for \$3,000 in the dead of night when no one was present except herself and the defendant. The defendant attempted to testify on the trial in this case, and his testimony shows that he is a weak-minded old man.

Viewing this case from any standpoint, either that of fair and open dealing or of a transaction between people on equal grounds, trading at arm's length, or putting the case upon the footing of a fair and adequate or any consideration whatever, there is not only an entire failure on the part of plaintiff to sustain the issues tendered by her complaint, but there is an affirmative showing in the testimony of the plaintiff herself, which goes to impeach the fairness of the transaction from any view that may be taken of it.

There is no substantial conflict in the evidence upon the point that there was no consideration given for said check or that the defendant was under any moral or legal obligation to execute said check in favor of the plaintiff. It appears from the record that the defendant is worth about \$17,000, and the jury by a three-fourths vote evidently concluded they would distribute it differently from what the old man had undertaken to distribute it by his last will. By the decision of my associates, the plaintiff is given \$3,000 without any past consideration for it and without any future obligation on the part of plaintiff to care for defendant during the remainder of his life.

The judgment ought to be reversed.

STATE v. ALLEN et al.

(Supreme Court of Idaho. May 8, 1913.)

1. CRIMINAL LAW (§ 622*)—SEPARATE TRIALS—DISCRETION.

Under the provisions of section 7860, Rev. Codes, as amended by 1911 Sess. Laws (1911 Sess. Laws, p. 368), "when two or more defendants are jointly indicted or informed against for a felony or any criminal offense, the defendants may be tried separately or jointly in the discretion of the court." Held that, under this statute, it was not an abuse of the discretion of the trial court to refuse to grant separate trials to defendants, where each of the defendants de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sired to be a witness for the other and also a witness in his own trial on his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383; Dec. Dig. § 622.*]

2. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—SUFFICIENCY OF IDENTIFICATION.

Held, that it was not error on the part of the trial court to admit a revolver holster in evidence in a prosecution for murder, where the witness identifying the holster was shown the holster in the presence of the jury, and was asked if that was the revolver holster the defendant had, and the witness replied: "I think it is, I am not sure; it appears to be."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.* Homicide, Cent. Dig. § 577.]

3. CRIMINAL LAW (§§ 663, 1168*) — DEMONSTRATIVE EVIDENCE—IDENTIFICATION — CUSTODY—HARMLESS ERROR.

Where the attorney for the defendant on cross-examination of a state's witness in the trial of a criminal case has the witness produce an article of personal property and testify concerning it, and tell where he got it, and what he had been doing with it, it is error for the trial court to refuse to have the article marked for identification, and retained in the possession of the court for the purposes of cross-examination and the inspection of the defendant and his counsel, or for any use to which defendant may legally apply the exhibit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1602, 3124, 3125, 3129-3136, 3144; Dec. Dig. §§ 663, 1168.*]

4. WITNESSES (§ 248*) — EXAMINATION — RESPONSIVENESS OF ANSWER.

Where a witness on behalf of the state while on the witness stand was asked the question, "Under what circumstances did you see him?" (referring to defendant) and the witness answers, "The Chinaman—the Chinese porter at my house pointed him out to me and told me to be careful of him," *held*, that the court did not err in denying a motion to strike the answer from the record.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

5. CRIMINAL LAW (§ 655*) — REMARKS OF COURT.

Where a trial judge after admonishing a jury before taking a recess in the course of the trial of a criminal case said in the presence of the jury: "The court desires to say to counsel concerned in this case that he is of the opinion that too much time is being consumed in the examinations, as the same questions are being repeatedly asked many times and much needless repetition being indulged in, and that perhaps nine out of ten questions which have been asked are irrelevant and immaterial because of this continued and useless repetition"—*held*, that the remarks of the court were not prejudicial to the rights of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.*]

6. HOMICIDE (§§ 166, 339*) — EVIDENCE — ADMISSIBILITY—HARMLESS ERROR.

Where a defendant is on trial on the charge of murder, and the evidence on the part of the state tends to show that the murder was committed in an attempt to commit robbery, and the state introduced evidence tending to show that defendant was "broke" and without any means, it would have been proper for the court to have allowed the defendant's offer to prove that he was in fact not "broke," but, on the contrary, had money and property of his own,

and was in good financial circumstances; and further, *held*, that the ruling of the court excluding such evidence was not reversible error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331, 714; Dec. Dig. §§ 166, 339.*]

7. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where a defendant, charged with the commission of a homicide, is endeavoring to establish an alibi, and testifies that at the time the homicide occurred he was at another place and in his room and in bed, and that he heard a conversation between two persons in a room opposite his and details the conversation, and the persons who occupied the room opposite the defendant testify that they heard the shooting, and that one of them opened the door and made remarks about the matter, and then the defendant seeks to have such witnesses detail the conversation had, and the court refuses to admit the evidence, *held* that, while it would not have been erroneous for the court to have admitted a detailed account of the conversation for the purpose of corroborating the defendant's evidence and establishing his alibi, still the court's ruling excluding such evidence was not prejudicial error, for the reason that the evidence admitted covered substantially all the facts tending to corroborate defendant's evidence as to the alibi.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

8. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—OFFER OF PROOF.

Upon a trial where a defendant is charged with murder, and the evidence tends to show that the murder was committed in an attempt to commit a robbery, and the court admits evidence as to the good reputation of the defendant for peace and quietude, there was no prejudicial error in the ruling of the court in thereafter excluding a general offer to prove the good reputation of the defendant "for truth and veracity, and honesty and integrity, morality and immorality, sobriety and inebriety."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

9. CRIMINAL LAW (§ 377*)—EVIDENCE—REPUTATION.

A defendant who is charged with homicide should, as a rule, be allowed to show, if he can, that he has a good reputation in his community and among those who have known him both for peace and quiet and truth and veracity in all cases where the evidence is circumstantial, or the plea is one of self-defense, and the defendant's truthfulness or honesty is brought in question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840; Dec. Dig. § 377.*]

10. CONVICTION SUSTAINED.

Evidence in this case considered, and *held* sufficient to support a verdict of conviction.

11. SHOWING FOR NEW TRIAL INSUFFICIENT.

Showing made in this case for a new trial on the grounds of newly discovered evidence *held* insufficient to require the granting of a new trial.

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Charles H. Allen and another were convicted of murder, and they appeal. **Affirmed.**

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

C. M. Booth and W. P. Guthrie, both of Twin Falls, and R. M. Angel, of Hailey, for appellants. J. H. Peterson, Atty. Gen., J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., for the State.

AILSHIE, C. J. The defendants were jointly tried and convicted on the charge of murder, and were sentenced to life imprisonment in the state penitentiary. This appeal is from the judgment and an order denying a motion for a new trial.

The homicide occurred in a house of ill repute in the town of Hailey on the night of September 21, 1911. A robbery was attempted, and resulted in the killing of a man named Crowley, who was a piano player in this resort. The house was entered by two masked men, one wearing a tall black hat and a red mask and the other a cap and a black mask. Two witnesses, Lorenzo Swift and Charles Crawford, testified that they were accomplices, and that they, together with the appellants, Allen and Clevenger, planned to rob the inmates of the Dot Allen resort, and that in pursuance of this plan they went with the appellants on the night in question to the Dot Allen house, and in accordance with the prearranged plans Swift and Crawford remained outside as guards, while Allen and Clevenger entered the house for the purpose of perpetrating the robbery. A number of errors have been assigned, but we shall not give separate consideration in this opinion to all of them.

[1] 1. Defendants made application to the trial court for separate trials, and the court denied the motion. This ruling is assigned as error. It is claimed that the court abused his discretion in denying this request. Section 7860 of the Revised Codes, as amended at the 1911 Session (1911 Sess. Laws, p. 368), provides that, "when two or more defendants are jointly indicted or informed against for a felony or for any criminal offense, the defendants may be tried separately or jointly, in the discretion of the court." The principal argument made against the ruling of the court is that each defendant desired to become a witness in his own behalf, and each one desired the other as a witness on his trial, and that to try them both together, and have them both defendants in the same action, tended to weaken their evidence before the jury. There is perhaps some force in this argument, but it is not sufficient to justify us in holding that the trial court abused his discretion in denying them separate trials. *Ball v. United States*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; *State v. Johnson*, 116 La. 856, 41 South. 117; 12 Cyc. 505.

[2] 2. The accomplice Crawford on the witness stand was handed a revolver holster, and asked if it was the holster Clevenger had his gun in when he left the house that night preceding the attempted robbery, to which the witness answered: "I think it

is; I am not sure; it appears to be." On this identification the holster was introduced in evidence over the objection of the defendants, and they now assign the ruling of the court as error. The witness had previously testified positively that Clevenger carried his gun in a holster buckled around him; and, while he was not positive that this was the particular holster he wore, he gave it as his opinion that it was. The identification is not such as should be required before an exhibit is introduced, but its admission under these circumstances could certainly do the defendants no harm. There is no error in the court's ruling in this respect. *Underhill*, Criminal Evidence (2d Ed.) § 47; *Mitchell v. State*, 94 Ala. 68, 10 South. 518.

[3] 3. While the accomplice, Crawford, was on the witness stand and during his cross-examination by counsel for defendants, he produced from his pocket a red handkerchief, knotted, and testified that he purchased it at Richfield, that he did not have it in Hailey, and that he and Swift tied knots in it while in jail. Thereupon counsel for defendants asked to have the handkerchief marked for identification for use on cross-examination, to which counsel for the state objected, and the objection was sustained by the court. This action of the court is assigned as error. Counsel for appellants insist that they had a right to make inquiry as to this handkerchief, and to have it retained in the custody of the court. We are of the opinion that the ruling of the court was erroneous. When an article is presented in court before the jury, and either party desires to have it marked for identification and retained in the custody of the court for the purpose of questioning witnesses concerning it, that right should be accorded the party who requests it. If a witness who produces an article in court is allowed to retain the possession of it and carry it away from the courtroom, it may become impossible to again get hold of it or to be certain that the same article is again produced. This ruling of the court, however, was not such an error as could have been prejudicial to the defendants. They did not ask any other witnesses about this handkerchief or pursue the inquiry any further. The evidence elicited fails to show that it had any relevancy whatever to the matters about which the witness was testifying or to any material fact in the case. No contention was made that this was the handkerchief worn by one of the masked men on the night of the homicide, and no attempt was made to show any such fact. We must assume that the jury were men of average intelligence who were trying to discharge their duties conscientiously as jurymen. With such men the evidence introduced on this subject and the incidents recited in the record concerning the same would certainly have no weight or bearing, and could in no way prejudice defendants' rights.

[4] 4. When the state's witness, Dot Allen, was being cross-examined, she was asked the question, "Under what circumstances did you see him?" (Allen), to which she answered, "The Chinaman—the Chinese porter at my house—pointed him out to me, and told me to be careful of him." Defendant moved to strike this answer out, on the ground that it was not responsive to the question, and the motion was overruled. The answer was not entirely responsive, and yet, assuming the statement contained in the answer to be true, it is the kind of answer that an average witness would naturally give to such a question concerning one whom they had first seen under such circumstances. There was no error in the ruling of the court on this motion.

[5] 5. During the course of the trial, and as the court was about to admonish the jury before a noon recess, the judge said: "The court desires to say to counsel concerned in this case that he is of the opinion that too much time is being consumed in the examinations, as the same questions are being repeatedly asked many times and much needless repetition being indulged in, and that *perhaps nine out of ten questions which have been asked are irrelevant and immaterial because of this continued and useless repetition.*" Counsel excepted to this statement of the court, and now complains of that part of the statement which we have italicized. There was no error in this statement by the court. It was made general and without reference to any particular counsel or to either side of the case, and it was not an expression of an opinion of the court as to the weight of the evidence. It had reference to the questions counsel were asking. The court made no suggestion that the evidence elicited by the questions was not material, but suggested that they were repetitions, and that they were "irrelevant and immaterial because of this continued and useless repetition." See *State v. Roland*, 11 Idaho, 490, 83 Pac. 337; *State v. Brown*, 100 Iowa, 50, 69 N. W. 277.

6. Assignments Nos. 6, 7, 8, 9, 10, 11, 12, and 13 have reference to the rulings of the court in admitting and rejecting evidence. There was no error in the rulings of the court to which these assignments are directed, and the questions involved are not of such consequence as would justify their detailed consideration in a written opinion.

[6] 7. Assignment No. 14 is directed against the ruling of the court in sustaining the state's objection to a question asked of defendant Clevenger on direct examination as to the nature, extent, and character of his resources. The state had shown that the homicide was committed as the result of an attempted robbery or holdup. The defendant sought to show that he was in comfortable, financial condition, and by that means to show that there was no motive for a robbery.

The argument advanced in support of this assignment of error is that poverty and hunger and want are strong incentives to crime and especially to the crime of robbery; and that since the state had shown in this case that the real crime that was planned, and that defendants were trying to carry out was that of robbery, and that defendant was "hard up and broke," the defendant might show lack of motive to commit the crime of robbery by showing that he had plenty of money and property of his own, and that he was not pressed by hunger or "short" of money, as claimed by the state. Counsel cite the case of *Jacob v. Esau*, 25 Gen. 29, as showing what hunger will drive men to do. This is persuasive, and there is an element of merit in the contention, but it would be a very dangerous rule to adopt and an erroneous conclusion to reach to suppose those who are hungry or "broke" are the only ones who commit crime—even the crime of robbery. Of course, those who are in better circumstances frequently adopt an easier, more genteel, and less dangerous method of robbing their victims than that of going out with a six-shooter and holding them up, but the results accomplished amount to the same thing. The authorities, so far as they have been called to our attention, are adverse to appellant's contention.

A very similar question arose in *Reynolds v. State*, 147 Ind. 7, 46 N. E. 33, and the court, after discussing the principle involved and determining it adversely to appellant's contention, said: "Among the motives recognized as impelling men to commit crime is the desire of gain. * * * This motive, however, has influenced the conduct of rich persons as well as poor persons. Men do not rob or steal except as they have a desire to do so, but such desire does not come so much from the poverty of the individual, as from the absence of a moral sense, and from the desire to possess at all hazards something that does not belong to him." See, also, *Colter v. State*, 37 Tex. Cr. R. 284, 39 S. W. 576. The court's ruling did not deprive defendants of any substantial right.

[7] 8. Assignments 15 and 16 are directed against the ruling of the court in sustaining the state's objections to questions asked the witnesses Perkins and Butler as to a conversation had between them at the Borem rooming house in Halley, immediately following the firing of the shot at the Dot Allen house on the night of this homicide. The defendants testified that they were in their room at the Borem rooming house when this trouble took place at the Dot Allen house, and that about midnight they heard the door of the room across the hallway from them open and that two men seemed to be discussing a shooting that had occurred, and that one appeared to come to the door, and make the remark that "something is going on down town, either a robbery or a holdup or some

one killed," that the person who made this remark then went back into the room and closed the door, and that they heard certain remarks made by one of the occupants of the room at the time the door was closed. The defendants testified that they did not know who occupied this particular room that night, and did not know who the persons were who engaged in the conversation referred to. The defendants then called the witnesses Perkins and Butler, who had occupied this particular room on the night of this homicide. Perkins lived in the country some distance from Halley, and Butler resided at Corral, Idaho, and was a blacksmith at that place. They occupied the room opposite the room occupied by appellants on the night of this occurrence. They were not acquainted with appellants at the time of this difficulty. These witnesses both testified that they occupied the same room at the Rorem rooming house that night, and that about midnight they heard some shots fired, and that immediately after the shots were fired they had engaged in a conversation about the shooting, speculating as to what it was all over; that Perkins got out of bed and opened the door, and made some statement while he was in the hallway; and that after Perkins came back into the room and closed the door they heard some talking in the building, and that it sounded like it was in the room opposite the one occupied by them. Each of these witnesses started to detail the conversation they had at the time they heard these shots, and counsel for the state objected, and the court sustained the objection, and this ruling is the cause of the complaint in assignments 15 and 16 under consideration. The evidence given by these two witnesses tended to corroborate the appellants as to their alibi, and the testimony as given by them indicates that they did engage in a conversation about the shooting, and that they did so immediately after they heard the shots fired. It also shows they occupied the room across the hallway from the room occupied by appellants. A detailed statement of the conversation would not have added materially to this corroboration. Of course, had these witnesses testified to making substantially the same remarks as the defendants testified they heard, it would have tended to show that the defendants were close by at the time this conversation took place, and that they heard the conversation had between these two witnesses. *State v. Delaney*, 92 Iowa, 467, 61 N. W. 189; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *State v. Hayward*, 62 Minn. 474, 65 N. W. 66. We are of the opinion, however, that the evidence admitted covered substantially what could have been accomplished by detailing the conversation had between the witnesses. It is clear that that conversation would have been wholly inadmissible for any purpose except in so far as it tended to establish the alibi set up by

the defendants. We cannot say the court's ruling was erroneous in this respect.

[8, §] 9. Assignments 17 and 18 raise the correctness of the ruling of the trial court on the offer of appellant with reference to character evidence. When defendants had the witness George Johns on the stand, they asked him as to the general reputation of the defendant Clevenger where he resided for honesty and integrity, to which the court sustained an objection. Defendants' counsel then made the following offer: "We now offer at this time to prove that the reputation for truth and veracity, and honesty and integrity, morality and immorality, sobriety and inebriety, of the defendants is good." Whereupon the court denied the offer. This ruling of the court was apparently made on the theory that the defendants' reputation for truth and veracity, or honesty and integrity, or morality and immorality, or sobriety and inebriety, was not in issue. The court, however, had already admitted evidence on the part of the defendant Clevenger tending to show his good reputation for "peace and quietude," and disallowed the next question, which went to the reputation of the same defendant for "honesty and integrity." The court evidently took the view that, since this was a trial for murder, the real trait of character that was involved was that of the peace and quiet of the defendant; that is, as to whether he had been a peaceable, orderly, and law-abiding citizen. On the other hand, the court must have considered that the issue on trial did not primarily involve the reputation of the defendants for honesty and integrity. Technically and theoretically, we presume the trial court was entirely correct in his ruling, but it seems to us that courts ought not to be too particular, technically or theoretically, in these matters, as juries are not going to distinguish very much between these different phases of a man's reputation when he is on trial for his life. If a man ever has any use for a good reputation or it can ever serve him, it is certainly at a time when he is on trial for his life charged with having taken the life of a human being, and it is at such a time that he ought to be accorded the privilege and opportunity of introducing the evidence of those who have been acquainted with him and know his general reputation, not merely for peace and quietude, but as well for truth and veracity and honesty and integrity. A man who has borne a good reputation in his community and among those who have known him should, as a rule, be allowed to have evidence of such fact go to the jury in a case of homicide where the evidence is circumstantial or the plea is self-defense and the defendant's truthfulness or honesty is brought in issue. *State v. McGreevey*, 17 Idaho, 453, 105 Pac. 1047. In the case at bar the charge made by the information primarily involved the character of the defendants for peace

and quietude or their general attitude towards individuals, society, and the laws of the land. On the other hand, when it is remembered that the principal evidence produced by the state disclosed that this crime was committed in an attempt primarily to commit the crime of robbery, it becomes evident that the charge as disclosed by the evidence in a large measure involved the character of these defendants with reference to honesty and integrity. While we think it would have been eminently proper for the court to have admitted the evidence offered touching the reputation of the defendants for honesty and integrity as well as peace and quietude, we do not think the ruling of the court deprived the defendant of any substantial right or was prejudicial to his defense.

[10] 10. The next assignment is directed against the sufficiency of the evidence to support the verdict. We shall not enter into a discussion of the evidence in this opinion. There is no doubt in our minds but that there was sufficient evidence introduced to support the verdict and judgment.

[11] 11. The newly discovered evidence set up in the affidavits for a new trial was not such as would require granting a new trial, or would likely have produced a different result had the evidence been produced on the trial. Much of this would not have been admissible; part of it would have been only cumulative, while other affidavits consisted of mere contradictions and impeachments. The showing made was not of such a character as to call for a new trial.

The judgment should be affirmed, and it is so ordered.

STEWART, J., concurs. SULLIVAN, J., sat at the hearing, but did not participate in the decision.

CLEARY v. KINCAID.

(Supreme Court of Idaho. May 9, 1913.)

1. CONSTITUTIONAL LAW (§ 29*)—"SELF-EXECUTORY PROVISIONS."

Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given or the enforcement of any duty. This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 42-52; Dec. Dig. § 29.*

For other definitions, see Words and Phrases, vol. 7, p. 6045.]

2. CASES DISTINGUISHED.

The cases of *Blake v. Board of Commissioners*, 5 Idaho, 163, 47 Pac. 734, and *Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732, cited, discussed, and distinguished.

3. CONSTITUTIONAL LAW (§ 31*)—COLLECTOR.

Section 6, art. 18, of the Constitution, as amended by the amendment adopted by the voters of the state on November 5, 1912, which provides, "By striking out the words 'who is ex officio tax collector,' after the words 'a county assessor,' and inserting the words 'and also ex officio tax collector' after the words 'a county treasurer, who is ex officio public administrator,'" is self-operative and became a part of the state Constitution upon its adoption by the voters of the state at the general election on the 5th of November, 1912.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 58; Dec. Dig. § 31.*]

Original action for a writ of mandate by Maud Lowry Cleary against William A. Kincaid. Writ ordered to issue.

Cavanah, Blake & MacLane, of Boise, for petitioner. J. H. Peterson, Atty. Gen., and J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., for defendant.

STEWART, J. This is an original application for a writ of mandate to compel William A. Kincaid, the assessor of Ada county, to turn over the books and property used and required by the tax collector of said county and permit plaintiff, as county treasurer of Ada county, to perform the duties of tax collector of said county.

[3] The sole question involved is whether or not the amendment of section 6, art. 18, of the Constitution of the state, approved and adopted by the voters of the state of Idaho November 5, 1912, making the county treasurer tax collector instead of the county assessor, is self-operative, or whether such section requires legislative action in order to make the same effective. Plaintiff contends that the amendment is self-operative and that no action on the part of the Legislature was necessary to make it effective, while defendant contends that the section is not operative and that before it can be effective there must be an act of the Legislature providing for the election of and defining the duties of tax collector and assessor.

Section 6, art. 18, of the Constitution of the state of Idaho, before the adoption of the amendment now in question, provided that the county assessor is ex officio tax collector. The amendment transferred the duties of tax collector from the duties of county assessor and imposed such duties upon the office of county treasurer. The offices of county assessor and county treasurer were in no way affected as to the terms of office or the time of election to the offices, or the compensation of such offices. The amendment in no way affects or changes the laws of the state providing for and fixing the respective duties of the two officers, assessor and treasurer, as to the particular offices. The amendment only deals with the duties

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of tax collector, and imposes the duty upon the treasurer of the collection of taxes. Under the amendment, the duties of the assessor remain the same as they were before the amendment, except as to the collection of taxes. The section with reference to biennial elections is in no way altered or modified, but remains the same as before the amendment was adopted. The officers to be elected under the amendment are the same officers as were elected prior to the amendment. The amendment requires no legislative act to carry out its provisions. The general laws of the state, with reference to the duties of assessors and tax collectors in existence at the time the amendment was adopted, apply alike, whether the duties of tax collector be attached to the assessor's office, or the county treasurer's, and the separation of the duties of collector from the duties of the assessor and attaching such duties to the county treasurer in no way affects the duties of the assessor in making assessments and performing the duties bestowed upon the assessor under the law; neither does it affect the tax collector in any way, except that the treasurer is made the collector of the taxes, and the statutes in existence at the time the amendment was adopted, governing the various officers and their duties, can be applied to the duties under the amendment, and are just the same after the adoption of the amendment as before adoption. This being true, it would seem that the amendment to section 6, art. 18, of the Constitution, is self-operative; in other words, it supplies the rule or means by which the right given may be enforced and protected, and provides for performing the duty conferred by the amendment.

[1] In 8 Cyc. p. 753, the author, in discussing self-executing provisions, announces the following general rule: "A self-executing provision then is one which supplies the rule or means by which the right given may be enforced or protected or by which a duty enjoined may be performed." Also: "The question in such cases is always one of intention, and to determine the intent the general rule is that courts will consider the language used, the objects to be accomplished by the provision, and the surrounding circumstances, and, to determine these questions from which the intention is to be gathered, the court will resort to extrinsic matters when this is necessary." Many authorities are cited by the author. At page 743 of 8 Cyc. the author says: "The time when a Constitution takes effect is of importance and often becomes material in the course of litigation. The manifest intent of the framers of the instrument, to be gathered from the instrument itself, controls in the determination of such questions. * * * Provisions are always made designating the time when constitutional amendments or new Constitutions shall take effect."

The Legislature passed an act which was approved on March 11, 1913, amending section 1991 of the Revised Codes, wherein the section was re-enacted with the addition of paragraph 7 in the following language: "The county treasurer is hereby made ex officio tax collector, and all powers and duties heretofore exercised by the ex officio tax collector, under the laws of this state, as distinguished from the assessor, are hereby transferred and made a part of the powers and duties of the county treasurer." This addition to section 1991 is simply a declaration of the Legislature for the performance of a duty which the amendment itself provides for, and adds nothing whatever to the amendment, and provides no rules or means other than the amendment itself provides for, with reference to the transfer of the ex officio duties of tax collector from assessor to county treasurer. It amounts to, and is in fact an approval of, the amendment. The amendment, having provided that the county treasurer become tax collector, was sufficient of itself to make the county treasurer ex officio tax collector, and upon the adoption of the amendment by the voters of the state at the general election November 5, 1912, the duties of tax collector, as defined by law, were transferred from the assessor to the county treasurer, and legislation on the subject was not required, as such intent appears from the amendment itself and controls the determination of such question.

[2] Counsel for defendant seems to rely upon the case of *Blake v. Board of County Commissioners*, 5 Idaho, 163, 47 Pac. 734, and the case of *Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732.

The first case above referred to involved an amendment to section 6, art. 18, of the Constitution, which provides for the creation of the office of county superintendent as a new office, separate from the office of probate judge, who prior to such amendment was ex officio county superintendent of public instruction. By such amendment there was created a new office for which an appointment or election was necessary, while in the case now under consideration a new office is not created. In this case the duty of tax collector was transferred from the office of assessor to the county treasurer, two offices in existence at the time the amendment was adopted, and the opinion of the court in that case was based wholly upon the creation of a new office, and the court was dealing with the wording of the amendment and not with its effect.

The case of *Hays v. Hays*, supra, cited by defendant, is clearly distinguishable from the case now under consideration, as in the *Hays* Case the amendment provided for the abolition of the office of district attorney and the creation of the office of prosecuting attorney.

The amendments discussed in those cases are not in point on the question now before

this court for the reason that the amendment under consideration is not the creation of a new office or the abolition of an office, but merely a transfer of certain duties prescribed by law to be performed by a county officer to another county officer, to wit, the duties of tax collector are transferred from county assessor to county treasurer.

The Supreme Court of Minnesota, in the case of *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 81 Am. St. Rep. 626, states the rule, which in our judgment should be applied in this case, in the following language: "The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature; does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." This rule is well recognized by the Supreme Court of the state of Illinois in the case of *Tuttle v. National Bank of Republic*, 161 Ill. 502, 44 N. E. 984, 34 L. R. A. 750; 6 Am. & Eng. Enc. of Law, 912, note 2. The same volume and page of 6 Am. & Eng. Enc. of Law summarizes the rule as follows: "Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed." Applying this construction to the amendment proposed, and giving full force and effect to the language used relating to transferring the duties of tax collector from the office of assessor, and attaching the same to the office of county treasurer, the imperative duty of this court is to declare it self-executing.

It no doubt was the intention of the Legislature and likewise of the voters in the adoption of such amendment that the duties of tax collector performed by the assessor should, upon the adoption of such amendment, be transferred to and performed by the county treasurer, and that no action of the Legislature was required to complete the transfer. The office of county tax collector and county treasurer, as defined and provided for by the Legislature and incorporated in Rev. Codes, tit. 10, and in full force and effect at the time the amendment was adopted, applied distinctly to the particular office of assessor, tax collector, and treasurer, and such

statutes had the same application to each of the respective offices, whether such duties are combined in one officer, two officers, or in three different officers elected to the respective positions. The same duties clearly appear also in the various provisions incorporated in chapter 58, Laws of 1913, p. 173, providing a system of revenue for state, county, municipal, and school purposes, and particularly describing the duties of the assessor, tax collector, and treasurer, and in clear and plain language prescribe the duties in such a manner that such duties may be combined in one officer or two officers or three officers, one of which may be assessor, tax collector, and treasurer, or that the office of tax collector and treasurer may be performed by the county treasurer, as provided in the amendment now under consideration. Giving due credit to the language used in the amendment and the general provisions of the law as it existed at the time the amendment was adopted, and clearly recognized by the Legislature in enacting the general revenue act of March 13, 1913, clearly brings the provisions of the amendment within the rule announced by the authorities above enumerated.

We are therefore of the opinion that section 6, art. 18, of the Constitution of Idaho, is self-operative and became a part of the state Constitution upon its adoption by the voters of the state at the general election on the 5th of November, 1912.

It is ordered and adjudged that a writ of mandate be issued to William A. Kincaid, assessor of Ada county, directing him to turn over, within a reasonable time, the books and property used and required by the tax collector of Ada county and permit Maud Lowry Cleary, as county treasurer, to perform the duties of tax collector of Ada county. No costs are taxed.

SULLIVAN, J. I concur in the conclusion reached by Mr. Justice STEWART to the effect that said provision of the Constitution is self-executing or self-operative, but I am unable to concur in his statement that in the separation of the office of county superintendent of public instruction from that of probate judge in the case of *Blake v. Board of County Com'rs*, 5 Idaho, 163, 47 Pac. 734, a new office was created. The office of county superintendent of public instruction was created by the Constitution that created the office of probate judge and not by the amendment under consideration in the *Blake Case*. In the *Blake Case* the duties of one office were not transferred from the officer who performed them ex officio to another officer then holding office who was to perform them ex officio, but were transferred to an officer to be elected to fill the office of county superintendent, and neither the Constitution nor the law provided for such election, and it devolved upon the Legislature to enact a

law for that purpose. No new office was created by that amendment. The duties of the county school superintendent were not in any wise connected with the office of probate judge, except that the probate judge performed the duties of county school superintendent, and said amendment provided that the Legislature should by general and uniform laws provide for a biennial election of a county superintendent of public instruction, and the Legislature had not at the date of said decision provided a general law for that purpose, or any law whatever. In the case at bar no officer is required to be appointed or elected to fill the office of tax collector. The duties of that office have only been transferred from the assessor to the treasurer.

The case of *Hays v. Hays*, 5 Idaho, 154, 47 Pac. 732, is also relied upon by the Attorney General. In that case the office of district attorney, as provided for by section 18 of article 5 of the Constitution, had been abolished by amendment. Such district attorney was elected for each judicial district to hold office for a term of four years, and each judicial district included more than one county. The amendment adopted in 1896 abolished the office of district attorney and provided for a prosecuting attorney to be elected for each organized county of the state, for a term of two years, and to perform such duties as might be prescribed by law. No duties had been prescribed by law for the county attorney, although the duties of district attorney had been prescribed by law. The court in that case held that said amendment was not self-executing and said: "It is no answer to say that said offices might be filled by appointment, for the amendment provides that they shall be filled by election, and not by appointment, and, until the duties of the office are prescribed by legislation, it is an office without duties, as above stated, and the amendment expressly provides that compensation shall be fixed by the board of county commissioners of the respective counties at their July session next preceding the general election. The provisions of said section clearly negative any intention of permitting the appointment of the first incumbents of such office, and also clearly negative the intention of permitting (let alone authorizing) any person or board whatever to fix the salary of such officer prior to the month of July next preceding the general election to be held in November, 1898." As I view it, there is a clear distinction between the cases referred to and the case at bar.

AILSHIE, C. J. (concurring). I agree in the conclusion reached in this case that the

amendment to section 6, art. 18, as adopted at the last general election, is self-executing, and that it did not require legislation to put it into operation. I also agree with what is said by Mr. Justice SULLIVAN to the effect that the amendment considered in *Blake v. Board of Commissioners*, 5 Idaho, 163, 47 Pac. 734, did not create any new office, and that the office there provided for had at all times been provided for by the Constitution. I think, however, that the efforts of my Associates to distinguish the cases of *Blake v. Commissioners* and *Hays v. Hays* from the case at bar are more labored than convincing. It was evidently upon the authority of those cases that the Attorney General took the position in this case that this amendment is not self-operative. Those cases fully justified him in taking that position. The amendment considered in those cases was to the same section and article of the Constitution that was changed by the amendment under consideration in the present case. The principle of law and construction involved in this case is no different whatever from the principle involved in those two cases. In my judgment, it is futile to undertake to distinguish the present case from those cases, and I concur in the conclusion reached in this case wholly upon the theory that this court is not disposed to follow the reasoning adopted in those cases, rather than upon the fragile theory that there is any distinction between them.

In *Blake v. Board*, the amendment adopted separated the office of superintendent of public instruction from that of probate judge, and, whereas the duties of the two offices had been previously discharged by the same official, the amendment proposed that there be a separate officer for school superintendent. This court has held that under the Constitution and statute of this state, when a new officer is provided for and no provision is made to fill the same, that a vacancy at once exists which may be filled in the manner provided for filling vacancies generally. *Knight v. Trigg*, 16 Idaho, 256, 100 Pac. 1060. At the time of the decision in *Blake v. Board*, supra, section 1821 of the Revised Statutes of 1887 was in force, which authorized the board of county commissioners to fill all vacancies in county offices until the next general election. All that was necessary to do in the case of *Blake v. Board* or *Hays v. Hays* was for the county commissioners to make the appointments to fill the respective offices there provided for. The statutes already prescribed the duties of county superintendent of public instruction and also of prosecuting attorney.

ECKERT v. SOUND CONSTRUCTION & ENGINEERING CO.

(Supreme Court of Washington. May 5, 1913.)

MASTER AND SERVANT (§ 196*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD—FELLOW SERVANTS.

Plaintiff, a carpenter, was engaged in framing timbers to be used in the construction of the roof of a railroad roundhouse, in the presence of other carpenters who the day prior to the accident were engaged in erecting a scaffold to be used in putting the timbers in place. The general plan for the scaffold was furnished by defendant's foreman, but the details of the construction were left to the carpenters and employes assisting them. Plaintiff was ordered by the foreman to leave his work of framing and go on the scaffold and place several additional planks thereon, and while doing so a ledger board which had been insufficiently nailed gave way, and plaintiff fell, and was injured. *Held*, that plaintiff was a fellow servant of those engaged in constructing the scaffold, and he could not therefore recover for their negligence in insufficiently nailing the board.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 375-378, 486-488; Dec. Dig. § 196.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Charles H. Eckert against the Sound Construction & Engineering Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss.

Hughes, McMicken, Dovell & Ramsey, Otto B. Rupp, and J. B. Joujon-Roche, all of Seattle, for appellant. Penrose L. McElwain and Will H. Thompson, both of Seattle, for respondent.

CROW, C. J. Action by Charles H. Eckert against the Sound Construction & Engineering Company, a corporation, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

The sole question presented is whether the trial court erred in denying appellant's motions for a directed verdict and for judgment notwithstanding the verdict. Appellant, as contractor, was engaged in the construction of the roof of a roundhouse for the Great Northern Railway Company, at Wellington, Wash. Respondent was a carpenter employed by appellant to frame heavy timbers to be used in the roof. He contends that on November 12, 1910, while he was thus employed, appellant's foreman ordered him and one Swanson to go upon a scaffold and place several additional planks thereon; that while they were on the scaffold a ledger board held with only one nail gave way, and caused respondent and Swanson to fall; and that respondent fell a distance of 45 feet, inflicting the injuries of which he now complains. The accident in which respondent and Swanson were thus injured is the identical accident upon which the cause of Swan-

son v. Sound Construction & Engineering Co., 67 Wash. 128, 120 Pac. 880, was predicated. A reference to the opinion there reported will disclose the manner in which, and the persons by whom, the scaffold was constructed. In that case we affirmed an order directing a verdict for the defendant, holding that Swanson was a fellow servant of appellant's employes who constructed the scaffold, and that no negligence on appellant's part had been shown. We are unable to see how the judgment in this action can be sustained without overruling *Swanson v. Sound Construction & Engineering Co.*, and also overruling *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114, and *Muehlman v. Spokane & Inland Empire R. Co.*, 58 Wash. 327, 106 Pac. 764.

The undisputed evidence shows that Eckert was a carpenter employed by appellant; that he was injured on Monday, November 12, 1910; that on the previous Friday the scaffold which was to be used in placing the timbers in the roof was constructed by two other carpenters in appellant's employ; that while they were engaged in constructing the scaffold respondent was framing timbers in the same building, within sight of them, only a short distance away; and that all of these carpenter employes were subject to orders of the foreman. The only question is whether respondent Eckert was a fellow servant of the carpenters who constructed the scaffold, and whose negligence is the only negligence shown. Respondent insists that this action should be distinguished from the *Swanson* Case by reason of the fact that on the preceding Friday Swanson, a carpenter's helper, had to some extent assisted the carpenters who built the scaffold, and that he was their fellow servant, while respondent, who took no part in building the scaffold, was engaged in a different employment, and was not their fellow servant. He contends that on the morning of the accident he, with Swanson, was ordered upon the scaffold by appellant's foreman; that it was appellant's duty to provide him a safe place to work, which it failed to do; that by reason of such failure it was guilty of negligence; and that, as respondent was not a fellow servant of the men who built the scaffold, he is entitled to recover in this action. In view of the rule announced in *Metzler v. McKenzie*, *supra*, which has since been followed by this court, and in view of its further announcement in *Muehlman v. Spokane & Inland Empire R. Co.*, *supra*, we are compelled to hold that respondent was a fellow servant of the men who built the scaffold. They were all carpenters employed by the appellant corporation, were engaged in the general work of framing the roof, and preparing a scaffold to be used in its erection. No showing has been made to the effect that any of the workmen were incom-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—71

petent, or that appellant had been negligent in their employment. There can be no question but that at the time of the accident Eckert and Swanson were fellow servants. In Swanson's Case we held that he was a fellow servant of the men who built the scaffold. To now hold that Eckert was not their fellow servant, although he was injured in the same accident with his fellow servant, Swanson, would be drawing an exceedingly fine distinction in an attempt to distinguish this case from that of Swanson. On the authority of the Swanson Case, and the other cases above mentioned, we hold that Eckert and the men who constructed the scaffold were fellow servants; that the only negligence proven was the negligence of such fellow servants; that appellant was guilty of no negligence; and that this action cannot be sustained. Respondent was seriously injured, but that fact, although deplorable, is not sufficient to authorize a recovery against appellant without any proof of negligence upon its part as the proximate cause of the accident. In justice to the trial court it should be remarked that the final judgment, and the order denying the motion for judgment notwithstanding the verdict, were both entered in this action prior to the decision of the Swanson Case by this court.

Reversed and remanded, with instructions to dismiss.

MORRIS and MAIN, JJ., concur.

ELLIS, J. (concurring). In cases where temporary staging is used by carpenters, masons, painters, and persons in like employment there is a duty upon the master in the alternative either to furnish the staging as a completed structure for the use of the servants or to furnish timbers and other materials sufficient and suitable for that work and require the servants to build the staging themselves. Labatte, Master & Servant, § 615. When the master adopts the first alternative, he becomes liable for any injury resulting from a failure to use reasonable care either in selecting the materials used or in the use of those materials in the actual construction of the staging. When he adopts the latter alternative, he is liable only when he has failed to furnish materials sufficient in quantity, or suitable in quality, or competent fellow servants, and the injury results from failure in all or any of these particulars. This distinction is recognized in the Swanson Case, 67 Wash. 128, 120 Pac. 880, where the evidence showed that the only control exercised by the master or his representative in the actual construction of the staging was to furnish a plan, and as we said in that case, "The plan is a good one and is not questioned." The master having furnished sufficient and suitable materials and a good plan, and not having undertaken to furnish the completed

structure, was not liable for the failure of the men who did the work to use sufficient nails, in the absence of evidence of incompetence of these men. Had there been any evidence that the master had undertaken to furnish the completed staging for the use of the carpenters, or evidence that the injury resulted from a defective plan, the case should have been submitted to the jury upon such evidence. Since these men in the actual work of constructing the staging were doing a work incident to their employment, which the master had not undertaken to perform for them, they were fellow servants of the other carpenters.

I therefore concur.

MARKS v. HURLEY MASON CO.

(Supreme Court of Washington. May 6, 1913.)

1. MASTER AND SERVANT (§ 287*)—FELLOW SERVANT—VICE PRINCIPAL—QUESTION FOR JURY.

Where, in an action for injuries to a servant by the alleged negligence of plaintiff's foreman, the evidence was conflicting as to the duties of the foreman, whether he was plaintiff's fellow servant or a vice principal was a question of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. § 287.*]

2. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN—VICE PRINCIPAL.

Where plaintiff, a servant engaged with his foreman in putting up cement forms, was injured by the foreman's act in loosening a brace on which plaintiff was standing at the foreman's direction and without warning him, the foreman's act was not a mere detail of the work in the accomplishment of which he was a fellow servant of plaintiff, but rather the act of a vice principal in failing to provide plaintiff with a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

3. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN—SCAFFOLD RULE.

The rule that where a scaffold is built by the workmen from suitable material furnished by the master, and the foreman in charge merely gives directions that the scaffold be erected without further instructions, there is no liability on the part of the master for an injury which is produced by a defect in the scaffold, has no application to an injury to an employé while assisting in the construction of certain concrete forms by the act of his foreman in loosening a brace on which such employé stood at the foreman's direction, without warning to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

4. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A master, being bound to furnish a servant a safe place to work, is equally bound to refrain from causing the place to become unsafe by his positive act, or that of his foreman, for which he is responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. DAMAGES (§ 132*)—PERSONAL INJURIES.

Plaintiff, while engaged in the construction of certain concrete forms, fell a distance of 18 or 20 feet by reason of the negligence of his foreman, his back striking across a brace or timber, and fractured two ribs on his left side. He was still under medical treatment at the time of the trial 18 months after the injury, and had been unable to perform any labor. There was expert testimony that he had received an organic injury to the spinal cord which had produced traumatic neurosis, which was permanent, and which his physicians testified would probably result in total paralysis of the lower limbs within a comparatively short time. Plaintiff prior to the injury was a robust healthy man, 34 years of age, weighed 195 pounds, and earned \$4 a day. *Held*, that a verdict allowing plaintiff \$12,500 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Leo Marks against the Hurley Mason Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Reeves Aylmore, Jr., of Seattle, for appellant. Chas. H. Miller, of Seattle, for respondent.

MAIN, J. The purpose of this action is to recover damages for personal injuries alleged to be due to the negligence of the defendant.

At the time of the accident the defendant held a contract with the Northern Pacific Railway Company for the erection of concrete piers which were to be used for the foundation for a railway bridge to be constructed across the Cowlitz river near Olequa. The piers were to be solid concrete; and, in order to construct them, it was first necessary to build forms which would confine the concrete until the same became hardened. On November 5, 1910, the day of the accident, the plaintiff, together with other workmen, were erecting one of the forms. It is claimed by the plaintiff that one Bell was the foreman in charge of this work. The forms were erected in sections. First, heavy timbers were erected with a distance between them equal to the width of the intended form. These timbers were held in place by braces, one by six planks. A plank would be nailed to the bottom of one timber, and at an elevation of about 45 degrees extend to the top of the heavy timber on the opposite side. From the lower end of this opposite timber would be extended a similar brace to the one on the other side. After these timbers were erected and braced, the shiplap which was to confine the concrete would be nailed on the inside. At the top of the section of the form bolts or rods extend from the timbers on one side to those on the opposite for the purpose of holding the forms together. After the timbers had been erected, the braces nailed on, the shiplap put in place, and the bolts or rods adjust-

ed, it was necessary to put a heavy plank or planks near the top of the form for the purpose of extending it to the exact dimension desired. After one section of the form was erected, the top thereof furnished a platform upon which the men worked in erecting the next succeeding section. On the day in question, the plaintiff and his associate were attempting to put the brace at the top of the third section of the form. While thus engaged, Bell directed the plaintiff's associate to step aside and let him take his place; there apparently being some difficulty in getting the brace into place. Bell, after taking the place of the plaintiff's associate, directed the plaintiff to step upon the lower end of the brace nailed to the heavy timber on the side where plaintiff was working, and thereby elevate himself to a position where he could perform the work with greater efficiency; Bell working on the opposite side. In response to this direction, the plaintiff got upon the brace facing outward, his back towards Bell, they both being engaged in attempting to get the brace in place at the top of the section. While thus engaged, and without warning to the plaintiff, Bell, taking a hammer, knocked the top end of the brace on which plaintiff stood loose from the heavy timber, and thereby the plaintiff was precipitated 18 or 20 feet to the ground below. The plaintiff fell with his back across a brace or timber, and broke or fractured two ribs on his left side. A few hours later the plaintiff was taken to a physician, where he received attention. He returned to the camp where he remained for a period of three or four days, going then to his home in a suburb of the city of Portland. Here he remained for a period of two or three months, being, as he testified, confined to his bed a greater portion of the time. During this time he consulted a physician upon two or three occasions. It appears that at the end of three months he moved with his wife to the city of Seattle, and there remained until the time of the trial. From the time of going to Seattle until the date of the trial he received constant professional attention. About 18 months elapsed between the date of the injury and the time of the trial, and during this time plaintiff had been unable to perform any labor. At the time of the injury he was a robust healthy man, 34 years of age, weighing 195 pounds, and earning \$4 per day. Three months after the injury his weight was reduced to 176 pounds. And at the time of the trial he weighed 145 pounds. He claims that in the fall he received an organic injury to the spinal cord which produced traumatic neurosis. The expert witnesses called by the plaintiff testified that the injury was permanent, and in their opinion would result in a comparatively brief period of time in the total paralysis of the lower

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index-

limbs. The evidence on the part of the physicians called by the defendant was that from their examination which took place a day or two before the trial they were unable to find any symptoms which indicated that the spinal cord had been injured. While they did not say that in their opinion the plaintiff would completely recover, their evidence was to the effect that they found nothing in their examination that would lead them to believe that a permanent recovery would not in time result under proper treatment. The case was tried to the court and a jury, and a verdict in the sum of \$12,500 was returned in favor of the plaintiff. Motion for judgment notwithstanding the verdict and motion for a new trial being overruled, the defendant appeals.

The points in issue are: First. Was Bell a foreman or vice principal, or was he a fellow workman? Second. If he were a vice principal, was his act in knocking off the brace which precipitated the plaintiff to the ground a mere detail of the work for which the master would not be liable? Third. Does the rule of liability as applied to the "Scaffold Cases" apply here? Fourth. Is the verdict excessive?

[1] 1. The question whether or not Bell was a fellow servant or vice principal is one of fact. The evidence on the part of the respondent was positive and unequivocal that the latter was his function; while the evidence on the part of the defendant was equally positive that his relation was that of a fellow servant to the other workmen there engaged. This being a question of fact upon which the evidence was in conflict, it is a matter which is within the province of the jury to determine. The jury were properly instructed upon the question by the trial court; and, while there is no specific finding by the jury, yet the effect of their verdict is that Bell was a vice principal. Otherwise, under the instructions, they would have returned a verdict for the appellant. This question having been determined by the jury under proper instructions must now be taken as a fact so far as the consideration of the case here is concerned.

[2] 2. It is claimed by the appellant that the act of Bell which caused the accident was a mere detail of the work, and that in that act he in any event was a fellow servant and not a vice principal. In support of this contention the appellant cites *Swanson v. Gordon*, 64 Wash. 27, 116 Pac. 470, *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034, and other cases of like import. The principle that runs through these cases is that where a vice principal is performing a mere detail of the work, and through his act or neglect a workman is injured, there is no liability on the part of the master, because in the performance of that duty he was in effect a fellow servant of the other workmen. But we think

the principle of these cases is not applicable to the present case. The respondent's injury was directly due to the act of Bell in loosening the brace upon which the respondent stood at Bell's direction and without warning from him. This was not a detail of the work, but a positive act of Bell which produced the injury. The case falls within the principle stated in *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592, and *Tills v. Great Northern Ry. Co.*, 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434. In the *Creamer Case* it is said: "Under the authority of those decisions (*Nelson v. Willey Steamship, etc., Co.*, 26 Wash. 548, 67 Pac. 237; *Dossett v. St. Paul, etc., Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114), when the superintendent, without the knowledge of the workman, negligently set in operation an agency fraught with danger, he thereby rendered the company liable for the result of such negligence."

[3] 3. It is argued that inasmuch as the forms which were being erected at the time of the injury were temporary in their nature, in that they were only erected for the purpose of confining the concrete until it had hardened, the rule of the "Scaffold Cases," should apply, and the appellant should be exonerated from liability. The rule of these cases is that where a scaffold is built by the workmen from suitable material furnished by the master, and the foreman in charge simply gives direction that the scaffold be erected, but no further instruction, then there is no liability on the part of the master for an injury which is produced by a defect in the scaffold. In *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114, it is said: "We think that the action at bar falls within the rule announced in the above authorities, that where competent men are employed to do some work on a structure upon which scaffolding, or some other appliance to support the workmen, is required—the employer to furnish the materials, and the employed to construct or adjust the scaffolding or other appliance—the employer is not liable to one of the employés for the careless act of another employé done in the construction, adjustment, or maintenance of the structure or appliance." But this rule is clearly not applicable to a situation where the foreman directs a workman into a place which is then safe and subsequently and without warning by his own act renders the place unsafe. The proposition that it is the duty of the master to furnish the employé a safe place in which to work is so well settled as not to require the citation of authority in its support.

[4] And, if it is the duty of the master to furnish a safe place, it is equally his duty to refrain from causing the place to become unsafe by his positive act, or that of his foreman, for which he is responsible.

[5] 4. It is argued that the verdict is ex-

cessive. If the evidence of the appellant's witnesses is to be accepted, the verdict is for such an amount as to indicate passion or prejudice on the part of the jury that rendered it; but, if the evidence of the respondent's witnesses is to be believed, there is abundant substantial evidence to support it. Apparently the jury believed that the evidence of the latter described the real condition. There being substantial evidence to support the amount of the verdict, and the jury having passed upon the conflicting evidence, we think the verdict should not be disturbed.

The judgment is affirmed.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

BARTLETT v. PLASKETT.

(Supreme Court of Washington. May 6, 1918.)
APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE—REVIEW.

A verdict based on conflicting evidence will be sustained on appeal, where there is sufficient evidence to support every material issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8985-8987; Dec. Dig. § 1002.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Clifford Bartlett against P. L. Plaskett. Judgment for plaintiff, and defendant appeals. Affirmed.

John P. Hartman, of Seattle, for appellant. Geo. F. Hannan and McVicar & Boyle, all of Seattle, for respondent.

PER CURIAM. The respondent, while driving a passenger automobile upon one of the streets of the city of Seattle, collided with an automobile truck driven by the appellant, and received personal injuries. He brought this action to recover for the injuries suffered, and on the trial, which was had before a jury, a verdict and judgment was rendered and entered in his favor for \$1,200. This appeal, which is from the judgment so rendered, presents only the question of the sufficiency of the evidence to justify the verdict. In his argument in this court, the appellant quotes and cites from the record the evidence favorable to his contention, and, assuming it to be true, makes a substantial case against the verdict and judgment. But we find, on examining the statement of facts, that practically all of the facts thus assumed to be substantiated are disputed by other witnesses, and that there is another version of the transaction in the record which supports the verdict of the jury. This concludes the question in this court. We cannot retry the facts. We are bound to assume as true that version of the evidence which tends to support the jury's verdict, and, if it

be sufficient for that purpose, allow the verdict to stand. It would serve no useful purpose to enter upon a review of the evidence. We have examined it with care and find substantial evidence tending to support every material issue.

This is sufficient to sustain the judgment, and it will stand affirmed.

McCREERY v. CARTER et al.

(Supreme Court of Washington. May 6, 1918.)

1. MARITIME LIENS (§ 60*)—ENFORCEMENT—JURISDICTION.

The superior court has jurisdiction of an action for the price of machinery used in the construction and equipment of a vessel and for the price of machinery entering into and becoming a part of the vessel and to grant a judgment constituting a paramount lien thereon.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. § 60.*]

2. APPEAL AND ERROR (§§ 889, 907*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF COMPLAINT—PRESUMPTIONS.

In the absence of a statement of facts or bill of exceptions, the court on appeal will presume that the evidence supports the judgment, and, if necessary, deem the complaint amended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3621, 3622, 3673, 3674, 3676, 3678; Dec. Dig. §§ 889, 907.*]

3. MARITIME LIENS (§ 67*)—ENFORCEMENT—DEFICIENCY JUDGMENT.

The court, in an action for a judgment constituting a paramount lien on a vessel, for the price of machinery used in the construction and equipment thereof, and for the price of machinery entering into and becoming a part thereof, may enter a deficiency judgment.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 105; Dec. Dig. § 67.*]

Department 2. Appeal from Superior Court, Cowlitz County; H. E. McKenney, Judge.

Action by H. W. McCreery against L. L. Carter and others. From a judgment for plaintiff, defendants L. L. Carter and another appeal. Affirmed.

George S. Shepherd and Edward J. Clark, both of Portland, Or., for appellants. Edgar J. Wright, of Seattle, for respondent.

MAIN, J. This action was brought against L. L. Carter and wife, A. L. Davis and wife, and O. B. Ferris and wife. In the complaint two causes of action are set out, the first of which alleges that the plaintiff sold and delivered to the defendants certain machinery which was used in the construction and equipment of the steamboat "Una," and that as evidence of the indebtedness a promissory note was executed and delivered to the plaintiff. And as a second cause of action it is alleged that on a later date, at the special instance and request of the defendants, the plaintiff sold and delivered to them certain transmission machinery which entered into and became a part of the same

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vessel. Subsequent to the institution of the action, a receiver was appointed for the Una. The cause was tried to the court without a jury. The plaintiff prevailed. The decree provides: (1) That the plaintiff have judgment, specifying the amount thereof; (2) that the judgment be a paramount lien upon the steamer Una; (3) the receiver was directed to sell the Una; and (4) that, in the event the proceeds of the sale of the Una be not sufficient to satisfy the judgment, then and in that event the plaintiff have a deficiency judgment for the balance. The defendants Carter and wife appeal.

No statement of facts or bill of exceptions has been brought to this court. The questions sought to be raised on the record here are: (1) The jurisdiction of the superior court; (2) the sufficiency of the complaint; and (3) the validity of the deficiency judgment.

[1] The appellant contends that, in actions of this character, the superior court does not have jurisdiction; but this question has been determined adversely to such contention. In *Callahan v. Aetna Indemnity Co.*, 33 Wash. 583, 74 Pac. 693, it is said: "The materials were used in the ship. The case stands, then, the same as though appellant himself had furnished the materials to the construction company at the time they were used, and for the purpose for which they were used. These facts bring the case squarely within the terms of the statute, and the appellant was entitled to a lien for the amount of his claim."

[2] As to the sufficiency of the complaint, in the absence of a statement of facts or bill of exceptions, we must presume that the evidence supports the decree, and, if necessary, deem the complaint amended. In *Holden v. Romano*, 61 Wash. 458, 112 Pac. 489, it is stated: "Furthermore, in the absence of a statement of facts, we must presume that the testimony supports the findings, and would deem the complaint amended, if need be."

[3] Finally, it is urged that the court erred in entering a deficiency judgment, but this contention is not well founded. In entering the deficiency judgment, the court acted within the scope of its power. *Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019.

The judgment will therefore be affirmed.

MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.

McFERON et al. v. SHOEMAKER et al.
(Supreme Court of Washington. May 6, 1913.)

1. CORPORATIONS (§ 117*) — PURCHASE OF STOCK—FRAUD.

A purchaser of stock of a corporation whose principal office is in a distant state, and

whose property is at a distance, may rely on the representations of the seller as to the business and assets of the corporation, and, in case of the falsity of the representations, may rescind the purchase, and recover the price paid.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 506; Dec. Dig. § 117.*]

2. CORPORATIONS (§ 121*) — RESCISSION — LACHES.

Whether laches will prevent a rescission of a contract on the ground of fraud and a recovery of the consideration paid depends on the circumstances of the particular case; and a purchaser of corporate stock who institutes a suit to rescind the purchase and recover the consideration paid within four weeks after the discovery of the fraud relied on as a ground for rescission is not chargeable with laches because he did not earlier discover the fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

3. HUSBAND AND WIFE (§ 239*) — ACTIONS AGAINST—PURCHASE OF CORPORATE STOCK — RESCISSION—JUDGMENT.

Where a purchaser of corporate stock for which he conveyed real estate to one of two persons associated together in the transaction obtained a judgment for rescission on the ground of fraud inducing the purchase, the entry of a personal judgment against the wife of the grantee who, with the grantee, had mortgaged the property to a third person, was erroneous.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 855, 856, 860, 862, 983; Dec. Dig. § 239.*]

Department 2. Appeal from Superior Court, Spokane County; D. W. Hurn, Judge.

Action by Gershon McFeron and another against Fred H. Shoemaker and another. From a judgment for plaintiffs, defendants appeal. Modified and affirmed.

Marlon A. Butler, of Seattle, and Denton M. Crow, of Spokane (Robt. H. Lindsay, of Seattle, of counsel), for appellants. Samuel R. Stern, of Spokane, for respondents.

MAIN, J. The purpose of this action is to rescind an executed contract for the purchase of corporate stock, and to secure the reconveyance of certain real property. The plaintiffs are husband and wife. The defendants are the son and wife, respectively, of one Benjamin F. Shoemaker, now deceased. The case was tried to the court without a jury, and judgment entered for the plaintiffs, from which the defendants appeal.

The facts out of which the litigation grew are, in substance, as found by the trial court, as follows: At the time of the transactions here involved, Fred H. Shoemaker was, and for some time prior thereto had been, the fiscal agent for the Collins Wireless Telephone & Telegraph Company (hereafter referred to as the "Collins Company"), and as such agent had complete charge of all sales of stock for the company for the states of Washington and Oregon. He was also one of the original incorporators of the Collins Pacific Wireless Telephone & Telegraph Company, organized under the laws of the state of Washington (hereafter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

referred to as the "Collins Pacific Company"). This company was known as a subsidiary company to the former company. The Collins Company was organized under the laws of the state of New Jersey, with its principal place of business at Newark, in that state. Its capital stock was \$1,000,000, divided into a like number of shares, of the par value of \$1 per share. To assist in the promotion of the enterprise and the sale of the stock, the company caused to be issued printed matter of divers kinds, which was to be used by its agents and subagents in securing subscriptions to its capital stock. One M. E. Pearson and Mrs. S. B. Rothrock were subagents located at Spokane, Wash., working under the direction of the general agent. These subagents, with the knowledge and consent of Fred H. Shoemaker, were permitted to make use of the printed matter and make statements relative to the company, its equipment, operations, etc. The plaintiff Gershon McFeron first became interested in the purchase of the stock of the company through Mrs. Rothrock, who presented to him its literature, and informed him that the company was operating commercially, had contracts, and was making additional contracts with steamship companies for the purpose of installing the Collins wireless, and that stations had been erected at Seattle, Tacoma, Portland, and other places. It was stated that the value of the stock was then \$10 per share, and would soon advance to \$12, and that the then present was the last opportunity to secure this stock at the former price. Other statements were made of like import, all of which were false and untrue. On March 25, 1910, McFeron, Pearson, Mrs. Rothrock, and Fred H. Shoemaker met in Spokane, where the same statements in substance were made by Shoemaker to McFeron which previously had been made to him by Mrs. Rothrock. The purpose was to induce McFeron to subscribe for the Collins stock. Thereupon McFeron did subscribe on this occasion for 500 shares of the stock, for which he agreed to pay \$5,000, at the same time indicating that, if his wife were willing, he would take 500 additional shares. Along with the Collins stock he was to receive without additional cost a like number of shares in the Collins Pacific Company. On this occasion Shoemaker prepared two notes, one for \$4,000 and one for \$1,000, which were signed by McFeron and delivered to Shoemaker. A third note for \$5,000 was prepared and given to Pearson, which McFeron was to sign in the event that he concluded to make the additional purchase. Two days later, and on Sunday, March 27th, Pearson went to the home of the McFérons, which was about 10 miles distant from the city of Spokane, and there, by means of the same representations which had previously been made, induced the McFérons to take the 500 additional shares. Thereupon McFeron signed and de-

livered the \$5,000 note, which was dated as of the date of the previous transaction. At this time Fred H. Shoemaker and Benjamin F. Shoemaker, his father, were at Walla Walla on a stock selling mission. When informed that McFeron had taken the additional shares, both went to Spokane. At the time of the first transaction, McFeron had informed Shoemaker that he had no money, but did have land, and it was apparently understood that the notes were only a temporary expedient until the exchange of the land for the stock could be effectuated. The land had been examined by Shoemaker prior to his return to Spokane on March 29th. After the arrival of the Shoemakers in Spokane, they, Pearson, Mrs. Rothrock, and McFeron, met for the purpose of arranging for the transfer of the real estate then owned by the McFérons in payment for the stock. The real property conveyed upon this occasion by McFeron was valued at \$16,500. The stock which he had subscribed for he was to take at \$10,000. The difference between these two sums was met by the delivery to him of a check and some notes of other parties which were held by Fred H. Shoemaker. At the direction of Fred H. Shoemaker, Benjamin F. Shoemaker's name was inserted in the deed as the grantee. Subsequently the property was held by Benjamin F. Shoemaker for the benefit of his son. The father and son were associated together in the transactions, not only in this case, but in others involving the transfer of real estate in payment for the stock. Within a few weeks thereafter, Benjamin F. Shoemaker and his wife mortgaged the property which had been conveyed by McFeron to secure a loan in the sum of \$6,000. In the month of April, 1910, Fred H. Shoemaker made a trip to the home office of the Collins Company. Shortly thereafter a reorganization took place, and the Continental Wireless Telephone & Telegraph Company was organized, with Fred H. Shoemaker as one of its officers. The holders of the stock in the Collins Company began receiving circulars and letters requesting that they exchange their then stock in that company for Continental stock. McFeron, in response to these requests, surrendered his Collins Pacific stock, it being the only stock that had been issued to him, and received a certificate for stock in lieu thereof in the Continental Company. The property transferred by McFeron in payment for the stock was a few days before his death deeded by Benjamin F. Shoemaker to his wife. In receiving the title, however, Mrs. Shoemaker did not take it as a bona fide purchaser for a valuable consideration. During the early part of July, 1911, McFeron learned for the first time that he had been defrauded in the transactions, and that the stock in the Continental as well as that of the other two companies was practically worthless and always had been; that they were

all three paper corporations, with substantially no tangible or intangible assets. The findings of the trial court in this case are extensive and the statement of facts voluminous, but the above is a brief epitome of the ultimate facts as found by the court. The present action was begun on July 27, 1911, and in due time came on for trial. At the conclusion of the trial, the court decreed that the contract should be rescinded, and that the real property should be reconveyed to the respondents. In addition to this, the decree provides that, in the event that Mrs. Shoemaker does not reconvey the property free from the lien of the mortgage above mentioned, a personal judgment shall be entered against her for an amount equivalent to the difference between \$6,000 and the amount which McFeron had realized upon the check and notes that he originally received from Fred H. Shoemaker. The amount for which this personal judgment would be entered would be \$1,865.65.

The questions here for determination are:

First. Was McFeron justified in relying upon the statements which induced the transactions?

Second. Is the evidence sufficiently convincing to sustain the judgment directing a rescission and reconveyance?

Third. Is McFeron chargeable with laches?

Fourth. Did the court err in entering a conditional personal judgment against Mrs. Shoemaker?

[1] 1. It is now argued that inasmuch as no fiduciary relation existed between McFeron and the parties with whom he was dealing, he had no legal right to rely upon the representations which induced him to make the purchase of the stock. It must be remembered that the properties which the corporations were represented to own and operate were at a distance, that the principal office of the Collins Company was in a distant state, and the truth or falsity of the statements made to him was not easily ascertainable. Under such circumstances, a purchaser is justified in relying upon representations made to him by the seller. In *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514, it is said: "All that need be said upon the law of the case is a reference to what was said by this court in actions of this character in the late cases of *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054 [132 Am. St. Rep. 1102], and *Baillie v. Parker*, 56 Wash. 353, 105 Pac. 834, where it was held that a vendee may rely upon representations of his vendor where the property is at a distance, or where for any other reason the falsity of the representation is not readily ascertainable."

2. The contention is made that the evidence in this case falls short of that certainty of proof which the law requires before executed contracts will be rescinded and re-

conveyances of real property directed. It may be admitted without discussion that the rule in such cases is that the evidence must be clear and convincing. To review the evidence in the present case would extend this opinion to unreasonable length and serve no useful purpose. It is sufficient to say that in our opinion the charge of fraud is sustained by proof which is abundantly clear and convincing. Indeed, it is difficult to see how a disinterested perusal of the transcript of the evidence and the exhibits in the case could lead to any other conclusion.

[2] 3. Whether or not laches will prevent a recovery must depend upon the circumstances of each particular case. In *Romaine v. Excelsior, etc., Machine Co.*, 54 Wash. 41, 103 Pac. 32, it is said: "That the question of laches in this kind of a case bears no relation to ordinary statutes of limitation, where conditions of others are not changed or the rights of others not imperiled by lapse of time, and that the principle of laches still adheres in the substance of equitable relief and is, therefore, to be determined by the court under the circumstances of each particular case, has been the settled rule of law in this state since the decision of the case of *Gay v. Havermale*, 27 Wash. 390, 67 Pac. 804." We think that McFeron was not guilty of laches. It appears that within a period of four weeks time after he discovered the fraud which had been practiced upon him suit was begun. In view of all the attendant facts and circumstances, it cannot be that he is chargeable with laches because of the fact that he did not earlier discover the fraud.

[3] 4. It was decreed by the trial court that Mrs. Shoemaker should reconvey the property free and clear from the incumbrance of the \$6,000 mortgage or suffer a personal judgment for \$1,865.65 to be entered against her. We have been cited to no principle of law, and know of none, by which the entry of this personal judgment against Mrs. Shoemaker can be sustained.

The case will be remanded, with direction to the superior court to modify the judgment by eliminating the portion thereof which provides for a personal judgment against Mrs. Shoemaker in the sum of \$1,865.65. Beyond this the judgment is affirmed. Mrs. Shoemaker will recover one-half of the appellants' costs in this court.

MOUNT, MORRIS, ELLIS, and FULLERTON, JJ., concur.

EGBERS v. FISCHER et al.

(Supreme Court of Washington. May 1, 1913.)

1. TAXATION (§ 531*)—FORECLOSURE OF LIEN—GOOD FAITH OF CLAIMANT—EVIDENCE.

Evidence held to show that one suing to foreclose a lien for taxes had paid the taxes in good faith, believing that he was the owner of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the premises on which the same were assessed authorizing foreclosure.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.*]

2. JUDGMENT (§ 589*)—RES JUDICATA—QUESTIONS CONCLUDED.

An action to establish a legal title and obtain possession of real estate and an action to foreclose a lien for taxes assessed against the premises are independent, and an adverse judgment in the former action does not bar the latter action.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1062-1065, 1100, 1101; Dec. Dig. § 589.*]

Department 1. Appeal from Superior Court, King County; Geo. A. Joiner, Judge.

Action by Henry F. Egbers against Edward J. Fischer and another. From a judgment for plaintiff, defendants appeal. Affirmed.

S. D. King, of Seattle, for appellants. Lambuth & Rembert, of Seattle, for respondents.

GOSE, J. This is an action to foreclose a lien for taxes which the plaintiff claims to have paid in good faith, believing that he was the owner of the property upon which the taxes were assessed. A decree was entered in harmony with the bill. The defendants have appealed.

The appeal presents two questions, one of fact and one of law: (1) Did the respondent pay the taxes in good faith, induced by a belief that he owned the property sought to be charged with the lien, and (2) is he estopped by a former judgment?

[1] 1. In respect to the first proposition, the respondent testified that he was by occupation a hotel keeper; that he had never dealt in lands; that he knew nothing about examining land titles; that he did not procure an abstract of title to the land nor have the title examined; that he believed that an administrator's deed submitted to him by his grantor, together with the deed of the grantor, conveyed him a good title; and that in faith of that title he paid the taxes. He further testified that he bought the property through a friend whom he had known for years, who told him, in effect, that he had some lots upon which he had paid taxes and upon which other taxes were due, which he would sell very cheap. Upon the faith of these statements and the administrator's deed which, while without the chain of title, is regular upon its face, respondent purchased the property. He says that before purchasing he examined the land; that there was an old moss-covered fence around it; but that apparently no one was living upon it, and there had been no recent cultivation. He found no one upon the premises at the time he examined it. We think the court correctly held that he paid the taxes in good faith. The argument made against his good faith is that he paid a small sum for the

property, and that the administrator's deed was without the chain of title. We do not think he is concluded by these facts. The fact that he dealt carelessly does not necessarily impeach his good faith. It is not questioned that he paid the taxes.

[2] 2. After purchasing the property and paying the taxes involved in the suit, respondent with others commenced an action in the superior court of King county, alleging that he was the owner in fee of the land here sought to be charged with the taxes, and prayed that he be adjudged to be such owner and awarded possession thereof, and for general relief. The defendants in that action appeared and pleaded title by prescription. At the close of the plaintiff's case, the defendants therein moved for "an order of nonsuit and for the dismissal of the action," upon the ground that the plaintiff had failed to prove title or right to possession. This motion was sustained and "Judgment and decree of dismissal" was entered. It is alleged here that the decree "was and is upon the merits." We will assume, as the parties have assumed, that this was a judgment upon the merits. It does not, however, present the question of *res judicata* or estoppel by record. The respondent here, the plaintiff in that action, there relied upon his legal title and did not seek to establish any lien for taxes paid upon the property. There is no splitting of a cause of action, as the appellants contend. It seems quite obvious that there can be no estoppel to prosecute an action to foreclose a tax lien because the plaintiff had prosecuted a former action to establish his legal title and obtain possession of the premises. The two causes of action stand upon an entirely different footing. In truth, what the respondent did in the former action was to pursue a remedy which he did not have, and this does not bar an action upon a proper remedy. *Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. 525. Nor does it constitute an estoppel of record. *Thayer v. Harrican*, 126 Pac. 625; *Dunsmuir v. Port Angeles P. Co.*, 30 Wash. 586, 71 Pac. 9; *Snyder v. Harding*, 38 Wash. 668, 80 Pac. 789; *Marble Savings Bank v. Williams*, 23 Wash. 766, 63 Pac. 511; *Long v. Elsenbels*, 21 Wash. 23, 56 Pac. 933.

In the *Thayer Case* a suit was brought to recover an attorney's fee upon a written contract of employment. He held that there was no evidence of a meeting of the minds of the parties on the subject-matter of the controversy, hence that there was no written contract, and said: "Having failed in this action to establish the express contract, he can still maintain another action upon the quantum meruit for the same services. The judgment in this action is not a bar to such an action, since it requires different evidence to establish the two causes of action. *Buddress v. Schafer*, 12 Wash. 310,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

41 Pac. 43." In the Marble Savings Bank Case this court said: "The essential thing to determine is whether or not the question involved in the second suit was actually litigated in the first"—and quoted from an opinion written by Justice Brewer in *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626, as follows: "The whole philosophy of the doctrine of res adjudicata is summed up in the simple statement that a matter once decided is finally decided; and all the learning that has been bestowed and all the rules that have been laid down have been for the purpose of enforcing that one proposition." In the former case the question of taxes was not made an issue.

The decree is affirmed.

CROW, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

STATE v. HATCH.

(Supreme Court of Washington. May 6, 1913.)

1. INTOXICATING LIQUORS (§ 132*)—WRONGFUL SALE—LIQUOR NUISANCE—STATUTES—REPEAL.

Rem. & Bal. Code, § 6278, declares that the keeping or maintaining of any place in which intoxicating liquors are sold or given away contrary to law, etc., shall be a common nuisance; while section 6304 declares that all places where intoxicating liquors are sold in violation of the provisions of the local option law are common nuisances, and may be abated as such, and on conviction of the keeper of selling intoxicating liquors in violation of the local option law the court shall order that such nuisance shall be abated and the place closed. Held that, since section 6278 makes the keeping and maintaining of the place a nuisance, while section 6304 provides that the place where the liquors are unlawfully sold shall constitute the nuisance, the two sections are not repugnant, and hence the latter did not repeal the former.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 141; Dec. Dig. § 132.*]

2. CRIMINAL LAW (§ 200*)—FORMER JEOPARDY—IDENTITY OF OFFENSES.

A prior conviction of accused for maintaining a liquor nuisance in a local option district, in violation of Rem. & Bal. Code, § 6278, was not a bar to a subsequent conviction for unlawfully making a specific sale of intoxicating liquor at the same time and place, in violation of section 6304; the offenses not being identical.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 347, 386-409; Dec. Dig. § 200.*]

Department 2. Appeal from Superior Court, Whatcom County; John A. Kellogg, Judge.

J. B. Hatch was convicted of maintaining a liquor nuisance in selling liquor in violation of the local option law, and he appeals. Affirmed.

S. M. Bruce, of Bellingham, for appellant. Frank W. Bixby and H. C. Thompson, both of Bellingham, for the State.

MAIN, J. The defendant was informed against in the superior court by two sep-

arate informations filed by the prosecuting attorney of Whatcom county. The Legislature of the state of Washington, in 1909, passed an act known as the "Local Option Law," which provided for the submission to the qualified electors of a particular city, town, or district, called a "unit," the question whether intoxicating liquors shall be licensed or prohibited. Laws of 1909, c. 81. Under the provisions of this statute an election was held on November 8, 1911, in Ferndale, a city of the fourth class, at which election a majority of the votes were cast against license. From the 1st day of January thereafter Ferndale became what is known as a dry unit, and the sale of intoxicating liquors therein unlawful. As above stated, the defendant was charged by two informations. The information in cause 1,083 charged the defendant with the crime of maintaining a nuisance in selling and disposing of intoxicating liquors, without a license, between the 1st day of January, 1911, and the 3d day of February, 1911. The information in cause 1,085 charges the defendant with the crime of the unlawful sale of intoxicating liquors at Ferndale, Wash., on January 26, 1911. One information charges the defendant with the keeping and maintaining of a nuisance; the other with making a specific sale of liquor unlawfully. A jury being waived, both causes were tried to the court. Cause 1,063 came on for trial first, and resulted in a judgment of conviction and sentence. Immediately thereafter cause 1,085 was heard. The defendant interposed in the latter case a plea of former jeopardy, which was overruled. It was then agreed by counsel that the same evidence which had been heard by the court in trying cause 1,083 should be taken as evidence in cause 1,085 without recalling the witnesses. The second trial resulted in a conviction and sentence. The defendant appeals. By stipulation both appeals were consolidated, to be heard upon a single record.

[1] The guilt or innocence of the defendant, as a matter of law, depends upon the construction of certain sections of different statutory enactments. Section 6278, Rem. & Bal. Code (L. 1903, p. 32, § 3), provides: "The keeping or maintaining of any place in which intoxicating liquors are sold or given away, contrary to law, or in which such liquors are kept or harbored for the evident purpose of selling or giving away said liquors contrary to law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors or where intoxicating liquors are kept for the purpose of inducing people to resort, to buy or receive intoxicating liquors in violation of law, is hereby declared to be a common nuisance. * * *" This section makes the keeping or maintaining of any place a nuisance, (1) when intoxicating liquors are sold or given away contrary to law, (2) when such liquors are kept or har-

bored for the evident purpose of selling or giving away contrary to law, (3) when persons are permitted to resort there for the purpose of drinking intoxicating liquors, and (4) where intoxicating liquors are kept for the purpose of inducing people to resort to the place for the purpose of purchasing intoxicating liquors in violation of law. The portion of this section not quoted and the subsequent sections of the same act provide for the search of the premises, the seizure of the property used in distributing liquors in violation of the law, and the punishment of the offender. It was under the portion of the section quoted that the defendant was charged and convicted in cause 1,083.

Section 6304, Rem. & Bal. Code (L. 1909, p. 161, § 13), provides: "All places where intoxicating liquor is sold in violation of the provisions of this chapter are common nuisances, and may be abated as such, and upon conviction of the keeper of any such place of the sale of intoxicating liquor in violation of the provisions hereof, the court shall order that such nuisance be abated and that such place be closed until the keeper, owner, lessor, lessee or other person occupying the same shall give bond with a sufficient surety to be approved by the court making the order in the penal sum of one thousand dollars, payable to the state of Washington, conditioned that intoxicating liquor will not thereafter be sold therein contrary to the law, and will pay all fines, costs and damages assessed against him for any violation thereof, and in case of violation of any condition of the bond the whole amount may be recovered as a penalty for the use of the county, city or town wherein the premises are situated." This is one of the sections of the local option law, and makes the place where intoxicating liquor is sold in violation thereof a nuisance, and provides a method for its abatement and the giving of a bond conditioned that the law will be obeyed. The question arises, Does the section quoted from the local option law repeal the section of the previous statute under which the prosecution was brought? There is no express repeal, and, if repealed at all, it must be by implication. Repeals in this manner are not favored by the law. In *State v. Binnard*, 21 Wash. 349, 58 Pac. 210, it is said: "Section 211 does not repeal section 210 by any express words, and, if the latter is repealed by the former, it is repealed by implication, and such repeals are not favored by the law. It is a well-established rule of law that if two statutes can, by any fair construction, be reconciled with each other, neither will be held to have repealed the other." From an examination of the sections quoted it will be seen that the former makes the keeping and maintaining of the place a nuisance; while the latter provides that the place where sold shall be a nuisance. One deals with the keeper; the other with the place kept. The two sections are not necessarily repugnant, and therefore can

stand together. This view sustains the conviction of the defendant in cause 1,083.

[2] In cause 1,085 the defendant was charged with the specific sale of intoxicating liquor under section 6302, Rem. & Bal. Code (L. 1909, p. 160, § 11), which provides: "Whoever shall, either as principal, agent, clerk or servant, directly or indirectly, sell, barter, exchange, give away or otherwise dispose of any intoxicating liquor in any quantity whatever, within the limits of a unit which has, by its vote, decided against the licensing of the sale of intoxicating liquor, or who shall keep or have in his possession any intoxicating liquor with intent to sell, give away or otherwise dispose of such liquor in violation of the provisions hereof, shall, upon conviction thereof, be fined not less than twenty dollars nor more than two hundred dollars, or be imprisoned in the county jail for not less than ten days nor more than thirty days, or be punished by both such fine and imprisonment. * * *" This is a section of the local option law, and penalizes the sale of intoxicating liquor in units where a majority of the people have voted against license. It is argued that, if the former conviction is sustained, then that is a bar to the second, for the reason that a person cannot twice be placed in jeopardy for the same offense. It is the fundamental law that a person cannot be twice punished or placed in jeopardy for the same offense. But are the offenses with which the defendant was charged and convicted the same? In one he is charged with keeping or maintaining a nuisance; in the other with the specific sale of intoxicating liquors in contravention of the law. While a person may not twice be placed in jeopardy for the same offense, it does not necessarily follow that the same act may not constitute separate offenses. If it does, a charge and conviction of one offense does not bar the other. The offenses with which the defendant was charged and convicted were defined under different sections of the statutory law of the state. It is true that the charges were sustained by the same evidence, but they were by the Legislature made a separate and distinct offense.

In Cyc. (volume 12, p. 282) the rule is stated in this language: "The Legislature may carve out of a single act or transaction several crimes, so that the individual may at the same time and in the same transaction commit several distinct crimes, in which case an acquittal or a conviction of one will not be a bar to the indictment for the other."

In support of the conviction in cause 1,085 the case of *Mayhew v. City of Eugene*, 56 Or. 102, 104 Pac. 727, Ann. Cas. 1912C, 33, is very much in point. In that case the city of Eugene was a dry unit under the local option law of the state of Oregon. This law made the selling of intoxicating liquors unlawful in a dry unit. By ordinance the city of Eugene had made the maintaining of

a place where liquor was sold in violation of law a nuisance. Mayhew, the defendant, had been charged and convicted under the local option statute with selling liquor in violation of law. Subsequently he was charged and convicted under the ordinance of the city of Eugene with maintaining a nuisance. The question was, Did the first conviction bar the second? The court, in sustaining the second conviction, said: "Much of what has been heretofore said applies forcibly to the defendant's next objection, namely, the failure of the court to submit defendant's plea of former jeopardy to the jury. The offense of making a single sale of liquor is not identical and cannot be identical with that of maintaining a nuisance by carrying on the business, and the plea was bad on its face."

It follows that the judgment of conviction in both cases must be affirmed.

MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.

STATE v. MOSS.

(Supreme Court of Washington. May 6, 1913.)

1. ADULTERY (§ 11*)—WITNESSES (§ 331½*)—EVIDENCE—ADMISSIBILITY.

On a trial for adultery with C., where she testified for the defense, a copy of a letter couched in endearing terms, which she admitted writing to another man and intrusting to accused unaddressed for delivery, was admissible as affecting her credibility and as showing a degree of intimacy between her and accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 20, 23; Dec. Dig. § 11; * *Witnesses*, Dec. Dig. § 331½.*]

2. CRIMINAL LAW (§ 678*)—TRIAL—ELECTION BETWEEN ACTS.

Where there was evidence of four acts of adultery within one year, prior to the filing of the information, but the case was tried on the theory that the state relied for a conviction on proof of an act committed as alleged on or about November 30th, the first evidence of the commission of the offense was directed to that specific act and date, and the court in the instructions, without objection, treated that act as the one necessary to be proved in order to convict, there was an election by the state to rely on that act, although an election was not demanded.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.*]

3. CRIMINAL LAW (§ 772*)—INSTRUCTION—TIME OF OFFENSE.

Where the evidence of adultery relied on for a conviction was that it was committed on the exact date charged, and there was no other evidence except as to other distinct acts, it was error to charge that the exact time alleged was not material, but that any time on or about the time alleged and within one year prior to the filing of the information would be sufficient, and to repeat, in response to the jury's request for an explanation, that a latitude of one year was allowed, especially where the colloquy between the court and the jury showed that they did not understand that they could not convict for one of the other distinct acts, since, while under Rem. & Bal. Code, § 2060, providing that the precise time need not be alleged but that it may be placed at any time within the time in

which the action might be commenced, the same latitude is usually allowable in the proof, time was material under the circumstances to identify the offense and distinguish it from others shown by the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1812-1814, 1816, 1817; Dec. Dig. § 772.*]

Department 2. Appeal from Superior Court, Benton County; O. R. Holcomb, Judge.

Cecil A. Moss was convicted of adultery, and he appeals. Reversed and remanded.

Moulton & Henderson, of Kennewick, and H. J. Snively, of North Yakima, for appellant. Linn & Boyle, of Prosser, for respondent.

ELLIS, J. The appellant, a young man 23 years of age, was convicted of the crime of adultery with Florence Cornwell, a woman 35 years old and wife of one E. H. Cornwell. The information charged the commission of the offense on November 30, 1911, in Benton county, Wash. The appellant was a school-teacher in charge of the school at White Bluffs, a small, unincorporated community in Benton county. He boarded with the Cornwells, and slept in a tent near their home. There was evidence tending to prove four separate and distinct commissions of the offense. The prosecuting witness E. H. Cornwell, the first witness called on behalf of the state, testified positively as to seeing his wife and the appellant in the act of committing the offense on the evening of November 30, 1911, on a couch in the front room of the Cornwell residence. He testified to seeing the same thing again on January 11, 1912, and yet again on February 4, 1912. He made no complaint, told no one, but treated the appellant and his wife as usual until about March 8, 1912, when he claims to have charged his wife with the offense, and on March 10th he also spoke to the appellant about it. One John Bakheit testified that, in the month of June, 1911, he went to the Cornwell home, looked through the window of the tent occupied by the appellant, and there saw him and Mrs. Cornwell in the commission of the offense. Two other witnesses testified to having seen certain acts of familiarity between the parties. The court admitted in evidence a proved copy of a letter couched in somewhat endearing terms, written by Mrs. Cornwell to another man, and intrusted to the appellant for delivery. We will review no further the voluminous evidence, since the foregoing are the salient facts and form the basis of the errors assigned.

[1] It is first contended that the court erred in admitting in evidence the copy of the letter above mentioned. It was admitted on cross-examination of Mrs. Cornwell, who was a witness for the appellant, after she had admitted writing the letter of which it was a copy, and that she had intrusted it, to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant, unaddressed, but telling him to whom to deliver it. It was admissible on cross-examination as affecting the credibility of the witness and as tending to show a degree of intimacy between the parties. Underhill, Crim. Ev. (2d Ed.) § 381; State v. Nelson, 39 Wash. 221, 81 Pac. 721. The court by specific instruction limited the consideration of this letter by the jury to the testimony of this witness alone, and as only affecting her credibility. We find no prejudicial error in its admission.

The court gave the following instruction:

"No. 4. You are instructed that the exact time of the commission of the alleged offense, charged in the information, is not material, but any time, if proven, on or about the time alleged in the information, and within one year next before the date of filing the information, would be sufficient as to the time thereof."

"No. 11a. Gentlemen of the jury, you have been instructed that the state is not required to prove the exact date of the alleged crime, but the state is required to prove the exact offense charged in the information and cannot establish the commission of the act charged by the mere proof of other and similar acts; and evidence of the commission of other and similar acts is only to be considered for the purpose of showing the probability of the commission of the act charged, and if there is no evidence of the commission of the act charged, the guilt of the defendant cannot be established by proof or offered proof of other offenses than the one charged in the information."

[2] While there was evidence tending to prove the commission of similar offenses on three specific dates other than that charged in the information, and the appellant did not demand an election as to which act would be relied upon for a conviction, the case was tried throughout upon the theory that the state did rely for a conviction upon proof of the specific act committed as alleged in the information "on or about November 30, 1911." As stated in the state's brief, "from the beginning to the conclusion of the case the state tried the defendant for the offense of adultery committed according to the information 'on or about November 30, 1911.'" Moreover, the first evidence of the commission of the offense was directed to that specific act and date, and the court in his instructions treated that specific act as the offense necessary to be proved in order to a conviction. The state did not object or except to the instruction. Under these circumstances, no demand for an election was necessary, as the state must be held to have voluntarily made its election.

[3] The appellant claims that, in view of this admitted election by the state, the court committed prejudicial error in giving the foregoing instructions and afterwards in explaining them at the jurors' request. The evidence as to the specific commission of the

offense charged in the information was that of the prosecuting witness that the act was committed on the exact date charged. There is no claim of a mistake in time, nor evidence on which such a claim could be based. If the specific act charged was committed at all, it was committed on the exact date as charged. While under Rem. & Bal. Code, § 2060, the precise time at which the crime was committed need not be stated in the indictment or information, but may be placed at any time prior to the finding of the indictment or filing of the information within the time in which the action may be commenced, and while this latitude is usually allowable both in allegation and proof, still when an election is made, on proof of several acts, to rely upon an act committed at a specific time, the accused can only be convicted of the specific act constituting the offense committed at about that time and intended to be so designated and distinguished from other acts in evidence. He must be convicted, if at all, of that exact offense, not of another similar act. The question here presented is not one of allegation, but of proof and of instructions applicable to the proof. The instructions should have been so worded, and on request of the jury so explained, as not to permit the jury to convict the accused of any similar offense committed at another time, and not at a time either charged or intended to be charged in the information, nor sustained alone by evidence not directed to that specific act. The evidence as to the commission of other similar acts was not direct evidence of the commission of the specific act charged and selected as the basis for conviction, but was only evidence of circumstances tending to show a probability that the testimony as to that specific act was true; that is to say, it was only admissible and could only be considered as tending to show a probability of the commission of the act charged. The instruction numbered 11a, above quoted, standing alone, was unobjectionable. It correctly stated the law as applied to the facts in evidence. The instruction numbered 4, above quoted, while a correct statement of the general rule as applied to cases where the evidence is confined to one act or where there is no election, was misleading when applied to the particular facts in evidence. Standing alone, it would inevitably convey to the lay mind an impression that the jury would be justified in a conviction, on proof of any act of the kind charged in the information committed within one year next before the filing of the information. It was thus capable of a construction that would permit a conviction for the act testified to by the witness Bakheit as committed in June, 1911, in the tent, a different though similar act committed at a different time and place from that charged. Instruction No. 4 was unnecessary and should not have been given. That the two instructions, taken together, were calculated

to, and actually did, mislead and confuse the jury is shown by the sequel.

The jury returned to the courtroom for an explanation of instruction No. 4. The following colloquy took place: "A Juror: Your honor, we have come to the conclusion to ask you how to construe instruction No. 4. Some construe it in one way and some another, and we would like to have it settled, No. 4. The Court [addressing the attorneys]: Have you any objections? Both Counsel: No, sir. The Court: I cannot instruct you any further; the law forbids me to give you any different instructions after the case is closed, except to elucidate some of the instructions. [The court re-reads instructions numbered 4 and 11a.] The Court: To explain No. 4, it means that when a criminal offense is charged, there is a limit to the time that the prosecution can be commenced for that class of offenses; and the information charges a certain time usually, but it is not necessary to prove the exact date that may be alleged in the information; the information may be incorrect as to the exact date; but any time, if proven of that offense which they charge, within the time limit will be sufficient as to the date. The offense charged is capable of definite proof, and the circumstances surrounding it, but the date need not be definitely proven; that is, the date alleged in the information; that is, if they prove some date and the circumstances as charged in the information, and within the time limited by law. A Juror: Does that mean, if the offense is proven at any time within the year that covers the close of the specified time? The Court: Yes; but the state must rely upon the charge they preferred in proving the case. A Juror: I mean by that the credibility of the main witness previous to the credibility of the prosecuting witness; if the jury would be satisfied that the crime had been committed by the testimony of the witness previous to the prosecuting witness, would that be sufficient? The Court: I don't want to get any error in the record here by going too far. [The court again reads instruction 11a.] In other words, evidence of other offenses than the one charged in the information is received in this case in a certain way for the purpose of showing the probabilities in the case, and only that. The offense alleged here is, as alleged, as on or about November 30, 1911. A Juror: In speaking about that date, what latitude will that have? The Court: One year before the filing of this prosecution. [The jury again retire.] Mr. Moulton: The defendant excepts to the form and the substance of the explanation made by the court, of the instruction, at the request of the jurors, but does not except to the manner of giving it in open court; it being our purpose to except to the form of the instruction and the substance, for the reason that it does not correctly state the law applicable to the case."

The court's explanation was in the main correct, but, as shown by the last question of the juror and the answer of the court, it did not clear up the confusion produced by the fourth instruction. The jury was by the court's answer given a latitude of one year in which to find a time for the specific act, when there was no evidence as to that act on which such a latitude could be predicated. This tended to nullify the whole effect of the explanation. There was no evidence of any offense within the specified year, save as to other distinct acts. The jury, after the manifest confusion produced by the fourth instruction, should have been told that they could only convict for the specific act charged as committed on or about the date charged. The admission of evidence of other acts and the election of the state made the time fixed by the only witness who testified to the act charged a material factor in proving that offense. There being other acts in evidence, that time became a material circumstance in identifying the offense for which the appellant was tried, as distinguished from the evidentiary acts for which he was not tried. The approximate time thus became a part of the issue. The situation thus presented falls logically within the principle announced in *State v. Neils*, 68 Wash. 599, 123 Pac. 1022. Instruction No. 4 and the court's explanation assumed that there might be a mistake in the date, when there was no evidence of mistake or of any other date of the offense charged. It could therefore only mean to the jury that they might convict for the other offense. The principle that the evidence may narrow the issue so as to make the exact time a material factor is announced in *State v. King*, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322. In that case the defendant was prosecuted for obtaining money under false pretenses. The defense was an alibi. The state's witnesses fixed the date of the crime as between the 12th and 15th of February. We held that the date of the commission of the crime was material, and that an instruction to the effect that the exact date was immaterial, and that it was sufficient if defendant committed the crime at any time within the period of three years before the filing of the information was misleading and erroneous. So also in the case before us. The issue was narrowed so that the time became material.

Complaint is made of the failure to give an instruction offered by the appellant on this point which, while correct as stating this principle, was objectionable in that it was a near comment upon the evidence. It was properly refused. The court, however, having instructed the jury upon this point in a confusing manner, and the error having been again committed in the court's explanation to the jury, and exceptions having been taken both to the instructions and the explanation, we think there can be no ques-

tion that the error was prejudicial and that a new trial should be had.

The judgment is reversed, and the cause remanded for a new trial.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

DAVIS v. HIBBS.

(Supreme Court of Washington. May 5, 1913.)

1. ACTION (§ 53*)—SPLITTING CAUSES OF ACTION—NOTE.

On a note on which the maker agreed to pay monthly installments of a certain amount each, his obligation was divisible, and the holder might maintain separate actions to recover the installments as they became due.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-551, 553-623; Dec. Dig. § 53.*]

2. BILLS AND NOTES (§ 354*)—BONA FIDE PURCHASER—CIRCUMSTANCES OF TRANSFER.

Plaintiff, who purchased defendant's note for \$248 from the payee a day or two after it was executed for a consideration of \$231, after inquiry and information that the maker's credit was good, and who notified the maker of the transfer, was a bona fide holder for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 905; Dec. Dig. § 354.*]

3. JUDGMENT (§ 596*)—CONCLUSIVENESS—MATTERS IN ISSUE.

A judgment of a court of competent jurisdiction for plaintiff in an action to recover an installment of a note, defended on the ground that it had been obtained by fraud, from which no appeal was taken, was conclusive of that issue in a subsequent action on installments subsequently due.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1111; Dec. Dig. § 596.*]

4. BILLS AND NOTES (§ 534*)—AMOUNT OF RECOVERY—ATTORNEYS' FEES.

Where a note provided that the maker would pay such attorney's fee as the court adjudged to be reasonable, and where no attorney's fee was allowed in the first action to recover installments due, the allowance of one attorney's fee in a subsequent action to recover installments subsequently due was proper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge. Action by Charles D. Davis against W. A. Hibbs. Judgment for plaintiff, and defendant appeals. Affirmed.

H. E. Foster, of Seattle, for appellant. Robert M. Jones, of Seattle, for respondent.

MOUNT, J. This action was brought to recover upon a promissory note. Plaintiff had judgment in the court below; the defendant has appealed.

It appears that on November 5, 1908, the appellant executed and delivered to Ransom & Baker a promissory note as follows: "\$247.78. Seattle, Wn., Nov. 5th, 1908. One year after date, without grace, I promise to pay to the order of Ransom & Baker, two

hundred forty-seven and 78/100 (\$247.78) dollars, for value received, with interest after maturity at the rate of 7 per cent. per annum until paid. Principal and interest payable in U. S. gold coin at Seattle and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such sum as the court may adjudge reasonable as attorney's fee in said suit or action, above sum is to be paid \$20.65 every month commencing Dec. 5, 1908. W. A. Hibbs, 329 Walker Building." A day or two after this note was made, it was sold to the respondent, indorsed by Ransom & Baker. The first installment became due on December 5, 1908; appellant refused to pay the same; and an action was begun on December 20, 1908, in justice court in Seattle to collect such installment. Judgment was rendered in favor of the respondent. From this judgment in the justice court, an appeal was prosecuted to the superior court of King county where, on trial before a jury, judgment was again rendered in favor of the respondent for the first installment, \$20.65. No attorney's fee was allowed or collected. The judgment in that case was afterwards paid and satisfied. In July, 1909, the respondent commenced an action in the superior court of King county to recover the installments due at that time. This latter action was pending until May, 1910, when the respondent brought another action to recover for the installments subsequently becoming due. These last two cases were consolidated and tried together to the court without a jury. On the 26th day of May, 1911, a judgment was rendered for the full amount due upon the note, with interest and costs, and an attorney's fee of \$100. In the original case in justice court the appellant admitted the making of the note, but denied that it had been purchased by the respondent in good faith, and also pleaded affirmatively that the note was without consideration, and was obtained by fraud, and that there was nothing due upon it from the appellant. This issue was decided adversely to the appellant in the original case tried in the justice court and appealed and tried in the superior court. Thereafter, when the two subsequent actions were brought for the balance due upon the note, as above stated, the same defenses were interposed by the appellant. [1] It is argued by the appellant that the trial court in this action should have sustained the demurrer of the appellant and his objection to the evidence upon the ground that the note sued upon was an indivisible contract, and that, when the respondent brought the first action, he could not thereafter maintain any further action upon the contract. The appellant also contends that the note was obtained without consideration, in bad faith, and that the same was obtained from the appellant by fraud of the original payees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is apparent upon the face of the note that the contract is a divisible contract, which was not the case in *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566, 125 Am. St. Rep. 561, and *Kline v. Stein*, 46 Wash. 546, 90 Pac. 1041, 123 Am. St. Rep. 940, relied upon by the appellant. In this case the appellant agreed to pay the note in monthly installments of \$20.65 each, commencing December 5, 1908. The rule is well settled and well stated in 23 Cyc. at page 444, as follows: "The great weight of modern authority is to the effect, however, that a contract to do several things at several times is divisible in its nature because, although the agreement is in one sense entire, the performance is several, and an action will lie for the breach of any one of the stipulations; each of them being considered in respect to the remedy as a several contract. Thus, on an agreement to pay a sum of money by installments, an action will lie to recover each installment as it becomes due as rent or compensation for personal services, and it has been held that an indorser who is compelled to make payments on a promissory note may maintain separate actions against a prior indorser to recover each payment made." This rule is well sustained by numerous authorities cited in the footnotes to the text quoted. There is no merit, therefore, in the contention of the appellant that the contract was indivisible.

[2] The evidence is clear to the effect that the respondent was a bona fide holder for value. He purchased the note a day or two after it was executed, and paid therefor the sum of \$231 "and some cents." There is nothing in the record to dispute this fact, except the mere fact that respondent, at the time he purchased the note, was unacquainted with the maker; but he had inquired concerning the maker, and was informed that he was a good risk and paid his bills. The appellant was notified, but did not disaffirm the note for several days after it was purchased by the respondent. There is no substantial evidence to rebut the fact that the respondent purchased the note in good faith for value. He was an innocent holder.

[3] We are satisfied, also, that in the last two actions the fraudulent character of the note was res judicata, because that question was tried out before a court of competent jurisdiction in the original action appealed from the justice court. That issue was decided by a jury against the appellant at that time, and no appeal was taken from that judgment. It therefore became conclusive. The rule is stated in section 754, Black on Judgments, as follows: "It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary

proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. 'A party cannot re-litigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies in reference to the same subject-matter. * * *'" See, also, 23 Cyc. p. 1295; *Furneaux v. Bank*, 39 Kan. 144, 17 Pac. 854, 7 Am. St. Rep. 541.

[4] It is also argued by the appellant that the court erred in allowing an attorney's fee of \$100 in the last action. The contract provides for a reasonable attorney's fee to be fixed by the court. No attorney's fee was allowed in the first action, namely, the one which was appealed from the justice court to the superior court. It was proper, therefore, upon the subsequent action to allow one attorney's fee, which was done in this case.

We find no error in the record. The judgment will therefore stand affirmed.

CROW, C. J., and PARKER and CHADWICK, JJ., concur.

STATE ex rel. MURPHY, Pros. Atty., v. SUPERIOR COURT FOR KING COUNTY.

(Supreme Court of Washington. May 12, 1913.)

1. MANDAMUS (§ 4*)—SUBJECT-MATTER—ADEQUATE REMEDY BY APPEAL.

The writ of mandamus will not be allowed to issue where there is an adequate remedy by appeal.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. § 4.*]

2. JUDGMENT (§ 217*)—CONCLUSIVENESS—"FINAL JUDGMENT."

An order in a disbarment proceeding that the proceeding be dismissed upon failure of a third person to bring action against the defendant therein within 30 days was not a final judgment, but after the expiration of the 30 days it was necessary to enter a subsequent judgment to effect a dismissal, and subsequent orders refusing to set the cause for trial, on the ground that it had been dismissed by the first order, were merely expression of opinions as to the legal effect of the first order, not controlling upon the appellate court, and not in themselves final judgments; a "final judgment" being one which disposes of the controversy, either by dismissing the cause before hearing is had upon the merits, or after trial, by rendering judgment in favor of one or the other of the parties in the action.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 394; Dec. Dig. § 217.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

3. MANDAMUS (§ 28*)—ACTS OF JUDICIAL OFFICERS—DISCRETION.

The judgment or discretion of the trial court cannot be controlled by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 64; Dec. Dig. § 28.*]

4. MANDAMUS (§ 31*)—SUBJECT-MATTER—ENTERTAINING AND PROCEEDING WITH CAUSE.

Where a trial court, refuses to proceed to a final judgment in a cause, it may be required

to do so by a writ of mandamus, without determining how the cause shall be disposed of.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

5. MANDAMUS (§ 31*)—CONDITIONS PRECEDENT—REQUEST FOR DISMISSAL.

A motion in a disbarment proceeding to set the cause for trial, or to otherwise proceed therewith, those being the only two ways in which the court could proceed, was in effect a request that if the motion to set for trial was denied the proceeding should be dismissed, so that on refusal of the request mandamus might be maintained to compel the court to proceed.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

6. MANDAMUS (§ 143*)—JURISDICTION—LACHES.

Where an order refusing a motion to set a disbarment proceeding for hearing was entered on February 25th, relator, who on March 24th applied for a writ of mandamus, was not guilty of such laches as would deprive him of his right to the writ.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 282-285; Dec. Dig. § 143.*]

Department 2. Original application by the State, on the relation of John F. Murphy, Prosecuting Attorney in and for the County of King, for a writ of mandamus to the Superior Court of the State of Washington for King County (John E. Humphries, Judge). Writ ordered to issue, directing the superior court to take jurisdiction of a certain cause and proceed therewith to a final judgment.

John F. Murphy and John C. Higgins, both of Seattle, for relator. Hastings & Stedman, Guile & Guile, and Jay O. Allen, all of Seattle, for respondent.

MAIN, J. This is an original application in this court for a writ of mandamus.

So far as now material, it appears that a disbarment proceeding had been instituted in the superior court of the state of Washington, for King county, against Herbert E. Snook, a duly licensed and regularly practicing attorney. The cause came on regularly for trial on the 27th day of June, 1912. After the relator had made his opening statement, the respondent objected to proceeding further, for the reason that it appeared that no civil action had been begun against the respondent by one A. H. Tantow, with whom it was charged the respondent, in his transactions, had been guilty of professional misconduct. Thereupon the court refused to proceed with the trial at that time and entered the following order, which was filed on July 3, 1912: "It is ordered that the further hearing of this matter be and the same is hereby postponed and continued for the period of thirty days from this date. It is further ordered that if within thirty days from this date A. H. Tantow shall institute an action against respondent herein upon the matters set forth in the complaint in this action, then and in that event this action be further stayed until the determination of

such suit or suits so instituted by the said A. H. Tantow, but in case the said Tantow should fail or neglect to so institute an action against the said Herbert E. Snook upon said matters, within the period of thirty days from this date, then and in that event this action be dismissed, and the objection of the respondent to the introduction of any testimony be sustained in such event. Relator excepts to the above order and to each part thereof on the ground that it is unwarranted by law, and exception is allowed. Done and ordered this — day of June, 1912. Daniel H. Carey, Judge."

Thereafter a civil action was not begun by Tantow within the 30 days specified in the order, or at all. The matter again came on for hearing before the superior court on the 23d day of November, 1912, upon the application of the relator to set the cause for trial, and the court thereupon entered an order which, so far as material, is as follows: [The court], "being fully advised, refused and declined to set the said cause for trial because and for the reason of the order heretofore made herein by the Honorable D. H. Carey, Judge, then presiding in this court, on the — day of June, 1912; and the court finding, because of said order, it would be improper to set the case for trial, as asked for, or at all: Wherefore, by reason of the law and the premises, it is ordered that the motion to set this cause for trial be and the same is hereby denied, to which the relator excepts, and his exception is allowed. Done in open court this 14th day of December, 1912. H. A. P. Meyers, Judge."

Subsequently, and on the 15th day of February, 1913, the cause again came on regularly to be heard before the superior court upon the application of the relator "for an order of this court to set the case for trial, or to otherwise proceed therewith." Thereupon the court entered an order, the material parts of which are as follows: " * * * The court finding that this cause came on regularly to be tried before this court on the 27th day of June, 1912, that at said time this court made an order and entered a judgment herein to the effect that this cause should be continued for the period of thirty days, within which time A. H. Tantow should commence an action, and if said action was not so commenced within said period of thirty days that this cause should be deemed dismissed, and the court further finding that no such action was commenced by the said A. H. Tantow within said period of thirty days or at all, but that, on the contrary, the said Tantow has refused and declined to commence any action, and it further appearing to the court and the court finding that heretofore, to wit, on the — day of December, 1912, the relator herein made a motion herein to have this cause set for trial, and that the court having considered said motion and the affidavits

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—72

filed in support thereof did decide and hold that the order heretofore entered on the — day of June, 1912, was self-executing, and that this cause was dismissed, did enter an order herein declining to set this cause for trial at said time or at all, and the court again finding that the previous orders herein have fully determined, settled and dismissed this cause, does now for said reasons deny the motion herein to assign this case for trial, to which the relator excepts, and his exception is allowed. Done in open court this 25th day of February, 1913. John E. Humphries, Judge."

Following this, and on March 24, 1913, the relator herein filed his application in this court, praying for a writ of mandamus directed to the Honorable John E. Humphries, as judge of the superior court, commanding him to set the cause for trial, or to otherwise proceed therewith.

[1] The respondent contends that the above-mentioned orders were final judgments, and that the relator's remedy is by appeal. The relator contends that none of the above orders were final, and that he has no right of appeal therefrom. These respective contentions present the principal question to be determined upon this application, which is, Has a final judgment been entered in the cause?

It is clear that, if any one of the orders above referred to is in effect a final judgment, there is an adequate remedy by appeal therefrom, and in that event the writ of mandamus should be withheld.

In *State ex rel. Light Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933, it is said: "But, in addition, it plainly appearing that there is an adequate remedy by appeal, we take this opportunity of announcing the law of this state to be that extraordinary writs of this character [mandamus] will not be allowed to issue when there is an adequate remedy at law."

[2] A final judgment is one which disposes of the controversy, either by dismissing the cause before hearing is had upon the merits, or after trial, by rendering judgment in favor of one or the other of the parties to the action.

In *Cyc.* (volume 23, p. 672) it is said: "Judgments may be either final or interlocutory. A final judgment is one which disposes of the case, either by dismissing it before a hearing is had upon its merits, or after trial, by rendering judgment either in favor of plaintiff or defendant. An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties. No judgment is final which does not determine the rights of the parties."

The first of the three orders, that entered on July 8, 1912, provides that the action be

dismissed upon the happening of a contingency which may or may not occur. It appears to be well settled by the authorities that an order of this character is not a final judgment; but after the happening of the event, or the failure of the event to happen, upon which the cause was to be dismissed, it is necessary to enter a subsequent judgment of dismissal.

In *Jones v. Craig*, 127 U. S. 213, 8 Sup. Ct. 1175, 32 L. Ed. 147, an order had been entered, providing that if within 15 days the plaintiff in the action bring into court the amount of a note and mortgage, with interest thereon, together with taxes paid upon certain land, that in that event the defendant be restrained from the further prosecution of an ejectment action; but if the plaintiff should fail to bring the money into court within the time specified it was provided that the bill of complaint be dismissed. The court, in passing upon the question as to whether the order amounted to a final judgment, used this language: "This court, however, has no jurisdiction of the case as it stands, because the order just cited is not a final decree. Something yet remains to be done in order to make it such, and that action depends upon whether or not the complainants will comply with the order to bring in the sum due on the mortgage. If that order is complied with, then a decree should be made, upon the hypothesis on which the order was made, in favor of the complainants in the bill, and quieting their title. If, however, the money is not brought into court, then, according to the theory of the order, the bill of complaint should be dismissed. But, even assuming the right of the court to make the order, as well as its validity, the circumstances under which the bill of complaint is to be dismissed or the relief granted to the complainants named therein, and the sum to be paid, are matters which are yet to be determined, which may turn out either one way or the other, and which, when ascertained, will be the foundation for a final decree." To the same effect, see *Lide v. Park*, 132 Ala. 222, 31 South. 360; *Robertson v. Montgomery Association*, 140 Ala. 320, 37 South. 241; *Stratton v. Dewey*, 79 Fed. 32, 24 C. C. A. 435.

The inquiry then arises whether either of the subsequent orders was, in effect, a final judgment and operated to dismiss the action. In the first of these, that of December 14, 1912, the court finds that by reason of the previous order it would be improper to set the case for trial; and therefore the motion was denied. The last of the three orders, that of February 25, 1913, provides that in the opinion of the superior court the two previous orders had determined, settled, and dismissed the cause, and for that reason the motion to set the cause for trial was denied. In neither of the latter orders can there be found operative words which, in their effect, change the status of the action.

It is plain that neither of these orders disposes of the case. They are, in effect, the expression of an opinion on the part of the court as to the legal effect of the first order. This expressed opinion as to the legal effect of a previous order or orders is not controlling upon the appellate court.

In *Robertson v. Montgomery B. B. Ass'n*, 140 Ala. 320, 37 South. 241, it is said: "The order or decree, 'that the motion to dismiss the bill for want of equity is well made and is sustained, and unless complainant amends the bill so as to give it equity in two days after the enrollment of this decree the bill shall stand dismissed,' is not a decree dismissing the bill which will support an appeal. *Lide v. Park*, 132 Ala. 222, 31 South. 360. The further deliverance of the chancellor that 'it is decreed that the filing of the amendment by complainant on April 13, 1904, operated a dissolution of the injunction' is not a decree dissolving the injunction. It is no more than the expression of the chancellor's opinion as to the effect of the amendment. If that opinion is correct, the complainant dissolved his own injunction. If the amendment did not have the effect to dissolve the injunction, there has been no dissolution of it."

It is clear that none of the orders were, in legal effect, a final judgment. There was nothing from which the relator could appeal. Hence his remedy must be by application for a writ of mandamus requiring the trial court to proceed with the cause to a final judgment.

[3, 4] It is argued, however, that the issuance of the writ will, in effect, control the judgment or discretion of the trial court upon the merits, and that this is not the function of the writ. It is true that the judgment or discretion of the trial court cannot be controlled in a proceeding of this character. But if the trial court refuses to proceed to a final judgment in a cause it may be required to do so by a writ of mandamus. It is not the office of the writ to determine how the cause shall be disposed of, but it is its function to require the court to make some final disposition thereof. *State ex rel. Bank v. Superior Court*, 14 Wash. 686, 45 Pac. 670; *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071.

In the first of these cases it is said: "Respondent insists that to grant the writ prayed for would be, in effect, to control the discretion of the trial court, and to compel it to decide a question submitted to it in a particular way, and that the court's discretion cannot be thus controlled by mandamus. But it is a sufficient answer to this proposition to observe that the court did not possess discretionary authority to stay the proceedings indefinitely for the cause shown, and in such cases, there being no remedy by appeal, the appellate court will award a mandamus in the nature of a procedendo to com-

pel the trial court to proceed with the cause."

[5] It is contended that, where the trial court refuses to proceed with the action, the writ of mandamus will not issue to compel him to proceed, in the absence of a request having been made that the action be dismissed; and in support of this proposition the case of *State ex rel. Piper v. Superior Court*, 45 Wash. 196, 87 Pac. 1120, is cited. In that case the court declined to proceed with the cause, and motion for new trial was made and denied. Thereupon an application was made to this court for the writ. And it was there held that, inasmuch as no application had been made to the court to enter a judgment of dismissal, a sufficient showing had not been made. That case is distinguishable from the present case in this: Here the relator moved the court to set the cause for trial, or to otherwise proceed therewith. The court refused to set the case for trial, and did not proceed otherwise. There were but two ways open in which the court could proceed; the one being a final determination of the case on the merits, the first step in which would be the setting of the case for trial, and the other to enter a judgment of dismissal. The language of the motion, "or otherwise proceed therewith," was therefore, in effect, a request to the court to dismiss the action, if the request to set the cause for trial were denied.

[6] Finally, it is urged that the relator has been guilty of laches. The last of the three orders was entered on the 25th day of February, 1913. On March 24th thereafter the present application was made. We think the contention that the relator has been guilty of laches which would deprive him of the right to the writ is without merit.

The writ will issue directed to the superior court of the state of Washington, for King county, and the Honorable John E. Humphries, as one of the judges thereof, to take jurisdiction of the cause and proceed therewith to a final judgment.

CROW, C. J., and ELLIS, PARKER, and MOUNT, JJ., concur.

STATE ex rel. MURRAY v. HERDLICK et al.

(Supreme Court of Washington. May 1, 1913.)
EMINENT DOMAIN (§ 245*)—COMPENSATION—
TIME FOR PAYMENT—STATUTES.

Under Rem. & Bal. Code, § 7817, providing that a city taking possession of any property or doing damage in proceeding with any improvement, the compensation for which is to be paid from the proceeds of a special assessment, may advance from its general funds or any available money the amount of the assessment and pay it to the owner or into court, and section 7816 providing that, at any time within two months from final determination on

appeal, a city may discontinue condemnation proceedings before payment by paying all taxable costs to that time, an owner whose property has been condemned by judgment, but not actually taken, is entitled to satisfaction of the judgment without waiting until the assessment fund is collected, where the time to appeal or abandon has passed.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 637; Dec. Dig. § 245.*]

Department 1. Appeal from Superior Court, Spokane County; E. K. Pendergast, Judge.

Mandamus by the State, on the relation of William Murray, against Jared Herdlick and others. Judgment for relator, and defendants appeal. Affirmed.

Thos. P. Ferry, of Hillyard, Wm. E. Richardson, of Spokane, for appellants. Belt & Powell, of Spokane, for respondent.

MOUNT, J. This appeal is from a judgment in mandamus requiring the appellants to issue a warrant upon the general fund of the city of Hillyard in satisfaction of a judgment in condemnation in favor of the relator.

It appears that on March 22, 1912, a judgment in condemnation was entered in favor of the relator for \$1,174.25 for property which the city desired to take from the relator. Thereafter the city of Hillyard took no further proceedings. After the expiration of two months, the relator satisfied the judgment of record, and applied to the clerk of said city for a warrant upon the general fund of the city in payment of the judgment. The city refused to issue the warrant, when this action was brought.

The only question presented upon this appeal is whether the city may be required to issue its general fund warrant as demanded by the relator. The appellant contends that under section 7817, Rem. & Bal. Code, relator is not entitled to the warrant prayed for. That section provides: "If any city or town shall desire to take possession of any property or do any damage or proceed with any improvement, the compensation for which is to be paid for in whole or in part by the proceeds of special assessment under this act, it may advance from its general funds, or any moneys available for the purpose, the amount of the assessments aforesaid, and pay the same to the owner or into court, as herein provided, reimbursing itself for moneys so advanced from the special assessments aforesaid. * * *" It is contended that, because the city has not actually taken the property, it cannot be required to make compensation therefor under this statute. Section 7816, Rem. & Bal. Code, provides: "At any time within two months from the date of rendition of the last judgment awarding compensation for any such improvement in the superior court, or if any appeal be taken, then within two months

after the final determination of the appeal in the Supreme Court, any such city may discontinue the proceedings by ordinance passed for that purpose before making payment or proceeding with the improvement by paying or depositing in court all taxable costs incurred by any parties to the proceedings up to the time of such discontinuance. * * *"

It is conceded in this case that the city did not abandon the proceedings, and no appeal was taken from the judgment. Clearly, therefore, under the rule in *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348, the relator was entitled to the warrant demanded in this case; for there we said: "It is, however, urged that the city has not yet taken possession of the condemned property, that appellants have had the benefit of the use thereof and should therefore not recover interest upon their award. Section 822, Bal. Code, provides that the city may, within two months from the date of the condemnation judgment, if no appeal be taken, discontinue the proceedings and pay the costs. Not having so discontinued the proceeding in question, it must be held that the city has elected to abide by the award and appropriate the property. It follows that since the expiration of said two months' period the appropriation has been complete, with the exception of actual satisfaction of the judgment and taking possession by the city, which it was at liberty to do at any time. The proceeding has therefore resulted in an obligation which is binding upon the city, and from which it may not withdraw, at least not without consent of the property judgment holders." This is conclusive of the question presented here. The fact that the city has not taken actual possession of the property, and the fact that the city intends that the improvement shall be paid for out of a special improvement fund, does not require the relator to wait for his money until such improvement fund is collected. The lower court was clearly right, and the judgment is therefore affirmed.

CROW, C. J., and PARKER, and CHADWICK, JJ., concur.

MUTUAL HOME ASS'N v. JOE'S BAY TRADING CO.

(Supreme Court of Washington. May 7, 1913.)
CORPORATIONS (§ 499*)—LICENSE—RIGHT OF ACTION.

Under Rem. & Bal. Code, § 3714, providing that every corporation shall pay a license fee based on its capital stock, and section 3715, providing that no corporation shall be permitted to bring any action without proving that it has paid its annual license last due, a corporation which had no capital stock was not required to pay any license, and could maintain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an action without proof of payment of such fee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919, 2030; Dec. Dig. § 499.*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the Mutual Home Association against the Joe's Bay Trading Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded, with directions.

Jas. J. Anderson, of Tacoma, for appellant. Lund & Lund, of Tacoma, for respondent.

MAIN, J. This action is brought for the purpose of recovering the reasonable rental value of the premises owned by the plaintiff, but occupied by the defendant.

To the plaintiff's third amended complaint a demurrer was interposed and sustained by the trial court. Thereupon the plaintiff elected to stand upon its complaint and refused to plead further. The action was dismissed. The appeal follows.

The appellant, in its third amended complaint, attempts to plead two causes of action, separately stated. It is therein alleged that the appellant is a corporation, organized under and by virtue of the laws of the state of Washington providing for the incorporation of benevolent, scientific, charitable, or temperance societies; that the same is not organized for pecuniary profit; and that it has no capital stock. There is also set out in the complaint a copy of the articles of incorporation, and from an inspection it appears that nowhere in the articles is it provided that the corporation shall have a capital stock. It is not alleged as a part of either cause of action that the appellant has paid its annual license fee last due.

The sole point at issue here is the question whether or not a cause of action is stated in the third amended complaint without alleging the payment of the last annual license fee. If the appellant is required to pay an annual license fee before it is permitted to maintain an action, it must be by reason of a statutory requirement. Aside from statute there would be no such duty resting upon it.

By section 3714, Rem. & Bal. Code, it is provided: "Every corporation incorporated under the laws of this state, and every foreign corporation having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees: Every corporation having a capital stock, fifteen dollars. * * * And section 3715 provides: "No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it

has paid its annual license fee last due. * * * Section 3715 is general in its terms, and provides that no corporation shall commence or maintain an action without alleging and proving the payment of the annual license fee last due. It is necessary, then, to determine the amount, if any, of the license fee fixed by statute. The section first above quoted requires that every corporation having a capital stock pay an annual license fee in the sum of \$15 on or before the 1st day of July of each and every year. While the language of this section is broad and comprehensive in its opening, yet in its application it is limited by the provision which fixes the amount of the fee. There is no provision therein which fixes the amount of any annual license fee for a corporation which does not have a capital stock. In the absence of the amount of the fee being fixed in the statute, it is clear that none can be demanded. The appellant, in its complaint, alleges that it is organized without capital stock; and the articles, a copy of which is set out therein, confirm this allegation. These sections of the statute not being applicable to the appellant corporation, the court erred in sustaining the demurrer to the causes of action set out in the third amended complaint. Ellensburg No. 20 v. Collins, 68 Wash. 94, 122 Pac. 602.

The judgment will be reversed and the cause remanded, with direction to the superior court to overrule the demurrer.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

NILSSON v. McDOLLE et al.

(Supreme Court of Washington. May 1, 1913.)

1. PARTNERSHIP (§ 49*) — ESTABLISHMENT — EVIDENCE—DECLARATIONS OF PARTNERS.

Where plaintiff sued two persons as partners and both denied the existence of the partnership, evidence of declarations by each at different times to different persons, in the absence of the other, that a partnership relation existed between them was admissible against both to establish a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 67-73; Dec. Dig. § 49.*]

2. PARTNERSHIP (§ 49*) — REMOTENESS — EFFECT.

Where plaintiff sold goods to an alleged firm in 1910 and 1911, declarations by defendants, made in 1908 and 1909, that they were in partnership were not objectionable for remoteness, under the rule that, where a partnership is proved to exist at one time, it is presumed to continue, so long as the parties do the same business in the same way and in the same general locality, and hold themselves out as partners and are dealt with as such.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 67-73; Dec. Dig. § 49.*]

Department 1. Appeal from Superior Court, Columbia County; Thos. Neill, Judge. Action by Lars Nilsson against O. W. Mc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Dole and another. Judgment for plaintiff for part of the relief demanded, and he appeals. Reversed, and new trial granted.

T. P. Gose, of Walla Walla, and A. F. Appleton, of Dayton, for appellant. F. A. Garrecht, of Walla Walla, and Hardy E. Hamm, of Dayton, for respondents.

MOUNT, J. The plaintiff brought this action to recover upon three separate bills for goods, wares, and merchandise alleged to have been sold to the defendants as a copartnership. Two of these bills were assigned to the plaintiff. The complaint alleged that the defendants were copartners in the years 1910 and 1911 at the time the goods were so sold to them. It is also alleged that the goods so sold were of the reasonable value of \$590.42, no part of which has been paid. The defendants answered separately. O. W. McDole admitted the purchase of the goods upon his personal account and denied the value as alleged. He denied that A. S. McDole was a partner and alleged that the defendant A. S. McDole was his son and worked for him for hire, and was to receive as pay for such work one-fourth of the crop grown upon certain lands. The defendant A. S. McDole denied that he was a partner of his father, and denied all of the allegations of the complaint. He also alleged that he was working for hire for his father and was to receive as pay one-fourth of the crop upon certain lands. This new matter was denied by reply. The case was tried to the court and a jury. After all the evidence was introduced, the jury found a verdict against O. W. McDole, but in favor of the defendant A. S. McDole. A judgment was entered accordingly.

[1] The appellant, at the trial, sought to show a copartnership relation existing between the defendants in 1908, prior to the time the goods were purchased, by showing that the respondent A. S. McDole at that time stated to a witness by the name of Blue that he and his father, O. W. McDole, were partners (this statement was not made in the presence of his father, O. W. McDole); that about the same time, but not in the presence of A. S. McDole, O. W. McDole told the witness that he and his son, A. S. McDole, were in partnership in the farming business; that afterwards in the year 1909 the same witness had another conversation with A. S. McDole, in which said McDole told him that he and his father were partners. This evidence was objected to and excluded by the court upon the ground that the declarations of one partner, not in the presence of the other, were not admissible to prove a partnership against the other partner, and upon the further ground that the conversation occurred a year, in one instance, and two years in the other, prior to the time the goods were purchased. We are of the opinion that this ruling of the trial court

was error. The general rule is as stated in *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51: "There is some claim in appellants' brief that Bernard Krakenberger was a partner of Wright. There is no evidence in the record upon which such an assumption can be based. The only evidence is admissions of Wright to various dealers with whom he sought credit that Krakenberger was interested with him. Such declarations or admissions by Wright were not competent nor admissible as against Krakenberger. When a partnership is admitted or established, the declarations of one partner will to a large extent bind the other partners; but where the issue is the establishment of a partnership between two men the relation cannot be established against one by the admission of the other."

This is the rule. But where each of the parties makes statements at different times as to their relationship the same may be received for the purpose of binding the one who made the statement—not for the purpose of binding the other. It is argued by the respondent that O. W. McDole admitted full liability in his answer, and no evidence was necessary to bind him. It is true that he had assumed the sole liability by his answer to the effect that he had purchased the goods, but he had denied the copartnership relation and liability as alleged in the complaint. His statements, if made, that he sustained the relation of partner to his son were some evidence against him of the fact that such relationship existed; and similar statements, if made, by the son to the same or another party would be some evidence against the son. These admissions, if made, by each of the parties at different times to different persons were competent to be received against the respondents and to go to the jury.

"It is sometimes said that the admission of one is not evidence against the others, by which is meant that where the plaintiff falls in his proof against any one member of the alleged firm, he cannot recover, however strong and overwhelming may be the evidence arising from the admissions or conduct of the other defendants who are sued; for, in order to sustain his case, he must connect each and every one by their own admissions or acknowledgments. But to effect this the plaintiff has a right to prove one thing at a time, to add fact to fact, from which the jury, who must judge from the whole case, may infer the existence of the partnership." *Welsh v. Speakman*, 8 Watts & S. (Pa.) 257.

[2] We think this rule is applicable in this case. The objection that these statements were made in 1908 and 1909, a year or two previous to the time when these goods were sold, is not sufficient to exclude the evidence, because, where a partnership is proven to exist at one time, it is presumed to continue,

so long as the parties do the same business in the same way and in the same general locality, and hold themselves out as partners and are dealt with as such. The burden is cast upon such parties to overcome this presumption by showing that the partnership has been dissolved or discontinued, or that creditors did not deal with them as copartners. *Alaska Banking, etc., Co. v. Simmons*, 67 Wash. 673, 122 Pac. 319.

We think the evidence offered should have been permitted to go to the jury, so that the jury might determine from all the facts and surroundings whether or not the defendants were partners at the time these goods were purchased, and whether credit was given to the copartnership as such.

Other errors are assigned in the brief, but are not discussed. The appeal is based upon the rejection of this evidence.

Reversed and remanded for a new trial.

CROW, C. J., and PARKER, ELLIS, and CHADWICK, JJ., concur.

PASCO RECLAMATION CO. v. RANKERT. (Supreme Court of Washington. May 6, 1913.)

1. WATERS AND WATER COURSES (§ 257*)— CHARGE FOR WATER—LIABILITY.

A contract between a landowner and an irrigation company provided that the company would construct an irrigation system in the vicinity of the owner's land and convey to him a water right to serve one-half of his land, in consideration of which the owner would convey the other one-half to a subsidiary of the company; that the owner would pay to the company an annual charge for water of \$5 an acre; that it should have a lien on the land therefor; that the company, at its option, might shut off the water from the lands of any user who should be in arrears for "maintenance charges," and might enforce any lien which should have attached on account of such charges. Upon completion of the irrigation system, the company conveyed a water right to 24 acre inches of water an acre, or so much as was necessary to irrigate the land, by a deed which provided that the owner should pay "for the use of said water" \$5 an acre, which "shall entitle said water user to the use of 18 acre inches," or so much as might be necessary for the irrigation of the lands, and 35 cents per acre inch or fraction for all water in excess of 18 acre inches; that the owner should, on or before March 1st each year, notify the company of the quantity of water desired by him during that season; that the charges should be payable one-half on or before March 15th, and the balance on or before June 15th; and that the company should have a lien for such charges. *Held*, that the charge of \$5 an acre was a maintenance charge for which the owner was liable, whether he used any water or not; and hence he could not avoid liability by refusing to take water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. § 257.*]

2. WATERS AND WATER COURSES (§ 254*)— CONTRACTS — CONSTRUCTION — "GRAVITY FLOW."

A contract between a landowner and an irrigation company provided that the company would deliver water to a point within one mile

of the owner's land, and to such elevation as would permit the water to be carried to the highest point upon his land by gravity flow. It completed its main pipe line to within one mile of the land at an elevation 14 feet lower than the highest point on the owner's land, but there was sufficient pressure in the pipe line to raise the water through a pipe line connected therewith to such highest point, and by the installation of a standpipe 18 feet high water could be carried to the highest point by flumes. Under an agreement with and at the expense of the owner and others, a lateral pipe line was constructed to within 700 feet of such land, from which lateral water could be delivered to the highest point by flumes by means of a standpipe 5 feet high. The company agreed with the owner and others, at their expense, to construct a sublateral along the owner's land which would carry the water to the highest point; but it was not constructed because the owners refused to pay for it, on the ground that the estimate of the cost was too high. The company was ready and willing to construct a standpipe, either on the main pipe line or the lateral; but the owner failed to signify where he wished delivery. *Held*, that the company had complied with the contract, since a flow of water through a pipe line, without other aid than the hydraulic pressure furnished by gravity, where there were no qualifying words negating confinement in pipes or the use of pressure, would be included in the term "gravity flow," and a delivery by means of a standpipe into flumes of a reasonable height would also meet the terms of the contract, especially as the parties so construed the contract, as evidenced by the agreements for the construction of the lateral and sublateral.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 311; Dec. Dig. § 254.*]

Department 2. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

Action by the Pasco Reclamation Company against Charles Rankert. Judgment for plaintiff, and defendant appeals. *Affirmed*.

H. B. Noland, of Pasco, for appellant. Driscoll & Leonard, of Pasco, and Parker & Richards, of North Yakima, for respondent.

ELLIS, J. In this action the plaintiff seeks to foreclose a lien upon certain lands of the defendant for annual water charges for the year 1911, claimed to be due under a contract and a water right deed made in pursuance thereof. On June 26, 1909, the defendant, as party of the first part, and the plaintiff, as party of the second part, made a contract in duplicate, wherein the plaintiff agreed to construct an irrigation system in the vicinity of the defendant's land sufficient to perpetually supply water between April 1st and October 1st of each year to the extent of 1½ acre feet a year, and to convey to the defendant a water right to serve one half of his land described in the contract. In consideration of this agreement the defendant agreed to convey the other half of his land to Pasco Fruit Lands Company, a subsidiary corporation of the plaintiff, and party of the third part to the contract. The contract, among other things, provided that the first party should pay to the second party

an annual charge for the water of \$5 an acre, and that the second party should have a lien upon the land for which water rights were to be furnished for this annual charge, and further declared "that when the party of the second part * * * shall be able to deliver the water to a point within one mile of said land, * * * and to such elevation as will permit the water to be carried to the highest point upon said land by gravity flow, it shall be deemed to have completed said system, as herein provided for."

On February 28, 1911, the manager of the reclamation company, stating that it had complied with the terms of the agreement, demanded and received from the defendant a deed to Pasco Fruit Lands Company, conveying to it the land which, by the contract, was to be so conveyed on completion of the system, and at the same time delivered to the defendant the water right deed to serve the other half of the land. This deed conveyed a water right in perpetuity to 24 acre inches of water an acre, or so much thereof as necessary to irrigate the land, during the irrigation season from April 1st to October 1st each year. This right was subject to enumerated conditions, among them the following, which we deem material to the present inquiry:

"2. Said water shall be delivered at a point not greater than one mile distant from the lands herein described, and at such elevation as will permit such water to be conveyed to the highest point on said lands by means of gravity flow. The works and conduits necessary to conduct said water to said lands from such point or points of delivery shall be constructed and maintained by the water user. * * *

"6. The water user shall, on or before the 1st day of March, each year, file with the company a notice in writing specifying the quantity of said water which he wishes to use during the ensuing irrigation season, and upon filing such notice he shall be entitled to the use of such specified quantity only during such season.

"7. The water user shall pay to the company at its office at Pasco, Washington, for the use of said water, annual charges as follows: Five dollars (\$5.00) per acre for each and every acre of the lands herein described, which payment shall entitle said water user to the use of eighteen (18) acre inches of water per acre, or so much thereof as may be necessary, for the irrigation of said lands; and for all water used in excess of 18 acre inches per acre he shall pay thirty-five (35) cents per acre inch, or fraction thereof, for each and every acre of said lands.

"8. Beginning with the year 1911, the charges mentioned in the foregoing paragraph shall be due and payable: One-half on or before March 15th and the balance on or before June 15th, in each year.

"9. The company shall have a lien upon

the lands hereinbefore described for the annual charges mentioned in paragraph seven (7) hereof. * * *

The cause was tried to the court, findings were made in favor of the plaintiff, a judgment for \$45 and interest from June 15, 1911, was rendered against the defendant, and a decree foreclosing the lien therefor and ordering a sale of the land to pay the same was entered. The defendant appealed.

There are many assignments of error, but they are all argued under two heads and may be so considered:

[1] 1. The appellant contends that the contract and water right deed created no obligation on his part to pay any annual charges until he should begin to use the water. The argument is that paragraph 6 of the water right deed, requiring the "water user," on or before March 1st of each year, to give notice specifying the quantity of water he wishes to use during the ensuing irrigation season, and paragraph 7, providing that he shall pay, "for the use of said water," the annual charges thereafter designated, evidences an intention that the charges are for the actual use of water, and not for the right to use it, and that the right to use the water in perpetuity had already been paid for by the conveyance of half of the appellant's land. This last contention may be disposed of at once. It is obviously unsound, since to give the conveyance that force would make it a perfect defense to a claim for payment for any amount of water actually used up to the 24 acre inches an acre specified in the water right deed, and would render all remaining provisions in that deed as to payments absolutely meaningless, though express conditions of the grant. The respondent contends that the provision for the payment of the annual charge of \$5 an acre was intended as a maintenance charge entitling appellant to use 18 acre inches of water an acre, and that this payment was not dependent upon actual use, but was for the privilege to use that amount of water, whether the privilege was actually exercised or not. The question presented is one of intention, to be determined, not by isolated phrases in the water right deed alone, but by all pertinent recitals, both in the deed and in the initial contract referred to in and made a part of the deed. The initial contract provided "that said first parties * * * shall pay to the said party of the second part * * * an annual charge for said water of \$5 per acre, * * * one-half thereof to be paid on or before March 20th, and one-half on or before June 20th of each year;" and again it provided that "said party of the second part * * * shall have a lien upon the real estate for which water rights are to be furnished hereunder for said annual charge of \$5 per acre, and said second party shall have the right, at its option, to shut off the water from the lands of any user who shall be in arrears for maintenance charges," and may

also "enforce any lien which shall have attached to said lands on account of such charges." Nowhere in the initial contract do we find any words indicating that actual use of water shall be a prerequisite to the annual charge of \$5 an acre, or to the attaching of the lien therefor. On the contrary, we find the charge in the above-quoted provision referred to specifically as a maintenance charge. A reading in context of the different provisions of the water right deed leads to the same result. Paragraph 7 of the deed provides (we italicize for emphasis) that the water user shall pay, "for the use of said water, annual charges as follows: Five dollars (\$5.00) per acre, * * * which payment shall entitle said water to the use of 18 acre inches of water per acre, or so much thereof as may be necessary, for the irrigation of said lands; and for all water used in excess of 18 acre inches per acre he shall pay thirty-five (35) cents per acre inch, or fraction thereof. * * *". The words of this paragraph relied upon by the appellant, "for the use of said water," while introducing the subject of annual charges, are not controlling of the specific provisions for payment immediately following. That the payment of \$5 an acre is not dependent upon the amount of water actually used is obvious, since the payment is clearly the same, whether much or little is used, up to the limit of 18 acre inches. That this payment may not be avoided by refusing to use any water is equally obvious, since the payment of \$5 an acre is to entitle the water user to the use up to the 18 acre inches. This is made plain by the further provision for payment at 35 cents an acre for all water used in excess of that limit. It seems clear that actual use or the amount used are only important factors when the minimum payment of \$5 an acre is to be exceeded, and that the parties intended that the respondent should be ready to supply, and the appellant should be entitled to take, at least 18 acre inches of water, and that the appellant undertook to pay the \$5 an acre as a minimum annual charge, whether he took none, any part, or all, of that amount. This construction is made unavoidable by paragraph 8. The provision therein that, "beginning with the year 1911, the charges * * * shall be due and payable," would be useless and meaningless if all payments were to be dependent upon actual use. While not so named in the water right deed, this payment of \$5 an acre was clearly intended as in the nature of a maintenance charge, and was so designated in the initial contract, which was made a part of the deed. If the respondent was ready to deliver the water, the appellant cannot avoid the payment of this charge by refusing to take it.

In Fresno Canal & Irrigation Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275, the contract was in some respect analogous to the contract here. By the contract the water com-

pany sold to the water user for a money consideration a water right for his land, and the water user agreed to pay an annual charge "after the water shall first be brought to the said land." The contract also provided for a lien on the land to secure the annual payments. The court held that the defendant could not avoid the lien by a failure to take the water.

In Purser v. Baker, 129 Cal. 607, 62 Pac. 190, relied upon by appellant, the contract provided that the defendant should pay "annually on the first day of December the sum of \$2 per acre for the use of water on the above-described land. * * * Said water shall be used by the party of the second part for no other purpose than for the irrigation of said land and for domestic purposes on said land during the irrigation thereof, * * * nor shall the party of the second part be required to pay any sum for the use of water for the year or years of crop failure by reason of an insufficient supply of water." There was, so far as the opinion shows, nothing in the contract requiring the defendant to take any amount of water, or to pay a minimum charge for the privilege of using any amount. In that case it was the clear intention of the contract that pay should only be required for water actually and beneficially used.

It would be a bootless task to further review the authorities cited. They merely emphasize the fact, shown by the two we have noticed, that each contract must be construed according to its terms. The contracts in the other cases cited are so widely variant as to be of little illustrative aid.

[2] 2. It is next contended that the water was not delivered or tendered at any point within one mile, from which it could be carried to the highest point of the appellant's land by gravity flow. The evidence is conclusive that the respondent has constructed its irrigation system; that its main pipe line runs to within much less than a mile of appellant's land. It is conceded that at a point within 2,290 feet of the appellant's land the ground elevation of the pipe line is 412 feet; while the ground elevation of the highest point of the appellant's land is 426 feet. It was proved, without contradiction, that the pressure in the pipe line at the point mentioned will raise water to an elevation of 440 feet, and that a pipe line connected with the respondent's main pipe line at this point would therefore carry the water to the highest point of the appellant's land. It was also proved, without contradiction, that by the installation of a standpipe 16 feet high on the respondent's pipe line at the point in question water could be carried by means of a flume to the highest point of the appellant's land. The evidence showed that the appellant and others, on March 10, 1911, entered into an agreement with the respondent, authorizing the respondent to construct a lat-

eral pipe line running within 687 feet of the appellant's land, at which point the ground elevation is 424 feet, the appellant and others to be served by this lateral agreeing to pay the actual cost of construction, and that this lateral has been constructed. It was also proved that on March 17, 1911, the appellant and others to be served thereby entered into a similar agreement with the respondent to construct a sublateral connecting with the lateral above mentioned at the point nearest to the appellant's land, and running directly to and along the north line of the appellant's land, which pipe line would carry the water to the highest point of the appellant's land, but that this sublateral has not been constructed because appellant and others to be served by it have refused to pay for it. Appellant's refusal was not on the ground that piping would not meet the terms of the water right deed, but on the ground that the respondent's estimate of the cost was too high. The evidence further shows that by the construction of a standpipe 5 feet high at a point on the lateral pipe line, already constructed, within 687 feet of the appellant's land the water can be delivered by means of a flume and ditch to the highest point of the appellant's land. The appellant has never signified a desire to take any water in any way, and has never indicated to the respondent at what point upon its pipe line or upon the lateral he desires delivery to be made. The respondent expresses a willingness either to allow the appellant to connect with its main line or the lateral above mentioned by a pipe line, or to itself construct the necessary standpipe at either of these points for delivery into a flume. We think that under the evidence the respondent has complied with its contract and with the terms of the water right deed. A flow of water through a pipe line, without other aid than the hydraulic pressure furnished by gravity, in the absence of other qualifying words, such as "without confinement in pipes," or "without the aid of pressure," or "by means of open ditches or flumes," would be included in the term "gravity flow." By the two agreements of March 10th and March 17th, above referred to, the parties themselves have so construed the initial contract and the water right deed. If the respondent has made an overestimate of the cost of laying these pipes, which was the only objection made by the appellant to paying his share of the cost, then the appellant should construct the sublateral pipe line carrying the water to his land for himself, since by the contract and paragraph 2 of the water right deed he undertook to construct and maintain the works and conduits necessary to conduct the water to his land from the point of delivery. We are not impressed by the argument that, if the use of a standpipe for the purpose of delivery through a flume be permitted at all,

standpipes requiring flumes of an unreasonable height might be constructed. A practicable delivery which would permit the use of flumes of a reasonable height would meet the terms of the contract, since there is no agreement that the water shall be so delivered as to be conveyed to the highest point on the appellant's land in ditches without the use of flumes. The evidence fairly shows that the only reason the water has not been delivered to the appellant is because of his failure to designate any point from which he desired to take the water, and his failure to construct the necessary conduit thence to his land, as he agreed to do. The respondent can do no more than it has done until the appellant signifies where and how he desires to take the water.

The judgment is affirmed.

CROW, C. J., and MAIN, FULLERTON, and MOUNT, JJ., concur.

OPEJON v. ENGEBO et ux.

(Supreme Court of Washington. May 5, 1913.)

1. VENDOR AND PURCHASER (§ 147*)—TIME AS ESSENCE—WAIVER—EFFECT.

After a party to a contract for the sale of realty has waived the clause providing that time should be of the essence of the other party's obligation to convey, such other party will not be in default until after a demand upon him for a compliance with his obligation and a reasonable time in which to comply therewith.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 285-289; Dec. Dig. § 147.*]

2. CONTRACTS (§ 305*)—MODIFICATION—PAROL EXTENSION OF TIME FOR PERFORMANCE.

The time for performance of a written contract may be waived as well as extended by parol.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467-1475; Dec. Dig. § 305.*]

3. VENDOR AND PURCHASER (§ 144*)—DELAY IN PERFORMANCE — ESTOPPEL TO ASSERT BREACH.

Where one of the parties to a contract for the sale of land encouraged the prosecution of a suit to quiet the other's title so that conveyance might be made to him and acquiesced in the delay in tendering the deed and abstracts of title, he could not assert a breach of the contract upon the part of the other in failing to convey within the time agreed upon.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 271-275; Dec. Dig. § 144.*]

4. VENDOR AND PURCHASER (§ 160*) — PERFORMANCE—CONVEYANCE—DESCRIPTION.

Where the description in a deed tendered in performance of a contract for the sale of land conveyed the identical property which was agreed to be conveyed, and a mathematical calculation would disclose that it was definite and easily susceptible of identification, it was all that the law required.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 324; Dec. Dig. § 160.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. VENDOR AND PURCHASER (§ 183*) — CONSTRUCTION OF CONTRACT — REFERENCE TO PLAT.

Under Rem. & Bal. Code, § 7831, providing that any person laying off any town shall, previous to the sale of any lots therein, record in the proper office a plat showing the streets, etc., a purchaser agreeing to convey a lot according to an unrecorded plat was not required to procure the plat to be filed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. § 133.*]

Department 1. Appeal from Superior Court, Spokane County.

Action by Oluf Opejon against Edward Engabo and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Severin Iverson, of Spokane, for appellant. Parks & Day, of Spokane, for respondents.

GOSE, J. On the 14th day of July, 1910, the plaintiff and the defendants entered into a written contract whereby they agreed to an exchange of certain real property; the defendants paying \$10 in cash and agreeing to pay \$1,490, with annual interest, on or before the 14th day of July, 1914, the agreed difference in value between the properties. The contract provides that the plaintiff will sell and convey to the defendants 80 acres of land, describing it, by warranty deed, giving abstract showing good title on or before the 14th day of July, 1914, when the defendants have performed all the covenants and agreements on their part. The defendants agreed to convey to the plaintiff by warranty deed, "giving abstract showing good title," on or before the 30th day of January, 1911, "lot 2 in block 3 of the town site of Dishman, according to an unrecorded plat; said tract or parcel of land being situated in the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 19 in township 25 north, of range 44 east, W. M., in Spokane county, Wash., and said lot 2 in block 3 of said addition having a frontage of 50 feet on Sprague avenue between Wilton street and Raymond street and being 142 feet in depth as shown on the unrecorded plat of Dishman." They further agreed that, in case they could not convey a good title to the lot at the time specified, "then it is mutually agreed between the parties hereto that the said premises [meaning the lot] are of the value of \$1,500," which sum the defendants agreed to pay to the plaintiff on or before the 14th day of July, 1914; that is, that, upon the happening of that event, \$3,000 cash, with interest, was the consideration to be paid for the plaintiff's property. The contract further provided that: "Time is of the essence of this contract." It was further agreed that the respective parties would exchange possession of their lands on the 20th day of July, 1910, and that they might improve the properties as they saw fit. The plaintiff took possession of the lot and the residence upon it on the 20th day of July,

1910, and remained in possession up to and including the 21st day of July, 1911. The defendants took possession of the 80-acre tract and were in possession at the time of the trial. On the 18th day of February, 1911, the plaintiff served a written notice upon the defendants, advising them that they were in default in having failed to convey the lot, and that he would require them to pay \$3,000 in cash according to the terms of the contract. On the 19th day of July, 1911, he notified them in writing that they were in default in having failed to convey the lot and in having failed to pay interest as provided in the contract, and that he canceled and terminated the contract. He further stated in the notice that he surrendered "the possession" of the lot, and that he demanded possession of the property which he had agreed to convey to them. On the 21st day of July following, the defendants tendered the plaintiff a deed of conveyance for the lot, with covenants of warranty and an abstract of title. These he refused, and on the 22d day of August following commenced this action for the recovery of the possession of the premises. The defendants answered, pleading the contract and the exchange of possession of the properties; that they had made valuable improvements upon the property which the plaintiff had agreed to convey to them; and that they had paid the interest due upon the contract; alleged a tender of the deed and abstract of title, and set up facts tending to establish a waiver of the essence clause of the contract. The plaintiff replied, denying the affirmative matter pleaded in the answer, and alleged a failure to convey the lot at the time agreed upon, a failure to pay the interest, and the service of the notices as stated.

The court found, in substance, that after the making of the contract, and on the 20th day of July, 1910, in accordance with its provisions, the defendants entered into possession of the acreage property which the plaintiff agreed to convey to them; that they had ever since been, and were then, in the lawful possession thereof; that they had expended labor in clearing and breaking the land and improving the same in the sum of \$1,000; that on the 20th day of July, 1910, in pursuance of the contract, the plaintiff entered into possession of the town lot and remained in possession thereof up to and including the 21st day of July, 1911; that the defendants were unable to give good title to the lot on the 30th day of January, 1911, on account of an apparent cloud upon the title which required the institution of an action to quiet title against certain unknown heirs; that the defendants informed the plaintiff of that fact, and that he requested the defendants to perfect their title to the lot, and agreed that they should have a reasonable time in which to do so, and agreed to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

accept the lot upon the defendants' having perfected their title within a reasonable time; that an action was commenced pursuant to plaintiff's request, prosecuted with reasonable diligence, and terminated in favor of the defendants and their grantors on the 1st day of June, 1911. The court further found that in June, 1911, the defendants, being ready, able, and willing to perform their part of the contract, offered to convey the lot to the plaintiff by a warranty deed, which offer the plaintiff then and there refused; that plaintiff requested the defendants not to take a deed from their grantors, for the reason that he desired to have the town-site plat recorded in the office of the county auditor of the county in which the property is situate; that the defendants, by reason of their contract with the owner of the town site, were in a position to compel him to file the plat, and for that reason plaintiff requested the defendants to use their best efforts to obtain the filing of the plat, and assured them that he would not take advantage of the delay; that by reason thereof the defendants were delayed in the performance of their contract; that they did use their best efforts to obtain the filing of the plat; that on the 17th day of July, 1911, the defendants paid to a duly authorized agent of the plaintiff the sum of \$105, the first annual payment of interest due upon the contract, and that plaintiff accepted it; that the plaintiff never at any time rescinded the contract, "but at all times treated the same in full force and effect and acquiesced and consented to the delays of the defendants"; that the defendants have fully performed all the terms and conditions of the contract on their part, and on the 21st day of July, 1911, before the commencement of the action, the defendants, through their attorney, tendered to the plaintiff a warranty deed, together with the abstract of title for the lot; and that the defendants are entitled to a deed from the plaintiff for the acreage property upon paying to the plaintiff, "on or before July 14, 1914, the sum of \$1,490, with interest thereon at the rate of 7 per cent. per annum, payable annually from July 15, 1911." These findings were made effective by the decree. The plaintiff has appealed.

[1] The findings are abundantly supported by the evidence. It shows that the respondents had a contract with Dishman, the owner of the town site of Dishman, for the purchase of the lot which they agreed to convey to the appellant; that there were certain apparent clouds upon the title; that the appellant encouraged the prosecution of a suit to quiet title; and that he continued to encourage the prosecution of the suit after he had given the notice, on the 19th day of February, that he would not accept a conveyance of the lot. This suit terminated favorably about the 1st of June, 1911. The respondents, through their attorney, then of-

ferred to convey the property to appellant. Appellant said to the attorney: "I want you to help me to get Dishman to file the plat." The attorney told him that it would take three or four months to get the plat filed, because the old plat had been lost and the property was in crop, and the appellant consented to this arrangement. The evidence is also convincing that on July 17, 1911, the annual interest was paid. This was three days after its maturity. Two days later the appellant sought to terminate the contract by notice without surrendering possession of the lot. This he could not do. He had not only encouraged the prosecution of a suit to quiet title, but had said to the attorney for the respondents, in effect, that he would consent to a delay of three or four months further if they would undertake to persuade Dishman to file a plat of the town site. Long before this time had expired, he sought by notice to terminate the contract.

The rule is well settled in this state that, after a party has waived the essence clause of a contract, the purchaser will not be in default until after a demand has been made upon him for a compliance with his contract and a reasonable time has elapsed in which to comply with the demand. *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

[2] We have also held that the time in which to perform a written contract may be waived as well as extended by parol. *Whiting v. Doughton*, supra.

[3] The appellant having encouraged the prosecution of the suit to quiet title to the lot, and having acquiesced in the delay in tendering the deed and abstract of title, was not in a position to assert a breach of the contract upon the part of respondents in failing to convey the lot at the time agreed upon. *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634; *Hawes v. Swanzy*, 123 Iowa, 51, 98 N. W. 586; *Bales v. Williamson*, 128 Iowa, 127, 103 N. W. 150.

[4] It is contended that the description in the deed which the respondents tendered is indefinite. It suffices to say that it conveys the identical property which the respondents agreed to convey, and that a mathematical calculation will disclose that the description is definite and easily susceptible of identification. This is all the law requires. *Rucker v. Steelman*, 73 Ind. 396; *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250.

[5] The appellant makes frequent reference to Rem. & Bal. Code, § 7831, which provides that any person "who may hereafter lay off any town within this state shall, previous to the sale of any lots within such town," cause to be recorded in the proper office a plat of the town with the streets and alleys, etc. It is apparent that this section has reference only to the person who lays off

the town. This was Dishman, and not the respondents. The latter agreed to convey a lot according to an unrecorded plat. They tendered a conveyance in harmony with their agreement. They were not required to procure the plat to be filed. Whether or not the appellant may be able to compel Dishman to cause the plat to be filed is not before us. The other objections to the abstract of title have been examined, and we find them to be without merit.

The judgment is affirmed.

CROW, C. J., and MOUNT, PARKER, and CHADWICK, JJ., concur.

BENNER v. SCANDINAVIAN AMERICAN BANK.

(Supreme Court of Washington. May 7, 1913.)

1. SHIPPING (§ 83*)—SALES—RECORDING CONVEYANCES—"ANY PERSON."

Under Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837), providing that no bill of sale of any vessel or any part thereof shall be valid against any person other than the grantor, his heirs and devisees, and persons having actual notice thereof, unless recorded in the office of the collector of the customs where the vessel is registered or enrolled, an unrecorded bill of sale is invalid as against a creditor of the vendor who seeks to sequester the property to the satisfaction of the debt; the phrase "any person" in the statute including the general creditors of the vendor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 109-119; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 1, pp. 427-430.]

2. RECORDS (§ 2*)—RECORDING ACTS—CONSTRUCTION.

Recording statutes are remedial, and must be liberally construed, so as to attain the object intended by them.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 27; Dec. Dig. § 2.*]

3. BANKRUPTCY (§ 185*)—TRUSTEE IN BANKRUPTCY—TITLE.

A trustee in bankruptcy holds, not only the legal title to the bankrupt's estate, but he also represents the creditors of the bankrupt, and has such rights as the creditors possessed, and he can avoid any transfer which the creditors could have avoided, and under Bankr. Act (Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), the trustee has plenary power to take all steps necessary to subject the bankrupt's property to the satisfaction of his debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 235, 273; Dec. Dig. § 185.*]

4. BANKRUPTCY (§ 161*)—UNRECORDED BILL OF SALE OF VESSEL—VALIDITY.

Under Bankr. Act (Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), providing that a person shall be deemed to have given a preference where, being insolvent, he has within four months before the filing of the petition made a transfer, and the period of four months shall not expire until four months after the date of the recording of the transfer, if by law the recording is required, a bill of sale of a vessel must, to be valid as against creditors of the vendor who becomes bankrupt, be recorded in the office of the collector of customs where the vessel is reg-

istered or enrolled as required by Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837), and, when not recorded within four months prior to the filing of the petition, the bill of sale operates as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

5. CORPORATIONS (§ 544*)—INSOLVENT CORPORATIONS—TRANSFERS—VALIDITY.

A domestic corporation may not, after insolvency, prefer its creditors, but its property is then a trust fund for the benefit of all creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. § 544.*]

6. BANKRUPTCY (§ 184*)—PREFERENCES—UNRECORDED BILL OF SALE.

Under Rem. & Bal. Code, §§ 3860, 5291, providing that a chattel mortgage is void as against creditors of the mortgagor unless recorded, and that a transfer of personalty is void as against existing creditors where the property is left in the possession of the seller, unless the transfer is recorded within 10 days after its execution, an unrecorded bill of sale of a vessel is void within Bankr. Act (Act July 1, 1898, c. 541, § 87, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), providing that claims which for want of record or for other reasons would not have been valid liens as against claims of creditors of the bankrupt shall not be liens against his estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Department 2. Appeal from Superior Court, Pierce County; O. M. Easterday, Judge.

Action by J. D. Benner, as trustee in bankruptcy of the Gawley Foundry & Machine Works, a bankrupt, against the Scandinavian American Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Sorley and Williamson, Williamson & Freeman, all of Tacoma, for appellant. Raymond J. McMillan, of Tacoma, for respondent.

FULLERTON, J. This action was instituted by J. D. Benner, as trustee in bankruptcy of the Gawley Foundry & Machine Works, against the Scandinavian American Bank to recover the value of a coasting vessel which the machinery company had transferred to the bank as security for a debt owing by it to the bank. The action was based on the ground that the transfer was void as against the creditors of the machinery company because made within four months of the filing of the petition in bankruptcy against it, thereby creating a preference in favor of the bank forbidden by the bankruptcy act. The trustee recovered in the court below, and the bank has appealed.

The bank and the machinery company were both domestic corporations doing business at Tacoma, Wash. The relation between the bank and Joseph Gawley, the manager and chief owner of the machinery company, were more or less intimate. Gawley owned some 50 shares of the capital stock of the bank, and the banking business of the machinery company, as well as Gawley's private banking business, was done with the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

bank. In its earlier years the machinery company was a prosperous concern, its business was large, and the bank extended to it an extensive credit; its indebtedness to the bank at times running as high as \$70,000. The machinery company's business was somewhat varied, and it became the owner and operator of a coasting steam vessel called "The Advance," which was duly enrolled in the name of Joseph Gawley under the laws of the United States at the office of the collector of customs for the Puget Sound district. In the earlier part of the year of 1909 the machinery company for some reason not explained in the record withdrew its banking account from the appellant bank, and began banking elsewhere. At this time the company owed the appellant bank some \$15,000 which was evidenced by promissory notes made by the machinery company to the bank and indorsed by Joseph Gawley individually. The bank was not satisfied with the indebtedness as it stood, and solicited the company through Gawley for some satisfactory settlement of the account. After considerable negotiation a settlement was had on May 6, 1909. At that time Joseph Gawley turned over to the bank, or to one of its directors, in payment of the machinery company's account, the capital stock of the bank which he held individually for the sum of \$5,500, which is conceded to be its then fair cash value, paid to the bank \$1,800 in cash, and gave the machinery company's demand note for the balance, \$7,700, which note he promised to secure by a chattel mortgage or a bill of sale on the coasting vessel before mentioned. On July 9, 1909, pursuant to the agreement, a bill of sale was executed by Joseph Gawley to the bank purporting to convey to it absolutely the coasting vessel for the sum of \$5,000. It was understood, however, by both parties to the instrument that the instrument was a mortgage to secure the machinery company's note to the bank. The bill of sale was by the agreement of the parties withheld from record, and the machinery company continued as a going concern. Shortly thereafter Joseph Gawley as the representative of the machinery company made a written statement of its assets and liabilities in which he included the coasting vessel as part of the machinery company's assets, but made no mention of the bill of sale. The statement showed the machinery company to be in a flourishing condition, and on the strength thereof and other representations the machinery company was enabled to borrow from one banking firm the sum of \$15,000, and from another the sum of \$3,000, without security other than the individual indorsement of Joseph Gawley.

The machinery company was in straightened circumstances long prior to its settlement with the appellant bank, a condition which the officers of the bank knew, although they may not have known its exact situation.

It was found by the trial court, and we think the evidence justifies the finding that the machinery company was at the time of the settlement wholly insolvent, that its assets did not exceed \$20,000, while its liabilities exceeded \$100,000. Later on actions were started against the machinery company by certain of its creditors in one of which a default judgment was entered. Still later, and on October 27, 1909, with knowledge of the pendency of these actions, the appellant bank caused its bill of sale to be recorded in the office of the collector of customs where the vessel was enrolled, and thereupon took possession of the vessel. On January 19, 1910, the machinery company was adjudged a bankrupt, and the respondent J. D. Benner was appointed trustee in bankruptcy of its property. On April 7, 1910, the bank began foreclosure proceedings on its bill of sale, alleging that the same was intended as a mortgage to secure the payment of the note of the machinery company, naming the respondent Benner, among others, as a party defendant to the action. No service of process, however, was made upon Benner, and the action went to judgment and order of sale against the other parties defendant. At the sale the vessel was purchased by the appellant for the sum of \$5,000. The costs of the foreclosure proceedings were \$719.10. The court found the reasonable value of the vessel to be \$5,500, and further found that the appellant bank on taking possession of the vessel paid lienable claims to which it was subject in favor of certain employes and persons furnishing materials and making repairs thereon, aggregating \$1,094.07. This sum the court deducted from the value of the vessel as it found that value to be and entered a judgment in favor of the trustee in bankruptcy for the remainder; but refused, contrary to the request of the appellant, to allow a deduction for the costs of the foreclosure proceedings.

The statutes of the United States, relating to the recording of vessels enrolled under the Laws of the United States, reads as follows: "Sec. 4192. No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section." Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837). The Bankruptcy Act contains the following sections: "Sec. 60. A person shall be deemed to have

given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." Remington on Bankruptcy, p. 1780. "Sec. 67. (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. (b) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate." Remington on Bankruptcy, p. 1783. From an examination of the dates above given it will be observed that the bill of sale, which is thought to have created a voidable preference in favor of the appellant bank over other creditors of the bankrupt, was executed on July 9, 1909, and recorded with the collector of customs where the vessel was enrolled on October 27, 1909, that the vendor in the bill of sale was adjudged a bankrupt on January 19, 1910, and that four months did not elapse between the date of recording the transfer and the adjudication of bankruptcy.

[1] It is the contention of the appellant that the instrument under which it claims is not such an instrument as the bankruptcy act requires to be recorded; and, since it was executed more than four months prior to the filing of the petition in bankruptcy, it was not avoided by that proceeding. In support of its contention the appellant suggests two principal reasons: The first is that the section from the Revised Statutes above quoted does not require an instrument to be recorded in order to be valid against general creditors of the vendor named in the instrument, but requires recording only as against creditors who have acquired some form of lien upon the property without notice of the lien created by the unrecorded instrument; and the conclusion is drawn therefrom that since the creditors represented by the trustee in bankruptcy in the present case are general creditors of the bankrupt, having no specific lien upon the property included within its bill of sale, they are not protected by the section of the bankruptcy act which avoids a transfer of property not recorded within four

months prior to the institution of bankruptcy proceedings against the vendor therein.

A number of cases are cited supporting this construction of the recording act, among which are *Hill et al. v. Golden Gate*, 12 Fed. Cas. 168, *White's Bank v. Smith*, 7 Wall. 646, 19 L. Ed. 211, *Aldrich v. Aetna Co.*, 8 Wall. 492, 19 L. Ed. 473, and *The J. E. Rumbell*, 148 U. S. 2, 13 Sup. Ct. 498, 37 L. Ed. 345, but a careful perusal of them has not convinced us they are in point upon the question here suggested. Certainly they do not determine the question directly, and the analogy is not sufficiently close to enable us to say that a contrary conclusion is not permissible. Treating the question as one of first impression, we cannot adopt the construction contended for as a correct construction of the statute. It will be observed that the statute is somewhat broad in its terms. The language of the act in so far as it is applicable to the present case is that no bill of sale or mortgage shall be valid against any person other than the grantor or persons having actual notice thereof, unless recorded in the office of the collector of customs where the vessel is enrolled. The term "any person" does not mean of course a stranger to the transfer, or an individual who has no interest at all in the property of vendor. These are not affected by the disposition made of the vendor's property. But we think it broad enough to include the general creditors of the vendor, and especially those who, like certain of the creditors of the vendor in the present instance, have subsequent to the execution of the bill of sale, but prior to its recording and in ignorance thereof, advanced large sums to the vendor on the faith of its representations that the title to the property was unchanged and clear of incumbrances.

[2] One of the purposes of the recording acts is the avoidance of secret liens and the consequent frauds attendant upon them. To that end, such statutes are regarded as remedial, and are to be liberally construed so as to attain the object intended. So with the statute in question here, since its language is broad enough to permit of it, the court will give it that construction which will prevent a vendor or mortgagor from pledging his property to secure one obligation, and then using it as an unincumbered asset to incur others. So construing it, we hold that an unrecorded bill of sale is invalid as against a creditor of the vendor who seeks to sequester the property to the satisfaction of the obligations due him.

[3] But it is said that the creditors here are not seeking to sequester the property to the satisfaction of their debts; that the title to the property is in the trustee in bankruptcy, who took it from the bankrupt, the vendor in the bill of sale; that the trustee's title is no better than the bankrupt's, and since it could not avoid the conveyance the

trustee cannot. But the trustee not only holds the legal title to the bankrupt's estate, but he represents the creditors of the bankrupt also. Such rights as they possessed against the claimants and holders of the bankrupt's estate he possesses, and he can avoid any transfer or conveyance of the property which they could have avoided. In other words, the bankruptcy proceedings are in themselves in effect an attachment and sequestration of the property of the bankrupt for the benefit of his creditors, and the trustee thereof has plenary power to take all such steps as are necessary to subject the bankrupt's property to the satisfaction of his obligations. Section 67c, Bankr. Act; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *In re Pekin Plow Co.*, 112 Fed. 308, 50 C. C. A. 257; *In re Thorp* (D. C.) 130 Fed. 371.

[4] The second reason given in support of the contention is that, since the bill of sale is valid between the parties and as to persons having actual notice thereof without recording, it is not such an instrument as the bankruptcy act requires to be recorded. In other words, it is contended that no instrument is required to be recorded by the bankruptcy act in order to be valid, unless such instrument is invalid without recording as against all persons. We cannot accept this construction of the statute. It will be remembered that section 60 of the bankruptcy act as originally enacted did not contain the last sentence now in the section above quoted. This was added by the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1911, p. 1506]), and had as its purpose the prevention of giving secret preferences made possible under the law as it was originally enacted by withholding from record instruments creating liens. It is plain that, if the appellant's construction of the statute is adopted, the amendment is rendered nugatory, as no statute of the United States or of any state, in so far as we are aware, requires instruments conveying or creating liens upon property to be recorded in order to be valid as against all persons. Usually, and universally in so far as our examination goes, they are valid between the parties and some classes of persons having actual notice without recording. These facts were known at the time the amendment was enacted, and it will hardly do to say that it was the purpose of Congress to do an idle thing. There is no necessity that requires the construction contended for. The act can be held operative as to those persons whom the recording statutes favor without doing violence to any of its terms; and, since creditors are persons against whom unrecorded transfers and mortgages are void unless recorded under the section of the Revised Statutes above quoted, we hold in ap-

plying the principle to the case before us that the failure of the appellant to record its lien more than four months prior to the filing of the petition in bankruptcy against its vendor destroyed the preference given thereby, and subjected the property to distribution among the creditors of the bankrupt's estate.

Our attention has been called to no adjudicated case where the bankruptcy act has been construed with reference to the federal recording act above quoted. It has been construed, however, by the United States Circuit Courts and Circuit Courts of Appeal, in numerous cases with reference to the recording acts of the various states. The diligence of counsel has demonstrated that these decisions have not been entirely uniform, but we think the trend of authority is to support the conclusion we have reached. *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233; *Mattley v. Giesler*, 187 Fed. 970, 110 C. C. A. 90; *In re Beckhaus*, 177 Fed. 141, 100 C. C. A. 561; *First National Bank v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148; *English v. Ross* (D. C.) 140 Fed. 630; *In re Pekin Plow Co.*, 112 Fed. 308, 50 C. C. A. 257; *In re Montague* (D. C.) 143 Fed. 428.

[5] We think the transfer void for another reason. It will be remembered that the *Gawley Foundry & Machine Works* is a domestic corporation, and was wholly insolvent at the time it made and delivered the bill of sale in question to the appellant bank. In this state it is the rule that a domestic corporation cannot after insolvency prefer its creditors; but, on the contrary, its property is from thenceforth regarded as a trust fund for the benefit of all its creditors, and any transfers or mortgages thereof after insolvency, which have the effect of preferring one creditor over another, are void. *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Conover v. Hull*, 10 Wash. 675, 39 Pac. 166, 45 Am. St. Rep. 810; *Allen v. Stallcup*, 13 Wash. 631, 43 Pac. 884; *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 312, 46 Pac. 338; *Biddle Pur. Co. v. Pt. Townsend Steel, etc., Co.*, 16 Wash. 692, 48 Pac. 407; *State ex rel. Strohl v. Superior Court*, 20 Wash. 551, 56 Pac. 35, 45 L. R. A. 177; *Tacoma Ledger Co. v. Western Home, etc., Assoc.*, 37 Wash. 471, 79 Pac. 992; *Carstens & Earles v. Hofus*, 44 Wash. 456, 87 Pac. 631; *Nixon v. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11.

[6] By section 67 of the bankruptcy act it is provided that claims which for want of record or "for other reasons" would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate. It is plain, therefore, that under the laws of this state, as they are administered by our courts, this transfer would have been void, although recorded

within the statutory period. Again, our recording acts make void any transfer of personal property as against existing creditors, where the property is left in the possession of the vendor, unless the transfer be recorded within ten days after its execution. Rem. & Bal. Code, § 5291. So a mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers of the property unless recorded in the manner required by law. Id. § 3660. This rule of law and these statutes, it seem to us, afford "other reasons" for declaring the lien of the appellant invalid within the meaning of the bankruptcy act, even though we were to conclude that the transfer was valid under the recording acts.

The appellant complains that the court erred in failing to allow it its costs expended in foreclosing its lien, and in allowing a recovery for the value of the vessel in excess of the price for which it sold at public sale under the foreclosure proceedings. But we find no error in either of the rulings.

The judgment is affirmed.

CROW, C. J., and MAIN, MORRIS, and CHADWICK, JJ., concur.

LAY v. BOUTON et al.

(Supreme Court of Washington. May 6, 1913.)

1. CONTRACTS (§ 153*) — CONSTRUING TO AVOID INVALIDITY.

Where a contract is fairly open to two constructions, one lawful and the other unlawful, the lawful one will be adopted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

2. USURY (§ 41*)—USURIOUS CONTRACTS—CONTRACTS INVOLVING CONTINGENCY.

Plaintiff having a contract for the purchase of a tract of land platted into lots borrowed \$2,000 from defendants, assigning the contracts as security, and agreed that defendants should have charge of the sale of lots, that, if they should pay the vendor the amount to which he was entitled, they might sell lots at not less than \$100 a lot, \$100 on each sale to be applied on the loan, and the balance to be retained by defendants as interest on the loan and compensation for their services, and that the balance due defendants on June 24th on account of the loan, the amount paid the vendor, or taxes or liens should be paid as defendants might elect in cash or lots at the agreed price of \$50 a lot. Subsequent to June 24th defendants advanced \$2,098 additional, received a conveyance of ten lots, and a new contract was made reciting that plaintiff was indebted to defendants in the sum of \$6,098, for which he was to give notes which should be a first lien on all unsold property. In a suit for relief the only evidence as to the value of the lots was that at the time the second contract was made they were selling on the installment plan for \$250 each. Held, that the contracts by which defendants by advancing \$4,098 received 10 lots worth \$2,500 and plaintiff's notes for \$6,098 were obvious evasions of the statute against usury (Rem. & Bal. Code, § 6251), especially as the first contract showed on its face that defendants regarded the lots as worth at least \$100, since, while a contingency as to the pay-

ment of full legal interest may justify the interest so contingently payable in exceeding the legal rate, the contingency must be more than a nominal or colorable one.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 94, 95; Dec. Dig. § 41.*]

3. USURY (§ 143*)—APPLICATION OF PAYMENTS OF USURY.

Under Rem. & Bal. Code, § 6255, authorizing a recovery on usurious contracts where interest has been paid for the principal less twice the amount of the interest paid, there was nothing due defendants, the lots having been taken as interest and their value, when doubled, exceeding the amount of the loan.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 434; Dec. Dig. § 143.*]

Department 1. Appeal from Superior Court, Clarke County; H. E. McKenny, Judge.

Action by Marion G. Lay, as administratrix of John M. Lay, deceased, against E. F. Bouton and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Miller, Crass & Wilkinson, of Vancouver, for appellant. Back, Hall & Drowley and Jas. P. Stapleton, all of Vancouver, for respondents.

GOSE, J. This is a bill in equity for an accounting and other equitable relief. The plaintiff John M. Lay died pending the action, and Marion G. Lay, as administratrix of his estate, was substituted as plaintiff. She has appealed from an adverse judgment.

The litigation arose out of two contracts made between John M. Lay and his wife, Marion G. Lay, and the respondents. The first contract was entered into on the 8th day of January, 1910. It recites that John M. Lay has a contract with one Hoff and his wife for the purchase of certain real estate situate in Clarke county, this state, bearing date June 23, 1908; that the property had been platted as "Minnehaha Park addition"; that he also had a contract with one Knowles and wife, bearing date September 29, 1909, for the purchase of a tract of real estate known as Knollwood, situate in the same county; that Lay desired to "borrow" \$2,000 from the respondents, the "loan" to be secured by an assignment of these contracts to them, and that in consideration of the agreement and the sum of \$2,000, the receipt of which was acknowledged, they sold and assigned all their right, title, and interest in the two contracts, and to any and all contracts for the sale of lots or portions of the tracts designated. It was agreed therein that the respondents should take charge of, and direct the sale of, lots in Minnehaha Park addition subject to the provisions of the Hoff contract; that, if the Hoff had been paid in full, "the \$14,000 which they are to receive" before June 23, 1910, according to the terms of their contract, then the respondents might sell such lots as had not been sold "at such prices as they may fix," but

at not less than \$100 a lot, the first \$100 paid upon each lot to be applied in payment of the loan of \$2,000; the balance, if any, in excess of that sum for each lot sold prior to June 23, 1910, to be retained by the respondents as interest "on said loan and compensation for their services." It was further stipulated that the respondents at their option might at any time settle in full with the Hoffs, and that whatever sum was paid in the settlement should "become a part of the consideration for this agreement." The contract also provided that the respondents might purchase all sale contracts at a discount of 10 per cent. of their face value, the balance to be applied in payment of their advances to the Hoffs. It was also agreed that: "The balance due to said parties of the second part [the respondents] on account of this agreement, either on account of the original loan of \$2,000, on account of the amount paid to said Hoffs, or on account of any payments of taxes or liens of any nature against said 'Minnehaha Park addition,' or said 'Knollwood,' which shall not have been paid to said parties of the second part in accordance with the provisions hereinbefore contained, shall be paid on June 24th, 1910, to said parties of the second part as they may elect, either in cash or in lots to be by them selected from the 'Minnehaha Park addition' at the agreed price of \$50.00 per lot," except certain enumerated lots the prices of which were fixed at \$15 each. The contract concludes with the stipulation that if the lots in Minnehaha Park addition remaining unsold on the 24th day of June, 1910, were not sufficient to repay the respondents at the prices agreed upon, then they should retain all the right, title, and interest of the Lays in Knollwood and to all contracts for the sale of lots therein. On July 20, 1910, they made a second contract, reciting that the respondents had upon that day taken title to certain lots in Minnehaha Park addition to the city of Vancouver; that there was due the respondents, for "money advanced and services rendered an amount mutually agreed to be \$6,098.70"; that they should accept two notes of John M. Lay in equal amounts due one year from date with interest at the rate of 8 per cent. per annum after six months from that date; that Lay should sell the property, provided that no lot should be sold for less than \$200; that all money derived from sales should be applied in payment of the notes until they were liquidated, less 5 per cent. to be allowed to Lay as a commission; that, if the notes had not been paid at maturity, the respondents might sell any of the remaining lots for "their reasonable cash value"; that the notes should be a first lien on all unsold property and all contracts for sale of property in both additions. This contract further provided that the respondents "during the life of the trusteeship" should, after they had been paid, pay certain enumerated claims out of any

moneys coming into their hands from sales of property.

It will be observed that the first contract provides for two contingencies, and gives the respondents two option privileges. The first is that, if the Hoffs have been paid prior to June 23, 1910, the respondents may up to that date sell lots at a price fixed by them, but not less than \$100 each, and have the excess, if any, as interest on the \$2,000 loan. The second is that the balance due the respondents on June 24, 1910, both upon the original loan and on account of money paid to the Hoffs and for taxes and liens upon both tracts, shall be paid on that date "either in cash or in lots to be by them selected from the Minnehaha Park addition at the agreed price of \$50 per lot," except certain enumerated lots which they had the option to take at \$15 each. At the time the first contract was made, the respondents loaned Lay \$2,000, and took his noninterest-bearing note therefor. On the 23d day of June, 1910, they advanced \$2,098, the amount required to pay the Hoffs the balance due upon their contract. There were no other advancements for the Lays. So the situation on the 20th day of July, 1910, was this: The respondents had loaned Lay \$2,000 at the time the first contract was made and \$2,098 on June 23d following, making in the aggregate \$4,098. On the date last mentioned the Lays conveyed to the respondents 10 lots of the value of \$250 each, and gave them two notes aggregating \$6,098, thus making a bonus of \$2,500 in property and \$2,000 in notes.

[1, 2] The appeal presents a single question; i. e., were the contracts usurious? The rule adopted by the courts in construing contracts is that, where a contract is fairly open to two constructions, the one lawful and the other unlawful, the former will be adopted. The circumstance conferring the right to exercise the first option did not arise. Hence it has no bearing on the case except as it may tend to throw light upon the second option clause. It is obvious, we think, that, when the first contract was made, the respondents considered the lots worth more than \$100 each; for, if they did not sell for a greater price, they would receive no compensation for the loan. Measured by this valuation, and all the circumstances indicate that they then had even a greater value, the privilege of selecting lots at \$50 each in lieu of cash was an obvious evasion of the usury statute. Rem. & Bal. Code, § 6251, provides that: "No person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or other thing in action than twelve per centum per annum." The books are replete with cases where artful contrivances have been resorted to whereby the lender is to receive some advantage or thing of value beyond the repayment of the loan with lawful interest.

These evasions are almost infinite in variety. The courts, however, have been vigilant in unmasking the transaction and finding its real purpose; and wherever, when exposed to the light it is apparent that there has been a shift or a device to evade the statute, the transaction has been condemned as usurious. "When the payment of full legal interest is subject to a contingency wholly or in part so that the lender's lawful profit is put in hazard, the interest so contingently payable need not be limited to the legal rate, providing the parties are contracting in good faith and without intention to avoid the usury statutes; and the same rule governs where only part of the legal interest is in hazard. This rule finds its most frequent application in respect of loans stipulating for the payment of a portion of partnership profits in lieu of interest." 39 Cyc. 952. The same view is thus tersely stated in *White Water Valley Canal Co. v. Vallette*, 62 U. S. (21 How.) 414, 16 L. Ed. 154: "Where there is a loan, although the profit derived to the lender exceeds the legal rate, yet, if that profit is contingent or uncertain, the contract, if bona fide and without any design to evade the statute, is not usurious." The contingency, however, must be more than a nominal or a colorable one. As was said in *Missouri, K. & T. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N. W. 560: "The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, who are bound to exercise their judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury." Where the borrower, in order to obtain an extension of time in which to pay his debt, was required to buy horses from the lender at prices largely in excess of their value, the sale was treated as a subterfuge to compel payment of an unlawful rate of interest. *Kommer v. Harrington*, 83 Minn. 114, 85 N. W. 939. So where the lender required the borrower to take out insurance, and the compensation exacted exceeded the lawful rate of interest plus the reasonable cost of the insurance, the transaction was held usurious. *Missouri, K. & T. Trust Co. v. McLachlan*, supra; *Missouri, K. & T. Trust Co. v. Krumseig*, 77 Fed. 32, 23 C. C. A. 1; *Brower v. Life Ins. Co. (C. C.)* 86 Fed. 748. So where there has been an exaction in excess of the lawful rate of interest in the form of a commission or for pretended services, the purpose to evade the statute being patent, the contract has been treated as usurious. *Dayton v. Dearholt*, 85 Wis. 151, 55 N. W. 147; *France v. Monroe*, 138 Iowa, 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391; *Horkan v. Nesbitt*, 58 Minn. 487, 60 N. W. 132. The same view has been taken where an excessive and certain profit has been agreed upon in lieu of interest. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997.

The respondents contend in effect that the

first contract was a profit-sharing one; that the value of the property was uncertain; that they had the right when the second contract was made to demand the conveyance of 82 lots at \$50 each; and that they took a bonus of ten lots and \$2,000 in lieu of this privilege. The respondent Adams admitted upon the witness stand that at the time the second contract was made lots in Minnehaha Park addition were selling on the installment plan at \$250 each, but he said that he did not put that value upon them. He made no further statement as to their value at that time. The second contract was less ingenious than the first. It recites that the \$6,098 was due "for money advanced and services rendered." This was not true. There was \$4,098 then due, and no services of any appreciable value had been rendered. The respondents, among other cases, have cited *Scripps v. Crawford*, 123 Mich. 173, 81 N. W. 1098; *Duffy v. Gilmore*, 202 Pa. 444, 51 Atl. 1026; *Duval v. Neal*, 70 Miss. 288, 12 South. 145. In the *Scripps Case* it was held that an agreement by a surviving partner to pay the administrator of the estate of the deceased partner the value of the estate's interest in the partnership property as shown by the inventory, and one-half the net profit that should be earned for five years, for the one-half interest of the deceased in the partnership property and the good will of the business, was not usurious, although the one-half of the net profits exceeded the lawful rate of interest. The agreement stated that the one-half of the net earnings was "as interest on said loan and compensation for the good will of the estate in the business." The court said that there was nothing to show that either party understood that an unlawful rate of interest was contemplated. In the *Duffy Case* the court held that, where partners contribute to the capital of the firm in unequal parts, an agreement between them that in distributing the profits at the end of each year one should pay to the other "ten per cent. interest on the difference in their capital" was not usurious. This was put upon the ground that the exaction was not for interest properly so called, but for a share of the profits. In *Duval v. Neal*, 70 Miss. 288, 12 South. 145, it was held that, where an advancement is made to promote an enterprise, the consideration being a half interest in any net profits that may spring from the venture, the advancement with lawful interest to be returned if the requisite funds shall ever arise in the prosecution of the enterprise, the contract was not usurious. In that case both the principal and interest were risked upon the success of the venture.

Whether the contracts be viewed standing alone or as supplemented by the parol evidence there can be no escape from the conviction that they were not bona fide and without design to evade the statute, but the view is compelling that there was a studied

attempt to circumvent the statute and to exact from the borrower a contract which in all reasonable probability would, and which as a matter of fact did, result in more than 100 per cent. interest.

[3] The statute (Rem. & Bal. Code, § 6255) provides that: "If interest shall have been paid, judgment shall be for the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest." The lots of the value of \$2,500 were taken as interest, and this, when doubled as the statute commands, pays the amount actually due the respondents on the second contract.

The judgment is reversed, with directions to take an accounting between the parties after giving this credit, determine the status of the trusteeship respecting the enumerated claims, and to otherwise proceed in harmony with the principles of equity.

CROW, C. J., and MOUNT, PARKER, and CHADWICK, JJ., concur.

HALLIDIE MACHINERY CO. v. WHIDBEY ISLAND SAND & GRAVEL CO. et al.

(Supreme Court of Washington. May 6, 1913.)

1. REPLEVIN (§ 120*)—JUDGMENT—DELIVERY OF PROPERTY IN DEPRECIATED CONDITION.

Under Rem. & Bal. Code, § 711, authorizing a defendant in claim and delivery to reclaim the property by executing a redelivery bond conditioned for delivery to plaintiff if such delivery be adjudged, and for the payment of such sum as may for any cause be recovered against the defendant, and section 434 providing that in actions to recover the possession of personal property judgment for the plaintiff may be for the possession or value thereof in case a delivery cannot be had, plaintiff is not required to accept the property when tendered in a condition substantially depreciated from its condition when reclaimed under the redelivery bond and to sue for the depreciation, but may reject the property and sue on the bond for its full value as fixed by the judgment.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 479; Dec. Dig. § 120.*]

2. REPLEVIN (§ 107*)—ALTERNATIVE JUDGMENT—STATUTORY PROVISIONS.

While Rem. & Bal. Code, § 434, providing that, in actions to recover the possession of personal property, judgment for plaintiff may be for the possession or the value thereof in case a delivery cannot be had, is not mandatory in terms as to rendering a judgment in the alternative, either party has a right to insist on such judgment being rendered.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424-428; Dec. Dig. § 107.*]

3. PLEADING (§ 180*)—REPLY—DEPARTURE.

Where the complaint in an action on a bond in claim and delivery alleged the failure to return the property or otherwise satisfy the judgment, and the answer alleged an offer to return the property, a reply admitting the offer to return, and alleging facts showing a depreciation in its condition justifying a refusal to accept the offer, did not depart from the complaint, since it did not set up any new cause of action, especially where no objection to the reply was

made until the trial five months after the service and filing of the reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.*]

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Action by the Hallidie Machinery Company against the Whidbey Island Sand & Gravel Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 62 Wash. 604, 114 Pac. 457.

Craven & Greene, of Bellingham, for appellants. Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, all of Seattle, for respondent.

PARKER, J. The plaintiff, Hallidie Machinery Company, seeks recovery from the defendants, Whidbey Island Sand & Gravel Company, as principal, and United States Fidelity & Guaranty Company, as surety, upon a redelivery bond executed by them in an action prosecuted by the machinery company against the sand and gravel company under the claim and delivery statutes. The plaintiff rests its right to recover upon the alleged failure of the sand and gravel company to return the property to the plaintiff in compliance with the conditions of the redelivery bond and the judgment rendered in that action in its favor. A trial before the court and a jury resulted in a judgment and verdict in favor of the plaintiff in the sum of \$2,296.30 damages, from which the defendants have appealed.

Prior to February 19, 1909, respondent commenced an action in the superior court for Whatcom county against appellant sand and gravel company to recover possession of certain machinery, and caused the seizure thereof by the sheriff upon the execution of the usual bond and affidavit required by the claim and delivery statute (Rem. & Bal. Code, §§ 708 and 709). On that day appellant sand and gravel company, as principal, and the guaranty company, as surety, executed in that action the redelivery bond here sued upon, conditioned as required by Rem. & Bal. Code, § 711, and thereby secured the return of the property to appellant sand and gravel company. That action proceeded to trial before the court without a jury, resulting in judgment in usual form in the alternative in favor of the respondent awarding to it the property, and, if delivery thereof could not be had, that respondent recover of appellant sand and gravel company the value of the property, which was determined and fixed by the court in that judgment. Upon appeal from that judgment, it was affirmed by this court; our decision being reported in 62 Wash. 604, 114 Pac. 457, where a more detailed history of the case may be found. On June 7, 1911, which was very soon after the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

filing of the remittitur from our decision in the superior court, appellant tendered to respondent the machinery, claiming such tender to be in compliance with the redelivery bond executed by it in the claim and delivery action. Respondent refused to accept that tender, and seeks to justify its refusal upon the ground that the machinery was at the time of the tender not in substantially the same condition in which it was when redelivered to the appellant sand and gravel company under the redelivery bond, but was at the time of the tender in a greatly depreciated condition and practically worthless, by reason of its use by appellant sand and gravel company and its exposure to the elements during the period from its redelivery to appellant sand and gravel company on February 11, 1909, until its tender to respondent on June 7, 1911. On July 12, 1911, this action was commenced against appellants upon the redelivery bond seeking recovery of damages measured by the value of the property as fixed by the court in the judgment in the claim and delivery action.

It is contended by counsel for appellants that the evidence introduced was not sufficient to warrant the jury in concluding, as it manifestly did, that the machinery was not in substantially as good condition at the time of the tender as when it was reclaimed by appellant sand and gravel company under the redelivery bond. We think it sufficient to say, in answer to this contention, that we find ample evidence, if believed by the jury, to warrant them in concluding that the machinery was in fact very much depreciated in value, and not nearly in such good condition as it was when appellant sand and gravel company reclaimed it under the redelivery bond. There was a period of some 27 months elapsed from the date of reclaiming the property under the redelivery bond until return thereof was offered to be made, during which period the machinery was used to a large extent by appellant sand and gravel company in its plant, and during which period it was also to a considerable extent exposed to the elements causing depreciation by rust and the usual results of such exposure. There was also competent testimony tending to show that portions of the machinery were very much worn and that all of it was in some degree worn. We conclude that we cannot disturb the judgment because of want of evidence to support the jury's conclusion upon this question.

[1] Counsel for appellants contend that respondent was bound to accept return of the property when tendered, even though it may not have been in substantially as good condition as when it was reclaimed by appellant sand and gravel company under the redelivery bond, and that respondent's only remedy was an action for damages measured by the difference, if any, between the value of the property when reclaimed by appellant sand

and gravel company and when tendered to respondent. The trial court gave to the jury, among other instructions, the following:

"If you find from the evidence that the property when tendered by the defendant Whidbey Island Sand & Gravel Company, on or about June 6, 1911, was substantially in the same condition that it was when possession of the same passed to the defendant Whidbey Island Sand & Gravel Company on or about February 19, 1909, under and by virtue of the redelivery bond mentioned, then it became the legal duty of the plaintiff to accept the property, and in such case you should find for the defendant."

"If you find from the evidence, by a fair preponderance thereof, that the property when so tendered was so worn from use and the operation of the same by the defendant after the execution of the redelivery bond, and was damaged after that time by the action of the rains, winds, and salt water, or in either of these ways, so that the same was not in substantially the same condition it was when received by the defendant Whidbey Island Sand & Gravel Company under the bond, then and in such case you are instructed that the plaintiff was under no legal obligation to receive the property, and in such case you should find for the plaintiff."

These instructions were in accordance with the theory upon which counsel for respondent rested its right to refuse the tender of the property and recover the full value thereof as determined by the judgment in the claim and delivery case. The giving of these instructions and other rulings of the trial court in keeping therewith are the principal claimed errors relied upon by counsel for appellants for reversal. The obligation resting upon the party holding the property, after giving a bond for its delivery to the other party, is stated in *Shinn on Replevin*, § 679, as follows: "The plaintiff in replevin, against whom a judgment for a return has been entered, is bound to restore the goods to the defendant in the like good order and condition as when taken. The mere restoration of the goods in a damaged condition will not be in compliance with the conditions of his bond. This may be required by express terms of the statute, but, if the statute does not expressly require it, it does so by implication. After a judgment for a return has been entered against the plaintiff, he can only satisfy it by a return of the identical property which was taken from the defendant under the writ. The defendant is not bound to accept any other." *Fair v. Citizens' State Bank*, 69 Kan. 353, 76 Pac. 847, 105 Am. St. Rep. 168, 2 Ann. Cas. 960; *Capital Lumber Co. v. Learned*, 38 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792; *Wallace v. Cox* (Neb.) 138 N. W. 579.

Our statute prescribing the conditions of the bond (Rem. & Bal. Code, §§ 709, 711) does

not in terms require the property to be returned in substantially as good condition as when taken; but that such is the obligation under the bond the law creates, whether in terms so specified in the statute or not, is well settled by the authorities. This observation is made in view of certain contentions made by counsel for appellant rested upon the absence of such a prescribed condition of the bond in our statute. We may also observe at this time that in view of the conditions prescribed for delivery and redelivery bonds being in substance the same, and imposing like obligations upon the party acquiring possession of the property under such bonds, whether plaintiff or defendant, the law touching the obligations of the respective parties to each other to deliver the property in compliance with their bond must necessarily be the same. We may therefore call to our aid and regard as equally applicable decisions dealing with claims of defendants as well as those dealing with claims of plaintiffs under such bonds.

The decisions of the courts are in apparent conflict upon the question of the right of the party for whose protection the bond is given to reject a tender of only a portion of the property, or a tender of all of the property, when it is not in substantially the same condition as when taken or reclaimed. We think, however, that the varying circumstances involved in the cases will in many instances account for the seeming conflict of the decisions. In the case of *Jones v. Messenger*, 40 Colo. 37, 90 Pac. 64, there was an attempt to satisfy a replevin judgment pro tanto by the tender of 56 of 76 horses taken under a redelivery bond; the horses not tendered having been disposed of, so as to render their tender impossible. The tender was refused, which was sought to be justified upon substantially the same grounds as are invoked by respondent here. Disposing of the question involved, the court said: "Under no circumstances could the defendant in replevin satisfy the judgment against him pro tanto by a partial delivery of the property involved under the circumstances of this case. A return of all the property promptly, in substantially the same condition as it was at the time of bringing the replevin suit, would satisfy the judgment in respect to the possession. In addition to the return of the property, the judgment in the replevin suit required the payment of certain damages. The rule in jurisdictions where the statutes provide that the value of the separate articles of property must be found does not prevail in this state. Our statute requires the return of the entire property when in the hands of the other party, or judgment for its full value if a delivery cannot be had, and a judgment must be for the possession of the entire property to be operative. *Horn v. Bank*, 8 Colo. App. 539, 46 Pac. 838, and cases cited. Whether the return be in whole

or in part, the goods must be in like good order and condition as when taken. *Shinn on Replevin*, § 679. In jurisdictions where it is required to find separate values, if the separate value of each article be not assessed, the verdict will not support a judgment. *Shinn*, § 627, and cases cited. In this state, on the contrary, it requires the finding of the aggregate value of the property to support a judgment under the terms of our statute and the conditions of the replevin bond, necessarily given. To permit defendant in replevin to retain the horses involved in this case in his possession during years of litigation, and to return a portion of them at his option, in a diseased condition, would be to render nugatory the replevin judgment which must be satisfied according to its terms." It is true that was an equity case wherein it was sought to compel satisfaction of the replevin judgment pro tanto, but we are unable to see that the principle involved and decided would have been any different had the suit been for damages sought to be measured by the value of the property, as determined in the judgment in the replevin case.

Referring to *Horn v. Citizens' Savings & Commercial Bank*, 8 Colo. App. 539, 46 Pac. 840, cited in the above quotation, we find the Colorado statute relative to judgments in actions to recover personal property quoted as follows: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

[2] This is the exact language of our statute relating to judgments in actions for the recovery of personal property. *Rem. & Bal. Code*, § 434. While the language of this section does not appear to be mandatory in terms as to rendering the judgment in the alternative, it is plain that either party has the right to insist that it be so rendered. Like the Colorado statute, we have no provision requiring that the separate value of different portions or articles of the property shall be determined by the judgment rendered in the claim and delivery action. The theory of the Colorado decisions seems to be that, in view of the statute, the judgment is to be satisfied, so far as the right to the property has been determined by the judgment, by a return of the whole of it in substantially the same condition as when taken, or by the payment of the whole value thereof as determined in the replevin judgment, and that the party adjudged to be entitled to the property is not required to accept satisfaction in any other manner.

In the case of *Elckhoff v. Elkenbary*, 52 Neb. 332, 72 N. W. 308, it was held that, in order to satisfy a replevin judgment by a return of the property, it was necessary to return, or offer to return, the identical property replevined and not other property of like kind or value, even though in that particular case the property replevined was a lumber yard; the lumber being sold therefrom in the usual course of business, and other lumber of like kind, quantity, and value substituted before the tender made to satisfy the judgment.

In *Wallace v. Cox* (Neb.) 138 N. W. 578, Reese, Chief Justice, speaking for the court to the question of the duty of accepting a tender of return of property, said: "It is fundamental that, where a judgment in an action of replevin is against the plaintiff, it is his duty to return the property to the defendant within a reasonable time in substantially as good condition as when taken, and this would satisfy the judgment in so far as the return had been ordered if the property was accepted by the defendant, but it would not cancel the money judgment for damages, nor would it deprive the defendant of his action for depreciation of the value of the property while out of his possession. While this is all true, yet the duty of returning the property within a reasonable time and in substantially an unimpaired condition should be performed, and it does not lie with the plaintiff in the action after long delay to return property badly damaged by use or otherwise, compel the defendant to accept it, and then litigate the question of damages in another action. Our statute does not provide that the property shall be returned in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held." This, it is true, can hardly be regarded as a direct holding that a tender of the property, immediately upon the rendering of the judgment, in a substantially worse condition, would not satisfy the judgment pro tanto and require the successful party to seek relief in another action for damages; but the reasoning of the learned justice, it seems to us, is a convincing argument in support of such a holding, especially where more than two years' time intervenes between the reclaiming of the property and the end of the litigation, as in this case.

In the case of *Mounts v. Murphy*, 126 Ky. 803, 104 S. W. 978, while the duty of accepting a tender of the property in a damaged condition was not strictly involved, in speaking of the measure of damage for failure to return the property in substantially the same condition as when taken, the court said: "It did not satisfy the obligation when Hatfield returned the oxen, some of them with eyes knocked out and otherwise injured and in poor condition, as the testimony tends

to show in this case. It is true that appellee might have elected to refuse the cattle on account of their condition, and collected their value as fixed in the judgment; but he was not bound to do so."

In *Pauls v. Mundine*, 37 Tex. Civ. App. 601, 85 S. W. 43, the court said: "The only question presented for our determination on this appeal is whether, under the judgment in favor of appellant against appellee, above mentioned, the latter had the legal right to satisfy same by a delivery or tender of less than the whole of the property recovered by said judgment. We are of the opinion that the recital in the judgment to the effect that the plaintiff recover the value of each article of said machinery, stating the separate value thereof, the total value of which being \$375, in the event the said machinery, or any part thereof, could not be found, conclusively answers this question in the negative. Under the provisions of this judgment, the appellee could not satisfy same without a delivery or tender of the entire property recovered, or the payment of its value, as stated in the judgment. *Byrne v. Lynn*, 18 Tex. Civ. App. 252, 44 S. W. 311, 544."

In the case of *Whetmore v. Rupe*, 65 Cal. 237, 3 Pac. 851, under a statute similar to ours and in reference to the right and duty of the successful party in a replevin action, the court said: "In *De Thomas v. Witherby* [61 Cal. 92, 44 Am. Rep. 542], the language of the superior court of New York, in *Suydam v. Jenkins*, 3 Sandf. [N. Y.] 614, is cited with approval: 'The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods or pay their value at the time of the execution of the bond. We do not think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner.' It cannot be doubted that a plaintiff, who, without right, has seized the property of a defendant under a writ, is a wrongdoer. Under our Code the defendant who recovers a judgment in an action like the present, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of the property; and if the property, all of it, cannot be returned, then to a judgment for the value of the whole." *Stevens v. Tuite*, 104 Mass. 328, and *Johnson v. Mason*, 70 N. J. Law, 13, 56 Atl. 137, are in harmony with these views.

The authorities so far noticed, as we understand them, lend support to the view that the party for whose benefit the delivery or redelivery bond is given, under which his property is withheld from him, upon judgment being rendered in his favor for the recovery of the property, or in the alternative for its total value determined by such judgment without separate valuation of separate portions or articles, may elect to accept tender of the property, though depreciated in value, and sue upon the bond for his dam-

ages, measured by its depreciated value; or he may, if the property is tendered to him in substantially worse condition than when first withheld from him under the bond, refuse the tender and sue upon the bond for damages measured by the total value of the property as determined by the alternative judgment. We are impressed with the justice of this doctrine, in view of the fact that it favors the party who is finally adjudged to be in the right. The very object of the statute, in requiring the value of the property to be determined and the judgment to be rendered for the property or for that value in case the property cannot be delivered, is manifestly to enable the one in whose favor the judgment is rendered to avoid the necessity of again trying the question of his damage, in so far as it is measurable by the value of the property, in the event he is compelled to or acquires the right to take the money judgment in lieu of the property. If he is compelled to accept tender of the property in a condition of substantially depreciated value, or if he is compelled to take a portion of the property even if in substantially as good condition as when withheld from him, the determination of its total value, which he has a right to have made in the replevin judgment, it seems to us would fail of its purpose. We think he is not obliged to accept satisfaction of the judgment in part by return of the property in a damaged condition or a portion of it even in substantially the same condition, and in part by money damages to be again determined in a new action.

Let us now notice the decisions relied upon by counsel for appellant as opposed to this view.

In the case of *Leeper, Graves & Co. v. First Nat. Bank*, 26 Okl. 707, on page 721, 110 Pac. 655, on page 660 (29 L. R. A. [N. S.] 747, Ann. Cas. 1912B, 302), the reasoning of the court is apparently not in harmony with our conclusions. It is worthy of note, however, that the court in that case was dealing with a situation where all but a small fraction of the entire property was tendered back, as indicated by the following remarks of the court: "In the case at bar, as the parts of the different bridges which were not tendered constituted but a small fraction of the entire amount of the property taken, and there was no showing that the same could not be readily procured in the open market, or were within plaintiff's control, we can see no reason why a party in such a case should not be required to accept the great bulk of the property involved and recoup on the bond given for such as was missing. Counsel for the bank in their brief ask if a wagon be replevied, and plaintiff be required to restore, could he tender the tailgate, and require its acceptance? To this we will say that we think not, but should the wagon be tendered entire with the exception of the tailgate,

which it was not within the power of the plaintiff to restore (that is, was lost and not willfully withheld), we believe that its acceptance would be required with an allowance of damages therefor." Had it there been established by the verdict of the jury, as it was in this case, that the property had materially depreciated in value by use and exposure to the elements, it is possible the court might have reached a different conclusion.

In *Reavis v. Horner*, 11 Neb. 479, 9 N. W. 643, there was a tender of the property, except certain specified articles, being a small portion of the whole; these articles having a value readily ascertainable, and no showing that the condition of the property actually returned was materially lessened in value. It also appeared that the tender was refused for a reason wholly foreign to the question of it being satisfactory to the judgment creditor so far as its amounts and value were concerned, and would have been accepted so far as any objections could have been made on that ground.

In *Ervin v. Montgomery*, 84 Neb. 107, 120 N. W. 903, it appears that there was a tender of all of the property in substantially the same condition as when taken, and, being refused, the tender was again made at the trial of all the property except one horse, which had died, for which there was a tender of \$10 in money. The court held that the first tender was sufficient to satisfy the judgment.

Counsel for appellant also cite and rely upon the following decisions: *Franks v. Matson*, 211 Ill. 338, 71 N. E. 1011; *Yelton v. Slinkard*, 85 Ind. 190; *Larabee v. Cook*, 8 Kan. App. 776, 61 Pac. 815; *New England Furniture & Carpet Co. v. Bryant*, 64 Minn. 256, 68 N. W. 974; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641.

A critical examination of these cases, however, will show that the right of the judgment creditor in the replevin action to refuse tender of return of the property to him in satisfaction of the judgment, either in whole or pro tanto, was not involved; there being involved only the question of the measure of his damages where the property was returned and he accepted it. Our attention has been called to the case of *Edwin v. Cox*, 61 Ill. App. 567. We do not regard that as an authority contrary to the conclusions we have reached, in view of the fact that it does not appear to have involved an alternative judgment determining the value of the property.

There may be found in text-books and in the texts of encyclopedias general statements to the effect that a successful party to a replevin suit is bound to accept the property, though depreciated in value, or a portion of the property, in satisfaction of the judgment pro tanto; but such general statements are, we think, subject to qualifications such

as we have noticed. The duty of the successful party in a replevin suit to accept such a tender in partial satisfaction of the judgment is stated in Shinn on Replevin, § 679, as follows: "Whichever party recovers a judgment for a delivery or return of the property in replevin, when the same is in the possession of the adversary, is bound to accept the return of it, or the return of a substantial part of it. In case of the tender of a part of it, such tender of return should be accompanied by a tender of the money value of the remainder in satisfaction of the judgment for a return or for a payment of the value in case a return cannot be had. The party has a right to deliver or return what he can, and pay for that which he cannot deliver. This is true, if the part offered to be returned is separable from the others and in no way dependent upon it for use or value, and the part tendered is in the same condition as when taken. It is to provide for just such condition as this that a finding of the separate values of different articles having different values is required to be made." This is about as comprehensive a statement of the general rule and its qualification as can be found in any text, yet we think it is not necessarily opposed to the conclusion we have here reached, in view of the provisions of our statute and the nature of the judgment the successful party is entitled to have rendered in his favor, which includes the determination of the total value of the property manifestly to the end that that question can be rendered final in the claim and delivery action. We conclude that the learned trial court was not in error in giving the instructions complained of and in making rulings in the progress of the trial in keeping with the law as announced in those instructions.

[3] It is contended by counsel for appellants that there was a departure in the reply from the issues as tendered in respondent's complaint. The principal allegation of the complaint was, after setting up the judgment in the claim and delivery case, that the appellant sand and gravel company had not returned the property nor otherwise satisfied the judgment. The answer alleged the offer to return the property by the appellant sand and gravel company. The reply admitted the offer to return the property, and alleged affirmative facts showing the depreciated value of the property occurring while in the possession of appellant sand and gravel company under the redelivery bond, as a justification for its refusal to accept the offer. This, counsel for appellants contend, was a departure and injected a new issue into the case. We are unable to agree with this contention. It was not a new cause of action, though it may have pleaded facts which should have been pleaded in the complaint. The first objection to the pleading of these

facts in the reply occurred at the trial some five months after the service and filing of the reply. Clearly no prejudice occurred to appellant's right by overruling the objection to introduction of evidence because of the alleging of these facts in the reply instead of in the complaint. *Erickson v. McClelland Co.*, 46 Wash. 661, 91 Pac. 249.

We conclude that the record discloses no prejudicial error committed against appellants, and therefore affirm the judgment.

CROW, C. J., and MOUNT and CHADWICK, JJ., concur.

BARRETT MFG. CO. v. KENNEDY et al.
(Supreme Court of Washington. May 10, 1913.)

1. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

The statute authorizing service of process upon the statutory agent of a foreign corporation is only cumulative and is not exclusive, and service may be made upon other agents of the corporation in pursuance of the general law.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

2. CORPORATIONS (§ 670*)—FOREIGN CORPORATIONS—GARNISHMENT—SERVICE.

Under Rem. & Bal. Code, § 1828, providing that writs of garnishment may be served in the same manner as a summons, and section 226 providing that, if suit be brought against a foreign corporation or nonresident joint-stock company or association, summons may be served by delivering a copy to any agent, cashier, or secretary thereof, a writ of garnishment may be served upon a foreign corporation by service on an agent who had sole charge of its business during the absence of its manager who was the statutory agent; it not being necessary to come within the statute that the agent be a general or managing agent, representative authority being sufficient.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2628-2639; Dec. Dig. § 670.*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by the Barrett Manufacturing Company against H. G. Kennedy and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Jas. W. Reynolds, of Seattle, for appellant. Lewis & Levine, of Seattle, for respondents.

GOSE, J. This action was brought by the plaintiff for the purpose of vacating five default judgments entered against it as garnishee in one of the justice courts of King county. There was a judgment in favor of the defendant, from which the plaintiff has appealed.

The appeal presents a single question, viz., the legality of the service upon which the judgments were rendered. The returns show that the several writs of garnishment were served upon the appellant, a foreign corporation, by personally delivering a true copy

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the writs to "S. M. Edwards; he being the acting manager of the garnishee." Prior to the service of the writs, the appellant had filed its certificate with the Secretary of State, designating George S. Turner as its statutory agent, and empowering him to accept service conformably to the statute.

[1] The first contention is that process can be served only upon the statutory agent. This court held, in *Tatum v. Niagara Fire Ins. Co.*, 43 Wash. 373, 86 Pac. 660, that the statute authorizing service of process upon the statutory agent of a foreign corporation was only cumulative, and that service might be made under the general statute. It is argued that the opinion does not show that the corporation had appointed a statutory agent. The briefs, as well as the opinion, clearly show that his appointment was assumed. The following cases speak the same rule: *Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560; *Eagle Life Ass'n v. Redden*, 121 Ala. 346, 25 South. 779; *In re Curtis*, 115 La. 918, 40 South. 334, 5 L. R. A. (N. S.) 298, 5 Ann. Cas. 950; *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; *Mutual Reserve, etc., Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212; *Bankers' Union v. Nobors*, 36 Tex. Civ. App. 38, 81 S. W. 91.

[2] The next contention is that Edwards was not an agent within the meaning of the statute. Our statute (Rem. & Bal. Code, § 1828) provides that writs of garnishment may be served in the same manner as a summons. Section 226 provides that a summons shall be served by delivering a copy thereof as follows: "If the suit be against a foreign corporation or nonresident joint-stock company or association doing business within this state, to any agent, cashier or secretary thereof."

The record shows that Turner, the statutory agent who was also the resident manager of the appellant, had gone to California; that the writs were served in the afternoon; that Turner returned to Seattle that evening after the service of the writs; that Edwards had sole charge of the appellant's warehouse in Seattle during his absence; that he shipped goods out of the warehouse as directed, and made out the shipping bills; that he received freight into the warehouse; that he checked the bills; and that he sold the appellant's goods and solicited orders for its goods at list prices. Measured by the duties which Edwards performed, he was clearly an agent, within the meaning of the statute. It is true that he was not a general agent, but the statute does not require that service in such cases shall be made upon a general or a managing agent; it suffices if it is made upon "any agent" with representative authority. *Sievers v. Dalles, etc., Nav. Co.*, 24 Wash. 302, 64 Pac. 539; *Tatum v. Niagara Ins. Co.*, supra; *Womach v. Case Threshing Machine Co.*, 62 Wash. 661, 114 Pac. 509; *Lee v. Fidelity S. & T. Co.*, 51 Wash. 208,

98 Pac. 658; *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991; *Norfolk, etc., v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Moinet v. Burnham, etc.*, 143 Mich. 489, 106 N. W. 1126; *Arnold v. Huber Mfg. Co.*, 166 Mich. 190, 131 N. W. 537.

In the *Sievers Case* summons was served upon both the purser and wharfinger of the defendant corporation, a navigation company. In holding the service sufficient to confer jurisdiction, the court said: "The corporation received and discharged freight and passengers at Vancouver, and this business was in charge of the purser, who was certainly one of the company's agents looking after this with other business of the company. The appellant's steamers regularly landed at the wharf in Vancouver, and regularly discharged and received passengers and freight. To that extent it was certainly doing business in the state, and the wharf was an office for the transaction of such business. Paragraph 9 of section 4875, which provides the manner of service of summons, provides that, if the suit be against a foreign corporation or nonresident joint-stock company or association doing business within the state, the summons may be served on any agent of the corporation. It does not specify any particular kind of agent, and we think that both the wharfinger and the purser were agents within the meaning of the law."

In the *Tatum Case* it was argued in the briefs that the words of the statute, "any agent, cashier, or secretary," are limited to agents of the same class as "cashiers" and "secretaries," meaning those agents who have been vested with "executive powers and general authority and discretion." This view, however, was not accepted by the court.

In *Venner v. Denver, etc., Co.*, supra, in construing a statute which provided that service might be made upon "any agent" of a foreign corporation, the court said: "The purpose was to employ a term so broad as to cover all who bore the relation of agent to such corporations, without specifically naming the official who should be regarded as an agent. The General Assembly had the power to make a provision as broad and sweeping as this, provided, of course, that service of process shall be upon such agents as may be properly deemed representatives of the corporation."

In the *Jenkins Case* a service of summons upon a timekeeper of the defendant, a foreign corporation, was held sufficient. The court said that the legality of the service did not depend upon the tenure of service, but "upon the character or nature of the service," and that "agency may also be shown by the fact that a person represents the master in some one or more of his relations to others, even though he may not have power to contract. The statute makes service on 'any agent' of a foreign corporation sufficient. The statute, therefore, does not require that the agent shall be general, but is complied

with by a service upon an agent having limited authority to represent his principal."

In the Cottrell Case the court defined the term "agent" as signifying "any one who undertakes to transact some business or to manage some affair for another, by authority and on account of the latter, and to render an account of it."

In the Molnet Case it was held that a traveling salesman of a domestic mercantile company is an agent within the meaning of the statute permitting service of process "upon the agent" of a corporation. The words of the statute, "any agent," were intended to have a broad meaning, and must be liberally construed to effectuate the legislative intent. While they may not include a day laborer or an employé who has no authority to represent the corporation in any way other than to discharge his daily task, they must be held to include all such agents as represent the corporation in either a general or a limited capacity.

The appellant has cited *Erie R. R. Co. v. Van Allen*, 76 N. J. Law, 119, 69 Atl. 484. That case holds that the statute refers "to officers having some general or supervisory authority," and that a service of summons upon "the resident freight agent" of the corporation was insufficient. This construction is not in harmony with the rule heretofore adopted by this court in *Sievers v. Dallas*, etc., Co., supra, and *Tatum v. Niagara*, etc., Co., supra.

The judgment is affirmed.

CROW, C. J., and MOUNT and PARKER, JJ., concur.

FEROGLIO v. PAULSEN et al.

(Supreme Court of Washington. May 6, 1913.)

1. MASTER AND SERVANT (§ 107*)—INJURY TO SERVANT—SAFE PLACE TO WORK.

Where an employé engaged at work on the side of a mountain in making a cut for the foundation of a mill could not see workmen above him engaged in making another cut for a water flume, and the foreman attempted to make the place for the employé safe by placing brush below the flume to prevent material from rolling down the mountain side, the rule of safe place applied, and the employer must furnish an effective barrier.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

2. MASTER AND SERVANT (§§ 206, 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé assumes the ordinary risks of the work in which he is engaged, and he may not assume that the employer has furnished him a safe place where the dangers are known or are as apparent to him as to the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 550; Dec. Dig. §§ 206, 217.*]

3. MASTER AND SERVANT (§ 226*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé engaged at work on the side of a mountain in making a cut for the foundation

for a mill does not assume dangers not incident to the work, and may assume that the employer's attempt to protect him against workmen above him is effective, and he does not assume the risk of the employer's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

4. MASTER AND SERVANT (§ 297*)—INJURY TO SERVANT—GENERAL AND SPECIAL VERDICTS—INCONSISTENCY.

A special verdict in an action for injuries to an employé engaged at work on the side of a mountain in making a cut, caused by a rock rolling down on him from a cut above him, that the injury was caused by the foreman in charge of all the men in not constructing a sufficient barrier to make the employé's place of work safe, is consistent with a general verdict for the employé, for the negligence of the foreman was the negligence of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Keenan, Judge.

Action by Eligio Fergilio against August Paulsen and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Myron A. Folsom, of Spokane, John H. Wourms, of Wallace, Idaho, and John H. Pelletier, of Spokane, for appellants. Robertson & Miller and Thomas Corkery, all of Spokane, for respondent.

MOUNT, J. Action for personal injuries. Plaintiff recovered a judgment in the court below for \$2,200 on the verdict of a jury. The defendants have appealed from that judgment.

The facts are, in substance, as follows: The defendants, with others, on November 20, 1910, were the owners of the Hercules mine located at Burke, Idaho. They were engaged in constructing a building for a mill near there at Wallace, Idaho. This mill was being constructed upon the side of a mountain which was very steep, rising at an angle of about 45 degrees. At that time they were engaged in making a cut for the foundation of the mill. The plaintiff was employed as a workman in this cut. His duties were to hold a drill while another workman used a large hammer with both hands to strike the drill. In order to hold the drill, it was necessary for the plaintiff to watch the drill closely. On the date named the defendants had made two angular cuts in the side of the mountain. The perpendicular wall of the lower cut was about 16 feet in height. Immediately above this, and to the east was another triangular cut, the perpendicular wall of which was about 4 feet in height. The plaintiff was working in this upper triangular cut holding a drill while another man was hammering on the drill. He was sitting or resting upon his knees with both hands upon the drill. Each time the drill was struck, it was necessary to raise it slightly and turn it. The drill was op-

erated in solid rock. The mountain side above where plaintiff was working had been cleared of brush, and when he was standing he could look above the perpendicular wall under which he was working, and have a good view of the side of the mountain. About 100 feet up the mountain side from where the plaintiff was working, a crew of men in the employ of the defendants were making a cut for a water flume. These men, under the direction of Mr. Franz, the foreman in charge, had piled brush below the cut for the water flume in order that the rocks therefrom might not roll down the mountain side. While the plaintiff was holding the drill, as above stated, a rock started to roll down the side of the mountain. One of the men above saw the rock, and called a warning to the men below. The foreman in charge at that time was within about eight feet of the plaintiff. He saw the rock coming, and called a warning to the plaintiff and the man who used the hammer. The foreman and the man who was doing the hammering ran. The plaintiff at the time the warning was given was either sitting or resting upon his knees, holding the drill. He started to run, but got in the way of the rock, which struck him and injured him. The plaintiff knew that the men were working above him on the hill. He also knew that brush had been piled along the cut for the flume. But, while he was sitting at his work, he could not see above the perpendicular cut under which he was working. He knew that the side of the hill was very steep; that, when a rock or anything above was loosened, it would roll down. There was no evidence to show just where the rock started or what caused it to start down the mountain side. Plaintiff knew the vicinity and all the surroundings.

Upon the trial of the case, several interrogatories were propounded to the jury by the court at the request of the defendants, two of which questions were answered as follows: "Was the injury to the plaintiff caused by the negligence of any person or persons? Answer: Yes. If you answer the first interrogatory in the affirmative, state the name of the person or persons whose negligence caused the injury. Answer: Mr. Franz." Mr. Franz was the foreman in charge of all the men at work on the mountain side. At the close of the plaintiff's evidence, the defendants moved the court for a nonsuit, and at the close of all the evidence moved the court for a directed verdict. These motions were denied.

The appellants make no question upon the introduction of evidence or the instructions of the court. The assignments of error are to the effect that the court erred in overruling the motion for a nonsuit and the motion for a directed verdict, and that the special verdicts are inconsistent with the general verdict. The theory of the plain-

tiff's case is that the defendants placed plaintiff at work in a dangerous place and stationed men above him on the hillside, which made the place more dangerous than it otherwise would have been, and negligently failed to make the place safe or to keep it safe. The appellants contend upon this appeal that the plaintiff, knowing the conditions which surrounded him, assumed the risk of rocks rolling down upon him, and that the doctrine of "safe place" does not apply to this case. They also contend that the negligence, if there was any which caused the rock to roll down the mountain side, was the negligence of a fellow servant of the plaintiff, and that the plaintiff therefore cannot recover. There is no evidence in the case which shows how the rock was started in its descent. One of the men working above saw the rock after it had started. He shouted a warning to the men below. Mr. Franz, the foreman, was standing near the plaintiff, and also shouted a warning to the plaintiff. The plaintiff, in obedience to the warning sought shelter, not knowing the course of the rock. If he had remained at his post, he would not have been injured.

[1, 2] We think the rule of "safe place" applies to this case. The plaintiff while at his work was unable to see the workmen above him, or to see rocks which might start from the hillside. The foreman in charge of the work had attempted to make the place safe by placing brush below the cut for the flume where workmen were engaged in throwing rocks and material upon the brush. This brush was for the purpose of preventing such material from rolling down the hill. In other words, the foreman, who represented the master, realized the necessity of protecting the men below, and therefore had directed the men above to place this barrier for that purpose, and for the purpose of holding the material upon the ground. If we may assume for the purpose of this case that the plaintiff working below was a fellow servant with the workmen above, it was the duty of the defendants through their foreman in charge of the work to furnish the plaintiff with a reasonably safe place so that he might be protected from acts which he could not see and which he could not prevent. Where the plaintiff knew that the defendant had constructed a barrier, he certainly had the right to assume that the defendant had furnished an effective barrier. It is no doubt true that this court has held in many cases that a servant assumes the ordinary risks incident to the work in which he is engaged. And it is also true, as we have many times held, that the servant has no right to assume that the master has furnished a safe place where the dangers are known or are as apparent to the servant as to the master. But we think neither of these rules apply to this case. Plaintiff knew that a barrier had been erected by

the defendants or their foreman. Although he knew there was danger where no barrier was constructed, he had a right to assume that the master had erected a sufficient barrier, and to rely upon the master performing the duty which had been undertaken and which the master owed to him.

In *McLeod v. Chicago, Milwaukee & P. S. Ry. Co.*, 65 Wash. 62, 117 Pac. 749, we said: The servant "assumes the risk of such dangers only as are necessarily incident to the work. The difference is not in the rule, but in the greater number of dangers incident to the work. The real question in any case is as to what constitutes reasonably careful conduct on the part of the master looking to reasonable safety for the men. * * *

If the place was made unnecessarily dangerous through the negligent act of the master or its vice principal, the master is liable for injury resulting therefrom." In *Campbell v. Jones*, 60 Wash. 285, 110 Pac. 1083, where the servant was placed to work on a hillside and was injured by a stump which was loosened from its place by the foreman in charge, we said: "But we think the court erred in sustaining the challenge to the evidence made on behalf of the defendants *Jones & Onserud*. They were the appellant's employers, and owed to him the duty of furnishing him with a reasonably safe place in which to work, and the duty of keeping the place reasonably safe as long as they required him to work therein. This duty was nondelegable, and, when they intrusted it to another, they became responsible for the negligent performance of the duty by that other. * * * The duty of the respondents to oversee the appellant's place of work was a continuing duty, obligatory upon them at all times; that while the work itself may have been servant's work the duty to see that its performance did not result in injury to the servants working elsewhere was the master's duty. This duty, as we say, could not be delegated, and, if the injury to appellant was caused by its negligent performance, the master is liable. This principle was announced by this court in the case of *Creamer v. Moran Bros. Co.*, 41 Wash. 636 [84 Pac. 592]." In *Howland v. Standard Milling, etc., Co.*, 50 Wash. 34, 96 Pac. 686, we said: "Nor do we think the act which rendered the place unsafe was the act of a fellow servant of the respondent. It is the fundamental duty of the master to make and keep safe the place in which he requires his servants to work, and this duty cannot be delegated so as to relieve the master from liability for a negligent performance of the duty. * * * But it is not the rule that a servant who goes into a dangerous situation assumes the risk of all dangers surrounding the place. He assumes those dangers only which are inherent in and which exist from the nature of business—those dangers against which there is no ab-

solute protection, not those caused by some negligent act of the master and which would not exist but for such negligent act."

[3] In this case the master had undertaken to protect the plaintiff and those working with him in the excavation for the foundation by erecting a barrier above to prevent the earth and rock from rolling down upon the plaintiff and those associated with him. It was not the duty of the plaintiff to inspect this barrier to see that it was safe, but he had a right to rely upon the master in that respect. And, when he went to work at his place at the drill, he did not assume dangers which were not incident to the work in which he was engaged. He no doubt assumed whatever risk there was in connection with his fellow workmen striking the drill and things of that character. But he might rest assured that the master had protected him against the workmen above, as the master had attempted to do. The master's neglect in this respect was not one of the risks which the plaintiff assumed. We are satisfied for these reasons that there was no question of the assumption of risk by a fellow servant and that the evidence was sufficient to go to the jury upon the question of "safe place." The laws of Idaho, where this action arose, are substantially the same as our own upon this question. *Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080; *Craesafulli v. Winston Bros. Co.*, 18 Idaho, 158, 108 Pac. 740; *Knauf v. Dover Lumber Co.*, 20 Idaho, 773, 120 Pac. 157.

[4] By the special verdicts hereinbefore quoted, the jury found that the injury to the plaintiff was caused by the negligence of Mr. Franz. As we have seen, Mr. Franz was the foreman of the men employed in the work where plaintiff was working, and also foreman of the men employed in the work above upon the mountain side. His negligence as such foreman in not constructing a sufficient barrier was, of course, the negligence of the defendants, and the special verdicts are consistent with the general verdict.

We find no error in the record, and the judgment is therefore affirmed.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

LUDBERG v. BARGHOORN.

(Supreme Court of Washington. May 7, 1913.)

1. MASTER AND SERVANT (§ 330*)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—EVIDENCE.

Evidence, in an action for personal injuries by being struck by defendant's automobile while in a public street, held to establish, without substantial dispute, the fact that the errand upon which it was being run by defendant's servant was not an errand of defendant, but only of the servant personally or of his

father, who had obtained the use of the automobile for his own private purpose.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

2. EVIDENCE (§ 265*)—ADMISSIONS—WEIGHT.

Verbal admissions should be received with caution and subject to careful scrutiny, since no class of evidence is more subject to error or abuse.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

3. APPEAL AND ERROR (§ 1001*)—WEIGHT AND SUFFICIENCY.

A verdict cannot be sustained unless it is supported by substantial proofs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

4. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSONS—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT.

Where defendant's servant, by permission of defendant's wife, took his automobile, and, while using it on a personal errand of his own or of his father, ran into and injured plaintiff, who was standing in the public street, the accident occurred while the servant was acting beyond the scope of defendant's employment, and hence defendant was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

5. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSONS—BURDEN OF PROOF—SCOPE OF EMPLOYMENT.

The fact that the automobile by which plaintiff was struck was admitted to belong to defendant and that its driver was the defendant's employé put defendant upon proof that the automobile was not used in his business or for his employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

6. MASTER AND SERVANT (§ 332*)—INJURY TO THIRD PERSONS—DIRECTION OF VERDICT—STATUTES.

Under Rem. & Bal. Code, § 340, providing that where the court decides, as a matter of law, what verdict should be found, it shall discharge the jury and direct judgment in accordance with its decision, where the defendant, in an action for injuries resulting from being struck by his automobile, showed, without substantial dispute, that it was not being used in his employment, but was being used by some other person on business of his own, the court properly directed a judgment for defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

Department 1. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Charles H. Ludberg against S. Barghoorn. Judgment for defendant, and plaintiff appeals. Affirmed.

Dan Danielson, of Spokane (Heber McHugh, of Seattle, of counsel), for appellant. Charles P. Lund, of Spokane, for respondent.

MOUNT, J. Plaintiff brought this action to recover for personal injuries. Upon the trial of the case to a jury, after the evidence was all submitted, a challenge to the suffi-

ciency of the evidence was interposed by the defendant. The trial court sustained this challenge and directed a judgment to be entered in favor of the defendant. The plaintiff has appealed.

[1] The facts are as follows: On May 2, 1911, the plaintiff was run over and injured by an automobile belonging to the defendant. It was driven at that time by one Byron Raney. The evidence tended to show that the automobile was being driven, at the time of the accident, at an excessive rate of speed in the city of Spokane, and while the plaintiff was passing a standing street car he was struck by the automobile. The driver, Byron Raney, had been in the employ of the defendant for some time. His duties were to care for the defendant's lawn, do chores around the house, and keep the automobile clean. He sometimes drove the automobile for Mrs. Barghoorn. Upon the day of the injury to plaintiff, Byron J. Raney, who was a near neighbor of the defendant, requested the use of the defendant's automobile for the purpose of sending for a doctor to attend his daughter who was critically ill. Byron J. Raney is the father of Byron Raney, who was employed by the defendant. Byron J. Raney, the father of the boy, testified that on that day he was unable to locate the doctor he desired; that he went over to the defendant's house, who lived the next place east, and requested Mrs. Barghoorn to let his son, Byron Raney, take the automobile for the purpose of looking up the doctor. Mrs. Barghoorn consented that Mr. Raney's son should take the automobile for that purpose. The young man took the automobile and went to the doctor's office, where he found the doctor. He took the doctor in the automobile to his father's house. Thereafter he took the doctor to the doctor's apartments in the city, and on his return met a lady friend upon the street. He took this lady in the automobile to catch a street car which she had missed. They caught the street car several blocks away and the young man then started to return with the automobile to the garage. On his way back he ran over the plaintiff.

Mrs. Barghoorn testified that at the request of Byron Raney's father she loaned him the automobile for the purpose of going for the doctor.

The defendant testified that he did not know anything about the accident until after it had occurred.

The lady friend of Byron Raney also testified to substantially the same facts with reference to being invited to ride in the automobile as were given by Byron Raney. She also testified that she did not know the defendant or his wife at that time. The doctor also testified that the boy came for him with the automobile, took him to his father's house to see the sick sister, and then took him to his apartments.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The evidence established beyond controversy that, at the time of the injury to the plaintiff, the automobile which was driven by Byron Raney was being driven, not for the defendant, but for Byron J. Raney, and that the driver was not then in the employment of the defendant or upon the business of the defendant, but he was upon an errand solely for his father.

The only attempt in the record to dispute this fact were statements made by the defendant some time after the accident under circumstances substantially as follows: The defendant, after learning of the accident, visited the place of the accident and had a conversation with two firemen, whose station was near the place of the accident, for the purpose of learning the facts in regard thereto. One of these firemen, named Wood, testified that the defendant came to the fire station and inquired about the accident and that he and another man by the name of Donaldson went to the scene of the accident with the defendant and showed him how the accident occurred; that he told Mr. Barghoorn about the rate of speed the automobile was going. The witness Wood then testified as follows, referring to Mr. Barghoorn, the defendant: "He said he was the owner of it (the automobile), and he said that his boy could not have got time to have got up speed from the corner if he was going at the rate of speed that we thought he was going at the time he hit the man. He said that his boy had fetched a friend home and was on his way back. * * * A. The conversation was about the speed that the boy could have got up on his machine. He said that he had only come up to fetch a friend up to the corner and from that corner to our corner would not be time to get up the speed. Q. He said his boy? A. Yes, sir; as I first understood his reference to his son, but they told me not. Q. That is when he said his boy? A. Yes, sir; his boy."

Mr. Donaldson, the other fireman, testified to this conversation as follows: "Well, the gentleman asked the party who I was with, one of the boys at the station there, Mr. Wood, asked him about how fast the machine was running. Mr. Wood said he thought about 30 or 35 miles an hour, and then this gentleman said, 'I don't think the machine could have been running that fast, because,' he said, 'I sent the boy up to Ninth and Sherman streets with this friend of mine, and I don't think the machine could have gotten up that much speed before he got back to Eighth.'"

This is the only evidence in the record which has any tendency to dispute the fact that the driver of the automobile was on the business of his father and not in the business of the defendant.

It is argued by the appellant that this is sufficient to take the case to the jury. This evidence was disputed by the defendant who

testified that he made no such statements. It is apparent from the statements of these witnesses that they misunderstood or misconstrued the conversation they had with the defendant upon that occasion, because Mr. Wood said that the conversation was that "his boy had fetched a friend home and was on his way back," while Mr. Donaldson testified that the defendant said, "I sent the boy up to Ninth and Sherman streets with this friend of mine," while the evidence of the defendant was to the effect that the driver of the machine was taking a lady friend of his (the boy's) home. It is undoubtedly a very easy matter to misconstrue or misunderstand statements of the kind here referred to. It is apparent, we think, that there is no substantial evidence here to dispute the fact that the errand upon which the automobile was run upon that day was not an errand of the defendant, but was an errand of the driver personally, or of the driver's father, who had obtained the use of the automobile for his own private purpose.

[2] Jones on Evidence, p. 297, in referring to this class of evidence says: "It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or changing of words, to convey a false impression of the language used."

[3] This court has frequently held that before a verdict can be sustained it must be supported by substantial proofs. Pederson v. Seattle, etc., Street Ry. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; Guley v. Northwestern Coal & Transportation Co., 7 Wash. 491, 35 Pac. 372; Comegys v. American Lumber Co., 8 Wash. 661, 36 Pac. 1087. We are of the opinion that the evidence of these two witnesses does not dispute the fact that the boy was on an errand for his father, or even rise to the dignity of an admission on the part of the defendant that the driver was on an errand for the defendant.

[4] In Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915, we held that the owner of an automobile is not liable to one who was run over by his incompetent chauffeur where the machine was operated without the knowledge or authority of the owner on a personal errand of the servant; and many authorities are there cited sustaining this rule.

[5] The fact that the automobile was admitted to belong to the defendant and that the driver of the automobile was in the employment of the defendant was sufficient to put the defendant upon proof that the automobile was not used in his business or for his employment has been held in a number of cases. Knust v. Bullock, 59 Wash. 141, 109 Pac. 329; Kneff v. Sanford, 63 Wash. 503,

115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

[8] But where, upon the defense, it is shown conclusively and without any substantial dispute that the automobile was not being used at the time of the injury in the defendant's employment or upon his business, and was being used by some other person on business of his own and without any reference to the business of the owner, it becomes the duty of the court to direct the judgment under section 340, Rem. & Bal. Code. We think the trial court, therefore, properly directed a judgment in favor of the defendant.

The judgment is affirmed.

CROW, C. J., and PARKER, GOSE, and CHADWICK, J.J., concur.

GARSTAD v. PIONEER SAND & GRAVEL CO.

(Supreme Court of Washington. May 7, 1913.)

MASTER AND SERVANT (§ 233*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a master supplied a safe way through its sand bunkers, a servant who in his haste chose a more dangerous course cannot recover for injuries resulting therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Hans E. Garstad against the Pioneer Sand & Gravel Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Hayden & Langhorne, of Tacoma, for appellant. Arctander, Halls & Jacobsen, of Seattle, for respondent.

MAIN, J. The object of this action is to recover damages for personal injuries alleged to be due to the negligence of the defendant. The accident out of which the litigation grew happened on June 18, 1910. The action was begun during the latter part of January, 1912. At the time of the accident the defendant was operating a sand and gravel plant near Stellacom, Wash., and the plaintiff was at that time employed about the plant. The sand and gravel were taken from the pit, and by means of a flume conveyed to the bunkers. At a point in the flume before reaching the bunkers, there were placed rods or bars for the purpose of arresting the larger rock or stone. This was called the rock chute. Thirty feet below this there was a screen, the meshes of which were sufficiently large to permit the sand and water to pass through, and yet prevent the passage of gravel. From this point the

gravel passed down what was known as the gravel chute, and the sand and water continued down the flume to the sand bunkers, a distance of about 20 feet. Around the top wall of the sand bunkers was a heavy timber or plank of sufficient width to furnish a reasonably safe footway. In one side of the bunkers were openings capable of being closed as occasion might require. When the bunker was filled with sand to a point above these openings, a slide would be raised which would open the holes through which would then pass the sand into what was known as the sand boxes. The plaintiff had been employed at the plant for a period of about two weeks before the accident, and two days before had been put in charge of the bunkers. His duties there were to attend the rock chute, the gravel chute, and the sand boxes. On the day of the accident the plaintiff left the gravel chute, passed down a stairway to a landing or platform, then stepping upon the timber or plank at the top of the sand bunker proceeded a distance of about six or eight feet to where there was an upright post inclining outward from the top wall of the bunker and supporting the flume which passed over the bunker at an elevation of about four feet. The plaintiff was on his way to adjust the sand boxes which were beyond the side of the bunker over which the flume passed. When he reached the post already referred to which supports the flume, he attempted to step across the corner of the bunker to the end of a plank which projected over the adjacent wall and under the flume about 10 or 12 inches. Holding to the post with one hand, one foot upon the heavy timber at the base of the post, he extended his other foot across to the end of the plank, and, releasing his hold upon the post, attempted to swing himself or jump across, and in his effort to do so struck his head upon the bunker which was 4 feet above, and fell into the bunker, sustaining the injury for which he claims damages. Instead of stepping across as he attempted, there was a reasonably safe way for him to proceed by passing the upright post under the flume to the corner, and then along the other side and under the flume to the plank which he was attempting to reach. This way was open and apparent, and was known to the plaintiff. The reason he gives for attempting to step across rather than proceed around the corner was his haste. The distance which he attempted to step was approximately three or four feet; the distance around the corner would have been but little greater. The only inconvenience in passing around the corner was the fact that the flume was four feet above; but, in reaching the end of the plank upon which he attempted to step, he must also pass under the flume. The case was tried to the court and a jury,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and a verdict in the sum of \$3,500 returned. At the conclusion of the evidence, the defendant challenged the legal sufficiency of the evidence, and moved the court for a directed verdict. This motion was denied. After the verdict was returned, the defendant renewed its challenge to the legal sufficiency of the evidence to sustain the verdict, and moved the court for a judgment notwithstanding the verdict. This motion was overruled. The defendant appeals.

In the appellant's brief a number of errors are assigned, but upon the oral argument counsel waived all assignments of error except the one challenging the sufficiency of the evidence to sustain the verdict. As above stated, the respondent chose a dangerous way by which to reach the sand boxes, and in consequence thereof was injured, when a reasonably safe way was open to him which was but little less convenient. It has by repeated decisions of this court become a settled principle that where the master provides a reasonably safe method by which the employé may perform a given service, and the servant voluntarily elects to perform that service by a dangerous method, and is injured in consequence thereof, the servant is guilty of contributory negligence which bars his right to recover damages. In *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545, it is said: "The proposition is thoroughly established by the courts that, where an employé voluntarily elects to perform a given service in a perilous manner when a perfectly safe method is open and known to him, he is guilty of such contributory negligence as will defeat a recovery as against his employer." The fact that the respondent was in haste at the time of the accident and for that reason chose the dangerous way does not relieve him from the operation of the principle stated. In *Seghetti v. Eatonville Lumber Co.*, 65 Wash. 378, 118 Pac. 310, it is said: "The master had provided the servant with a safe and simple way to do the thing he attempted to do. He could stop the cogs and rolls in from five to fifteen seconds, without interfering with the other movements of the machine or the rest of the machinery in the mill. This was well known to the appellant. He had often used the lever to stop the cogs and rolls. He did not do so this time because he was in a hurry, and thought he could do it quicker in the way he attempted. His voluntary choice of an unsafe and dangerous way, instead of the safe and simple way provided for his protection, stamps his act with negligence, and exonerates the master from any liability for his consequent injury."

The conclusion we have reached upon this question is decisive of the action, and renders further discussion unnecessary.

The judgment will be reversed and the cause remanded, with direction to the su-

perior court to enter judgment in favor of appellant notwithstanding the verdict.

CROW, C. J., and ELLIS and MORRIS, JJ., concur.

FULLERTON, J. (dissenting). The evidence in the record, as I read it, justifies the conclusion put upon it by the jury and the trial judge, rather than the conclusion put upon it by the majority. For this reason, I dissent from the judgment ordered.

SIMONS v. HALLIDIE CO. et al.

(Supreme Court of Washington. May 10, 1913.)

1. COMPROMISE AND SETTLEMENT (§ 23*)—RECEIPT—VACATION—BURDEN OF PROOF.

While a receipt evidencing satisfaction of all demands between the parties to a settlement is not conclusive and may be contradicted by parol for fraud, overreaching, mistake, misunderstanding, or other like facts, the burden of proof thereof is on the person seeking to overthrow the receipt.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 91-94; Dec. Dig. § 23.*]

2. COMPROMISE AND SETTLEMENT (§ 16*)—RECEIPT—IMPEACHMENT.

Where, pursuant to a compromise and settlement of plaintiff's interest in defendant corporation, defendant repurchased plaintiff's stock and executed certain checks to him therefor, he executing receipts "in full of all demands of every kind and nature," after being warned not to take the money unless he accepted it as a final and complete settlement, such receipts constituted a complete defense to a subsequent action to recover profits on his stock, in the absence of proof of fraud, mistake, misunderstanding of facts, etc.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 54-65; Dec. Dig. § 16.*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by E. J. Simons against the Hallidie Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Graves, Kizer & Graves, of Spokane, for appellants. Geo. E. Canfield, of Spokane, for respondent.

MORRIS, J. Action by respondent, a former stockholder of the appellant corporation, to recover profits claimed to have been earned while he was such stockholder.

The facts are these: In March, 1910, appellant and respondent entered into an agreement whereby respondent entered the service of appellant as a machinery salesman at a salary of \$150 a month, purchasing at the same time 20 shares of its stock at its par value of \$2,000. This agreement contained the following provision relating to the stock, in the event of respondent ceasing to become a stockholder: "The Hallidie Company has the right at any time to discharge E. J. Si-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 131 P.—74

mons should his services become unsatisfactory, but, in the event of their discharging E. J. Simons, they hereby agree by B. B. Truett, president, to purchase E. J. Simons' stock for the same price that he paid for same, and in the event of his withdrawing from the firm his proportion of the profits to the date of his withdrawal are to be paid him in cash." Respondent remained with the company about a year, when he became dissatisfied because of their refusal to promote his brother from the position of shipping clerk to that of salesman and spoke to Mr. Truett, the president of the company, about withdrawing from its employ. It then being the busy season for the machinery business, the company was very desirous of retaining respondent's services, and after some negotiations between Truett and respondent, Truett, as an inducement to respondent to continue in the service of the company, offered to increase his salary to \$250 a month, repurchase the stock at the price paid for it, and give respondent an additional \$750, making an aggregate of \$2,750 to be payable in three notes due in 6, 12, and 18 months. Respondent still remained dissatisfied; Truett's offer seemingly did not appeal to him, as he refused to accept it, and on March 7, 1911, respondent was discharged. An attempt was then made to arrive at an adjustment of the amount to be paid respondent, culminating in the repurchase of the stock for the sum of \$2,000, for which sum respondent received the check of appellant with two other small checks representing the balance due on salary and expense account, and respondent signed the following receipt: "Received of Hallidie Company and B. B. Truett, the sum of two thousand thirty dollars in full of all demands of every kind and nature. E. J. Simons." On the \$30 check was also written these words: "Salary in full to date, \$30, balance in full of all demands to date." Respondent testified that these words just quoted were not on the check when he received it, but from the nature of the testimony offered in support of that contention we are inclined to the belief that they were. The next communication between the parties was on March 24th, when through an attorney respondent wrote appellant demanding his share of accrued profits which he put at \$1,200. The company refused to recognize any claim of respondent under its settlement with him, claiming that the entire matter had been adjusted, and respondent brought this action in which he recovered, and the company has appealed.

The cause was tried without a jury, and the lower court first decided in favor of appellant, holding, as we understand, that the evidence of respondent was not sufficient to overcome the receipt. A motion for a new trial was made and upon further consideration the court changed its mind and entered judgment for respondent. In awarding the re-

spondent a judgment the lower court took into consideration the business done by appellant while respondent was in its employ, determined a profit of \$11,654.26 had been earned during that time, and then concluded that respondent was entitled to one-tenth of this profit because of his ownership of one-tenth of the stock. After reading the record, we believe the lower court was correct in its first conclusion. We can find nothing to indicate to us sufficient reason why the receipt should not be given effect. The whole matter it is admitted was discussed between Truett and respondent at the time the checks were given and the receipts signed. Truett says that they were then endeavoring to arrive at a complete settlement of the amount due respondent as salary, upon expense account and for the repurchase of the stock, and that: "I made him a new offer, a cash offer to wipe everything off the slate so that there would be no further argument, no further trouble, so that we could get a complete settlement, and I particularly called his attention to the fact that that settlement was to be in full of all demands of every kind in full, for his dividends if he had any such claims; in full for everything, and I told him particularly that he must not accept the settlement—that he would have to give us a receipt in full, and that he must not take it unless it was final, a complete settlement." Respondent does not deny this further than to say that Truett told him when he inquired as to his share of the profits that it would depend upon his future action whether he received any or not.

[1] We are inclined to accept appellant's version of the purpose and meaning of the receipt. The burden of proof was upon respondent to overthrow this receipt, and show some good reason why he should not be held to its language. He has not done so. Receipts are not conclusive. They may be contradicted by parol. Fraud, overreaching, mistake, misunderstanding, or other like facts may be shown to destroy the effect of the language used in a receipt.

[2] We do not find any of these facts in this case. The relation between these parties was at that time somewhat strained. They had met together for the purpose of arriving at a complete settlement of their affairs. It was not intended to leave anything for future negotiations, and when respondent asserts that the receipt was intended to represent only the money then paid, and to leave the question of whether he was to receive an additional sum representing the earning power of his stock during the time he held it, his position does not appeal to us as natural or probable. There is much in this case that makes the following excerpt from the opinion in *Sherman v. Sweeney*, 29 Wash. 321, 69 Pac. 1117, applicable: "If respondent understood the matter otherwise than as stated in the paper, she should have so an-

nounced before signing it. If she expected to make any demand inconsistent with the terms there stated, it was her duty to make it known before signing and delivering it, and accepting the money which was paid relying thereon." Without saying more, we believe respondent has not made out a case in his attempt to overthrow the receipt and that the lower court should have so held.

The judgment is reversed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

PARKER v. SLOAN.

(Supreme Court of Utah. July 22, 1912. Rehearing Denied April 30, 1913.)

TROVER AND CONVERSION (§ 66*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the conversion of an automobile, evidence of conversion held insufficient to go to the jury.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 238-294; Dec. Dig. § 66.*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Arthur Parker against R. W. Sloan. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Gustin, Gillette & Brayton, of Salt Lake City, for appellant. George M. Sullivan and A. T. Sanford, both of Salt Lake City, for respondent.

STRAUP, J. In the complaint it is alleged that the plaintiff, in February, 1911, indorsed and delivered to the defendant a check for \$239 on a bank in Idaho, which the defendant was to collect and pay to the plaintiff; that the defendant collected the money, but paid plaintiff only the sum of \$10. Judgment on this count was asked against the defendant for \$229 and interest. For a second cause of action it is alleged that the plaintiff, in July, 1910, borrowed \$95 from the defendant, and that to secure the payment thereof the plaintiff gave the defendant a bill of sale of an automobile of the value of \$2,000, but of which the plaintiff retained possession until in August, 1910, when he delivered it to the defendant "to safely keep and preserve the same as security for said indebtedness." It is further alleged that two days thereafter the defendant wrongfully and in breach of his agreement and without authority sold and disposed of the automobile, to plaintiff's damage in the sum of \$2,000. On this cause of action judgment was asked for that amount.

The defendant, by way of answer and a counterclaim, admitted and averred that in February, 1911, he received \$239 on the check referred to in the complaint for the use of the plaintiff. He further averred that be-

tween July, 1908, and February, 1911, he at divers times, and at plaintiff's request, advanced and paid to him \$357, which the plaintiff had not repaid, except the amount received by the defendant on the check, and that \$129 remained due and unpaid. He also alleged that in July, 1910, at plaintiff's request, he loaned him \$95, "and in order to secure the repayment of said sum" the plaintiff gave the defendant a bill of sale of the automobile, but which was of the value of only \$100, and that the \$95 was due and unpaid. He denied the sale and conversion of the automobile. He prayed judgment against the plaintiff for \$129, and for a sale of the automobile to satisfy the loan of \$95.

The case was tried to the court and a jury. A verdict was rendered for the plaintiff on the first cause of action for \$229 and on the second for \$379. The defendant appeals.

We think there was no evidence to justify a submission of the case to the jury on the second cause of action. The evidence bearing thereon is: The plaintiff had shipped to him an automobile at Salt Lake City. He borrowed \$95 from the defendant to pay the freight, and gave him a bill of sale of the automobile. He retained possession of it and used it, expecting to repay the defendant from rentals and hire. Business not being good at Salt Lake, he went to Ogden with it. There he used it for the same purpose. He accomplished but little there. Finally he concluded to go to Oregon, and left the automobile at Ogden with a Mr. Cole, who had operated it with him. The evidence is in conflict as to the purpose for which the plaintiff left the automobile with Cole. The plaintiff testified that he left it with him only for safe-keeping until the plaintiff returned. There was considerable evidence that he had sold it to Cole. The defendant, learning of the plaintiff's departure and of Cole's possession of the automobile, exhibited to Cole the bill of sale plaintiff had given the defendant, and demanded possession of it. Cole claimed that he had purchased it from plaintiff. He, however, on the presentation of the bill of sale, surrendered the automobile to the defendant. As testified to by Cole, the defendant then sold the automobile to Cole for \$450; Cole paying the defendant \$25 as part payment. Cole took the car back to Ogden and used it about six weeks, and then returned it to the defendant at Salt Lake, stating that he could not pay for it, and demanded back the \$25 which had been paid by him. The defendant returned him the money and took the automobile. Shortly thereafter the defendant gave his chauffeur a bill of sale of it, for the reason that different persons were using it, and he did not desire to become responsible for accidents which might result from the operation of the car. The chauffeur paid him nothing for it, and neither intended a trans-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fer of title or possession. The defendant had possession of the automobile after Cole delivered it to him, and had it stored at the time of the trial, and offered to surrender and deliver it to the plaintiff upon payment of whatever amount might be found due him and owing from the plaintiff.

Upon this evidence the plaintiff claims two conversions of the automobile by the defendant; one growing out of the transactions had with Cole, the other the defendant's giving his chauffeur a bill of sale. We do not think either amounted to an appropriation of the car to the defendant's use with intent to deprive the plaintiff of it, or that either constituted a conversion. The defendant had possession of it, and was able and willing to surrender it to the plaintiff upon payment to him of whatever amount was found due and owing from the plaintiff. The plaintiff made no demand or effort to get the car, and made no offer to adjust or settle the account between him and the defendant. He seemingly preferred not to have it, and to charge the defendant with the value of it.

The judgment is reversed and the case remanded for a new trial. Costs to appellant.

FRICK, C. J., and McCARTY, J., concur.

MCKENZIE v. CANNING.

(Supreme Court of Utah. Jan. 13, 1913. Rehearing Denied April 30, 1913.)

1. MALICIOUS PROSECUTION (§ 24*)—ACTION—PRESUMPTION AND BURDEN OF PROOF.

Plaintiff, in an action for malicious prosecution, has the burden of showing want of probable cause, but he makes out a prima facie case by showing his discharge in a criminal prosecution upon a hearing before a magistrate.¹

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49-55; Dec. Dig. § 24.*]

2. MALICIOUS PROSECUTION (§ 71*)—PROBABLE CAUSE—ADVICE OF COUNSEL—QUESTION FOR JURY.

Where defendant substantially stated to counsel all the material facts known to him, and upon their advice instituted a criminal prosecution in good faith and upon a well-grounded belief of plaintiff's guilt, it may be a defense, and the question as to such good faith is for the jury.²

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Ned McKenzie against George Canning. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Gustin, Gillette & Brayton, of Salt Lake City, for appellant. Smith & McBroom, of Salt Lake City, for respondent.

STRAUP, J. This case was brought to recover damages for an alleged malicious prosecution. The plaintiff had a verdict and judgment in his favor. The defendant appeals.

[1] The burden, of course, was on the plaintiff to show want of probable cause. He, in that respect, made out a prima facie case by showing his discharge in the criminal prosecution upon a hearing and an investigation of the charge before the magistrate. *Smith v. Clark*, 37 Utah, 116, 106 Pac. 653, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912B, 1366. To meet it the defendant showed that in instituting the criminal proceedings complained of he acted upon the advice of counsel (his own counsel and the county attorney), to whom he had stated all material facts known to him. With respect to this issue the court charged: "(13) If you believe from the evidence that the defendant, Canning, before the institution of any criminal proceedings against the plaintiff, McKenzie, sought the advice of counsel and put before him a full and fair disclosure of all the facts he had with reasonable diligence been able to gather concerning the guilt of the accused, and then and there received advice justifying the prosecution, and relied thereon and in good faith made the criminal complaint believing the accused guilty, then and in such event the defendant, Canning, is entitled to immunity from damages, notwithstanding the subsequent acquittal of the accused. If you find from the evidence that such was the course of the defendant Canning's conduct, then and in such event the allegations that there was want of probable cause for commencing the prosecution is completely rebutted and, of itself shows probable cause. If you are therefore so satisfied from the evidence, you are instructed that your verdict should be for the defendant." Both parties concede this, in substance, to be a correct statement of the law.

[2] They further concede that the question of probable cause is a mixed question of law and fact, and that the general rule is as stated in 3 Elliott on Evidence, § 2473, as follows: "The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause is a question of law. This is the doctrine generally adopted. It is therefore generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what fact it proves, with in-

¹ *Smith v. Clark*, 106 P. 653, 37 Utah, 116, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912B, 1366.

² *Wright v. Ascheim*, 5 Utah, 480, 17 Pac. 125.

structions that the facts found amount to proof of probable cause, or that they do not." This, of course, when there is a conflict in the evidence with respect to the facts bearing on the question, or where just conclusions of fact on the evidence are fairly and reasonably subject to different deductions or inferences of fact.

What divides the parties is this: The defendant contends that the evidence with respect to such facts is without conflict, and hence the court, on his request, ought to have directed a verdict in his favor on that ground; the plaintiff, that there is some conflict as to whether the defendant stated to counsel all the material facts known to him, and as to his belief of the plaintiff's guilt of the charge. The defendant, his counsel in the criminal prosecution, and the county attorney were witnesses on behalf of the defendant. What facts were known to the defendant and what were communicated to counsel by him, the advice given, and the defendant's belief of the plaintiff's guilt were testified to by these witnesses. We think the evidence, without conflict, shows that the defendant substantially stated to counsel all the material facts known to him; that upon them, they advised him; that he, on such advice, instituted the criminal prosecution; and that in doing so he acted in good faith and upon a well-grounded belief of the plaintiff's guilt. It, however, in effect, is urged that before advice of counsel may be a defense it must appear, not only that the defendant fairly stated all the facts to counsel, and upon them was advised, but also that the defendant in good faith believed the plaintiff guilty of the charge, and that as to such fact the plaintiff was entitled to the judgment of the jury. That in some cases, dependent upon the nature of the evidence, may be true. But before the jury is justified in rejecting or disregarding evidence of the defendant's belief of the plaintiff's guilt, there must be some evidence, either from the nature of the evidence, calculated not to justify such a belief, or tending to show the defendant's disbelief, or other facts or circumstances to justify a fair inference of the defendant's disbelief. In other words, the jury may not arbitrarily reject the defendant's evidence showing a well-grounded belief by him of the plaintiff's guilt. The respondent's contention in this regard is well answered in the case of *Wright v. Ascheim*, 5 Utah, 480, 17 Pac. 125. Said Mr. Justice Henderson, in speaking for the court: "If the defendant in this kind of an action, at the time of commencing the suit complained of, had knowledge of facts tending to show probable cause, but had knowledge of other facts which would tend to explain or modify them, or tending directly to show want of probable cause, and it becomes a question as to which of such facts

were believed and acted upon, this would be a question for the jury. This is mentioned in *Stewart v. Sonneborn*, 98 U. S. 187 [25 L. Ed. 116], as an apparent exception to the general rule that what facts will constitute probable cause is a question of law for the court; but this does not apply to a case where all the undisputed facts known to the defendant, taken together, would justify in a reasonable person the honest belief that the fact charged was probably true. In such case the defense would be absolute as matter of law, and the jury would have no right, under the pretense of saying the defendant did not believe, to find against him. If it were otherwise, the rule that what facts constitute probable cause in an action for malicious prosecution is a question of law for the court would have no meaning or force whatever. The jury might in every case, no matter what the facts might be, under the pretense of unbelief on the part of defendant, find against him."

Upon the evidence we think the defendant was entitled to a directed verdict in his favor; for the assumed facts as to the question of probable cause, and upon which the court directed the jury to return a verdict for the defendant, were without any substantial conflict.

The judgment of the court below is therefore reversed and the cause remanded, with directions to vacate the judgment and to grant a new trial. Costs to the appellant.

McCARTY, C. J., and FRICK, J., concur.

UTAH FOUNDRY & MACHINE CO. v. UTAH GAS & COKE CO.

(Supreme Court of Utah. December 20, 1912.
Rehearing Denied April 30, 1913.)

1. TROVER AND CONVERSION (§ 35*)—BURDEN OF PROOF.

Where defendant set up as a counterclaim its right to compensation for scrap iron which it claimed had been converted by plaintiff, defendant has the burden of proving the conversion and the amount of iron converted.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 215, 216; Dec. Dig. § 35.*]

2. TRIAL (§ 234*)—INSTRUCTIONS—BURDEN OF PROOF.

Where a defendant set up as a counterclaim plaintiff's conversion of scrap iron, which was denied by plaintiff, who introduced evidence in support of the denial, an instruction that if the jury found part of the moneys paid by plaintiff to defendant's agent was for scrap iron wrongfully sold, but were unable to determine the exact amount, the amount so paid being peculiarly within the knowledge of plaintiff, the jury might, in the absence of any showing, assume that all moneys paid to defendant's agent were for that purpose is erroneous and prejudicial because casting on plaintiff the burden of proof which was on defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. EVIDENCE (§ 54*)—PRESUMPTIONS—INFERENCES UPON INFERENCES.

Inferences cannot be bottomed upon inferences, and an instruction upon defendant's counterclaim for conversion of scrap iron, which allowed the basing of inferences upon inferences by assuming wrongdoing by plaintiff, is erroneous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. § 54.*]

4. EVIDENCE (§ 244*)—ADMISSIONS—ADMISSIONS BY AGENT.

To bind his principal, an admission by an agent must be made within the scope of his employment and during the transaction of business by him; therefore, a statement or declaration by the secretary and bookkeeper of a corporation, long after the transaction, as to the purposes for which checks were given is not binding on the corporation as an admission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

5. TROVER AND CONVERSION (§ 40*)—ACTIONS—EVIDENCE.

Evidence held insufficient to sustain a finding in favor of defendant who by counterclaim set up plaintiff's conversion of scrap iron.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

6. APPEAL AND ERROR (§ 1175*)—REVERSAL—REMAND.

Where defendant admitted plaintiff's demand, and set up a counterclaim for conversion, a judgment in favor of defendant, which is not sustained by sufficient evidence, will be reversed without remanding for new trial; it appearing that the judgment was rendered in obedience to an erroneous instruction on the burden of proof, and that in a former trial, where the evidence was the same and no such instructions were given, verdict was for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by the Utah Foundry & Machine Company, a corporation, against the Utah Gas & Coke Company, a corporation, which counterclaimed. From a judgment for defendant for the difference between the amount of its counterclaim and plaintiff's demand, plaintiff appeals. Reversed and remanded, with directions.

George M. Sullivan, of Salt Lake City, for appellant. Stephens, Smith & Porter, of Salt Lake City, for respondent.

STRAUP, J. The plaintiff brought this action to recover a balance of \$285, alleged to be due for goods and supplies, consisting of iron castings, sold and delivered to the defendant. The defendant, in its answer, admitted the alleged claims and the amount due. By way of counterclaim it alleged in the first count that, in purchasing goods and supplies by the defendant from the plaintiff, one Wright, the agent of the defendant and acting for it in the making of such purchases, had entered into a conspiracy with the plaintiff whereby the goods were purchased at an excessive price, and the excess

paid by plaintiff to Wright, and that in furtherance of such conspiracy the plaintiff in such transactions overcharged the defendant in the sum of \$200. In the second count the defendant alleged that between the 1st day of August, 1906, and the 1st day of August, 1907, it was the owner and lawfully possessed of certain "cast-iron piping"—scrap iron—of the value of \$300, and that "on divers dates between said dates, the exact date this defendant is unable to give, the plaintiff, at Salt Lake City, Utah, unlawfully took and carried away said goods, to wit, said iron piping, and converted and disposed of the same for its own use to the damage of this defendant in the sum of \$300." The counterclaim was denied. The case was first tried in the city court. From a judgment in favor of the plaintiff on its complaint for the full amount sued for, the defendant appealed to the district court. There the case was tried three times before the court and a jury. In the district court the defendant abandoned the first count of its counterclaim. So each time the case was tried it was tried solely on the issues presented by the counterclaim in respect of the alleged thefts and conversion of the defendant's scrap iron by the plaintiff. The first trial resulted in a verdict in favor of the plaintiff for the full amount sued for. The second was a mistrial resulting in the discharge of the jury without a submission of the cause to them after the evidence had all been adduced, the parties had rested, and arguments to the jury partially made. The third resulted in a verdict in favor of the defendant on its counterclaim in the sum of \$8 in excess of plaintiff's claim. From that judgment the plaintiff has appealed. The evidence and proceedings had on the first and last trials in the district court and the substance of the second are preserved by a bill of exceptions and made a part of the record on appeal. Numerous errors are assigned. We find it necessary to consider but two of them: Those relating to the charge, and insufficiency of the evidence to support the finding on the counterclaim.

The defendant was engaged in manufacturing and furnishing gas in Salt Lake City; the plaintiff in a foundry business. In support of the thefts and conversions alleged in its counterclaim, the defendant called but one witness, its superintendent of distribution, who, in substance, testified: At the time in question the defendant was laying about 60 miles of gas mains along the streets of the city. It furnished its own material. The work was done under contract by Hanly & Ritchie. Piping and other material were delivered at railroad sidings for the contractors who hauled and scattered the piping and material along the streets where trenches had been dug and where they remained until put in the trenches. The plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff, at the defendant's request, furnished the defendant cast-iron goods and supplies used by it in the prosecution of the work. In the laying of the pipe and in the construction of the work, scraps and pieces of pipe and other material resulted, which were "left lying around on the job until they were disposed of." The witness further testified that among other duties it also was his duty to superintend the laying of the gas mains. He attended to the hauling of the material, the keeping of plenty of pipe ahead for the contractors, and the making of estimates on which the contractors were paid. The defendant also had in its employ one W. O. Wright, who was foreman of the inspectors. It was his duty to inspect the work, to supervise and control inspectors under him, and to see that the work was done in accordance with the contract. There was no one charged with the duty of looking after the scrap iron scattered along the streets after the mains had been laid; but the witness and Wright both looked after it and both jointly attended to it. The witness further testified that in the construction of the work throughout the city the defendant during the prosecution of the work, and after the mains had been laid, lost about 40 tons of scrap iron so left scattered along the streets. He largely arrived at this estimate by ascertaining from the books of the defendant the amount of gas pipe and other material purchased by it; by ascertaining from the books the amount of gas pipe and other material placed underground; and by subtracting the latter amount from the former. He also testified that on several occasions he directed employes of the defendant to gather some of the scrap iron and that he caused some of it to be delivered to plaintiff. But he did not testify how much he caused to be so gathered or delivered to it. He, from vouchers rendered by the plaintiff, testified that it at different times had received about 7 tons and 1,572 pounds of scrap iron, which, at the market price of one cent a pound, amounted to \$155.72; but that the defendant was given full credit and was paid therefor. He did not testify, nor did any other witness, that Wright had no authority to sell scrap iron of the defendant, but testified that Wright had no authority to sell scrap iron "on his own account."

Robert Croft, Jr., who owned about 4,900 shares of the capital stock of 10,000 shares of the plaintiff, was the president and general manager of the plaintiff corporation. His father, Robert Croft, Sr., 73 years of age and owning 30 shares, was its secretary, book-keeper, and collector. Fred Croft, a son of Robert Croft, Sr., and a stockholder of the company, had a personal controversy with the plaintiff over matters between him and it. He consulted an attorney about it, the same attorney who represented the defendant in this litigation. Fred took from the private papers of the plaintiff a returned check

which had been issued by the plaintiff to Wright for \$56, and indorsed by him, and the stub from which the check had been detached and delivered them to the attorney. It is not made to appear that they had anything to do with his controversy. The stub, when it was delivered to the defendant's attorney by Fred, had written on it the words "for iron and commission." This, with Fred's consent, was communicated to the general manager of the defendant and the check and stub shown him. His suspicions were aroused that Wright had some kind of dealings with the plaintiff in which money was paid him, and that he had failed to account to the defendant for it. Thereupon he directed the witness, the defendant's superintendent of distribution, and his stenographer, to visit the Crofts and interview them. They visited the plaintiff's place of business and there found Croft, Sr., alone. Among other things the witness said to him: "Information has reached us to the effect that Wright sold scrap iron to you." As testified to by the witness, Croft first denied it; then he said that Wright had sold him scrap iron, but he presumed that he was an employe of the gas company; that he paid him, and presumed that he had paid it to the gas company. The witness asked him how Wright delivered the iron to him. He answered that Wright called him up and asked him to send a team to certain places to collect scrap iron. The witness told Croft that "it was peculiar that he would take that kind of an order from Wright when previous orders, any time he had been ordered to collect scrap iron by the company, came directly from him [the witness] or else the iron was hauled to him [Croft] by our teams or hired teams." The witness asked Croft how he had paid Wright. He said by checks. He was asked if he had any other transactions with Wright and he said that he had not. The witness then asked permission to look over the papers, checks, stubs, and books of the plaintiff. He and his stenographer were given liberty to do so. About that time Robert Croft, Jr., appeared at the office. Both he and his father assisted the witness and his stenographer in gathering up and getting all the returned checks and stubs and all books and papers pertaining to plaintiff's business. The witness and his stenographer found four returned checks which had been issued to Wright by the plaintiff. He testified that he and his stenographer compared the checks with the stubs and that on at least one of them found written or noted "for commission," not for iron, and testified that he could not remember what notation or words were on the other stubs. The witness showed Croft two checks and asked permission to take them. The permission was granted. They took the two and clandestinely two others. Later all the checks taken were returned to the plaintiff, including the check and stub which Fred had taken. At the trial the defendant called for

all the checks which the plaintiff had issued and given to Wright. The plaintiff produced five. It was unable to find or produce the check or stub which Fred had taken and which had been returned to the plaintiff. The five checks were put in evidence. Evidence was given of the notation on the missing stub and the contents and amount of the missing check. The other stubs were not called for and were not offered in evidence by the defendant. The six checks amounted in the aggregate to \$277.45, all payable to Wright and issued by the plaintiff and indorsed by Wright. While the witness testified that Croft, Sr., first denied receiving any iron from Wright, then admitted receiving some, and afterwards "told a different story," again denying it, still the witness did not testify that Croft stated any amount of iron so received by him from Wright.

This, in substance, is all the evidence adduced by the defendant in support of its counterclaim that the plaintiff at divers times "unlawfully took and carried away" iron belonging to the defendant "and converted and disposed of the same for its own use."

Two witnesses testified on behalf of the plaintiff, Robert Croft, Sr., and Robert Croft, Jr. They denied that they or the plaintiff had received any iron from Wright or the defendant, except the 7 tons and 1,572 pounds for which admittedly the defendant was given credit and was paid. They testified that when the defendant began its construction work it was purchasing foundry supplies from other foundries in the city. Thereafter Wright called on the Crofts and told them that he was in a position to give the plaintiff orders for supplies and that he could throw a good deal of work to it; but, if he did, he thought he should be entitled to a commission on the amount of goods sold by plaintiff to the defendant. After negotiating back and forth as to the rate, the plaintiff finally agreed to give him 10 per cent. Thereafter the plaintiff received orders from the defendant for foundry supplies and furnished to the defendant in all about \$3,300 worth, for which plaintiff was paid in full by the defendant, except the balance sued for of \$285. When the last check was issued to Wright, the amount so sold and delivered was about \$2,580. The Crofts further testified that the checks issued by plaintiff and delivered to Wright were all in payment, not of scrap iron, but of commissions. Croft, Sr., who wrote the checks, testified that the stub after it had been taken by Fred and when it was returned to the plaintiff had on it the words "for iron and commission"; but that the word "iron" was not in his (Croft, Sr.'s) handwriting, and was not written on the stub when the check was issued, and was not on the stub when it was taken from the plaintiff's possession, and in effect testified that some one wrote the word "iron" on the stub after Fred had taken it and be-

fore it was returned. The plaintiff offered in evidence the stubs of the other checks, all of which had on them the notation or memorandum "for commission," not for iron. The offer was supported by the testimony of Croft that he had personal knowledge of the fact so stated; that the notation or memorandum was made on each of the stubs by him at the time the checks were written and detached therefrom and delivered to Wright; and that they were made in the regular and due course of business. Upon defendant's objections, the offer was by the court refused.

[1, 2] Upon these issues and upon this evidence the court instructed the jury to find for the plaintiff on the issues presented by the complaint for the full amount sued for, together with interest. Upon the issue presented by the counterclaim, the court charged: (5) That "in order to establish defendant's counterclaim the burden is on the defendant to prove by a preponderance of the evidence the amount of cast-iron pipe, if any, belonging to the defendant that the plaintiff unlawfully took or carried away, if any, and, second, the reasonable market value thereof." The court also charged: (6) That if the jury, from a preponderance of the evidence, found that Wright "delivered to plaintiff cast-iron piping, the property of the defendant, and that plaintiff had not given defendant credit on its account for the same, then the court instructs you that you must find for the defendant on the counterclaim for the reasonable market value of such cast-iron piping." The court further charged: "(8) If you find from a preponderance of the evidence that at least part of the moneys paid to Wright by the plaintiff company was paid for scrap iron of the defendant company wrongfully sold to the plaintiff company by said Wright, but you are unable to determine definitely the exact amount so paid, then you are instructed that it is peculiarly within the knowledge of the plaintiff company as to just how much was paid for scrap iron, if any, and how much was paid as commission, if any, and within plaintiff's power to explain and show definitely the amount for each; and you have the right, in the absence of any such showing and explanation, to assume, if under all the circumstances of the case you find it is a fair assumption, that all of said moneys so paid to Wright were paid to him for scrap iron, and you may resolve reasonable doubts as to the amount, if any, of such scrap iron so sold to the plaintiff most strongly against the plaintiff company. It is the policy of the law not to permit a wrongdoer to profit by his own wrongdoing; but, before you can apply this principle, you must believe from a preponderance of the evidence that the plaintiff company was in fact a wrongdoer and actually received from Wright scrap iron wrongfully taken by Wright from the defendant company." The proposition as to

burden of proof, and as stated in paragraph 5 of the charge, was correctly stated. Let it also be assumed that the proposition as stated in paragraph 6, if within the allegations of the counterclaim, was also correctly stated. But the propositions and principles stated in paragraph 8 are, we think, erroneously stated. The court apparently had in mind the principle applicable to proceedings to reclaim or to recover the value of property wrongfully, fraudulently, or negligently commingled or confused with other property of like character, and where, because of such commingling or confusion by a wrongdoer, the property or its value sought to be reclaimed or recovered was not capable of identification. And on that theory does the respondent defend the charge. Hence cases are cited that, where one fraudulently or wrongfully or negligently commingled or confused property of another with that of his own of like character, the burden is on him to designate or point out his own property or to show the quantity or the amount thereof. And, in the absence of such a showing by him, the wrongdoer may be held to a forfeiture of his own property, or the jury justified in finding in favor of the innocent wronged party the highest proved price and the largest proved quantity of his property shown to have been commingled or confused by the wrongdoer. We do not see how this doctrine can properly be applied here.

No claim was made nor is there any evidence to support the claim that the plaintiff commingled or confused defendant's property with plaintiff's. The charge is that the plaintiff unlawfully took and carried away property belonging to the defendant and converted it. That allegation was denied. Upon that issue the defendant had the burden of proof. That burden did not shift. It was upon the defendant when the case opened, so continued throughout the trial, and so remained when the evidence closed and the case let to the jury. There can be no doubt of that. And so the court charged in paragraph 5. But in paragraph 8 the court wholly destroyed it. Nor can the charge be justified on the theory of particular facts resting peculiarly within the knowledge of the plaintiff. It cannot be said that the alleged facts that the plaintiff unlawfully took and carried away property belonging to the defendant rested peculiarly within the knowledge of the plaintiff. The defendant made the charge and it was required to prove it. As has been seen, the defendant adduced no evidence that the plaintiff wrongfully or unlawfully took and carried away any iron belonging to the defendant. Neither did it show that Wright wrongfully or unlawfully took a pound of its iron, or wrongfully or unlawfully sold or delivered any to the plaintiff. Neither did the defendant otherwise prove that the plaintiff wrongfully or unlawfully came into possession of a pound of the

defendant's iron, or that it received any iron from the defendant for which the defendant had not been given full credit. It did show that the plaintiff received 7 tons and 1,572 pounds of the defendant's iron, but at the same time also proved that it was fully paid for that. The defendant, however, sought to have the inference drawn that the plaintiff wrongfully received additional iron from Wright, based on the transactions of the plaintiff with Wright in respect of the checks, and of the admissions of Croft, Sr. The checks issued by plaintiff to Wright and indorsed by him, did not, on their face, disclose what they were given for. As tending to show that, the defendant was permitted to put in evidence the admissions of Croft, Sr., which were to the effect that he had received iron from Wright; that he paid him for it by checks; and that he had no other dealings or transactions with him. But the making of such a claim and the adducing of such evidence in no sense shifted the burden of proof. The burden of proof, even as to particular facts, lies on him who wishes the court to believe in their existence. If the defendant desired the court and the jury to believe that the checks were given for iron which the plaintiff had wrongfully received from Wright, it had the burden of proving such fact. It advanced it, asserted and claimed it, and, to justify the court and jury to believe such was the fact, the defendant was required to establish it. It could not merely assert it and then require the plaintiff to disprove it. The plaintiff denied that the checks were given for any such purpose. Its witnesses testified that the checks were given, not for iron, but for commissions; that the plaintiff received no iron whatever from Wright; and that no part of the checks were given for any such purpose. But as to that fact, and upon the evidence adduced by it, the defendant contended that all of the checks were given to Wright for iron; the plaintiff, on the evidence adduced by it, that all of the checks were given for commissions. Neither the plaintiff nor the defendant contended that a part of the checks were given for iron and a part for commissions.

[3] The charge (paragraph 8), with respect to this question, not only contains wrong principles as to the burden of proof, but is also erroneously bottomed on inferences upon inferences, on assumptions of wrongdoing by the plaintiff and a want of explanations by it in utter disregard of its evidence, and is but an argument on the theory and on behalf of the defendant. While the court, of course, did not intend it as such, nevertheless that is the effect of it. Notwithstanding the plaintiff by its evidence had denied that any part of the checks was given for iron, that it had wrongfully received any either from Wright or the defendant, or had converted any, and upon its theory fully explained the transactions had with Wright

and the defendant, which, as explained by it, showed it not to be a wrongdoer and not guilty of a conversion, nevertheless the court cast on the plaintiff the burden of explaining such transactions on the defendant's theory that the checks or some of them were given for iron, that the plaintiff was a wrongdoer, and that it was guilty of some kind of a conversion of an indefinite and uncertain amount of iron, and hence required the plaintiff to explain how much it had converted, when by its pleadings it had claimed, and by its evidence shown that it had converted none. As well say that a defendant, who by his pleadings had denied the commission of, and by his evidence shown he had not committed, a charged larceny, and who on his theory had given in evidence full explanations of all transactions connected therewith clearly showing his innocence, nevertheless was also, on the theory of his adversary, required to show the amount and value of property purloined by him.

[4, 5] Now, as to the insufficiency of the evidence: As already shown, there is a total want of evidence that the plaintiff, as alleged in the counterclaim, unlawfully or wrongfully took or carried away a pound of the defendant's iron. No such claim, on the evidence, is made. The claim made is that Wright wrongfully took iron from the defendant and without authority delivered and sold it to the plaintiff, and that the amount thereof is as evidenced by the aggregate amount of the checks. But there is also no evidence to show that Wright wrongfully took a pound of iron or wrongfully sold any to the plaintiff. There is the evidence of Croft, Sr.'s, admission that he received iron from Wright; that he paid him for it; and that he presumed Wright had paid it to the defendant. But there is no evidence that Wright, the defendant's foreman, who inspected the work and whose duty it was to see that it was done in accordance with the contract, and who, as shown, on at least several occasions with the knowledge and consent of the defendant, ordered goods and material, and who, jointly with the superintendent of distribution, looked after and took charge of the scrap iron strung along the streets, unlawfully or wrongfully took any iron or wrongfully sold or delivered any to the plaintiff. The defendant did not even show that Wright was unauthorized to sell scrap iron on behalf of the defendant. It did show that he had no authority to sell its scrap iron "on his own account." The evidence on this point is: The superintendent of distribution, after testifying that Wright received his orders from him, was asked and he answered: "Q. Did you ever authorize Wright to sell any scrap iron? A. On his own account? Q. Yes. A. No, sir." And in the defendant's counterclaim, verified by its general manager, the defendant alleged that Wright "was the acting

agent of the defendant in making purchases" of supplies for the defendant from the plaintiff, and in effect transacted the business for the defendant with the plaintiff in the making of such purchases.

The only legitimate inference upon the record is that Wright had authority to sell and dispose of the scrap iron. At least there is ample evidence from which such an inference may be deduced. If he had no such authority, the defendant well could have shown it. Instead of showing the want of such authority, it adduced evidence which rather tended to show that he had authority. Hence, in view of the undisputed evidence, the admission of Croft that he had received iron from Wright and paid him for it does not support the claim that the plaintiff wrongfully or without authority received the defendant's iron and converted it. In the next place, the admission of Croft, Sr., was not a binding admission of the plaintiff. He was the secretary of the plaintiff corporation, and its bookkeeper, and collector. The rule is well settled that, to bind the principal with an admission of his agent, the declaration or statement of the agent must have been made within the scope of his employment and during the transaction of business by him for the principal and in relation to such business; that is, the declaration or statement of the agent must be contemporaneous with or in the course of the business or transaction and in relation thereto conducted by the agent for the principal within the scope of the agency. The declarations or statements of the agent here were not made under any such circumstance. They were made long after the transactions with respect to which they were declared had wholly ended, long after the business had been conducted, and were not made in the course of nor in relation to any business which the agent was then transacting or conducting for the principal. Certainly an agent not in the course or transaction of any business for his principal, may not on the public mart or elsewhere make binding admissions of fact against his principal by a mere narration of facts relating to transactions wholly ended and long past. Property rights of the principal cannot be bartered away in any such manner as that. Croft, of course, could have been called as a witness and permitted to testify to any fact within his knowledge. But his admission, under the circumstances, was not evidence against his principal, the plaintiff. He was called as a witness, not by the defendant, but by the plaintiff, and gave testimony, not only in dispute of the admission, but of facts wholly at war with it. We think the evidence insufficient to sustain the defendant's counterclaim. The judgment, therefore, cannot be sustained, for two reasons: The erroneous charge, and insufficiency of the evidence to support the counterclaim.

[6] The further question is, What order

should now be made, whether to remand the case for a new trial or to direct a judgment in favor of the plaintiff? In actions at law where judgments are reversed for errors such as here, the cause generally is remanded for a new trial. But here the plaintiff's claim is confessed. On its counterclaim the defendant already has had three trials in the district court. The whole of the evidence with respect to two, and the substance of the other, is before us. On neither did the defendant produce or proffer sufficient competent evidence to support its claim. We think it evident the jury rendered a verdict for the defendant on the last trial solely because of the charge. That was the opinion too of the trial court. Said the court in refusing a new trial: "I think the verdict the first time was obtained very largely now, I think, because of the lack of a proper instruction. * * * I think that if the first jury had been given the same instructions that they were given in the last trial as to the burden of proof, the verdict would have been different in the first case" (trial). The court further observed that on the first trial the jury "were instructed that the burden was on the defendant to prove, not only that the plaintiff had obtained iron (that is, had converted iron belonging to the defendant), but the amount of it also, and that was the extent of the instruction," and, after stating that upon the evidence the jury could not definitely fix that amount, observed, "But when I instructed them in the last case that, if they were satisfied from the evidence that the plaintiff had converted some amount, then the amount it may have converted was peculiarly within the knowledge of the plaintiff and it should not profit by its wrongdoing, but must disclose the amount;" and, because the plaintiff had not done that and "concealed that amount," the jury reached the conclusion as evidenced by their verdict. This we think fairly reflects the intended meaning of the charge and the application the jury made of it. As already observed, we think the charge wrong and highly prejudicial. And since the defendant has had three trials in the district court on the issues presented by its counterclaim, and since in neither it adduced or proffered sufficient competent evidence to support its claim, and since it prevailed only because of the erroneous charge, we think this litigation ought to end. We cannot see any good to be subserved, or any benefit to the defendant, by remanding the case for another trial. Whatever may be the real merits of this controversy, we think we may assume that when the defendant by its proffered evidence on three trials was unable to support its claim, to do which it, and not the plaintiff, had the burden, it cannot do so on a fourth trial.

The order, therefore, is that the judgment of the court below be reversed and vacated,

and the case remanded to the district court, with directions to dismiss the counterclaim and to enter a judgment in favor of the plaintiff for the amount alleged in its complaint, together with interest thereon. The plaintiff is awarded all costs on the appeal and all taxable costs in the court below, except those incurred on the second trial.

FRICK, C. J., and McCARTY, J., concur.

BROCK v. FRANCIS.†

(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 119*)—COMMENCEMENT OF ACTION.

An injury occurred May 11, 1904. A petition in an action to recover damages was filed May 9, 1906, and a summons issued on that day was served May 11th; answer day being June 8th. June 7th the defendant filed a motion to set aside the service on the grounds that no summons had been issued and served as required by law, and that the pretended summons was void. July 7th this motion was confessed. Alias summons was issued October 1st, but service was not had until October 10th. Held, that the action was not begun until the date of the last-mentioned summons. *The Bank of Topeka v. Clark*, 69 Kan. 864, 77 Pac. 92, distinguished.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 529-535; Dec. Dig. § 119.*]

Appeal from District Court, Montgomery County.

Action by J. T. Brock against George Francis. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. E. Ziegler, of Coffeyville, J. H. Dana, of Denver, Colo., and Chas. Bucher, of Coffeyville, for appellant. L. P. Brooks, of Cherryvale, for appellee.

WEST, J. The only question presented is the statute of limitations, it having been agreed what the plaintiff should recover if entitled to recover at all. The record shows that on May 11, 1904, the plaintiff's wife was injured in a runaway alleged to have been caused by the frightening of her horse by the defendant's automobile. The petition to recover for loss of service of his wife, for medical expenses and for nursing, and for damages to the plaintiff's horse and buggy was filed May 9, 1906. Summons was issued on the same date and served on May 11th; the answer day being June 8th. On June 7th defendant filed a motion to set aside the service which motion on July 7th was confessed. On the same date, July 7th, a præcipe for an alias summons was filed, another on August 29th, and another on October 1st. October 1st an alias summons was issued, which was served October 10th. October 29th a motion to set aside the service

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

was filed, which motion was overruled May 4, 1907. The answer pleaded the statute of limitations generally with other defenses, and testimony was taken to show the presence of the defendant within the state.

It is insisted that after the confession of the motion to set aside service on July 7th subsequent issuance of service of summons amounted to the beginning of a new action, and not to the completion of service in one already begun. Also, that the defendant having pleaded the statute of limitations failed to prove the defendant's presence in the state subsequent to January 1, 1906. It is suggested that the cause of action for loss of services, medical attention, and nursing did not accrue until long after May 11, 1904. But the injury which thus resulted occurred then and certainly the damage to the horse and buggy was sustained then, and we see no escape from the proposition that whatever cause of action the plaintiff had arose at the date of the collision. He could have sued the next day for injury to his property already suffered and for his loss of services and expenses which he could show he was to suffer by reason of the injury to his wife, "and whenever one person may sue another a cause of action has accrued and the statute begins to run." 25 Cyc. 1066; Calumet Elec. St. Ry. Co. v. Mable, 66 Ill. App. 235; Birmingham v. C. & O. Ry. Co., 98 Va. 548, 37 S. E. 17; Jackson v. Emmons, 19 App. D. C. 250.

The testimony regarding the presence of the defendant within the state was by no means as clear as it might have been, but from the questions and answers taken together it may fairly be inferred that he was in the state substantially all the time up to August, 1906. The grounds of the first motion to set aside and quash the service were that no summons had been issued and served in the cause as required by law, and that the pretended summons issued was void. When this motion was confessed on July 7th, the case was in the condition of having a petition *præcipe* and summons on file under date of May 9th and nothing more. The service of the alias summons issued October 1st was attacked by motion to quash and set aside on the grounds that no summons had been issued and served in the case as required by law, and that the pretended summons and service were void. Although the only defect appearing on the face of the original summons was the failure to indorse the amount sued for, and although the same defect appeared on the alias issued October 1st, the motion to quash was overruled. The motion to quash the original summons having been made on the grounds already stated, and the motion having been confessed, it would seem that not until the 10th of October was any summons issued, at least any service made, which even the plaintiff claimed to have been good. No exception to the quashing of the original was taken, and, of

course, none could have been taken for the motion was confessed. The defendant cites section 19 of the Civil Code (Gen. St. 1909, § 5612), especially the clause: "An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication of service of the summons within sixty days." This section was said at an early day to have application only to the statute of limitations. *Dunlap v. McFarland*, 25 Kan. 488, page 491.

In *C. K. & W. R. Co. v. Com'rs of Chase County*, 42 Kan. 223, page 227, 21 Pac. 1071, page 1072, it was held that a case must be considered as commenced at the date of the process actually served upon the defendant. In the opinion it was said: "Although actual jurisdiction of a defendant cannot be obtained without service of summons or original process upon him, nor until the service is actually made, yet, when the service is actually made, the case must then be considered as having been commenced at the date of the process served upon the defendant." In *Insurance Co. v. Stoffels*, 48 Kan. 205, page 209, 29 Pac. 479, page 481, the policy sued on limited the time of action to six months next after the fire. The petition was filed and the summons issued in time, but the summons and service were on motion set aside by the court, and afterward, the six months having expired, a new summons was issued and served, and this was held to be too late. In the opinion it was said: "There having been no objection to the action of the court below in setting aside said summons and service, and no exception thereto, and no appeal having been taken from the order of the court therein, the judgment of the court thus expressed settled the law of that case, and the plaintiff in error cannot now question it. After the summons and service thereof were set aside by the court below, there was nothing left in that court except the petition and *præcipe*, and the case stood then as though there never had been anything done therein except to file a petition and *præcipe*; and it will not be pretended that the mere filing of a petition and *præcipe* constitutes the commencement of an action." In *Jones v. Warnick*, 49 Kan. 63, 30 Pac. 115, it was held that an affidavit for service by publication must be filed, and the first publication made within 60 days from the date of filing the petition, in order for action in attachment to be begun, following *Bannister v. Carroll*, 43 Kan. 64, page 68, 22 Pac. 1012, page 1013, which pointed out the distinctions between *lis pendens* and the time when an action is begun, and wherein it was said that section 19 has no application, "except to fix an arbitrary time at which the statutes of limitation cease to run against the claim or demand of the petition."

In *Modern Woodmen v. Bauersfeld*, 62 Kan. 340, 62 Pac. 1012, a similar ruling was made. In the opinion it was said that the clause that an action shall be deemed commenced at the date of the summons which is served on the defendant or a codefendant united in interest with him declares when the action shall be deemed commenced and relates to the matter of commencement, and that section 58, providing that a civil action may be commenced by filing a petition and causing a summons to be issued thereon, provides how it may be commenced and relates to the manner of commencement, and that "it shall be deemed commenced at the date of the summons which is served upon the defendant."

In *Green v. McCracken*, 64 Kan. 330, page 333, 67 Pac. 357, page 358, the action was brought on July 14, 1898, and summons issued for both defendants and returned July 21st non est as to one of them who was a nonresident. September 17th an affidavit for attachment was filed, and the order therefor was returned October 15th without showing service. November 15th an alias order was issued which was returned November 25th, "No property found." November 26th plaintiff filed an affidavit for garnishment summons which was issued to several garnishees, some of whom disclosed by their answers that they owed the nonresident defendant. December 22d plaintiff filed an affidavit for publication service against him on the ground of nonresidence. December 2d the nonresident defendant appeared and moved to dismiss the action as to him for want of jurisdiction because more than 60 days had elapsed since the filing of the petition, and no service of summons had been made upon him. The denial of the motion was held to be correct, no question of limitations being involved, but the court said: "To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in section 20 of the Code (now section 19). Neither would it amount to a lis pendens. * * *"

In *Insurance Co. v. Wright*, 6 Kan. App. 611, page 616, 49 Pac. 704, page 705, it was held that a petition being filed and the summons issued on January 29th, the service being set aside, and an alias issued on February 12th and properly served February 14th, the action should properly be deemed to have been commenced on January 29th. In the opinion it was said: "The petition in this case was filed January 29, 1891, being several days prior to the expiration of the six months' limitation. The service of the summons only was set aside on March 4, 1891. On February 12, 1891, an alias summons was issued and properly served. This is a full compliance with the requirements of the statute. The plaintiff certainly attempted to commence her action on January 29, 1891, and faithfully, properly,

and diligently endeavored to and did procure a service upon the company within 60 days." The court quoted with approval from *Thompson v. Wheeler & Wilson Mfg. Co.*, 29 Kan. 476, which held actual service of summons in error within 60 days from the filing of the petition sufficient to give jurisdiction—the one year for the commencement of proceedings in error having expired between the time of filing the petition and the service of the summons.

It would seem from these decisions to be the settled construction of the statute in question that when the petition and summons are filed and issued in time, and the service is set aside, it is necessary that proper service must be made within 60 days in order for the action to be deemed begun when the petition was filed. The plaintiff was required to bring his action within two years from the time his cause of action accrued. Civil Code, § 17, subd. 3 (Gen. St. 1903, § 5610). Section 19 fixes the time when such action shall be deemed to have been begun, and, if not begun in the time prescribed, the defendant may rightfully interpose the bar of the statute.

The plaintiff insists that this was a case of failure otherwise than upon the merits which operated to toll the statute for one year, and cites *Bank of Topeka v. Clark*, 69 Kan. 864, 77 Pac. 92. The bank sued Clark and others on a note due February 29, 1891. The summons served on Clark was not indorsed with the amount sued for. Clark failed to appear, and judgment was taken against him November 16, 1896. September 23, 1897, at plaintiff's request, the judgment as to Clark was set aside on the ground that the summons was void. September 13, 1899, plaintiff applied to have this order set aside, which was denied. January 7, 1903, plaintiff caused an alias summons to issue against Clark, which was regularly served. June 22, 1903, judgment was rendered against the plaintiff for costs. It was held that the order setting aside the judgment was final, and being unappealed from the plaintiff could not complain. But it was said: "Had the alias summons been issued within one year from September 23, 1897, the date the judgment was set aside, the statute of limitations could not have been successfully pleaded."

In *Parker v. Dobson*, 78 Kan. 62, page 69, 96 Pac. 472, page 475, an action was brought against the makers of a note, one of whom was duly served. A summons was also sent to another county and served on another maker who resided there. The plaintiff believed in good faith that he had a valid cause of action against the local defendant; but, becoming convinced that the action against him was barred, he dismissed the action as to that one. Then the resident of the other county moved to set aside the summons and service which was done and the entire proceedings dismissed. It was held that the

plaintiff, having failed otherwise than upon the merits, had one year within which to begin another action. The court said: "The result was not to obliterate historical facts, but to start a new train of events, not to render uncommenced an action which had been commenced, but to afford ground for terminating, otherwise than upon the merits, an action which had been commenced." That it had in fact and in law been begun in time was, of course, sufficient in that case while here the pivotal question is as to whether the action was thus begun. As to *Bank v. Clark*, it should be said that the order setting aside the judgment was made upon the request of the plaintiff. The judgment had been rendered November 16, 1896, several months after the statute had run, but it does not appear when the petition was filed or when the unindorsed summons was served on Clark. When the plaintiff applied in September, 1899, to have the order set aside, which was in effect asking to have the judgment reinstated, its request was denied. After that, alias summons was issued, but Clark at each successive step "by appropriate motions and pleadings, saved whatever right he had under the statute of limitations," and finally, in June, 1903, judgment for costs rewarded the plaintiff for its prolix attempts to collect from Clark. The court refused to reverse this judgment and in the per curiam opinion said that the order of September 23, 1897, setting aside the judgment, was final unless set aside by proceedings in error which were not taken. What was said as to the failure of the action otherwise than on its merits and as to the tolling of the statute was out of line with the decisions referred to, and was not necessary to a determination of the question involved.

Counsel cite Clause v. Columbia Savings & Loan Ass'n, 16 Wyo. 450, page 467, 95 Pac. 54, page 59, in which the Supreme Court of Wyoming construed a statute identical in terms, and held that to deprive the county of jurisdiction of a case the summons or the service must be so bad that the judgment could be collaterally impeached, and that the quashing of service because made by the sheriff in a case to which he was a party left the plaintiff entitled to proceed and get good service within one year. But this ruling was made upon the express assumption that the action was not barred, and it was said: "The question is not affected in our opinion by section 3462 [Rev. St. 1899], making an attempt to commence an action followed by service within 60 days equivalent to the commencement thereof; for here service was obtained upon the summons issued, and, if the action was not commenced by the issuance and service of that summons, section 3462 would not apply, and there would be no extension of the statutory period." The failure to indorse on the summons the

amount sued for did not render the summons void, and the confession of the motion which alleged the invalidity of both the summons and the service should not be taken as a solemn admission that the summons was void, but it certainly must be deemed equivalent to a stipulation that the service was bad, and hence there was a petition and a summons not served, and in order to deem the action begun it was essential that actual service be made within 60 days. This not having been done and the statute having run, the action was barred.

Complaint is made that the plea of the statute was so drawn as to amount only to a conclusion of law, but we think it gave the plaintiff sufficient information as to the defendant's claim, and it was met not by motion or demurrer, but by an objection to testimony, which was no better than the pleading complained of. *Gano v. Cunningham*, 88 Kan. 300, 128 Pac. 372; *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61 (Syl. 3); *Railway Co. v. Murphy*, 75 Kan. 707, 90 Pac. 290 (Syl. 3); *Capper v. Paper Co.*, 86 Kan. 355, 121 Pac. 519 (Syl. 5). We are clear that the cause of action was barred when the service was had on October 10th, unless the defendant's absence from the state prevented the statute from running, and from the arguments and briefs as well as the record we think there is no serious question as to that. The plaintiff says in his brief that the defendant did not prove when the statute began to run, "unless it be said by the court as a matter of law the time of the injury is the time when the statute begins to run."

There being no doubt that this is the time, the judgment is reversed, and the cause remanded, with directions to render judgment for the defendant. All the Justices concurring.

HUBBARD v. SPRING RIVER POWER CO.†
(Supreme Court of Kansas. April 12, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 271*)—REMEDY OF OWNER—RECOVERY OF DAMAGES.

Where lands are subject to overflow by reason of the erection and maintenance of a dam permanent in character, the owner who has not been compensated for the appropriation of his lands may, if he see fit, maintain an action to recover all damages occasioned to the lands present and prospective, and such cause of action accrues at the time of the appropriation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.*]

2. JUDGMENT (§ 598*)—RES JUDICATA.

The owner of lands adjacent to a dam erected as a permanent structure sued to recover damages to the lands by reason of their being subject to overflow. The answer set up the record and proceedings in a former action between the same parties, wherein the plaintiff recovered damages to the land caused by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 16, 1913.

erection and maintenance of the dam. *Held*, that the facts pleaded constitute a good defense of *res judicata*, and that a demurrer to the answer was rightly overruled.

[Ed. Note.—For other cases, see Judgment. Cent. Dig. § 1113; Dec. Dig. § 598.*]

Appeal from District Court, Cherokee County.

Action by H. R. Hubbard against the Spring River Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Morgan & Burr, of Galena, for appellant. Sapp & Wilson, of Galena, for appellee.

PORTER, J. This is an appeal from an order overruling a demurrer to an answer. The purpose of the action is to recover damages alleged to have been sustained by appellant's lands being flooded by reason of the erection of a dam in Spring river by the appellee.

The only question involved in the appeal is: Was the judgment rendered in appellant's favor in a former action a bar to the present one? In overruling the demurrer the court held that the answer set up a good defense of *res judicata*. The answer set out copies of the pleadings, instructions, verdict, and special findings, and all the proceedings in the former action except the evidence, and in addition alleged that the matters involved herein were fully determined in the former action. From the answer it appears that the parties to the former action were the same; that in the first, second, and third causes of action the petition set up a claim for damages to the crops of 1906, 1907, and 1908, respectively, by the erection of the dam in question, and by keeping the gates of the dam closed and thereby flooding the lands. The fourth cause of action was stated as follows: "That by reason of the frequent flooding of said land caused by the erection of said dam and the insufficiency of the flood gates therein, and the failure to raise the same, and by reason of the building of the obstruction near the section line between section 19 and section 20 of Garden township, Cherokee county, Kan., the said land has been damaged in the sum of not less than \$100 per acre, and that the damage by reason thereof to this plaintiff has been the sum of \$8,000."

The petition in the present case contains three counts, the first and second being for damages caused to the crops of the years 1909 and 1910, respectively. The third reads: "Plaintiff further states that the said defendant has been during all the years hereinafter complained of maintaining, still maintains and threatens in the future to maintain, the obstruction or dam across Spring river, and refuses and will refuse to open the flood gates therein sufficiently to let the water escape there through, and main-

tains and threatens in the future to maintain, the concrete and steel structure on or near the section line between section 19 and section 20. That such dam and obstructions are a constant menace to the land of this plaintiff, in that such a head of water is thereby maintained that in times of ordinary high water the land of plaintiff is liable to and does overflow and become flooded, and that by reason thereof plaintiff is unable to lease or let his lands to tenants for farming purposes, and that, by reason thereof, the production of crops on said land will be in the future materially diminished, all to the plaintiff's damage in the sum of eight thousand dollars (\$8,000)." The answer in both actions admitted the erection of the dam, that it was of reinforced concrete and permanent in character, and that appellee had not acquired by condemnation the land necessary for use as a dam or the right to flood adjacent lands. The answer in the present case shows that in the first action the court submitted to the jury the issue raised by the fourth count of the petition, and gave the following instruction: "You are instructed that the measure of damages to the real estate or that applicable to the fourth count in the petition is the difference between the value of the land damaged immediately before the same was damaged and its value immediately after said damage and injury if any." It further shows that the jury returned a general verdict in favor of the plaintiff (appellant) for \$710, and, after finding the damages to the crops of 1907 and 1908 to be, respectively, \$210 and \$250, made the following special finding: "(3) How much do you allow plaintiff, if anything, as damages for injury to land as claimed in his fourth cause of action? Answer. Two hundred fifty dollars (\$250)." It is not claimed that appellee erected any other dam than the one involved in both actions, the parties are identical, and the purpose of the present action is to recover damages to the land caused by the erection and maintenance of the dam. It is plain from the petition and answer in the former action as well as from the pleadings in this that the dam was erected as a permanent structure and was intended to be used as such, and, further, that in order to operate it successfully it is necessary to keep the gates closed.

[1] The appellant's land having been appropriated without compensation to him, he had a choice of several remedies. The appropriation being permanent in character, he could sue to recover for permanent damages. *W. & W. R. Co. v. Fechheimer*, 36 Kan. 45, 48, 12 Pac. 362. The question is, Did he elect to do this in the former action? In support of the contention that he did not so elect, some stress is laid upon the language of the fourth count of the petition in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

former action in which it was alleged that the land "has been damaged in the sum of not less than \$100 per acre," and it is sought to distinguish the cause of action from this because in the latter the allegation is that, by reason of the erection and maintenance of the structure, the damages to the land "in the future" will amount to \$100 per acre.

In the *Fechheimer Case*, supra, land was taken for railway purposes. It was held that, the nature, use, and design of the railroad being permanent in character, the landowner might elect to sue for all present and future damages, and that the manner in which she conducted her suit, the character of the testimony offered, the rulings of the court, and instructions given in regard to the measure of damages indicated that she was seeking to recover for the entire injury present and prospective. For the same reasons it is equally clear that appellant by his former action submitted his claim for all injury to the land, present and prospective. The instructions given in respect to the measure of damages under the fourth cause of action could only have been pertinent upon the theory that evidence was offered of the value of the land immediately before and immediately after the dam was constructed.

In *C. B. U. P. Rld. Co. v. Andrews*, 28 Kan. 703, the action was for damages to certain city lots occasioned by the appropriation of land for railroad purposes without condemnation proceedings and without compensation to the owner. It was ruled that the latter might elect to consider the obstruction as a permanent appropriation and sue for his permanent damages, and that the measure of such damages was the injury to his lots at the time the appropriation was made and not at the time of the trial of the case. So here the permanent injury to appellant's land by its appropriation for use in connection with the erection and maintenance of the dam was occasioned at the time of the appropriation. In setting up his claim of damages he could not by the mere use of the past perfect tense of the verb split his cause of action into several actions.

In case of *Brock v. Francis*, 131 Pac. 1179, just decided, the husband sued to recover for the loss of his wife's services resulting from an injury alleged to have been caused by defendant's negligence. The action was not begun until more than two years after the injury to the wife. To avoid the defense of the statute of limitations, plaintiff claimed that the injury to the wife did not result in depriving him of her services until some months after the accident to her; and therefore that the statute did not begin to run until he sustained damages by the actual loss of her services. It was held that the two-year statute barred his action; and it was said in the opinion that: "He could have sued the next day * * * for his

loss of services and expenses which he could show he was to suffer by reason of the injury to his wife."

[2] It would be somewhat difficult to imagine a clearer instance of a thing fully determined and adjudicated than the matter of appellant's damages arising from the construction of the dam and the consequent appropriation of his land. Moreover, the averments of the answer are that the question of permanent damages to the land was in fact fully submitted and determined in the former suit; and, if the record set up in the answer had not conclusively established the fact, the demurrer was rightly overruled, for the reason that it was competent for appellee to show by oral evidence what was in fact submitted and determined in that action.

It becomes wholly unnecessary to review the numerous decisions upon the question of when a judgment is *res judicata*. The answer set up a record from which it appears, not only that the question of permanent damages to the land might have been litigated in the former suit, but that it was litigated and fully determined.

It follows that the judgment is affirmed. All the Justices concurring.

MORROW v. INGE et al.

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 186*)—BEST AND SECONDARY EVIDENCE.

What purports to be a copy of the official county paper, containing the notice of the conveyance of unredeemed lands sold for taxes, found among the files of the office of the county treasurer, although not required by law to be kept there, is sufficient to establish *prima facie* the contents of the published notice, where evidence of a higher order cannot be procured.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 661-673; Dec. Dig. § 186.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR.

A judgment will not be reversed because such a copy was admitted without a showing that no better evidence was procurable, where no reason is suggested for supposing that the notice there contained is not genuine.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

Appeal from District Court, Hamilton County.

Action by S. H. Morrow against Lycurgus Inge and G. T. Inge. Judgment for plaintiff, and defendants appeal. Affirmed.

Scates & Watkins, of Dodge City, for appellants. George Getty, of Syracuse, for appellee.

MASON, J. The plaintiff in ejectment recovered judgment against the holders of a tax deed less than five years old, who appeals. The plaintiff traced title from the Atchl-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

son, Topeka & Santa Fé Railroad Company. A record was introduced showing a patent from the state to the company. The defendants maintain that there was a technical defect in the record, and therefore that the plaintiff failed to prove title in himself. If the record was in fact defective, it was validated by the curative act. Gen. Stat. 1909, §§ 1684, 1685; Van Hall v. Rea, 85 Kan. 675, 118 Pac. 693. Moreover, the land being in an odd-numbered section within ten miles of the main line of the railroad, the court takes judicial notice, in the absence of proof to the contrary, that it was patented to the company. Worden v. Cole, 74 Kan. 226, 86 Pac. 464. A newspaper was introduced in evidence containing what purported to be the redemption notice upon which the tax deed was based; that is, the notice that the lands sold for taxes would be deeded unless redeemed by a time stated. Assuming the genuineness of the paper the tax deed was voidable, for the amount stated in the notice in connection with the tract in question exceeded the taxes and interest, and evidently included other charges, under a practice due to an error in an edition of the statute by which the phrase "taxes charged, and interest," was rendered "taxes, charges and interest." Harp v. Wilson, 84 Kan. 45, 113 Pac. 309.

The only question in the case not covered by prior decisions of this court is whether it was sufficiently shown that the notice given in evidence was in fact the official notice published by the county treasurer. The newspaper was produced by that officer, who found it among his files. The transcript does not show the name of the paper, but in support of the judgment it must be presumed to have been the Journal, as it was agreed that that was the official county paper in the year 1897, when the notice was published. No affidavit of publication was attached to the newspaper. If there had been, the treasurer's office was not the proper place for its retention, since the statute makes the county clerk the permanent custodian of all "affidavits, notices of papers of reference to" tax sales. Gen. Stat. 1909, § 9456. The publication of the notice of the sale of land for taxes is required to be proved by the affidavit of the printer (Gen. Stat. 1909, § 9443), but no such requirement seems to be made as to the redemption notice. In Bergman v. Bullitt, 43 Kan. 709, page 712, 23 Pac. 938, page 939, it was held that the trial court erred in admitting in evidence a document certified by the county treasurer to be a true copy of the redemption notice on file in his office. In the opinion it was said: "The county treasurer, * * * not having the official custody of these records, is not authorized to certify, and the copy of the notice which he chanced to find in his office, and which was offered in evidence, should have been rejected. The parties, however,

are not foreclosed by the absence of such record evidence in the office of the county clerk. The facts with reference to this redemption notice may be obtained from the files of the official paper, and from the testimony of the publisher of the same; and they may be shown by still other competent evidence."

[1] The newspaper found in the office of the county treasurer, although not required by law to be kept there, proved itself with reasonable certainty. There is little likelihood of any one having been at the pains to print a counterfeit, purporting to be one of the regular issues of the paper. In case better evidence could not be produced it had sufficient probative force to establish prima facie the contents of the redemption notice. Its admission may have been technically erroneous, because no sufficient foundation for it had been laid, by showing that no affidavit of publication was in the custody of the county clerk, and that no publisher's file was accessible. But under the present Code this would not justify a reversal unless it affirmatively appear that prejudice resulted. Civ. Code, § 581 (Gen. St. 1909, § 6176).

[2] No reason has been suggested for supposing that, if any other copy had been produced, it would have shown a different state of facts from that exhibited by the paper introduced. If such reason existed, it could easily have been shown. Without such showing, it must be assumed that the paper produced correctly showed the amount stated in the redemption notice, and any error in its admission was not prejudicial. Bridges v. Vann, 88 Kan. 98, 127 Pac. 604.

The judgment is affirmed. All the Justices concurring.

DYER v. MARRIOTT et al.

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 353*)—HEIRSHIP—RECITALS IN RECENT DEED.

Recitals of heirship in a recent deed are not binding against strangers to the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.*]

2. TAXATION (§ 796*)—SETTING ASIDE TAX DEED—EVIDENCE.

A defendant in a foreclosure suit, who claims title and seeks to set aside a tax deed and conveyances thereunder and oust the holder from possession, must show some title or interest in the land before being entitled to such relief.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1578-1581; Dec. Dig. § 796.*]

Appeal from District Court, Greeley County.

Action by H. G. Dyer against Ada M. Marriott and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

W. M. Glenn, of Tribune, for appellant.
D. R. Beckstrom, of Tribune, for appellees.

WEST, J. The plaintiff sued to foreclose a mortgage on the land in controversy and recovered judgment; personal service having been made upon the mortgagor and publication service upon the present defendant, who thereafter procured the judgment to be opened up and answered that she was the owner of the title in fee simple, denying that the mortgagor had any interest in the land, except that given by a tax deed which she alleged was void, and prayed that the tax deed be set aside and that all parties claiming thereunder be barred and enjoined from setting up any title to the land. A trial resulted in a judgment in her favor, except that the plaintiff was given a first lien for taxes. The plaintiff appeals and asserts that the defendant was not entitled to judgment because she failed to prove title in herself.

She offered in evidence a deed to the heirs of Cornelius C. Barber, and then a deed from Jennie C. Barber, which deed recited that Jennie C. Barber was the duly appointed and qualified executor of the last will of Cornelius C. Barber, and that by the terms thereof she was named as executor and residuary legatee as heir at law of Cornelius C. Barber. Plaintiff contends that there was no evidence to show that Jennie C. Barber held the title which she warranted to the defendant's grantor; that the mere recitals of the deed were not proof, and, there being no other, the defendant failed. The defendant contends that she did not come into court for the purpose of attacking the tax deed, but that she was forced into court and simply defended her own title. That the court did not grant her any relief but simply restored to her what she had before the tax deed was issued, subject to a lien for the taxes, and that it is only in case of a direct attack upon a tax deed that the attacking party must have an interest in the property. She also argues that there is nothing in the record to show that the plaintiff alleged either title or possession in herself as against the defendant, or that she offered any evidence in support of her claim for affirmative relief. The plaintiff asserts in her reply brief that the defendant in the third defense of her answer alleged possession in the plaintiff and asked judgment for rent.

Having sent for the transcript and obtained instead a copy of the answer, it may be as well to give a short history of the case as gathered from the record. In September, 1907, a tax deed was issued to W. M. Glenn. Glenn conveyed to Gerard, who gave a mortgage back, which mortgage was assigned by Glenn to the plaintiff Dyer. In October, 1910, this mortgage was foreclosed, and in January, 1911, the appellant filed her motion to be let in to defend; and, there being no objection, she filed her answer alleging that

she was a resident of Ohio; that Gerard, Glenn, and Dyer had all the time since September 12, 1907, excluded her from the possession and control of the land, and had ever since claimed ownership and right of possession, although in fact having no such right; that the whole proceeding was based upon the tax deed setting forth many reasons why this instrument was void. In another part of the pleading she again alleged that the parties named had retained possession of the property and excluded her from the rents and profits thereof, and that, as the result of such adverse possession held by such parties, she had been damaged in the sum of \$2 an acre since the issuance and execution of the tax deed in the total sum of about \$80, which sum she alleged constituted a legal set-off against any claim for taxes. She prayed for possession, that the tax deed, the conveyance by Glenn, the mortgage to him, and the assignment by him be set aside and held for naught, and that Gerard and Dyer and Glenn and every one claiming under them be forever barred and enjoined from asserting or setting up any title, claim, or interest in or to the land, and that her title be decreed valid and perfect, and that she be adjudged to have a legal set-off in the sum of \$80, together with an additional sum of \$2 a month from the date of filing the suit until final determination, against any sum found due for taxes, and that she recover her costs and for such other and further relief as to the court might seem just and proper.

The plaintiff appears to assume that, having been for several years in possession under a tax deed, the latter could not be attacked by the defendant without actually showing some title to the land. The defendant seems to contend that, having been attacked by the holder of a void tax deed who had made her a party to the foreclosure alleging that she claimed some interest, she was not required to show much of a title, if any, in order to resist the groundless attack of the plaintiff. The pleading already quoted from places the defendant in the attitude of having admitted possession for a number of years in her adversary under the tax deed in question; and having prayed that such possession be restored to her, together with damages for its detention, as well as a decree quieting title in her or at least barring the other parties, she was under obligation to show at least some title to the land.

In *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862, it was held that the plaintiffs in a foreclosure suit, who attacked certain tax deeds set up by an interpleader and asked that the title be quieted against them, should show some title in the mortgagor. There in a suit against the mortgagor *Ordway* was made a party upon his own motion and alleged ownership and possession under certain tax

deeds duly executed, to which the plaintiffs replied that the tax deeds were void and asked to have their title quieted. The trial court ruled that the burden was upon Ordway, and this was held proper. It seems that the mortgagee failed to prove a chain of title from the government down to the mortgagor, and the court said: "And we think from the nature of the issues made by the pleadings that the plaintiffs below should have shown title in the mortgagor before they were entitled to a decree. [Citing authorities.] * * * Again, the title to the mortgaged premises being in controversy, and the plaintiffs asking that the cloud of the tax title might be removed, they should recover on the strength of their own title; and, under the circumstances of this case, we think the chain should have been complete in the mortgagor. A person should have a reasonably clear title to maintain an action to have a cloud upon his title removed. He must proceed upon the strength of his own title, and not the weakness of his adversary."

In *Parker v. Vaughn*, 85 Kan. 324, 116 Pac. 882, a suit was brought to quiet title against one who, if alive, held the patent title, and against his unknown heirs if the patent holder were dead. Doty, the grantee in a conveyance executed after the suit was begun by those who were the heirs, if such death had taken place, was held to occupy the position of an original defendant. Having been made a defendant upon his own application, he filed an answer and cross-petition alleging, among other things, an ownership of an undivided third, and prayed for partition. The plaintiff in reply set out a tax deed which the party mentioned replied was void. At the conclusion of the plaintiff's evidence, Doty dismissed his cross-petition. The plaintiff then admitted that the tax deed was void, subject to the objection that Doty had no standing to raise the question. Doty then introduced certain evidence touching the absence of the patent title holder, and the court gave a decree to the plaintiff barring Doty, who appealed. It was said in the opinion (85 Kan. 327, 328, 116 Pac. 883) that the rule that one without interest in the property cannot attack a tax deed refers to an attack by which affirmative relief is sought. "Doty, having dismissed his cross-petition, is in the attitude of an ordinary defendant." It was pointed out that as the plaintiff had brought his suit in the alternative, and Doty had come into the case occupying the position of the heirs if the patent holder were dead, he ought not be allowed to have a bad tax deed decreed good as against Doty, and it was said; "He still has his tax deed, which will become unassailable unless attacked in due time by one who can show an interest in the property. If George Vaughn is alive, the plaintiff's title is already perfected by the judgment against him. If he is dead, the plain-

tiff is not wronged by being denied a judgment against others on the theory that he is still living. * * * Doty, of course, is not to be given a right to redeem or any affirmative relief."

We think, under the circumstances of this case, that a tax deed having been issued in 1907, and conveyances and possession thereunder having followed for a number of years, the defendant was not in a position to assail by way of cross-petition and prayer for affirmative relief such tax deed and possession without showing some substantial sort of interest in the land. Her title depended absolutely on the deed from Jennie C. Barber, and the only evidence by which it was sought to show that Jennie C. Barber had any title to convey consisted of the recitals in her own deed. These were to the effect that Cornelius C. Barber, the original entryman, died in 1875, leaving a will; that Jennie C. Barber was appointed and qualified as executor and named as executor and residuary legatee in the will as heir at law of Cornelius C. Barber. If all of these recitals had been proven by competent evidence, they would have fallen far short of showing title in the maker of the deed. The fact that she was heir at law did not show title, because the will may have devised the property to some one else. Being residuary legatee gave her no title, because there was nothing to show what the residuum consisted of. There was nothing to indicate that she was authorized to convey any of the estate as executor; nor did she so execute the deed, but as grantor.

[1] In an ancient deed, a recital of heirship is sometimes competent, when followed by long possession and acquiescence, which show a recognition of such heirship. *Bell, Adm'r, v. Barron*, 14 Vt. 307; *Wigmore on Evidence*, § 1573; 2 *Horton on Evidence*, § 1041. But ordinarily recitals in a deed are not evidence against a stranger. "It is very certain, when one attempts to derive title to land through the heirs of a former proprietor, the fact of heirship must be proved. This cannot be done by a recital, merely, in the deed, especially where the deed is of recent date, which, at most, amounts to a mere claim of heirship." *Potter v. Washburn*, 13 Vt. 558, 564, 37 Am. Dec. 615. "The recitals in the deed to William Costello that the grantors therein are the heirs at law of John Bennington, deceased, are not competent evidence either of his death or their heirship. These recitals are not part of the conveyance, and they are no more competent as evidence in this controversy of the facts stated than they would be if embodied in any other writing signed by the parties." *Costello v. Burke*, 63 Iowa, 361, 364, 19 N. W. 247, 248. "The recitations of the deed do not bind plaintiffs, who are not privies of the grantor, but claim adversely to him. 1 *Greenleaf on Evidence*, § 23; *Carver v. Jackson*, 4 Pet. 1 [7 L. Ed. 761]. Defendant,

in order to establish title under this deed, must, in addition to introducing it in evidence, prove the will, the probate thereof, and lawful proceedings ending in the execution of the deed." *Miller et al. v. Miller et al.*, 63 Iowa, 387, 389, 19 N. W. 251. See, also, *Robertson v. Lumber Co.*, 74 Kan. 117, 85 Pac. 799, and cases cited.

[2] Although the judgment only set aside the tax deed, together with all conveyances based thereon, and gave a lien for the amount of taxes due, and ordered sale if not paid within 60 days, and did not affirmatively quiet the title in the defendant or give her the damages prayed for, it did, nevertheless, give her substantially the relief she sought. This could only be done upon her showing some title to the land.

Having failed to show this, the judgment is reversed, and the cause remanded for further proceedings. All the Justices concurring.

CRANE v. MISSOURI PAC. RY. CO:†
(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 324*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

It is contributory negligence which precludes a recovery of damages for an injury sustained by a traveler at a railroad crossing in a collision with a train of moving cars, where he stepped in front of the moving cars that he saw, or where there was nothing to prevent him from observing his danger and avoiding the injury if he had looked.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1020-1025; Dec. Dig. § 324.*]

2. RAILROADS (§ 352*)—REVIEW.

The special findings of the jury show that the injury sustained by the traveler was due to his own want of care and hence the general verdict must be set aside and judgment given for appellant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1216; Dec. Dig. § 352.*]

Appeal from District Court, Wyandotte County.

Action by John Crane against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. P. Waggener and J. M. Challis, both of Atchison, and J. McCabe Moore, of Kansas City, Mo., for appellant. Getty & Carson, of Kansas City, and D. E. Henderson, of Kansas City, Mo., for appellee.

JOHNSTON, C. J. John Crane was struck by a moving car at a street crossing, and he brought this action against the Missouri Pacific Railway Company in which he recovered \$1,000 as damages for injuries sustained. Appellant's railway occupies a part of First or Wood street, and near the intersection of First street and Central avenue a switch is located; the switch track lying

east of the main track. It appears that Crane was walking westward on Central avenue, and when he reached First street he claims to have looked, but saw no indications that cars were moving. However, cars were being moved on the track as an engine gave a string of five cars a start towards Central avenue, after which it was uncoupled and the string of cars were thrown over onto the switch track and were permitted to run down that track over Central avenue of their own momentum. When Crane was approaching the switch track, he could have seen cars at a distance of two blocks, and when he reached that track the cars were approaching the crossing at a rate of about four miles an hour. When he stepped upon the track, the cars were within 20 feet of the crossing.

It was alleged that the company had failed to have a person on the front end of the moving cars to manage or control their movement, but it appeared that there was a brakeman on the hind end of the front car, and it was also claimed that it had no watchman or other person to warn or notify Crane of the approach of the cars. The company alleged and contended that, granting there was negligence on the part of those in charge of the cars, the collision and injury resulted from Crane's own negligence, and that therefore it could not be held liable for the injury. Special questions were submitted to the jury, and answers were returned to the effect that the accident occurred at 10 o'clock in the forenoon; that the string of cars moved about 200 feet after the engine was uncoupled from them before they struck Crane; that, when he was within 15 or 20 feet from the switch track he could have seen the approaching cars a distance of 100 feet, and when from 3 to 10 feet from the track he could have seen them when they were about 50 to 75 feet from him; and that the cars were only 15 or 20 feet from him when he stepped from a place of safety in front of the approaching cars. There were express findings that there was no obstruction of his view, and that he could have seen the cars if he had looked, and that he did look in the direction from which the cars were coming.

Proceeding on the theory that there was negligence on the part of those handling the cars, it is clear that Crane's want of care contributed to the injury and is such negligence as bars a recovery. It is not claimed that the injury was wantonly or willfully inflicted, and there is no reason, in either the testimony or findings, why the rule of contributory negligence should not be applied. When Crane approached the crossing, it devolved upon him to make reasonable use of his senses to ascertain if he could safely proceed over the crossing. The cars were then moving toward him in broad daylight, and there was no obstruction to his view

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 13, 1913.

nor anything to prevent his seeing their approach. They were coming at the moderate rate of speed of four miles an hour, which was about the rate that he was moving. If he had looked when he reached First street, he could have seen the cars approaching without difficulty, and when he was ten feet from the track, and they were only 50 feet away from him, their approach must have been very manifest to any observer with the sense of sight, and when he was within three feet of the track the cars were then almost upon him. It is possible that he might have been mistaken as to whether the cars were moving when they were 200 or even 100 feet away, but there is no reason why he should have been mistaken about the movement of cars that were only 20 feet from him. At that time he was in a place of safety, but he recklessly ventured to step in front of the moving cars. He may have thought that he was moving faster than the cars and could therefore effect a crossing in front of them. In his race with the cars he lost.

[1, 2] He testified that he did not observe that the cars were moving, but the jury have found that he could have seen that they were approaching if he had looked and have also found that in fact he did look; and, there being no defect in his vision, the inference is irresistible that he did see that the cars were approaching and that at the time he looked were only 20 feet away. *Young v. Railway Co.*, 57 Kan. 144, 45 Pac. 583. Notwithstanding the information that was certainly given him by his eyes and ears, he stepped directly in front of the moving cars, and this gross negligence on his part contributed directly to his injury and precludes a recovery. *A. T. & S. F. Rld. Co. v. Priest*, 50 Kan. 18, 31 Pac. 674; *Roach v. St. J. & I. Rld. Co.*, 55 Kan. 654, 41 Pac. 964; *Railroad Co. v. Holland*, 60 Kan. 209, 56 Pac. 6; *Beech v. Railway Co.*, 85 Kan. 90, 116 Pac. 213; *Coleman v. Railway Co.*, 87 Kan. 190, 123 Pac. 756.

The judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment on the special findings in favor of appellant. All the Justices concurring.

CITY OF MOLINE v. MOLINE DRILLING & DEVELOPMENT CO.

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

1. GAS (§ 14*)—POWERS—CONTRACTS.

The municipal authorities of a city of the third class had authority in October, 1902, to contract with a gas distributing company to furnish gas to the city and its inhabitants, and to fix all charges therefor. *Laws 1897, c. 82, § 2.*

[Ed. Note.—For other cases, see *Gas*, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

2. GAS (§ 14*) — GAS COMPANY — CONTRACT WITH CITY—BINDING EFFECT.

A formal acceptance of the terms of the ordinance containing such a contract is not necessary to bind the company where the facts show an actual practical acceptance. The company enjoyed all the privileges granted for a term of years during which its charges were made in conformity with the prescribed rates. Having taken the benefits of the grant, the company must observe its conditions.

[Ed. Note.—For other cases, see *Gas*, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

Appeal from District Court, Elk County.

Action by the City of Moline against the Moline Drilling & Development Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. H. Piper, of Independence, for appellant. Huggins & Riddle, of Emporia, for appellee.

BENSON, J. This is an action to restrain the defendant, a gas distributing company, from increasing its rates in the plaintiff city.

By an ordinance adopted October 23, 1902, the city granted to the company the right to furnish gas to the city and its inhabitants, and for that purpose to lay its pipes through streets and alleys. The ordinance fixed maximum rates for the proposed service, and provided that it should become a contract between the city and company upon the filing of an acceptance of the grant with the city clerk. The acceptance of the ordinance was denied by the company, and the evidence fails to show that an acceptance was filed. The evidence tended to show the following facts: The proposed ordinance was drawn and presented at a meeting of the mayor and council by an attorney of the company. Upon its adoption the company laid its pipes in the streets, and installed the service, furnished gas to the city and the people, and charged rates in accordance with the ordinance. When disputes arose concerning rates, they were adjusted by referring to the ordinance, and making the charges conform to its provisions. The service was maintained, and rates collected as ordained until some time before this suit was brought, when the company advanced its charges to rates exceeding the maximum so allowed. A demurrer to the plaintiff's evidence was overruled, and, no evidence being offered by the defendant, a judgment was rendered enjoining the collection of any excess over the rates specified.

The defendant contends that the ordinance is not binding upon the company because the city had no authority to grant the use of its streets, or to fix rates for the proposed service and because the ordinance was not accepted, and never became a contract between the city and the company.

[1] The plaintiff is a city of the third class. The authority of cities of that class to enter into such contracts is not an open question,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

but was determined in the affirmative in *State ex rel. v. Gas Co.*, 88 Kan. 165, 127 Pac. 639. It was said in that case: "Chapter 136 of the Laws of 1903 (see Gen. Stat. 1909, § 749 et seq.) relates to cities of the second and third classes. Rosedale was in 1903, and still is, a city of the second class. Section 2 of this act authorized Rosedale 'to contract and fix rates for private consumers, for a period of not exceeding twenty years * * * (for) furnishing water, heat, light or power for public use.'" Elsewhere in the opinion the authority of the city of Rosedale to make the contract was affirmed. 88 Kan. 174, 127 Pac. 639. The section of the act of 1903 referred to in the quotation continues to cities of the second and third class the powers given by chapter 82 of the Laws of 1897 to cities of the three classes. This latter act provided that: "The municipal authorities of any city of the first, second or third class in this state in which any such private corporation now exists, and which may now or hereafter manufacture, sell or furnish gas light, electric light, electric power, water or heat to such city and its citizens is hereby authorized to contract with any such corporation for the lighting of, and for supplying power, water or heat to public or private buildings and other places, and for all purposes necessary in any such city, and to fix all charges therefor, upon the conditions imposed in this act." Section 2. It will be observed that the statute above quoted confers the same power as that contained in the later act referred to in *State ex rel. v. Gas Co.*, cited above.

[2] The failure to formally accept the terms of the ordinance cannot relieve the company from its obligations after enjoying all the privileges granted by the ordinance for over six years. Section 1 of the act of 1897 in force when the ordinance was adopted conferred upon the city the authority to grant the use of its streets for such service which it accordingly did grant to this company. The company has remained undisturbed in this use, and must comply with the terms upon which it was given. An acceptance may be implied from the circumstances. 12 Encyc. of Ev. 118; 16 Cyc. 787. In a somewhat similar situation it was observed in *City Railway Co. v. Citizens' Railroad Co.*, 166 U. S. 557, 568, 17 Sup. Ct. 653, 657 (41 L. Ed. 1114): "No formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the amendment were accepted." It was also said in the same opinion that "it is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance." Having sought, taken, and retained the benefits of the grant, the company must observe the conditions.

It is argued that there was no proof of publication of the ordinance. The ordinance book was offered in evidence containing the record of the ordinance, to which was appended a note signed by the clerk stating the date of its passage, the name of the paper in which it was published and date of publication, and other matters required by section 1529 of the General Statutes of 1909. This is competent proof of publication.

The judgment is affirmed. All the Justices concurring.

STATE et al. v. MARTIN.

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES (§ 61*)—MILEAGE—ARREST.

A sheriff with a warrant issued by a justice of the peace went to Colorado and apprehended the defendant, who returned with him without demanding a requisition, and was tried and convicted of a felony not capital. *Held*, that the sheriff is entitled to mileage for the distance traveled in Kansas only in serving the process.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 77, 87; Dec. § 61.*]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"ARREST"—DEFINITION—"APPREHENSION."

Code Cr. Proc. § 129 (Gen. St. 1909, § 6706), defines "arrest" as the taking of a person into custody that he may be held to answer for a public offense. Bouvier defines "apprehension" as the capture or arrest of a person on a criminal charge, and says that the term is applied to criminal cases, while arrest is applied to civil cases (citing 1 Words and Phrases, p. 464).

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 501-503; vol. 8, p. 7579.]

Appeal from District Court, Kingman County.

Proceedings by the State and John Bolin against George Martin to collect costs on conviction of defendant of crime. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

Geo. L. Hay and L. F. Walter, both of Kingman, for appellant. Jno. S. Dawson, Atty. Gen., and S. S. Alexander, of Kingman, for appellees.

WEST, J. The sheriff of Kingman county with a warrant for the arrest of a man charged with a felony—not capital—went to Colorado and apprehended him, and brought him to Kingman county, where he was tried and convicted, no requisition having been demanded by him. The sheriff's mileage was \$125, and this sum was taxed as costs in the case against the convicted party, and his counsel presents the question whether or not this is a proper charge, asserting that, under the statute, no expenses can be allow-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed the sheriff, unless he goes armed with a requisition. The state and the sheriff contend that under section 3664, allowing 10 cents for every mile actually and necessarily traveled each way in serving or endeavoring to serve any process, this was a proper charge.

[2] The cause was submitted on an agreed statement of facts, which recited: "That said sheriff went to Monta Vista, Colo., apprehended said George Martin, and that said George Martin voluntarily returned with him to Kingman, Kan. That no requisition was ever obtained by said sheriff for said defendant. That said George Martin was never formally arrested in the state of Kansas under said warrant." Bouvier defines apprehension as "the capture or arrest of a person on a criminal charge," and says that the term is applied to criminal cases, while the term "arrest" is applied to civil cases. See, also, 1 Words and Phrases Judicially Determined, p. 464. Our Code of Criminal Procedure, § 129 (Gen. St. 1909, § 6705), defines arrest as the taking of a person into custody that he may be held to answer for a public offense. So it would seem, technically speaking, that the sheriff arrested Martin in Colorado and brought him here without a requisition. Martin could have refused to come without service of other papers than the warrant but he did come, and at least after Kansas was reached he was in the lawful custody of the sheriff, who was armed with a warrant good anywhere in the state. It was not necessary upon reaching the line to make another formal arrest, for the statute provides that "an arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer." Gen. Stat. 1909, § 6706 (Code Cr. Proc. § 130). Whether, having voluntarily submitted himself to custody in Colorado, Martin could have reconsidered and refused to continue the journey after it was begun, need not now be considered. Certainly, after crossing the line, he was in lawful custody, and the sheriff was actually engaged in executing his process. The fee and salary act allows the sheriff 10 cents for each mile actually and necessarily traveled each way in serving or endeavoring to serve any process. Gen. St. 1909, § 3664. Hence there can be no question that for the Kansas mileage the sheriff was entitled to his statutory fee.

[1] It is argued that as he could have refused to go until a requisition had been procured, and would then have been entitled to \$5 a day and certain expenses, he ought to be allowed mileage when the real object of a requisition was accomplished by his prompt and faithful efforts without one. The trouble is that the Legislature has not so expressed itself. As the warrant had no extra-territorial efficiency, we are compelled to hold that the mileage can be taxed only for

the distance traveled in this state, which the record shows was 536 miles. To this effect was the decision of the Arizona Supreme Court in Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430. And such, we think, is the principle governing the situation here presented.

The judgment is therefore modified accordingly. All the Justices concurring.

BERG v. CHANEY et al.

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

ADVERSE POSSESSION (§ 79*)—TAX DEEDS—AVOIDANCE.

A tax deed good on its face, which has been of record more than five years, during which time the holder thereof has been in possession of the land conveyed thereby, cannot be avoided or defeated, except in cases where the taxes have been paid or the land redeemed as provided by law.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.*]

Appeal from District Court, Hamilton County.

Action by P. E. Berg against Greenberry Chaney and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Scates & Watkins, of Dodge City, for appellants. George Getty, of Syracuse, for appellee.

SMITH, J. The appellee brought this action in Hamilton county May 10, 1909, to quiet title to a large number of tracts of land in that county. After the filing of the petition, the appellant having acquired patent title to two tracts of land, he was substituted a defendant in lieu of the prior owners thereof. The appellee alleged title in himself, and that the defendants claim an adverse estate therein, and that such claim was without right and was a cloud upon his title which he asked to have removed; he prayed that the defendants be required to set forth their claims and that his title be adjudged valid and perfect and quieted as to all the defendants. The appellant, in answer, admitted he had an interest in two tracts of the land and denied the plaintiff's claim generally and set up a counterclaim in ejectment. At the trial the plaintiff introduced in evidence a compromise tax deed, good on its face, issued to himself May 5, 1902, and recorded on the following day. It was founded upon a sale of the lands for taxes in 1894 and embraced also the taxes of 1895 to 1901, inclusive. He also introduced evidence sufficient to establish that he had been in the actual, exclusive, and continuous possession of the land from the date of his tax deed.

The appellant offered evidence, which was uncontroverted, that he was the owner of

the patent title to the two tracts under mesne conveyances from the patentees. He also offered in evidence the following admission: "While not admitting the competency, materiality, or relevancy of the testimony couched in this admission, and objecting to such testimony because it is incompetent, irrelevant, and immaterial, the plaintiff nevertheless admits that as to the tract of land described in plaintiff's petition as the southeast quarter of section 25, township 26, range 42, the delinquent tax sale notice and the final redemption notice upon which the tax deed of plaintiff offered in evidence was founded did not describe the said tract of land in the same manner, nor did either one of said notices describe said tract in the same manner as the same was described upon the tax rolls of this county for the year 1894; and further that the final redemption notice upon which said tax deed is founded did, in so far as it pertains to said tract of land, contain, as a part of the amount stated in said notice as being necessary to redeem said land on the last day of redemption, the fees of the county treasurer for listing and the printer for printing the delinquent sale notices for the sales of the years, 1895, 1896, and 1897. By the Court: The court will sustain the objection and the admission will stand as though the proof has been attempted to be made in the record."

The only question involved is whether, in an action brought by a tax deed holder of land to quiet his title thereto, after he has produced evidence that his deed has been of record more than five years and his possession of the land has been continuous from the date of recording the deed, the patent title holder can defeat such title by showing such defects in the proceedings leading up to the issuance of the deed as would have defeated the deed, had an action for that purpose been commenced before the expiration of the five years' statute of limitations. The question of the right to use the statute as a weapon of attack instead of a shield of defense does not arise in this case. The evidence of defects in the tax proceedings and tax deed was offered by appellant to attack the title shown by appellee's evidence to be in appellee, and thereby to sustain his cross-petition asking that title to the land be quieted. By the provisions of section 9483 of the General Statutes of 1909, both his attack upon the tax deed and his attempt to recover the land were barred.

The appellee's action to have all adverse claims adjudicated and to have his title quieted asked only to have conclusive evidence placed of record of the rights which the law already had given him. His tax deed, possession, and the statute of limitations had "created a fixed status vesting a good title against all adverse claimants, such title constitutes a weapon offensive as

well as defensive, and the fact that this condition has been brought about by the running of the statute does not change its character or the rights thereunder." *Freeman v. Funk*, 85 Kan. 473, 490, 117 Pac. 1024, 1027. That was a case under the 15-year statute of limitation, but the principle applies as well to the limitation of actions to defeat a tax deed and possession thereunder. See, also, *Trust Co. v. Jones*, 81 Kan. 753, 106 Pac. 1052.

A tax deed good on its face, which has been of record more than five years, during which time the holder thereof has been in possession of the land conveyed thereby, cannot be avoided or defeated except in cases where the taxes have been paid or the land redeemed as provided by law. Gen. Stat. 1909, § 9483.

The judgment is affirmed. All the Justices concurring.

GURWELL v. SHIMEALL

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

Where an issue of fact, upon which the evidence is conflicting, determines the verdict and judgment, and a jury has returned a verdict thereon which was approved by the trial court, and judgment has been accordingly rendered, this court will not disturb the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1006.*]

Appeal from District Court, Norton County.

Action by J. L. Gurwell against Clark Floyd Shimeall. Judgment for plaintiff, and defendant appeals. Affirmed.

R. W. Hemphill, of Norton, for appellant. W. N. Moore, of Phillipsburg, for appellee.

SMITH, J. The appellee had been employed for several years by appellant as manager of a store. The compensation for the services, it is agreed, was a certain salary per month and a commission. Settlements had been made from year to year without disagreement. After appellee had quit the service, appellant sold the remaining stock without notice to appellee, and at a considerable reduction from the cost price. During their association appellee loaned appellant \$1,000 and took appellant's note therefor, which fell due before this action was brought to recover the amount due thereon. The appellant pleaded several set-offs, all of which were agreed to or found in his favor, except that he pleaded and testified that by the contract of employment the appellee was to receive a commission only on the net profits of the business; that appellee had received from year to year a commission on the goods

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sold at retail; that the loss between the wholesale price and the price at which the remaining stock had been sold reduced the net profits; and that appellee had been overpaid by the amount of his percentage thereof, for which appellant should be allowed an offset in the amount pleaded.

The appellee, however, testified that by the terms of the employment contract he was to receive, in addition to his monthly salary, the commission on the profits on goods sold at retail, and that there was no agreement that he was to bear any portion of the loss in question.

The jury evidently believed appellee's evidence and returned their verdict accordingly, and the court approved the verdict by rendering judgment for the amount so found. Where an issue of fact, upon which the evidence is conflicting, determines the verdict and judgment, and a jury returned a verdict thereon which was approved by the trial court, and judgment has been accordingly rendered, this court will not disturb the judgment. So frequently has the question involved been decided by this court that a citation of authorities is unnecessary.

The judgment is affirmed. All the Justices concurring.

MOTZNER v. BOGAN, Sheriff.

(Supreme Court of Kansas. May 10, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 76*)—PROPERTY SUBJECT—CONTRACT FOR SALE OF REAL ESTATE.

Contracts for the conveyance of real estate for a consideration to be paid by the vendee, who also agrees to pay the taxes on the land and is given possession, are taxable against the vendor, although they contain provisions that the vendee shall cultivate the land and apply one-half the proceeds of certain specified crops each year in payment for it, and that the contract shall be void upon default of the vendee, who may then be treated as a tenant, and payments previously made applied as rent.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 162; Dec. Dig. § 76.*]

2. TAXATION (§ 76*)—PROPERTY SUBJECT—CONTRACTS TO CONVEY LAND.

A clause in the contracts referred to, that time is of the essence of the agreement, does not relieve them from the burden of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 162; Dec. Dig. § 76.*]

Appeal from District Court, Russell County.

Action by John Motzner against John G. Bogan, sheriff. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

L. C. Conwell, of Russell, and S. N. Hawkes, of Topeka, for appellant. L. B. Beardsley, of Russell, for appellee.

BENSON, J. This is an action to restrain the collection of taxes on certain contracts respecting the conveyance of land. These

contracts are designated as the Spaedt, Welmer, and Bender contracts, respectively. The Spaedt contract, dated April 18, 1908, recited that:

"This agreement, made this 18th day of April, A. D. 1908, between John Motzner, a bachelor, party of the first part, and Jacob Spaedt, party of the second part, witnesseth: That the said party of the first part hereby covenants and agrees that if the party of the second part shall first make the payment and perform the covenants hereinafter mentioned in this instrument, the said party of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatsoever * * * by a good and sufficient warranty deed, accompanied by an abstract of title, the following lot, piece or parcel of ground (descriptions). And the said party of the second part hereby covenants and agrees to pay the said party of the first part the sum of eight thousand and eighty dollars, in the manner following and within ten years as follows, to wit: The proceeds of one-half of all the crops each year, payable on the 1st day of October of each year. It is fully agreed and understood that two-thirds of all the land in cultivation be sown to wheat each year; the rest of the land is to be planted and cultivated to such crops (as) the second party may elect. It is further agreed and understood, that the principal, or any part thereof, may (be) paid at any time within the ten years, with interest at the rate of 6 per cent. per annum, payable annually on the 1st day of October of each year on the whole sum remaining from time to time unpaid. The said party of the second part hereby agrees to keep the buildings on said real property insured to the insurable value thereof in some good and reliable insurance company for the benefit of the party of the first part. The said second party further agrees that he will, in due season, pay all taxes or assessments that may become chargeable upon said premises or any part thereof, commencing with the taxes assessed for the year 1908, and that the buildings and improvements now on said land, or that shall hereafter be placed thereon, shall not be removed therefrom but shall be and remain the absolute property of the party of the first part until this contract shall be fully performed by said second party. And the party of the second part covenants and agrees with the party of the first part, that should default be made in the payment or payments aforesaid for twenty (20) days after such payments shall become due, or in case the party of the second part shall fail to pay the taxes or assessments on said land before said land shall have been offered for sale for said taxes, then and in such case, at the option of the said first party, this agreement shall be null and void, and no longer binding on the party of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

first part, and said first party shall have the right to re-enter and take immediate possession of the premises aforesaid, and all the payments that shall have been made under this agreement, and all the buildings and improvements on said land shall be and ever remain the absolute property of the party of the first part; and the party of the second part shall have no claim or right to recover said money, buildings, improvements, or any, or either, or any part of either. And in case this contract shall be determined as aforesaid, all of the payments which shall have been made by the said party of the second part under the terms herein and all of said buildings and improvements shall be taken and deemed to be as rental for the use and occupancy of said premises from the date of this contract to the date of its determination. It is further understood and agreed that the party of the first part shall have for the enforcement of this agreement all the rights and privileges of landlord to the party of the second part, who, during the existence of this agreement, shall be a tenant or tenants of the party of the first part, until the purchase price under this agreement is paid in full, time being the essence of this agreement."

This instrument bore the following indorsements:

"Aug. 11, 1908, paid on this contract, \$401.87.

"Nov. 7, 1908, paid on this contract, \$244.80.

"Nov. 5, 1909, paid on this contract, \$800."

The Welmer contract relating to other land, was in the same form and bore similar indorsements.

The Bender contract recited:

"That the said party of the first part has this day sold to the said party of the second part the following described tracts and parcels of land (* * *) upon the following terms of payment, to wit: Six hundred dollars cash on Sept. 1st, 1909, for which a bankable note is given of even date herewith; seventy-two hundred dollars in crop payments as follows, viz.: One-half of the crop until the whole sum of seventy-two hundred dollars is fully paid. The full consideration of this sale is seven thousand eight hundred dollars. The deferred payment of seventy-two hundred dollars to bear interest at the rate of six per cent. per annum, payable annually. The said second party agrees to pay the taxes each year as they become due. The said second party is (to) cultivate all the land on said tracts each year, that can be cultivated, and to sow not less than one hundred and seventy-five acres to wheat, and deliver to the said party of the first part one-half of all the crop, in Russell. The remainder of the land that can be cultivated to be planted (to) corn and feed crops and the half delivered in the city of Russell.

"Now if all the foregoing conditions be

performed by the said Henry P. Bender, the said second party, then, in that event, the said John Motzner, the said first party, shall make to him a good and sufficient warranty deed for above described land. If said second party fails to perform any or all, or any part, of the aforesaid agreement, then shall this agreement be void.

"The said second party agrees to vacate the premises at any time he makes default in any part of the above agreement. It is agreed that all payments herein are to be considered as rent payments until the full sum is paid."

[1] The district court held that the Spaedt and Welmer contracts were not taxable, and granted an injunction as prayed for. The defendant appeals. *The Bender contract was held taxable, and the court refused to restrain the collection of the tax assessed upon it. The plaintiff appeals from that part of the judgment.

In each of the contracts held by the district court to be not taxable, there is a covenant by the vendee to pay for the land and by the vendor to make conveyances upon such payments being made. The other contract contained a recital of a sale upon definite terms of payment of a certain consideration, and the receipt of an advance payment. Each of the contracts contained an agreement of the vendee to pay taxes on the land and interest on deferred payments. Possession was taken and held by the respective vendees, and payments were made each year and indorsed upon the contracts.

In view of the decisions of this court in *Williams v. Osage County*, 84 Kan. 508, 114 Pac. 858, 34 L. R. A. (N. S.) 1221, and *McGregor v. Ireland*, 86 Kan. 426, 121 Pac. 358, holding similar contracts taxable, it is only necessary, in considering the Spaedt and Welmer contracts, to determine whether the features of these contracts relating to the cultivation of the land and application of the proceeds of crops, and making time of the essence of the agreements, distinguish them so far as to relieve the owner from the burden of taxation. The stipulation first referred to is only a provision for making payments through such means, and is, in a limited sense, a security additional to the legal title held by the vendor for the payments to be made. The covenant to pay is absolute. The failure to cultivate crops as agreed would not impair the primary obligation to pay the consideration which could still be enforced. The provision that the agreements shall be void if the vendees make default are for the benefit of the vendor, who can still insist upon payment, although he has an option to declare a forfeiture. *Bohart v. Investment Co.*, 49 Kan. 94, 30 Pac. 180. The vendee in such a case cannot, by making default in his covenant, avoid its obligation. *Chambers v. Anderson*, 51 Kan. 385, 32 Pac. 1098. The same principle applies to the clause making

time the essence. The vendees cannot by default in cultivation and the application of proceeds, or in making payment otherwise, terminate the contract and relieve themselves from performance. The contracts would be still enforceable against the vendee as well as against the land. If enforceable against either, the contracts are taxable. *McGregor v. Ireland*, supra.

[2] In *Clark v. Horn*, 122 Iowa, 375, 98 N. W. 148, it was held that a contract to convey land upon stipulated payments, in which time was made of the essence, and which contained a provision that it should be void upon any default in making payment, an advance payment having been made, and possession taken, created an absolute indebtedness which could be enforced by the vendor notwithstanding the vendee's default, and that the contract was taxable. A like conclusion was reached in *Griffin v. Board of Review*, 184 Ill. 275, 56 N. E. 397, although there was provision for forfeiture in case of default in payment, and time was made of the essence of the agreement.

The Bender contract does not contain a formal express covenant to make payments, as the others do, but it recites a present sale, and refers to the payments, one of which was made at the time the contract was entered into by the note of a third party. It also contains an agreement to cultivate the land and to apply half the proceeds of the crop upon the consideration, also a covenant to pay interest on deferred payments and to pay the taxes. The vendee was put in possession. The omission of a formal covenant to pay the consideration does not make the contract unilateral. The question whether both parties are bound is one of intention to be determined from the whole instrument, and it is clear from the language used that it was understood that the vendee was to pay the consideration named, and that the agreement was mutual. It is only where the intention is plain and clear that one of the parties shall not be bound that an agreement is held to be unilateral. *Flanders v. Merrill*, 38 Iowa, 583; *Cross v. Snakenberg*, 126 Iowa, 636, 102 N. W. 508. A covenant to convey and a covenant to take create mutual obligations. *Golden v. Claudel*, 85 Kan. 465, 118 Pac. 77. No material difference in legal effect is found in the several contracts. Each conveys a substantial equity in the land, giving the vendee the right to the title upon making payment, and the vendor the corresponding right to enforce payment of the consideration.

The plaintiff suggests a difficulty in enforcing the contracts. The specific enforcement of the agreement to cultivate appears to be confused with the enforcement of the contract of purchase, which is the primary undertaking. It cannot be doubted that, if the vendees should fail to cultivate or apply the crops as agreed, they would still be liable to pay the stipulated consideration for the land. It cannot be contended that their failure to provide for the payments in a particular way would relieve them from making the payments altogether. Within the principles decided in the *Williams* and *McGregor* Cases and in *Harris v. Edwards County*, 132 Pac. 206, all the contracts are credits of the vendor and subject to taxation. No other question is presented.

The cause is remanded, with directions to modify the judgment in accordance with these views. All the Justices concurring.

DAVIS v. MELVIN.

(Supreme Court of Kansas. May 10, 1913.)

Appeal from District Court, Shawnee County. Action by W. B. Davis against Julia A. Melvin. Judgment for defendant, and plaintiff appeals. Affirmed.

J. J. Schenck, of Topeka, and Davis & Holmes, of Kansas City, Mo., for appellant. D. H. Branaman and J. B. Larimer, both of Topeka, for appellee.

PER CURIAM. If the jury believed the evidence produced by the defendant, instead of that produced by the plaintiff, they were abundantly justified in drawing the inferences embodied in the second and third findings of fact. The evidence for the defendant is not inherently incredible. It was believed by the jury who saw and heard the witnesses, and the jury's estimation of it has been approved by the trial court. Consequently this court will not interfere.

It is true that the defendant did not offer to return the policies, in the sense of making a tender of them; but when the agent said he would like for the defendant to keep the policies, that they were a good investment, and that he could fix it up all right for her, she told him she could do nothing of the kind. The difference between offering to return the policies and declaring that she could not keep them, when asked to do so, is not so great as to deprive finding No. 6 of all support. Certainly passion and prejudice on the part of the jury are not disclosed.

The question whether or not the defendant was bound by the receipts and the certificate which she signed did not depend upon her reading or not reading them, but upon whether or not her conduct was induced by fraud, deceit, and false representations.

The jury were adequately and correctly instructed.

The judgment of the district court is affirmed.

MEMORANDUM DECISIONS

ANDERSON v. NORTHERN PAC. R. CO. et al. (Supreme Court of Montana. Jan. 7, 1913.) Appeal from District Court, Missoula County; F. C. Webster Judge. Gunn & Rasch, of Helena, for appellants. Harry H. Parsons, of Missoula, and John H. Tolan, of Missoula, and Walsh & Nolan, of Helena, for respondent.

PER CURIAM. Pursuant to stipulation between counsel for the respective parties, it is ordered that the appeal herein be, and it is hereby, dismissed.

JENKINS v. CARROLL. (Supreme Court of Montana. Oct. 28, 1912.) Appeal from District Court, Silver Bow County. Nolan & Donovan and A. B. Melzner, both of Butte, for appellant.

PER CURIAM. Upon due consideration of respondent's motion to dismiss the appeal herein, it is hereby ordered that the appeal be, and the same is hereby, dismissed.

O'ROURKE v. GRAND OPERA HOUSE CO. (Supreme Court of Montana. Jan. 20, 1913.) Appeal from District Court, Silver Bow County; John B. McClernan, Judge. Chas. O'Donnell, Jas. E. Murray, and Alex. Mackel, all of Butte, for appellant. L. O. Evans and John E. Corette, both of Butte, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal from the judgment herein is hereby granted, and said appeal is accordingly dismissed.

PREUITT v. NORTHERN PAC. R. CO. (Supreme Court of Montana. Sept. 10, 1912.) Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge. Gunn & Rasch, of Helena, for appellant.

PER CURIAM. Appellant's motion to dismiss its appeal herein is hereby granted, and the appeal dismissed.

STATE ex rel. WHITE v. DISTRICT COURT OF FOURTH JUDICIAL DISTRICT et al. (Supreme Court of Montana. Jan. 27, 1913.) Original application for writ of prohibition. A. S. Ainsworth, of Thompson Falls, and John G. Brown, of Helena, for relator.

PER CURIAM: Relator's application for a writ of prohibition is this day by the court denied.

STONE-ORDEAN-WELLS CO. v. GOLDBERG et al. (Supreme Court of Montana. Dec. 12, 1912.) Appeals from District Court, Park County; J. F. O'Connor, Judge. Nichols & Wilson, of Billings, for appellants.

PER CURIAM. Respondent's motion to dismiss the appeals herein is hereby sustained, and the appeals are accordingly dismissed.

COOK v. STATE. (Criminal Court of Appeals of Oklahoma. May 9, 1913.) Appeal from Garfield County Court; Winfield Scott, Judge. Walt Cook was convicted of violating the prohibitory law, and appeals. Affirmed. W. O.

Cromwell, of Enid, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. The plaintiff in error was convicted in the county court of Garfield county of the offense of unlawfully selling intoxicating liquors. September 30, 1911, he was sentenced to serve a term of 150 days in the county jail and to pay a fine of \$200. To reverse this judgment there was filed in this court January 5, 1912, a petition in error with case-made. From a careful examination of the record, it is apparent that the several assignments of error are without merit. The information was sufficient. Two witnesses, George Hennington and Tom Seaton, testified for the state that they bought bottled beer in the defendant's place of business during the month of June, 1911, and there is evidence of the payment by the defendant of the special tax required of liquor dealers by the United States on December 10, 1910, which did not expire until the end of the following June. There was no evidence offered on behalf of the defendant. The judgment is affirmed.

EARLEY v. STATE. (Criminal Court of Appeals of Oklahoma. May 10, 1913.) Appeal from Oklahoma County Court; John W. Hayson, Judge. Orson L. Earley was convicted of violating the prohibitory law, and appeals. Affirmed. Pruiett, Wilson & Sniggs, of Oklahoma City, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

PER CURIAM. The plaintiff in error, Orson L. Earley, was tried and convicted in the county court of Oklahoma county in September, 1911, on a charge of having the unlawful possession of intoxicating liquors with intent to sell the same, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 90 days. The appeal was filed in this court on December 30, 1911. Briefs were filed by the state on May 24, 1912. No briefs have been filed on behalf of the plaintiff in error, and no appearance made for oral argument. The record has been examined for fundamental error, and, none appearing, the judgment of the trial court is affirmed.

FINLEY v. STATE. (Criminal Court of Appeals of Oklahoma. April 5, 1913.) Appeal from Greer County Court; Jarret Todd, Judge. Fred Finley was convicted of violating the prohibitory law, and appeals. Dismissed. Eagin & Eagin, of Shawnee, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Fred Finley, was convicted at the July, 1911, term of the county court of Greer county on a charge of violating the prohibitory law, and on the 30th day of August thereafter judgment was pronounced by the court imposing a punishment of 30 days' imprisonment and a fine of \$50. Time was given and extended within which to file this appeal, amounting to 120 days, the statutory limit. The appeal was not filed in this court until the 30th day of December, 1911, more than 120 days after the rendition of the judgment. The appeal not having been filed within the time provided by the statute, we are without jurisdiction to review the errors complained of, and upon motion of the Attorney General the appeal is dismissed.

HILL v. CITY OF KINGFISHER. (Criminal Court of Appeals of Oklahoma. March 22, 1913.) Appeal from Kingfisher County Court; Jno. W. Graham, Judge. R. G. Hill was convicted of a violation of an ordinance of the City of Kingfisher, and appeals. Affirmed. D. K. Cunningham, of Kingfisher, for plaintiff in error. John T. Bradley, Jr., of Kingfisher, for defendant in error.

PER CURIAM. The plaintiff in error, R. G. Hill, was tried and convicted in the police court of the city of Kingfisher on a charge of violating a city ordinance, and appealed to the county court, where he was again tried and convicted, and judgment pronounced, imposing a fine of \$10 and costs. From this judgment, the appeal is to this court. We have carefully considered the record and the briefs in this case, and are of the opinion that the judgment of the trial court is just and right. It is therefore affirmed.

Ex parte HOLDEN. (Criminal Court of Appeals of Oklahoma. April 5, 1913.) Petition of Lottie Holden for writ of habeas corpus. Dismissed. Al J. Jennings, for petitioner.

PER CURIAM. This is a petition for the writ of habeas corpus, filed in this court on the 30th day of September, 1911. The petition was never presented to this court, nor to the presiding judge thereof. It is based upon the contention that the petitioner was convicted in the district court of Oklahoma county on a charge of manslaughter and sentenced to 20 years' imprisonment in the state penitentiary, that bail was fixed in the sum of \$20,000, and that said bail was excessive. There has been no appeal perfected in this court from the original judgment, and the time has long since lapsed in which this appeal could have been taken. The writ of habeas corpus is not the proper remedy in this class of cases anyway, and in all probability counsel abandoned this application, as well as an effort to appeal from the original judgment. The petition does not state grounds for relief, and is dismissed for want of prosecution.

KYLE v. STATE. (Criminal Court of Appeals of Oklahoma. May 10, 1913.) Appeal from Oklahoma County Court; John W. Hayson, Judge. Sam Kyle was convicted of violating the prohibitory law, and appeals. Modified and affirmed. Jennings & Levy, of Oklahoma City, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

PER CURIAM. The plaintiff in error, Sam Kyle, was tried and convicted at the October, 1911, term of the county court of Oklahoma county on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at confinement in the county jail for a period of three months and the payment of a fine of \$250 and costs. Upon a careful examination of the record we think the judgment should be affirmed. It appears, however, that the trial court, in entering the judgment, provided for the imprisonment of the plaintiff in error for the payment of the costs. The judgment as to the imprisonment and fine should stand, but that portion providing for the imprisonment of the plaintiff in error until the costs are paid exceeds the authority of the court, and the judgment is therefore modified by striking out that portion. The trial court should read the opinion of this court in *Ex parte Jake Harry*, 6 Okl. Cr. 168, 117 Pac. 726, and follow the doctrine therein enunciated in imposing fines and costs. The judgment, as modified, is affirmed.

KYLE v. STATE.† (Criminal Court of Appeals of Oklahoma. May 10, 1913.) Appeal from Superior Court, Logan County; S. S. Lawrence, Judge. Charles Kyle was convicted of violating the prohibitory law, and appeals. Affirmed. H. C. Olds, of Guthrie, for plaintiff in error. Charles West, Atty. Gen., and John Adams, of Guthrie, Co. Atty., for the State.

PER CURIAM. The plaintiff in error, Charles Kyle, was tried and convicted at the July, 1911, term of the superior court of Logan county on a charge of selling intoxicating liquor, and his punishment fixed at imprisonment in the county jail for a period of 30 days and a fine of \$50. We have carefully examined the record, and find no sufficient reason for interfering with the judgment of the trial court, and it is therefore affirmed.

MATER et al. v. STATE.† (Criminal Court of Appeals of Oklahoma. May 10, 1913.) Appeal from Superior Court, Logan County; S. S. Lawrence, Judge. Dan Mater and E. L. Brown were convicted of violating the prohibitory law, and appeal. Affirmed. H. C. Olds, of Guthrie, for plaintiffs in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

PER CURIAM. The plaintiffs in error, Dan Mater and E. L. Brown, were tried and convicted at the July, 1911, term of the superior court of Logan county on a charge of unlawful possession of intoxicating liquors with intent to sell the same. The punishment of the plaintiff in error Dan Mater was fixed at a fine of \$350 and imprisonment in the county jail for a period of 60 days, and that of plaintiff in error E. L. Brown at a fine of \$50 and 30 days' imprisonment. We have carefully examined the record, and find no error sufficient to justify a reversal. The judgment is therefore affirmed.

Ex parte RIVERS. (Criminal Court of Appeals of Oklahoma. April 28, 1913.) Petition for writ of habeas corpus by Emma Rivers. Petition sustained, and petitioner ordered admitted to bail. F. E. Riddle, of Chickasha, for petitioner. Oscar Simpson, Co. Atty., and B. F. Holding, Asst. Co. Atty., both of Chickasha, for the State.

PER CURIAM. Petitioner being confined in the county jail of Grady county, Okl., has applied for the issuance of a writ of habeas corpus in order that she may be admitted to bail pending trial on said charge. This application is made upon two grounds: First, that the proof is not evident or the presumption great that petitioner is guilty of the crime of which she is charged; second, that petitioner is afflicted with a chronic disease, which has been greatly aggravated by her imprisonment, and that her continued confinement in the county jail of Grady county pending her final trial upon said charge will result in a serious and permanent impairment of her health. This court expresses no opinion as to the guilt or innocence of petitioner, but upon a consideration of the entire record, in view of the health of petitioner, the court is of the opinion that she should be admitted to bail in the sum of \$10,000. It is therefore ordered that the application for writ of habeas corpus be sustained, and that petitioner be admitted to bail in the sum of \$10,000, to be approved by the clerk of the district court of Grady county.

SANDERS v. STATE. (Criminal Court of Appeals of Oklahoma. May 14, 1913.) Appeal from McCurtain County Court; E. E. Cochran, Judge. Harry Sanders was convicted of violating the prohibitory law, and appeals. Affirmed. H. P. Hosey and Steel, Lake & Head, all of

† Rehearing denied May 24, 1913.

Idabel, for plaintiff in error. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

PER CURIAM. The plaintiff in error, Harry Sanders, was tried and convicted at the July, 1912, term of the county court of McCurtain county on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at imprisonment in the county jail for a period of 30 days and a fine of \$50. Upon a careful examination of the record, we find no error sufficient to justify a reversal of the judgment of the trial court. It is therefore affirmed. The clerk is directed to issue the mandate instant.

SINDERSON v. STATE. TITTLE et al. v. SAME (three cases). (Criminal Court of Appeals of Oklahoma. March 8, 1913.) Appeals from Garfield and from Craig County Courts. B. L. Sinderson, Otis Tittle and T. W. Pritchett (in two cases) and Otis Tittle and Charles Webb were convicted of violations of the prohibitory law, and appeal. Dismissed as to all but Webb and Pritchett. Rush & Smith, of Enid, for appellant Sinderson. James S. Davenport, of Vinita, for other appellants. The Attorney General, for the State.

PER CURIAM. It having been made to appear to the satisfaction of this court that B. L. Sinderson, the appellant in cause No. A-1585 is a fugitive from justice, and therefore is not subject to the jurisdiction of this court, and that appellant Otis Tittle, in causes numbered A-1538, A-1646, and A-1647, is a fugitive from justice, and is not subject to the jurisdiction of this court, it is therefore ordered by the court that said appeals of B. L. Sinderson and Otis Tittle be dismissed. But in cause No. A-1538 and A-1647 the appeals of T. W. Pritchett are not to be affected by this order. In cause No. A-1647 the appeal of Charles Webb is not to be affected by this order. Mandates will issue at once in the cases against Otis Tittle and B. L. Sinderson.

TOMERLIN v. STATE. (Criminal Court of Appeals of Oklahoma. April 5, 1913.) Appeal from Oklahoma County Court; John W. Hayson, Judge. Jess Tomerlin was convicted of operating a gambling game, and appeals. Reversed. Pruiett, Sniggs & Wilson and Kistler, McAdams & Haskell, all of Oklahoma City, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen. (Herbert M. Peck, of Oklahoma City, of counsel), for the State.

PER CURIAM. Plaintiff in error, Jess Tomerlin, was convicted at the January, 1912, term of the county court of Oklahoma county on a charge of operating a roulette wheel, and his punishment fixed at a fine of \$1,000 and imprisonment in the county jail for a period of four months. This is a companion case to the Cecil Proctor Case, 130 Pac. 819, decided at the present term of court. For the reasons given in that case, the judgment in this case is reversed, and the cause remanded, with direction to the trial court to grant a new trial and require the county attorney to file a proper information and proceed according to law.

Ex parte WARNER. (Criminal Court of Appeals of Oklahoma. April 5, 1913.) Petition of Charles Warner for writ of habeas corpus. Dismissed. See, also, 129 Pac. 708. D. P. Farrell, of Okmulgee, for petitioner.

PER CURIAM. This cause coming on to be heard upon a motion of the petitioner requesting that his petition be dismissed, upon due consideration by the court the request is granted, and the petition for the writ of habeas corpus dismissed.

WELDON et al. v. STATE. (Criminal Court of Appeals of Oklahoma. March 6, 1913.) Appeal from District Court, Wagoner County; H. C. Allen, Judge. Claud H. Weldon and another were convicted of contempt, and appeal. Reversed and remanded. Robert F. Blair and Henry M. Brown, both of Wagoner, for plaintiffs in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiffs in error were by proper proceedings under the statute (section 14, c. 70, Sess. Laws 1911) enjoined as owners of a building, known as the Central Drug Company Building, in the city of Wagoner, from keeping or permitting to be kept on said premises intoxicating liquors for unlawful sale. Upon affidavit of the county attorney, charging them with contempt of court in violating the terms of the injunction, an order of attachment was issued to the sheriff, and they were immediately arrested and brought before the court, and the case was called for trial, whereupon counsel for plaintiffs in error demanded a trial by jury, which demand was then and there denied by the court, and exceptions allowed, and the trial proceeded. Upon the hearing the court found that plaintiffs in error had violated the terms of the injunction, and were in contempt of court, and subject to imprisonment therefor, and adjudged that they be confined in the county jail for a term of three months each and pay a fine of \$250 each. They gave notice of appeal, and asked to be admitted to bail pending appeal, which request was denied by the trial court. An appeal was properly perfected, and an order made by this court granting supersedeas pending the determination of said appeal. The only question presented was passed upon by this court in the companion case of Nichols et al. v. State, 8 Okl. Cr. —, 129 Pac. 673. Unquestionably the court erred in denying the demand of the defendants for a trial by jury. For the reasons given in the opinion in the Nichols Case, the judgment of conviction is reversed.

WILSON v. STATE. (Criminal Court of Appeals of Oklahoma. March 11, 1913.) Appeal from Murray County Court; Harry W. Fielding, Judge. Homer Wilson was convicted of a violation of the prohibition law, and appeals. Dismissed. W. N. Lewis, of Davis, and Emanuel & Broadbent, of Sulphur, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

PER CURIAM. Plaintiff in error, Homer Wilson, was convicted of a violation of the prohibition laws, and was on November 9, 1911, in accordance with the verdict of the jury, sentenced to serve a term of 30 days in the county jail and to pay a fine of \$50. To reverse this judgment, an appeal was perfected. Plaintiff in error has filed a motion to dismiss his appeal for the following reasons: First, that he has been surrendered by his bondsmen and is now in the county jail; second, that he is arranging to apply to the Governor for a parole. The motion to dismiss the appeal is allowed, and the appeal is hereby dismissed. Mandate will issue forthwith.

Ex parte WOODARD et al. (Criminal Court of Appeals of Oklahoma. March 8, 1913.) Petition of Clifford Woodard and others for writ of habeas corpus. Bail granted as to Clifford Woodard, and denied as to other petitioners. Ed. M. Frye and Curtis & Pitchford, all of Sallisaw, for petitioners. T. F. Shackelford Co. Atty., of Sallisaw, opposed.

PER CURIAM. This is a petition for the writ of habeas corpus on the part of Clifford

Woodard, Barney Tisher, Edward Sanders, Wolf Porter, Ernest Williams, and Felix Lee, who are in the custody of the sheriff of Sequoyah county, for the purpose of being admitted to bail. Bail of Clifford Woodard is fixed at \$10,000. Bail is denied as to the other petitioners.

MOORE v. MIYANAGA et al. (Supreme Court of Washington. Feb. 28, 1913.) Department 2. Appeal from Superior Court, King County; Everett Smith, Judge. Action by Lillian Moore against K. Miyanaga and others, partners doing business under the firm name of the Rose Grocery Company. From a judgment for plaintiff, defendants appeal. Affirmed. Walter A. Keene, of Seattle, for appellants. Daniel Landon and J. G. Raley, both of Seattle, for respondent.

PER CURIAM. This is an action for personal injuries. The cause was tried to the court without a jury, and findings of fact were made as follows: "(1) That the defendants, K. Miyanaga, S. Takahashi, and K. Nakanishi, are now and at all times herein mentioned were partners doing business under the firm name and style of Rose Grocery Company. (2) That on or about the 15th day of March, 1912, the

plaintiff was injured in the store of the defendants at 1000 Howell street, in the city of Seattle, Wash., through the negligent and careless acts of the defendants and their servants and agents in maintaining and leaving open an unguarded trapdoor in the floor of said store, thereby causing the plaintiff to fall through said open space, through no negligence or carelessness on her part, and sprain her left ankle and strain and injure the ligaments therein. That said injury, caused as aforesaid, caused the plaintiff much physical and mental pain and suffering and was a severe shock to her nervous system. (3) That on account of the injuries received as aforesaid plaintiff has been obliged to expend the sum of \$15 for doctor's bills, and has been further damaged on account of the physical pain and suffering and mental anguish caused by the injuries aforesaid, amounting in all, including the physician's services, to the sum of \$75." Motion for a new trial being made and overruled, judgment was entered in favor of the plaintiff. The defendants appeal. From a reading of the transcript of the evidence as contained in the statement of facts, we are unable to say that the findings of the superior court are not sustained by the weight of the testimony. The judgment will therefore be affirmed.

END OF CASES IN VOL. 131

*

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§ 48 (Cal.App.) Under Code Civ. Proc. § 427, defining what causes of action may be joined, held that plaintiff's claims for damages for breach of a covenant contained in a lease of property, for the wrongful taking of his own property, and for insult and putting in fear during the ejection from the premises were claims arising out of the same transaction which might be properly joined.—Boulden v. Thompson, 131 P. 766.

§ 50 (Ariz.) An action against a wife on her individual note is improperly joined in an action against her husband and herself on notes and mortgages jointly signed by them.—Richards v. Warnekros, 131 P. 154.

§ 53 (Wash.) On a note on which the maker agreed to pay stated monthly installments, his obligation was divisible, and the holder might maintain separate actions to recover the installments as they became due.—Davis v. Hibbs, 131 P. 1135.

ADJOINING LANDOWNERS.

See Boundaries.

ADJOURNMENT.

See Courts, § 76; Elections, § 276.

ADMINISTRATION.

See Bankruptcy, § 262; Executors and Administrators.

ADMIRALTY.

See Maritime Liens; Shipping.

ADMISSIONS.

See Criminal Law, § 409; Evidence, §§ 211-265; Pleading, § 377.

ADULTERY.

See Criminal Law, §§ 678, 772.

§ 11 (Wash.) On a trial for adultery with C., where she testified for the defense, a copy of a letter couched in endearing terms, which she admitted writing to another man and intrusting to accused unaddressed for delivery, was admissible as showing a degree of intimacy between her and accused.—State v. Moss, 131 P. 1132.

ADVANCES.

See Factors.

ADVERSE POSSESSION.

See Limitation of Actions; Tenancy in Common, § 15; Waters and Water Courses, § 137.

I. NATURE AND REQUISITES.**(F) Hostile Character of Possession.**

§ 58 (Okla.) The mere possession of lands, without an adverse claim being made to them, for less than the limitation period, does not establish title.—Adkins v. Wright, 131 P. 686.

§ 63 (Cal.App.) A grantor's possession after delivery of his deed will be considered either as tenant or trustee for the grantee, in the absence of an express disclaimer of such relation and a notorious assertion of an adverse claim.—Gernon v. Sisson, 131 P. 85.

§ 79 (Kan.) A tax deed good on its face, recorded more than five years, during which time the holder thereof has been in possession, cannot be avoided unless the taxes have been paid or the land redeemed according to the law.—Berg v. Chaney, 131 P. 1191.

(G) Payment of Taxes.

§ 95 (Colo.App.) Evidence held insufficient to show payment of taxes for seven years under color of title, so as to constitute title by limitations, under Rev. St. 1908, § 4090.—Empire Ranch & Cattle Co. v. Howell, 131 P. 798.

ADVICE OF COUNSEL.

See Malicious Prosecution, § 71.

AFFIDAVITS.

See Appeal and Error, § 562; Attorney and Client, § 52; Contempt, § 61; Continuance, § 19; Criminal Law, §§ 134, 956, 957; Elections, § 285; Insane Persons, § 12; Judgment, § 159; Justices of the Peace, § 127; New Trial, § 143; Pleading, § 304; Taxation, § 662.

AGENCY.

See Principal and Agent.

AGRICULTURAL LANDS.

See Municipal Corporations, § 7.

AGRICULTURE.

See Waters and Water Courses, §§ 21, 156, 158½, 225-263.

§ 4 (Kan.) Where a fair association, chartered by the state under the statute for encouragement of agriculture and horticulture, sells the privilege of using its buildings for pool selling and bookmaking on horse races, it may be ousted at the suit of the state, regardless of the effect and validity of statutes enacted to suppress gambling.—State v. Anthony Fair Ass'n, 131 P. 626.

An act of an incorporated fair association which constitutes an abuse of its authority and is clearly against good morals, and which ordinarily constitute a crime, justifies a proceeding in the nature of quo warranto and a judgment of forfeiture of its franchise.—Id.

ALIMONY.

See Divorce, §§ 199-285.

ALLEYS.

See Dedication, §§ 17, 39; Easements, §§ 5, 21, 61.

ALLOTMENT.

See Indians.

ALTERATION OF INSTRUMENTS.

§ 7 (Colo.) Where a note, when delivered, was blank as to the rate of interest, term of interest payment, and time from which interest should date, but these were thereafter filled up without defendant's authority, the alteration was material and avoided the note as between

the original parties under Rev. St. 1908, §§ 4587, 4588.—*Ayres v. Walker*, 131 P. 384.

ALTERNATIVE INDORSEMENT.

See Bills and Notes, §§ 170, 182.

AMENDMENT.

See Indictment and Information, § 161; Pleading, §§ 237-280.

ANIMALS.

See Carriers, § 228; Larceny, §§ 32, 47, 55; Municipal Corporations, § 112; Public Lands, § 135; Railroads, §§ 405-446; Street Railroads, § 90.

§ 23 (Colo.) Under a bailment of cattle to be cared for upon a range, on death of part of them, the burden was on the bailee to show that the loss did not result from his fault.—*Nutt v. Davison*, 131 P. 390.

Under a bailment of cattle to be cared for, the bailee was bound to use ordinary care to avoid death of the cattle through starvation or exposure if the bailor had no knowledge as to the condition of the pasture and the bailee did know thereof.—*Id.*

§ 100 (Idaho) Under the "Two-Mile Limit Law" (Rev. Codes, §§ 1217, 1218), a right of action is given against any person owning or having charge of sheep that are allowed to graze within two miles of a dwelling house; and if the owner is unknown and not ascertainable, the person damaged may proceed against the property under the General Trespass Law (Rev. Codes, §§ 1294, 1296).—*Cleveland v. Wallace*, 131 P. 10.

Rev. Codes, § 1219, provides that, where the owner of trespassing sheep is unknown, the injured party may treat the trespassing animals as estrays, but under the Estray Laws (Rev. Codes, §§ 1299-1301), no damages can be collected.—*Id.*

Under Rev. Codes, § 4230, and under section 1294 of the General Trespass Law, which sections authorize proceedings against an unknown defendant, proceedings may be maintained against an unknown defendant for the assessment of damages against trespassing animals, but the amount assessed shall not be a personal judgment, but shall only bind the property itself.—*Id.*

In view of Rev. Codes, § 3925, providing that a judicial officer has implied power to adopt the means necessary to the exercise of the powers expressly conferred, and of the right of action conferred by sections 1217, 1218, in case of trespassing animals, it is proper for a justices' court to proceed under the General Trespass Law (Rev. Codes, §§ 1294, 1296), to enforce against trespassing sheep belonging to an unknown owner a claim for damages done by them.—*Id.*

Since it is not necessary to fence against sheep, it is not necessary to appoint appraisers in an action under Rev. Codes, § 1294, for damages done by trespassing sheep in violation of sections 1217 and 1218.—*Id.*

ANSWER.

See Pleading, §§ 93, 403.

APPEAL AND ERROR.

See Certiorari; Contempt, § 66; Courts, §§ 202, 213; Criminal Law, §§ 1038-1186; Divorce, §§ 179-186; Elections, § 305; Exceptions, Bill of; Homicide, §§ 339-342; Insane Persons, § 27; Justices of the Peace, §§ 159-209; Limitation of Actions, § 130; Mandamus, § 4; Prohibition, § 3; Wills, §§ 358, 797.

I. NATURE AND FORM OF REMEDY.

§ 5 (Wyo.) Fatal defects in substance in a petition may be taken advantage of by writ of error.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

§ 14 (Colo.App.) Where an appeal was dismissed without prejudice to appellants to sue out a writ of error after the taking effect of Sess. Laws 1911, c. 6, regulating appeals, it could not be entered in the Court of Appeals as pending on writ of error.—*Abernathy v. Wright*, 131 P. 280.

§ 14 (Colo.App.) Where appellee enters no appearance, so that no jurisdiction of his person is obtained, the appeal, if dismissed, cannot be re-entered as pending on error.—*Stevens v. Tompkins*, 131 P. 802.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

§ 78 (Colo.) An order denying a petition for leave to intervene was a "final judgment" against petitioners, to which a writ of error would lie.—*People v. District Court of Sixth Judicial Dist.*, 131 P. 424.

(E) Nature, Scope, and Effect of Decision.

§ 102 (Wyo.) An order overruling a demurrer can be reviewed only on proceedings taken to review a final judgment.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

§ 113 (Ok.) An order setting aside a default, and permitting the defendant to answer, is not appealable.—*Rahl v. Marlow State Bank*, 131 P. 525.

IV. RIGHT OF REVIEW.

(B) Estoppel, Waiver, or Agreements Affecting Right.

§ 154 (Wash.) Where officers of a city, prosecuting with diligence an appeal from a decree restraining the enforcement of rules regulating hackmen while at a passenger depot, unsuccessfully sought to supersede the effect of the decree pending the appeal, the mere fact that they establish other regulations did not show an acceptance of the decree so as to warrant dismissing the appeal.—*City Cab, Carriage & Transfer Co. v. Hayden*, 131 P. 472.

§ 162 (Ariz.) Where two causes were united in one action, and the jury rendered a general verdict for plaintiff and judgment was had thereon, a satisfaction of the judgment extinguished all matters in controversy regarding both causes of action, and hence an appeal could not be prosecuted by plaintiff.—*Shannon Copper Co. v. Potter*, 131 P. 157.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§ 171 (Cal.App.) Where an issue is tacitly accepted by all parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory.—*National Union Fire Ins. Co. v. Nason*, 131 P. 755.

§ 171 (Mont.) Where a cause was tried on the theory that it was a suit in equity, the appellant was bound by the theory he adopted in the court below and could not urge for review matters not reviewable in equitable suits.—*Moss v. Goodhart*, 131 P. 1071.

§ 171 (Ok.) Where an action for damages for statutory rape is submitted below on the theory that the offense was committed without consent, it must be reviewed upon the same theory.—*Watson v. Taylor*, 131 P. 922.

(B) Objections and Motions, and Rulings Thereon.

§ 193 (N.M.) An objection that inconsistent causes of action are joined will not be considered on appeal when not raised below.—Medler v. Childers, 131 P. 490.

§ 193 (Or.) In an action on a liquor dealer's bond given in connection with a license to do business at a certain place, it is too late on appeal to urge for the first time that a breach regarding which there was testimony was not alleged to have occurred in the place named in the bond.—City of Woodburn v. Aplin, 131 P. 516.

§ 193 (Wyo.) An objection that a petition is fatally defective in matter of substance may be first made on appeal.—Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43.

§ 197 (Cal.App.) Defendant should have pointed out any variance between the averments and the proof, so that plaintiff might have had an opportunity to amend the complaint, and not having done so cannot complain on appeal.—Stover v. Stevens, 131 P. 332.

§ 201 (Cal.App.) Where plaintiff's counsel permitted the court, without objection, to practically try the case without their aid, they could not be heard on appeal to object that plaintiff was denied his right to the aid of counsel at every stage of the proceedings.—Johnston v. Johnston, 131 P. 81.

§ 204 (Cal.App.) Complaint could not be made on appeal of the admission of evidence not objected to at the trial.—Johnston v. Porter, 131 P. 69.

§ 206 (Or.) Where evidence is admitted which is competent for some purposes, though not for others, the ruling of the court admitting the evidence will not be reviewed on appeal, in the absence of a request for an instruction limiting the effect of the evidence.—Foster v. University Lumber & Shingle Co., 131 P. 736.

§ 206 (Wash.) An objection that an answer was not responsive to a question cannot be reviewed, where there was no motion to strike and no request for an instruction to disregard it.—Independent Asphalt Paving Co. v. Hein, 131 P. 471.

§ 216 (N.M.) Failure of the trial court to mark instructions "given" or "refused" will not be considered unless objected to below.—Goldenberg v. Law, 131 P. 499.

An objection that the judge inadvertently handed two refused instructions to the jurors, who took them to their jury room, will not be considered where appellant's attorney was present at the time and knew of the mistake and failed to call the trial judge's attention to the matter or to object thereto.—Id.

§ 231 (Or.) A defendant who objected only generally to the admission of evidence competent for some, but not all, purposes cannot on appeal complain of its admission.—Foster v. University Lumber & Shingle Co., 131 P. 736.

(D) Motions for New Trial.

§ 281 (Wyo.) Where no motion for new trial was filed below, the judgment, in so far as applicable to proceedings in error, became final on the date of its entry.—Fremont Lodge, No. 11, I. O. O. F., v. Board of Com'rs of Fremont County, 131 P. 62.

§ 302 (Kan.) Under the express provisions of Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), rulings excluding evidence were not reviewable when the evidence was not presented to the trial court at the hearing of the motion for a new trial.—Cheek v. Missouri, K. & T. Ry. Co., 131 P. 617.

VI. PARTIES.

§ 323 (Ok.) A petition in error by one of several defendants against whom judgment was entered jointly will be dismissed for want of nec-

essary parties, where the other defendants are not made parties plaintiff or defendant in error.—Smyser & McCormick v. Hudson, 131 P. 1076.

§ 327 (Ok.) All parties in the trial court, whose interests will be adversely affected by a reversal of the judgment, must be made parties, either as plaintiffs or defendants in error.—Wiley v. Cobb, 131 P. 1098.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**(A) Time of Taking Proceedings.**

§ 338 (Ok.) Where a motion for new trial was overruled February 11, 1911, and the petition in error was filed February 13, 1912, it was too late, and will be dismissed.—St. Clair v. Hufnagle, 131 P. 171.

§ 338 (Wyo.) Under Comp. St. 1910, § 5122, giving parties one year in which to institute proceedings in error, a writ of error sued out more than a year after final judgment comes too late.—Fremont Lodge, No. 11, I. O. O. F., v. Board of Com'rs of Fremont County, 131 P. 62.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 373 (Cal.) An appeal complying with the requirements of Code Civ. Proc. §§ 941a, 941b, 941c, providing a new method of appeal, and which do not call for an undertaking, will not be dismissed, even though appellant may have supposed that he was proceeding under the old method of appeal, and may have made an ineffectual attempt to take some of the steps necessary before the enactment of such provision.—Thelsen v. Matthal, 131 P. 747.

An appellant who has not given his notice of appeal within the 60 days prescribed by Code Civ. Proc. § 941b, providing an alternative method of appeal, without an appeal undertaking, but who has given notice within the time prescribed by section 939, must comply with section 940 requiring an appeal undertaking.—Id.

§ 391 (Ariz.) Under Civ. Code 1901, par. 1508, as amended by Laws 1912, c. 44, providing that no appeal shall be dismissed or judgment affirmed for any defect in the appeal bond, if appellant files a sufficient appeal bond, held, that a bond on appeal was a condition precedent to such relief, and that without it the court had no jurisdiction to order the filing of a new bond.—Young Const. Co. v. Ruth Gold Mines Co., 131 P. 1045.

§ 391 (Cal.) An appeal undertaking, insufficient because not covering each of two separate appeals, is invalid for any purpose, and the objection thereto cannot be obviated by the filing of a new undertaking under Code Civ. Proc. § 954, providing for the ordering of a new appeal bond.—Thelsen v. Matthal, 131 P. 747.

§ 394 (Cal.) Under the code provisions regulating the method of appeal before the alternative appeal provided by Code Civ. Proc. § 941a, 941b, 941c, a single undertaking reciting two appeals would not support either, except that an appeal from the judgment and from an order denying a new trial were regarded as so far identical as to authorize one undertaking for both.—Thelsen v. Matthal, 131 P. 747.

(D) Writ of Error, Citation, or Notice.

§ 414 (Or.) An adverse party entitled to notice of appeal under L. O. L. § 550, is every party whose interest in relation to the judgment appealed from is in conflict with the modification or reversal sought by the appeal; that is, every party interested in sustaining the judgment.—Templeton v. Morrison, 131 P. 319.

§ 419 (Cal.) Under Code Civ. Proc. § 941b, which provides that an appeal must be taken within 60 days after service of notice of the entry of judgment or order to be reviewed, such notice need not contain the date of entry

of the judgment, since the time for appeal runs from the service of the notice, and not from the date when judgment was entered.—*Theisen v. Matthai*, 131 P. 747.

§ 428 (Cal.) An appellant who has not given his notice of appeal within the 60 days prescribed by Code Civ. Proc. § 941b, providing an alternative method of appeal, but who has given notice within the time prescribed by section 939, must comply with section 940, requiring the filing of his notice of appeal.—*Theisen v. Matthai*, 131 P. 747.

§ 430 (Cal.) An appellant who has not given his notice of appeal within the 60 days prescribed by Code Civ. Proc. § 941b, providing an alternative method of appeal, but who has given notice within the time prescribed by section 939, must comply with section 940 requiring the serving of his notice of appeal.—*Theisen v. Matthai*, 131 P. 747.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 511 (Okla.) A proceeding in error, where the record does not show that defendant was present at the settlement of the case-made, or that notice thereof was served or waived, will be dismissed on motion.—*Pain v. Wyley*, 131 P. 172.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544 (Wyo.) Under Comp. St. 1910, §§ 4597, 4598, relating to bills of exceptions, an order overruling a demurrer to a petition for want of facts was a part of the record and reviewable on the writ of error without a bill of exceptions.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

§ 553 (Idaho) When the stenographer's transcript is not settled by the trial judge as required by Rev. Codes, § 4434 as added by Laws 1911, c. 119, it will be stricken from the transcript upon proper motion.—*Strand v. Crooked River Min. & Mill. Co.*, 131 P. 5.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 562 (Wash.) An affidavit in support of a motion for new trial should be made a part of the statement of facts, if it is to be considered on appeal.—*Stern v. City of Spokane*, 131 P. 478.

§ 564 (Okla.) A purported case-made not served within three days after entry of judgment or order appealed from, or within an extension of time duly allowed, cannot be considered.—*Hengst v. Thompson Oil & Gas Co.*, 131 P. 1075.

§ 564 (Okla.) Where a case-made is not served within the three days allowed by Comp. Laws 1909, §§ 6074, 6075, and no order is made within that time extending the time of service, a purported case-made then served presents nothing for review.—*Missouri, O. & G. Ry. Co. v. Smith*, 131 P. 1097.

(E) Abstracts of Record.

§ 592 (Colo.App.) Appellants' failure to present an abstract of record of the proceedings on demurrer to a bill *held* to deprive them of the right to a hearing on the demurrer in the Court of Appeals for ambiguity or uncertainty in the bill.—*Rosenbaum v. McEwen*, 131 P. 780.

(F) Making, Form, and Requisites of Transcript or Return.

§ 607 (Idaho) That appellant does not file a *præcipe* designating the papers desired to be included in the transcript within five days as required by Rev. Codes, § 4820a as added by Act Feb. 25, 1911 (Laws 1911, c. 117), is not

ground for dismissal where the record shows that the attorneys certify the transcript to contain all papers desired to be included, and the clerk certifies that it contains all the files and records of the case.—*Strand v. Crooked River Min. & Mill. Co.*, 131 P. 5.

(G) Authentication and Certification.

§ 612 (Cal.App.) Under Supreme Court rule 29 (119 P. xiv), providing for authentication of papers, evidence, etc., by incorporating them in a bill of exceptions, and Code Civ. Proc. §§ 941b, 953a, prescribing an alternative method of appeal by record authenticated by the trial judge, *held*, that the clerk's certificate was not a sufficient authentication to perfect an appeal under either method of appeal.—*Thompson v. American Fruit Co.*, 131 P. 878.

§ 612 (Cal.App.) An appeal from an order fixing costs can be perfected only by the trial judge authenticating the record as required by Code Civ. Proc. § 953a, or by Supreme Court rule 29 (144 Cal. iii, 78 Pac. xii).—*Pouchan v. Godeau*, 131 P. 879.

§ 612 (Idaho) Where the transcript of the court reporter was completed July 5th, and filed with the clerk July 24th, and the transcript certified by the clerk August 8th, and the certificate refers to the reporter's transcript filed July 24th, and the record contains no certificate from the judge, but on the back is a certificate by him dated August 24th, certifying the transcript of the evidence as a bill of exceptions, but it does not appear whether counsel were present, and no service of process is shown, the record is so uncertain and indefinite as to require dismissal of the appeal.—*Primrose v. Armstrong Machinery Co.*, 131 P. 14.

§ 614 (Okla.) Where a void case-made contains no certificate of the clerk, but instead a mere attestation of the trial judge's certificate, it cannot be considered as a transcript of the record.—*Hengst v. Thompson Oil & Gas Co.*, 131 P. 1075.

§ 616 (Cal.App.) Under Supreme Court rule 29 (119 P. xiv), providing for authentication of papers, evidence, etc., by incorporating them into a bill of exceptions, and Code Civ. Proc. §§ 941b, 953a, prescribing an alternative method of appeal by record authenticated by the trial judge, *held*, that the clerk's certificate was not a sufficient authentication to perfect either method of appeal.—*Thompson v. American Fruit Co.*, 131 P. 878.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 623 (Ariz.) Where a new trial was denied August 5th, transcript filed and served October 3d, certified by the trial judge October 25th, and the record filed in the Supreme Court November 22d, there was a strict compliance with the statutes and rules of the Supreme Court.—*Hull v. Larson*, 131 P. 668.

§ 624 (Idaho) Where a justice of the Supreme Court extends the time within which a transcript may be filed beyond the period fixed by statute and rules, the appeal will not be dismissed on the ground that the transcript was not filed in time.—*Strand v. Crooked River Min. & Mill. Co.*, 131 P. 5.

§ 627 (Cal.App.) Under Supreme Court rules 2 and 5 (119 Pac. ix, x), where notice of the denial of a motion for a new trial was served on November 5th, and no transcript was on file at the time of hearing a motion to dismiss on February 10th, the appeal will be dismissed.—*Reynolds v. Planada Development Co.*, 131 P. 898.

§ 632 (Idaho) An appeal must be dismissed where it appears that the transcript was not served; Laws 1911, c. 119, § 2, requiring service of the transcript upon the adverse party

being mandatory.—*Strand v. Crooked River Min. & Mill. Co.*, 131 P. 5.

(I) Defects, Objections, Amendment, and Correction.

§ 655 (Or.) Where pages had been substituted in the transcript furnished by appellant for pages furnished by the stenographer, such transcript will be stricken, and appellant will not be allowed to have the case tried on the correct copy of the transcript furnished by appellee.—*Martin v. City of Brownsville*, 131 P. 512.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 663 (Idaho) The district clerk's certificate that an undertaking on appeal has been filed within time is sufficient, in the absence of contrary proof, to establish such fact.—*Strand v. Crooked River Min. & Mill. Co.*, 131 P. 5.

(K) Questions Presented for Review.

§ 671 (Ariz.) On appeal from the judgment alone, only errors appearing upon the judgment roll will be considered.—*Thomas v. Bartleson*, 131 P. 973.

§ 690 (Or.) Bill of exceptions complaining of the exclusion of evidence held insufficient under L. O. L. § 171, because it did not state enough of the evidence to enable the court to determine whether or not that excluded was relevant.—*Hawxhurst v. Meadow Lake Lumber Co.*, 131 P. 318.

§ 695 (Idaho) Where from the record there is reason to believe that material exhibits have been omitted, the court will not examine the record to pass upon the merits.—*Primrose v. Armstrong Machinery Co.*, 131 P. 14.

§ 695 (Or.) The court may refuse to review the denial of a request to charge that the evidence failed to show that plaintiff had sustained a permanent injury, where all of the testimony had not been reported in the transcript.—*Guild v. Portland Ry. Light & Power Co.*, 131 P. 310.

§ 702 (Wash.) Where all of the instructions given were not brought up to the appellate court, objections to disconnected portions cannot be sustained.—*Independent Asphalt Paving Co. v. Hein*, 131 P. 471.

Where the instructions as a whole were not presented on appeal, *held*, that it could not be determined that the instruction complained of was redundant.—*Id.*

XI. ASSIGNMENT OF ERRORS.

§ 719 (Cal.App.) Where, on the hearing of an administrator's petition for distribution, the matter was submitted on an agreed statement of facts covering all jurisdictional matters as well as all the facts, no assignment of errors was necessary to the consideration of an appeal from the decree of distribution.—*In re Davidson's Estate*, 131 P. 67.

§ 719 (Colo.) Where error was not assigned to the effect that mechanics' liens were allowed for the value of items not lienable, the question cannot be considered on appeal.—*Horn v. Clark Hardware Co.*, 131 P. 405.

XII. BRIEFS.

§ 758 (N.M.) An objection to an erroneous instruction will not be reviewed unless the complaining party clearly points out his objection in his brief.—*Goldenberg v. Law*, 131 P. 499.

§ 758 (Ok.) Where plaintiff in error fails in his brief to set forth a specification of errors complained of, in compliance with rule 25 of the Supreme Court (95 Pac. viii), his appeal will be dismissed.—*Vanselow v. McClellan*, 131 P. 172.

§ 765 (Ariz.) Under the express provisions of Supreme Court Rule 4, subd. 5 (126 Pac. x), as amended, appellant's brief is timely served on appellee's attorney if served within 30 days

after the record is filed in the Supreme Court.—*Hull v. Larson*, 131 P. 668.

§ 773 (Idaho) The failure to file briefs within time is not of itself ground for dismissing an appeal, though such fact may be considered, where other grounds exist, in determining whether the appeal has been prosecuted, with due diligence.—*Strand v. Crooked River Min. & Mill. Co.*, 131 P. 5.

§ 773 (Ok.) Where plaintiff in error fails to file briefs, as required by Supreme Court rule 7 (95 Pac. vi), the appeal will be dismissed.—*State v. Weatherford Milling Co.*, 131 P. 683.

§ 773 (Ok.) Where no briefs are filed, an appeal will be deemed abandoned, and the cause will be dismissed.—*State v. Heath*, 131 P. 685.

§ 773 (Ok.) Where brief of plaintiff in error is not filed with the clerk of the Supreme Court within 40 days after filing petition in error, and no response is made thereto nor any briefs filed, the appeal will be dismissed.—*Travis v. Waken*, 131 P. 1098.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 795 (Cal.) In view of the fact that a defect in an appeal bond was incurable, and went to the jurisdiction of the Supreme Court to entertain the appeal, a notice of motion to dismiss was sufficient without specifying the precise point in which it was bad.—*Theisen v. Matthai*, 131 P. 747.

§ 797 (Or.) Where a judgment was rendered against L., C., and M., on a joint delivery bond, L. defaulting, an appeal by M. without serving notice on C. would not be dismissed prior to final hearing; an appeal from a subsequent decree in another suit adjudging that C. was primarily liable not being determined.—*Templeton v. Morrison*, 131 P. 319.

§ 801 (Colo.App.) Where the Court of Appeals has no jurisdiction, and the appeal if dismissed, cannot be re-entered as pending on error, it may be properly affirmed under rule 1 of the Court of Appeals (127 Pac. ix), providing that, whenever an appeal or writ of error shall be dismissed, the court, in its discretion, may affirm the judgment of the court below.—*Stevens v. Tompkins*, 131 P. 802.

XV. HEARING AND REHEARING.

§ 832 (Cal.) The Supreme Court will not grant a rehearing to consider points not presented in the briefs or arguments on which the case was submitted for decision.—*Flores v. Stone*, 131 P. 351, 352.

§ 835 (Idaho) Where the contention on rehearing is merely that a new party should be brought in on a subject-matter not involved in the case appealed, the former opinion will be affirmed and a new trial denied.—*Wittenberg v. Northern Idaho Pine Lumber Co.*, 131 P. 1.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 837 (Cal.App.) In determining whether the evidence supported the findings and judgment for plaintiff, the evidence developed on defendant's case would be considered, although defendant moved for a nonsuit at the close of plaintiff's case.—*Reardon v. Richmond Land Co.*, 131 P. 894.

§ 866 (Or.) Where, after the denial of a nonsuit, defendant introduced evidence and the court directed a verdict for plaintiff, the Supreme Court, in determining whether the nonsuit was properly denied, could examine the whole of the evidence, even if insufficient to be submitted to the jury.—*Patton v. Women of Woodcraft*, 131 P. 521.

§ 867 (Wash.) On appeal by plaintiffs from order granting a new trial because the verdict was excessive, where no cross-appeal was or could be taken, defendants' claims of nonliabil-

ity could not be considered.—*Hammond v. Hillman*, 131 P. 641.

(C) Parties Entitled to Allege Error.

§ 877 (Or.) That a verdict in ejectment for defendant for possession only did not conform to L. O. L. § 329, and determine the question of title, *held* not an error of which plaintiff could take advantage on appeal.—*Marquam v. Ray*, 131 P. 523.

§ 882 (Or.) Where a recorder was testifying as to what a defendant in an action on a liquor dealer's bond had said in making a plea in a criminal action concerning the same breach, and defendant objected that the record was the best evidence, he cannot complain that the plaintiff introduced such record.—*City of Woodburn v. Aplin*, 131 P. 516.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 888 (N.M.) Where a material fact omitted from the complaint is as fully litigated without objection as if it had been put in issue, the complaint should be amended in aid of the judgment by the Supreme Court so as to allege the omitted fact.—*Canavan v. Canavan*, 131 P. 493.

§ 889 (Wash.) In the absence of statement of facts or bill of exceptions, the court will, if necessary, deem the complaint amended.—*McCreery v. Carter*, 131 P. 1125.

(E) Presumptions.

§ 907 (Nev.) The court, on appeal from a judgment only, will presume that the evidence is sufficient to support the findings of the trial court.—*Wolf v. Humboldt County*, 131 P. 964.

§ 907 (Wash.) In the absence of a statement of facts or bill of exceptions, the court will presume that the evidence supports the judgment.—*McCreery v. Carter*, 131 P. 1125.

§ 912 (Cal.App.) Where the complaint and record are silent on the question, it is presumed that defendants are residents of the county wherein the action is commenced, the burden being upon them to show that they were residents of another county if they seek a change of venue to such other county.—*Aisbett v. Paradise Mountain Min. & Mill. Co.*, 131 P. 330.

§ 916 (Colo.App.) Where the complaint attempted to state a cause of action on quantum meruit, and also relied upon an express contract, and an instruction that plaintiff elected to stand on the cause of action on quantum meruit was signed by both attorneys, the court will assume that a good cause of action on quantum meruit was stated.—*Sankey v. Cramer*, 131 P. 288.

§ 917 (Colo.) Although the record does not affirmatively say that the court passed upon a demurrer to a replication, its recital that plaintiff elected to stand upon his replication shows that the demurrer thereto was sustained.—*Castner v. Gray*, 131 P. 404.

§ 920 (Cal.) The court on appeal from an order granting a temporary injunction pendente lite must presume that the trial court accepted in support of the injunction the facts deducible from the complaint and affidavits.—*Vallejo Ferry Co. v. Solano Aquatic Club*, 131 P. 864, 874.

§ 927 (Cal.App.) In reviewing a judgment on a nonsuit, any reasonable construction of the testimony on behalf of the plaintiff which will sustain the cause of action alleged must be adopted.—*Hay v. McDonald*, 131 P. 74.

§ 927 (Wash.) Where the trial court withdrew a case from the jury and dismissed the action, the Supreme Court would accord verity to the evidence most favorable to plaintiff and give it its full probative effect.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

§ 927 (Wash.) In passing upon the sufficiency of the evidence to sustain a finding, after denial of a directed verdict, the Supreme Court must consider it most favorably to respondent.—*Nath v. Oregon R. & Navigation Co.*, 131 P. 251.

§ 928 (Colo.App.) Where the instructions are not in the abstract, and no exceptions were reserved thereto, it will be assumed that the matters in issue were submitted by proper instructions.—*Hill v. Sullivan*, 131 P. 1040.

§ 930 (Colo.App.) All conflicting evidence on material facts is presumed to have been resolved by the jury in favor of the successful party.—*Finding v. Gitzen*, 131 P. 1042.

§ 930 (Or.) Where it was agreed that a jury might return their sealed verdict to the bailiff and disperse, and no objection was made when such agreement was stated by the court or when the bailiff delivered the verdict to the court, nor until a motion for new trial was filed, it will be assumed that counsel consented to the separation of the jury and to the reception of the verdict in their absence.—*Foster v. University Lumber & Shingle Co.*, 131 P. 736.

§ 931 (Cal.App.) On appeal from a judgment on the judgment roll alone, every fact essential to support the court's findings must be presumed to have been proved.—*Burnham v. Abrahamson*, 131 P. 338.

§ 931 (Mont.) On appeal in suits in equity, the trial court is presumed to have disregarded incompetent testimony, unless it appears that it influenced the decision in some material aspect.—*Moss v. Goodhart*, 131 P. 1071.

§ 933 (Mont.) Where the record did not disclose whether motion for new trial was on the minutes or on a bill of exceptions, *held*, that it would be presumed that the order granting a new trial was based on the minutes.—*Moore v. Butte Electric Ry. Co.*, 131 P. 635.

§ 934 (Cal.App.) Where the clerk certified that a judgment was entered in the action, it must be presumed that it was regularly entered, in absence of a contrary recitation therein.—*Beaumont v. Midway Provident Oil Co.*, 131 P. 106.

§ 934 (Cal.App.) On appeal from a judgment on the judgment roll alone, every fact essential to support the judgment must be presumed to have been proved.—*Burnham v. Abrahamson*, 131 P. 338.

(F) Discretion of Lower Court.

§ 957 (Cal.) The appellate courts will not reverse a decision of the trial court refusing or granting relief from a default asked under Code Civ. Proc. § 473, unless there is an actual abuse of discretion.—*Oppenheimer v. Radke & Co.*, 131 P. 365.

§ 966 (Cal.App.) Where it is shown, on motion for continuance for the absence of a party defendant, that his interests will suffer if he is unable to attend the trial, which the affidavits of the other side tend to disprove, it is for the trial judge to determine the facts; and no abuse of discretion can be predicated on his ruling.—*Mead v. Broads*, 131 P. 758.

§ 971 (Colo.) The determination of the trial court of the question whether a child is competent to testify will not be disturbed on appeal, unless the trial court clearly abused its discretion.—*City of Victor v. Smilanich*, 131 P. 392.

§ 978 (Colo.) The discretion of the trial court in denying a new trial, sought on the ground that the jury were tampered with, will not be disturbed on appeal, unless the verdict is manifestly against the weight of the evidence.—*Liutz v. Denver City Tramway Co.*, 131 P. 258.

§ 979 (Wash.) In an attorney's action for services, the trial court's action in granting a new trial, unless plaintiffs would consent to a

reduction of the verdict from \$10,000 to \$8,000, held not an abuse of discretion, and hence not to be disturbed on appeal.—Hammond v. Hillman, 131 P. 641.

(G) Questions of Fact, Verdicts, and Findings.

§ 987 (Or.) Under Const. art. 7, § 3, as amended November 8, 1910 (see Laws 1911, p. 7), forbidding re-examination of any fact tried by a jury, unless there is no evidence to support the verdict, evidence held sufficient to go to the jury on the issue whether plaintiff's release of his claim for damages from an accident while in defendant's employ was fraudulently obtained, so that the jury's finding thereon could not be disturbed on appeal.—Foster v. University Lumber & Shingle Co., 131 P. 736.

§ 994 (Or.) A party's statement of fact accepted by the jury must be taken as true on appeal by the other party.—Foster v. University Lumber & Shingle Co., 131 P. 736.

§ 999 (Wash.) The verdict of a jury upon an issue correctly submitted is controlling on appeal.—Independent Asphalt Paving Co. v. Hein, 131 P. 471.

§ 1001. A verdict supported by substantial evidence will not be reversed.

—(Idaho) Johnson v. Fisher, 131 P. 8;
(N. M.) Goldenberg v. Law, 131 P. 499.

§ 1001 (Cal.App.) A verdict sustained by some evidence will not be disturbed on appeal.—Mullolland v. Western Gas Const. Co., 131 P. 110.

§ 1001 (Okla.) Unless the evidence with all the inferences is insufficient to sustain a verdict for plaintiff, a verdict for defendant cannot be directed.—Booker Tobacco Co. v. Walker, 131 P. 537.

§ 1001 (Okla.) Where the evidence reasonably tended to support the verdict for plaintiff, the judgment for plaintiff will not be disturbed.—Wegner v. Minchew, 131 P. 696.

§ 1001 (Wash.) A verdict cannot be sustained unless it is supported by substantial proofs.—Ludberg v. Barghoorn, 131 P. 1165.

§ 1002 (Colo.App.) A verdict on competent, substantial, and conflicting evidence is conclusive on appeal, although the court may believe from the record that the verdict might well have been otherwise.—Mountain Supply Ditch Co. v. Lindekugel, 131 P. 789.

§ 1002 (Colo.App.) A verdict on an issue of fact, where the evidence was in sharp conflict, was conclusive on appeal.—Bloomfield v. Nevitt, 131 P. 801.

§ 1002 (Colo.App.) The credit to be given to witnesses was for the jury, and its verdict upon conflicting evidence may not be disturbed.—Stevens v. Tompkins, 131 P. 802.

§ 1002 (Idaho) The rule that a judgment will not be reversed where there is a conflict in the evidence does not apply where the evidence is conflicting upon a question which does not govern the right of recovery.—Breshears v. Callender, 131 P. 15.

§ 1002 (Okla.) A verdict reasonably supported by evidence will not be reversed because other evidence conflicts therewith.—Town of Fairfax v. Giraud, 131 P. 159.

§ 1002 (Okla.) Where the evidence is conflicting and the verdict is not excessive, it will not be disturbed.—Muskogee Electric Traction Co. v. Patterson, 131 P. 702.

§ 1002 (Wash.) A verdict on conflicting evidence, under proper instructions, will not be disturbed.—Bradford v. Adams, 131 P. 449.

§ 1002 (Wash.) The credibility of the witnesses and the weight of conflicting evidence is for the jury, and a verdict within the issues and evidence rendered under proper instructions will not be disturbed.—Sutherland & Brewer v. Lewis River Boom & Logging Co., 131 P. 455.

§ 1002 (Wash.) A finding on conflicting evidence will not be disturbed on appeal.—Hertzog v. Star Logging Co., 131 P. 806.

§ 1002 (Wash.) A verdict on conflicting evidence will be sustained on appeal, where there is sufficient evidence to support every material issue.—Bartlett v. Plaskett, 131 P. 1125.

§ 1005 (Kan.) Where the evidence is conflicting and the verdict was approved by the trial court, the judgment will not be disturbed.—Gurwell v. Shimeall, 131 P. 1192.

§ 1005 (Mont.) A finding of the jury on conflicting evidence, when approved by the trial judge, will not be disturbed on appeal.—Previsich v. Butte Electric Ry. Co., 131 P. 25.

§ 1010 (Cal.) A trial court's findings upon disputed issues of fact will not be disturbed unless wholly lacking the support of substantial evidence, which rule is applicable to findings in proceedings to appoint a guardian for one mentally incompetent.—In re Coburn, 131 P. 352.

§ 1010 (Colo.App.) In an action to quiet title against a tax deed, a finding of fact, supported by evidence, that the notice of the tax sale and the list of property to be sold were advertised in the manner, and for the time, stated in the publisher's affidavit, and as required by law, is conclusive on appeal.—Pelton v. Muntzing, 131 P. 281.

§ 1010 (Idaho) Findings of fact supported by substantial, though disputed, evidence, will not be disturbed.—Brinton v. Steele, 131 P. 662.

§ 1010 (Kan.) A finding or determination of the trial court will not be set aside when supported by competent evidence.—Smethers v. Lindsay, 131 P. 563.

§ 1010 (Kan.) Findings of the trial court supported by some substantial testimony cannot be disturbed, though the Supreme Court might have reached a different conclusion on the same testimony.—Bartels v. School Dist. No. 118, 131 P. 579.

§ 1010 (Kan.) Findings of fact sustained by competent evidence will not be set aside, in the absence of error of law.—Garner v. Horner, 131 P. 585.

§ 1010 (Okla.) Findings of the trial court on issues of fact will not be set aside if supported by any substantial evidence.—Friedman & Co. v. State, 131 P. 529.

§ 1010 (Okla.) Findings of the trial court as to the place of residence of a certain person are conclusive on appeal when reasonably supported by any evidence.—Cornelison v. Blackwelder, 131 P. 701.

§ 1010 (Or.) The finding of the trial court on a question of fact amounts to a verdict and cannot be disturbed on appeal unless the court can say affirmatively that there is no evidence to support it.—Noble v. Beeman-Spaulling-Woodward Co., 131 P. 1006.

§ 1011. A finding on conflicting testimony heard by the trial court will not be disturbed on appeal.

—(Cal. App.) Rauer's Law & Collection Co. v. Third Street Improvement Co., 131 P. 77;
Blackwell v. Renwick, Id. 94; Griffin v. Long, Id. 760; Brown v. Ratliff, Id. 769;
Goodwin v. Central Broadway Bldg. Co., Id. 896;

(Colo.) Springhetti v. Hahnwald, 131 P. 286;

(Idaho) Wittenberg v. Northern Idaho Pine Lumber Co., 131 P. 1.

§ 1011 (Ariz.) An appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence or not supported by the evidence, when the evidence is conflicting, or when there is any substantial evidence to support the verdict.—Hull v. Larson, 131 P. 668.

§ 1011 (Colo.App.) While the findings of the trial court on conflicting evidence are conclusive on appeal in proceedings to secure permission to

change the point of diversion of water rights, this rule does not apply to findings in respect to questions upon which there is no substantial conflict in the evidence.—*Farmers' High Line Canal & Reservoir Co. v. Wolff*, 131 P. 291.

§ 1011 (Colo.App.) If after carefully weighing the conflicting evidence it leaves it doubtful as to which side should prevail, the Supreme Court will not disturb the trial court's finding.—*National Const. Co. v. Owens*, 131 P. 794.

(H) Harmless Error.

§ 1026 (N.M.) Errors not prejudicial to the substantial rights of a party will be disregarded on appeal.—*Goldenberg v. Law*, 131 P. 499.

§ 1032 (Colo.App.) A judgment will not be reversed, unless appellant shows error actually or presumptively prejudicial to it.—*Mountain Supply Ditch Co. v. Lindekugel*, 131 P. 789.

§ 1032 (N.M.) An objection that a witness was permitted to answer an improper question will not be reviewed unless the complaining party points out wherein his rights have been prejudiced thereby.—*Goldenberg v. Law*, 131 P. 499.

§ 1033 (Colo.App.) Where the only error shown was manifestly favorable to appellant, it is harmless.—*Mountain Supply Ditch Co. v. Lindekugel*, 131 P. 789.

§ 1039 (Cal.App.) Where, in an action for compensation for services and money due, no interest was allowed prior to the filing of the complaint, the ambiguity in plaintiff's demand for interest was not prejudicial.—*Kenison v. Campbell*, 131 P. 89.

§ 1040 (Cal.) No prejudice could have resulted from the refusal to entertain a demurrer to a petition which was not demurrable.—*In re Coburn*, 131 P. 352.

§ 1040 (Cal.App.) In view of the court's findings disregarding an ambiguous expression in a complaint otherwise correct, *held*, that the overruling of a demurrer for uncertainty was harmless.—*Kenison v. Campbell*, 131 P. 89.

§ 1040 (Cal.App.) Where a defective allegation of tender by the seller did not result in any substantial injury to the buyer, in his defense of the seller's action, error, if any, in overruling a demurrer on that particular ground was harmless.—*A. Widemann Co. v. Digges*, 131 P. 882.

§ 1040 (Cal.App.) The error in overruling a demurrer to a complaint on the ground of uncertainty as to its allegations is not prejudicial to defendant, who was not misled, and a judgment for plaintiff rendered after a trial on the merits will not be disturbed.—*Young v. Benton*, 131 P. 1051.

§ 1040 (Colo.) Where defendant as a matter of law was entitled to judgment, plaintiff on appeal cannot complain that the court did not dispose of the demurrer to his replication before rendering judgment on the pleadings.—*Castner v. Gray*, 131 P. 404.

§ 1041 (Okl.) An allowance of an amendment will not be disturbed unless the discretion of the court has operated to the prejudice of the complaining party.—*Booker Tobacco Co. v. Walker*, 131 P. 537.

§ 1047 (Cal.App.) In an action by an insurance company against its agent to recover commissions retained by the agent on policies that were afterwards canceled, in which the cancellations were conceded, and the only dispute was as to the time thereof which element the defendant deemed immaterial, rulings on the introduction of evidence as to the fact of cancellation, if erroneous, were harmless.—*National Union Fire Ins. Co. v. Nason*, 131 P. 755.

§ 1047 (Cal.App.) The error, if any, in failing to rule on a motion to strike out evidence, is without prejudice to the party complaining,

where the ruling should have been adverse to him.—*Young v. Benton*, 131 P. 1051.

§ 1048 (Okl.) Where, in an action on a fire insurance policy, the wife was clearly competent to testify as she did, error in submitting the question of her competency to the jury was not prejudicial to the defendant.—*Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co.*, 131 P. 691.

§ 1050 (Cal.App.) Where a witness testifying as an expert on the subject of what is necessary to make a gas factory reasonably safe for employees gave his reasons for his conclusion, any error in permitting him to state what is a safe way to equip a scrubber is not prejudicial.—*Mullholland v. Western Gas Const. Co.*, 131 P. 110.

§ 1050 (Kan.) A judgment will not be reversed because a copy of a newspaper, showing notice of conveyance of unredeemed lands sold for taxes, was admitted without a showing that no better evidence was procurable, where there is no reason to suppose that the notice therein was not genuine.—*Morrow v. Inge*, 131 P. 1184.

§ 1051 (Cal.App.) Rulings as to the admission of evidence upon facts admitted in the pleadings are harmless.—*Thal v. Radke & Co.*, 131 P. 63.

§ 1051 (Colo.App.) Where a tax deed under which defendant claimed title in a statutory action to quiet title was void on its face, and was rejected for that reason when offered in evidence, the admission of further evidence to prove its invalidity was not reversible error.—*Empire Ranch & Cattle Co. v. Howell*, 131 P. 798.

§ 1054 (Cal.App.) Where evidence was admissible for specified purposes, the refusal of the court to state for what purpose it admitted the evidence was not prejudicial.—*Young v. Benton*, 131 P. 1051.

§ 1057 (Cal.) Error in excluding evidence was harmless where such fact was admitted.—*In re Coburn*, 131 P. 352.

§ 1057 (Cal.App.) The error, if any, in excluding evidence of a fact established by other evidence, is not prejudicial.—*Brown v. Ratliff*, 131 P. 769.

§ 1058 (Or.) In action on benefit insurance certificate, defended on the ground that member was suspended, where defendant showed that the assessments were accepted on the affidavit of the local clerk that there had been no delinquency, exclusion of a letter written by her explaining the matter more thoroughly *held* not prejudicial to defendant.—*Patton v. Women of Woodcraft*, 131 P. 521.

§ 1064 (Cal.App.) In an action by a passenger for a wrongful ejection from a train, the error, if any, in an instruction that a passenger, who has not paid his fare before entering the train, if he has been given an opportunity to do so, must, on demand, pay an addition to the regular fare, was not prejudicial to the carrier.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

§ 1064 (Colo.) In an action against a bailee for loss of cattle, conflicting instructions as to burden of proof to show negligence constituted reversible error.—*Nutt v. Davison*, 131 P. 390.

§ 1066 (Cal.App.) Error in instruction on contributory negligence *held* not prejudicial to plaintiff, where the evidence showed no negligence on defendant's part.—*Campbell v. Southern Pac. Ry. Co.*, 131 P. 80.

Inaccurate instruction on assumed risk *held* not prejudicial to plaintiff, where no issue on assumed risk was raised by the pleadings or evidence.—*Id.*

§ 1066 (Wash.) Instruction which assumed that the place where plaintiff was struck by a taxicab was frequented at night by pedestrians, a fact not proven, *held* harmless, where it

clearly conveyed the idea that such care should be exercised in the management of a taxicab as the locality and time of the collision with plaintiff would suggest as necessary to avoid accident.—*Heath v. Seattle Taxicab Co.*, 131 P. 843.

Instruction incorrectly defining the speed limit at the place where plaintiff was struck by an automobile, as shown by ordinance in evidence, *held* harmless, where the sole issue was whether a car belonging to defendant company, and driven by its driver, struck and injured plaintiff.—*Id.*

§ 1067 (Kan.) Where an employee's action for injuries was tried on the theory that no recovery could be had, except under the Factory Act, no prejudice could have resulted to defendant from a refusal to instruct, upon assumed risk and contributory negligence, though the petition and evidence might have justified a recovery under the common law.—*Casillas v. Altoona Portland Cement Co.*, 131 P. 560.

§ 1067 (Okl.) Refusal to give an instruction based upon incompetent evidence introduced over objection, if error, is harmless where the party requesting such instruction was not deprived of any substantial right.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

§ 1068 (Okl.) Where, in a negligence case, the jury finds no breach of duty by defendant, an erroneous instruction on the measure of damages is harmless.—*Howard v. Rose Tp., Payne County*, 131 P. 683.

§ 1071 (Cal.App.) Any error, in an action against a partnership, in finding that the partnership existed before the date on which it was formed was not prejudicial to defendant, where the evidence showed that plaintiff's claim was for a debt assumed by the partnership and accruing within two years from the commencement of the action, or was a debt of the firm.—*Stover v. Stevens*, 131 P. 332.

§ 1073 (Colo.) Under Mills' Ann. St. § 78, *held*, that error in permitting plaintiffs to rescind in part a contract for the purchase of worthless mining property was not prejudicial to defendants, since it relieved them of the duty to reimburse plaintiffs to the extent that the contract was permitted to stand.—*Springhetti v. Hahnwald*, 131 P. 266.

§ 1073 (Colo.App.) Where in a suit to quiet title against a tax deed and the issues involved squarely presented the question who was the owner, a recital in a decree quieting title in defendant "that the action be dismissed" was not prejudicial to plaintiff.—*Pelton v. Muntzing*, 131 P. 281.

(I) Error Waived in Appellate Court.

§ 1075 (Colo.App.) A statement in an abstract that a demurrer was not set forth because it was not urged deprived appellants of the right to a hearing on the demurrer on appeal for ambiguity or uncertainty.—*Rosenbaum v. McEwen*, 131 P. 780.

(K) Subsequent Appeals.

§ 1097 (Cal.) Since under the direct provisions of Const. art. 6, § 4, the concurrence of all three justices is necessary to the pronouncement of a judgment by a District Court of Appeal, a question, from the decision of which two of the justices withheld their assent was not decided by the judgment, though the other justice expressed an opinion thereon.—*In re Coburn*, 131 P. 352.

Where two of the justices of the District Court of Appeal, though concurring in reversal on other grounds, expressly dissented from an opinion of the presiding justice that a finding of mental incompetency was not sustained by the evidence, so as to warrant appointing a guardian, the presiding justice's statements in his opinion as to the principles governing the appointment of guardians being part of his argument on the question of the sufficiency of the

evidence, was not a part of the decision so as to be the law of the case on a subsequent appeal.—*Id.*

§ 1097 (Colo.App.) The opinion of the Supreme Court on a former appeal was thereafter the law of the case as to all questions passed upon by it.—*Grand Lodge A. O. U. W. of Colorado v. Taylor*, 131 P. 783.

§ 1097 (Idaho) An essential question determined on a former appeal becomes conclusively the law of the case upon a subsequent appeal.—*City of Nampa v. Nampa & Meridian Irr. Dist.*, 131 P. 8.

§ 1099 (Wash.) The Supreme Court's determination in an action between the two owners of the capital stock of a corporation that, under their contract, one was only entitled to \$125 a month for his services, was the law of the case, and would be adhered to.—*Boothe v. Summit Coal Mining Co.*, 131 P. 252.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1100 (Okl.) Const. art. 7, § 5 (Williams' Ann. Const. Okl. par. 180), providing that the Supreme Court shall render a written opinion in each case within six months after submission, is directory, and the Supreme Court does not lose jurisdiction to determine a case after the lapse of six months from the date of its submission.—*Kinney v. Heatherington*, 131 P. 1078.

(B) Affirmance.

§ 1140 (Okl.) Where a verdict is so grossly excessive as to be clearly the result of passion and prejudice, a remittitur will not be ordered, but the case will be remanded for new trial.—*Rhyne v. Turley*, 131 P. 695.

§ 1142 (Or.) In an action at law where the judgment overruling a demurrer to the complaint is affirmed, the Supreme Court will not remand to permit the defendants to answer on the merits; it having no authority to determine, on affidavits dehors the record, the question of the existence of possible meritorious defenses which were not interposed.—*Williams v. Pacific Surety Co.*, 131 P. 1021.

(C) Modification.

§ 1153 (Or.) Under the authority of Const. Amend. art. 7, § 3, approved November 8, 1910, this court, when it can determine that the lower court should have entered a judgment against all the defendants in an action on a note, should change the judgment of the lower court so as to make it one judgment against all the defendants.—*Wagenaar v. Bee-man-Woodward Co.*, 131 P. 1023.

(D) Reversal.

§ 1169 (Kan.) Where undisputed testimony appears to have been arbitrarily disregarded, and special questions submitted unfairly answered, and the special findings returned upon important issues are unsupported by the evidence, and are inconsistent with each other and with the general verdict, a judgment on the general verdict will be reversed.—*Healer v. Inkman*, 131 P. 611.

§ 1175 (Utah) A judgment in favor of defendant upon its counterclaim for conversion will be reversed without remand, where the evidence was insufficient to sustain it, and the judgment was rendered in obedience to an erroneous instruction, and the verdict on a prior trial, when the evidence was the same but no such instruction was given, was in favor of plaintiff.—*Utah Foundry & Machine Co. v. Utah Gas & Coke Co.*, 131 P. 1173.

§ 1176 (Idaho) Where, in a suit to quiet title, the findings of fact are not sufficiently certain to enable the parties to identify the disputed boundary line, the findings and decree will be

set aside, and the trial court directed to make new findings and enter a decree in accordance therewith.—*Brinton v. Steele*, 131 P. 662.

(F) Mandate and Proceedings in Lower Court.

§ 1195 (Idaho) On a second trial of the case, the opinion on a former appeal is the law of the case where the causes of action set up in the amended complaint and relied on at the second trial involved the same transaction.—*Unfried v. Libert*, 131 P. 660.

(G) Jurisdiction and Proceedings of Appellate Court After Remand.

§ 1218 (Wash.) The Supreme Court may recall a remittitur to correct a mistake or enforce its judgment if application therefor is made with due diligence.—*Peabody v. City of Edmonds*, 131 P. 250.

Where a remittitur was sent down by the Supreme Court July 3, 1912, an application to recall remittitur made on March 6, 1913, was not made with due diligence.—*Id.*

APPEARANCE.

§ 20 (Colo.) The voluntary written appearance of the wife in her husband's action for divorce is sufficient to confer jurisdiction over her person without summons.—*Castner v. Gray*, 131 P. 404.

§ 24 (Colo.) A defendant, who without objection to the service of process on a codefendant, files an answer, enters thereby a general appearance, and waives any objection to the sufficiency of the service on codefendant.—*B. F. Salzer Lumber Co. v. Lindenmeier*, 131 P. 442.

§ 26 (Okla.) Where after judgment against a grantee on the warranty, and over against her grantor, the grantor moved for a new trial, he thereby entered a general appearance and validated the judgment regardless of any defect in the proof of service of the notice to warrantor prescribed by Comp. Laws 1909, § 1206, and in the absence of service of summons on him.—*Clarkson v. Washington*, 131 P. 935.

APPLICATION.

See New Trial, §§ 116-131; Waters and Water Courses, § 27.

APPOINTMENT.

See Executors and Administrators, § 17; Receivers, §§ 29, 35.

APPROPRIATION.

See Waters and Water Courses, §§ 128-152.

ARBITRATION AND AWARD.

III. AWARD.

§ 63 (Kan.) Award of arbitrators is not binding when it is the result of a misapprehension on their part of the language used in defining the matter submitted to their decision.—*Swisher v. Dunn*, 131 P. 571.

ARGUMENT OF COUNSEL.

See Criminal Law, §§ 699-730, 1090, 1128, 1171.

ARMY AND NAVY.

See Ferries.

ARREST.

See Execution: False Imprisonment; Municipal Corporations, § 189.

ARREST OF JUDGMENT.

See Judgment, § 263.

ASSAULT AND BATTERY.

See Rape, §§ 16, 53.

ASSESSMENT.

See Damages, § 208.

ASSIGNMENT OF ERRORS.

See Appeal and Error, § 719; Criminal Law, § 1178.

ASSIGNMENTS.

See Chattel Mortgages, §§ 213, 249; Corporations, §§ 403, 404; Mortgages, §§ 258, 267, 417; Names.

II. OPERATION AND EFFECT.

§ 78 (N.M.) The assignment of any particular claim is an equitable assignment of securities held by the assignor to secure it.—*Medler v. Childers*, 131 P. 490.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSOCIATIONS.

See Agriculture.

ASSUMPSIT, ACTION OF.

See Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 203-226.

ATTACHMENT.

See Chattel Mortgages, § 249; Execution; Exemptions; Sheriffs and Constables, §§ 88, 110.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

§ 8 (Kan.) It is not necessary in order that plaintiff may have an attachment that the damages should be capable of definite estimation.—*Cain v. Perfect*, 131 P. 573.

II. PROPERTY SUBJECT TO ATTACHMENT.

§ 60 (Kan.) A devisee's interest in real estate is subject to attachment, although the will gives a power to the executor to sell the property and distribute the proceeds among the devisees.—*Ward v. Benner*, 131 P. 609.

III. PROCEEDINGS TO PROCURE.

(A) Jurisdiction and Venue.

§ 71 (Kan.) Under Code Civ. Proc. § 190 (Gen. St. 1909, § 5783, as amended by Laws, 1911, c. 231), plaintiff in an action to recover money may have an attachment against the property of a nonresident defendant, though the action arose ex delicto in another state.—*Cain v. Perfect*, 131 P. 573.

§ 74 (Kan.) A civil action to recover damages from a libel published in another state may be brought against the nonresident in any county in which he has property subject to attachment under Code Civ. Proc. § 53 (Gen. St. 1909, § 5646).—*Cain v. Perfect*, 131 P. 573.

(B) Affidavits.

§ 105 (Kan.) It is sufficient under Code Civ. Proc. §§ 190, 191 (Gen. St. 1909, §§ 5783, 5784),

in an action for libel to allege the claim is just and the amount plaintiff ought to recover.—*Cain v. Perfect*, 131 P. 573.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 217 (Kan.) The final judgment, in an action wherein a devisee's interest in realty was attached, properly allowed the executor to sell the attached property as directed by the will and provided for the application of the defendant's share of the proceeds upon the judgment against him.—*Ward v. Benner*, 131 P. 609.

§ 219 (Kan.) Where a devisee's interest in real estate is attached and service is made upon him by publication only, the devisee's share of proceeds in personal property in the executor's hands, but not attached, cannot be applied upon the judgment.—*Ward v. Benner*, 131 P. 609.

While, under the express provisions of Code Civ. Proc. § 250 (Gen. St. 1909, § 5844), the disposition of property with intent to render a judgment ineffectual may be enjoined, the issuance of such injunction is not ground for constructive service and does not authorize the applying of property which is not attached to the satisfaction of a judgment in rem.—*Id.*

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 241 (Kan.) Where an attachment is levied upon real estate, and judgment is rendered for plaintiff without the validity of the attachment having been questioned, an order of sale of the attached property, conditioned on nonpayment of the judgment, follows as a matter of course.—*Jones v. Hedstrom*, 131 P. 145.

VIII. CLAIMS BY THIRD PERSONS.

§ 308 (Wash.) Evidence in an action to recover possession of shares of stock held by the sheriff under attachment by defendant against the property of one S., based on the claim that plaintiff had purchased the stock from S. prior to the attachment, and paid full value therefor, held not to establish plaintiff's ownership of the stock so that a judgment in her favor would be reversed.—*Livingston v. Gamble-Robinson Commission Co.*, 131 P. 818.

ATTESTATION.

See Appeal and Error, § 614.

ATTORNEY AND CLIENT.

See Appeal and Error, § 979; Bills and Notes, § 534; Constitutional Law, § 101; Corporations, § 320; Eminent Domain, § 178; Evidence, § 571; Injunction, § 228; Jury, § 19; Malicious Prosecution, §§ 3, 71; Mandamus, § 31; New Trial, § 29; Payment, § 89; Railroads, § 483.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

§ 26 (Colo.App.) An attorney who directed an official reporter to prepare a bill of exceptions, and who made no claim that he had authority to bind his client to pay therefor, was liable for the value of the reporter's services.—*Bloomfield v. Nevitt*, 131 P. 801.

Where official reporter brought suit against client for services in preparing bill of exceptions, under a mistaken belief as to the law, he could not recover from the attorney who directed the preparation of the bill of exceptions, his expenses in unsuccessfully prosecuting the suit against the client.—*Id.*

(C) Suspension and Disbarment.

§ 36 (Okla.) The Supreme Court has inherent power independent of statute to disbar attorneys for misconduct.—*State Bar Commission v. Sullivan*, 131 P. 703.

§ 37 (Okla.) The Supreme Court is not limited in its disciplinary power over attorneys to the grounds and remedies indicated by statute, but the statutory provisions are merely cumulative.—*State Bar Commission v. Sullivan*, 131 P. 703.

§ 43 (Okla.) The printing and publication of a pamphlet falsely and maliciously attacking the integrity of the courts and the judges thereof, designed to willfully, purposely, and maliciously misrepresent and bring them into disrepute, held ground for disbarment of an attorney.—*State Bar Commission v. Sullivan*, 131 P. 703.

§ 46 (Okla.) In a proceeding for disbarment upon charges of the publication of a pamphlet disrespectful to the court, the statute of limitations is not available as a defense, especially where the pamphlet remains in circulation until a time within what would be the limitation period if the statute of limitations be construed to apply.—*State Bar Commission v. Sullivan*, 131 P. 703.

§ 52 (Okla.) Under Comp. Laws 1909, § 267, no verification of the charges is necessary in disbarment proceedings brought by the state bar commission by order of the Supreme Court.—*State Bar Commission v. Sullivan*, 131 P. 703.

The sufficiency of the verification of the charges in disbarment proceedings must be determined by an inspection of the verification, and the evidence of affiant cannot be received to show that he had no personal knowledge as to the charges.—*Id.*

§ 53 (Okla.) While, under Comp. Laws 1909, § 266, an attorney cannot be disbarred for filing a pleading, a petition with pamphlet attached which falsely and maliciously attacks the courts and judges may be considered as evidence of the attorney's unfitness to practice law.—*State Bar Commission v. Sullivan*, 131 P. 703.

In disbarment proceedings, the guilt of the accused should be proved by a clear preponderance of the evidence, but not necessarily beyond a reasonable doubt.—*Id.*

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 129 (Colo.) The question of an attorney's negligence in failing to issue summons to defendant in a divorce action who had voluntarily entered her written appearance and consent to a trial was a question of law.—*Castner v. Gray*, 131 P. 404.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§ 140 (Wash.) If an attorney intentionally misrepresented to his client the magnitude of the services he was to perform for the purpose of obtaining a greater fee, he would only be entitled to the reasonable value of his services, instead of the contract price.—*Johnson v. Mann*, 131 P. 213.

§ 140 (Wash.) Where attorneys rendered valuable services under an invalid contract, and obtained a settlement on the basis of a conveyance to trustees, who agreed to pay them a reasonable compensation as determined in a proceeding brought for that purpose, the attorneys should be allowed a reasonable sum.—*Atwood v. Sicade*, 131 P. 850.

§ 143 (N.M.) An attorney may recover for legal services rendered after he has been admitted to practice, though he contracted to perform such services before being admitted.—*Goldenberg v. Law*, 131 P. 499.

AUTHORITY.

See Principal and Agent, §§ 97, 103, 148.

AUTOMOBILES.

See Highways, § 181; Master and Servant, §§ 302, 330, 332; Municipal Corporations, §§ 189, 703, 706; Trial, § 191; Trover and Conversion, § 68.

AWARD.

See Arbitration and Award.

BAIL.

See False Imprisonment.

II. IN CRIMINAL PROSECUTIONS.

§ 77 (Okl.) The county court, having jurisdiction of an offense charged and being required under Comp. Laws 1909, § 7105, to admit accused to bail, had jurisdiction, under section 7112, to declare a forfeiture of the bond; it not being limited in such act by the jurisdictional amount governing in civil cases.—State v. Hines, 131 P. 688.

Where the principal fails to appear as required by a bail bond, the failure to call the sureties will not defeat an action on the bond.—Id.

§ 84 (Okl.) In an action in the district court on a bail bond declared forfeited by the county court under Comp. Laws 1909, § 7112, sickness of the principal on the date of the forfeiture is no defense by the sureties.—State v. Hines, 131 P. 688.

In an action in the district court on a bail bond, forfeited by the county court having jurisdiction, sickness of the principal on the date of forfeiture is no defense against the sureties' liability; Comp. Laws 1909, § 7112, providing that if defendant fails to appear a bond shall thereupon be declared forfeited.—Id.

BAILMENT.

See Animals, § 23; Pledges.

§ 31 (Colo.) Delivery of property to a bailee in good condition and its destruction or return in an injured condition affords prima facie proof of his negligence.—Nutt v. Davison, 131 P. 390.

BANKRUPTCY.

See Evidence, § 82.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 161 (Wash.) Under Bankr. Act, § 60, providing that the period of four months shall not expire until four months after the date of the recording of the transfer, a bill of sale of a vessel must be recorded, as required by Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837), four months before the filing of the petition in bankruptcy against the vendor or the bill of sale operates as a preference.—Benner v. Scandinavian American Bank, 131 P. 1149.

§ 178 (Wash.) On purchase of shares of its own, outstanding stock by a corporation and payment therefor without diminishing capital stock, resulting in injury to creditors, held its trustee in bankruptcy could recover the payments.—Union Trust & Savings Bank v. Amery, 131 P. 199.

The right to recover such payment did not depend on the stockholder's knowledge that the purchase was made by the corporation, and an instruction making it so depend was erroneous.—Id.

Money paid by a corporation for its outstanding stock could not be recovered from a stockholder if he sold the stock to a third person and not to the corporation, and, if a por-

tion of it was sold to the third person, there could be no recovery as to that portion.—Id.

§ 184 (Wash.) Under Rem. & Bal. Code, §§ 3660, 5291, providing that a transfer of personal property is void as against creditors where the property is left in the possession of the seller, unless the transfer is recorded, an unrecorded bill of sale of a vessel is void within Bankr. Act, § 67.—Benner v. Scandinavian American Bank, 131 P. 1149.

§ 185 (Wash.) A trustee in bankruptcy holds not only the legal title to the bankrupt's estate, but he also represents the creditors of the bankrupt, and has such rights as the creditors possessed, and he can avoid any transfer which the creditors could have avoided, and under Bankr. Act, § 67c, the trustee has plenary power to take all steps necessary to subject the bankrupt's property to the satisfaction of his debts.—Benner v. Scandinavian American Bank, 131 P. 1149.

(D) Administration of Estate.

§ 262 (Wash.) The bankruptcy court may order a sale of the property of a bankrupt free from liens, and, when that is done, the purchaser acquires a good title and existing liens are transferred to the proceeds, and a mechanic's lien claimant, having notice of the sale, must resort to the fund.—Shinn v. Kemp & Hebert, 131 P. 822.

(E) Actions by or Against Trustee.

§ 303 (Wash.) In an action by the trustee of a bankrupt corporation to recover money paid by the corporation for its stock from a person who claimed that he sold the stock to a third person, the burden of proving that the sale was to the corporation was on plaintiff.—Union Trust & Savings Bank v. Amery, 131 P. 199.

§ 304 (Wash.) In an action to recover money paid by a corporation for its outstanding stock from a person who claimed that he sold the stock to a third person, whether the stock was sold to the corporation was a question of fact.—Union Trust & Savings Bank v. Amery, 131 P. 199.

(F) Claims Against and Distribution of Estate.

§ 341 (Kan.) The presentation of a claim against a bankrupt to the trustee in bankruptcy does not prevent an action thereon against the bankrupt, where the claim was stricken out.—Graves v. Neosho Falls Bank, 131 P. 146.

BANKS AND BANKING.

See Criminal Law, §§ 419, 420, 781, 800, 1186; Injunction, § 5; Jury, § 14.

I. CONTROL AND REGULATION IN GENERAL.

§ 21 (Oal.) The want of funds in or credit with the drawee is an essential element of the crime of making or delivering a worthless check under Pen. Code, § 476a.—People v. Frey, 131 P. 127.

In a prosecution for making and delivering a check, with knowledge that the drawer had no funds in or credit with the drawee with which to meet it, the allegation of the nonexistence of funds or credit was not a negative allegation regarding matters peculiarly within the knowledge of defendant within the rule that such allegations need not be proved.—Id.

An instruction that if accused drew a check or draft upon a bank in which he had no deposit or credit, and if he knew this to be true the jury must acquit, was properly refused, as the facts stated would have amounted to a prima facie case.—Id.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 77 (Kan.) An action to recover money which a bank, subsequently placed in the hands of a receiver, had received in payment of a note, but which it had failed to apply thereon, thereby compelling plaintiff to pay the debt again to the purchaser of the note, is properly brought against the receiver.—*Graves v. Neosho Falls Bank*, 131 P. 146.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 109 (Cal.App.) A written contract in the form of an I. O. U. signed by defendant, and followed by the descriptive word "Cashier," did not evidence a contract of the bank of which defendant was cashier.—*Hay v. McDonald*, 131 P. 74.

(C) Deposits.

§ 143 (Kan.) Where a bank wrongfully protests a depositor's check, it is not liable for exemplary damages, unless guilty of fraud, malice, gross negligence, or oppression in so doing.—*Winkler v. Citizens' State Bank of Gueda Springs*, 131 P. 597.

§ 152 (Colo.App.) Evidence held to warrant a finding that a bank receiving a deposit of \$35 issued by mistake to the depositor a certificate of deposit of \$315.—*Johnson v. First Nat. Bank*, 131 P. 284.

(D) Collections.

§ 156 (Cal.) Where a depositor drew a check on a bank in a sum less than the deposit, and transmitted it to a trust company, with directions to open an account and give credit for the amount of the check, and the trust company did so and the bank honored the check, the relation between the depositor and the trust company was that of creditor and debtor, and the insolvency of the trust company did not create a liability of the bank to the depositor.—*Plumas County Bank v. Bank of Rideout, Smith & Co.*, 131 P. 360.

§ 166 (Cal.) Where a check, drawn by a depositor on his bank and indorsed in blank, is transferred to another bank, which is insolvent, and advances are made thereon in good faith, the depositor must stand the loss.—*Plumas County Bank v. Bank of Rideout, Smith & Co.*, 131 P. 360.

Where a depositor in a bank drew a check and transmitted it to a trust company, with directions to open an account and give credit for the amount, which was done, and the bank, which had a deposit in the trust company for a less amount, honored the check and transmitted a draft for the overdraft, the depositor must stand the loss resulting from the insolvency of the trust company, the depositor and the bank acting in good faith without knowledge of the insolvency, though the depositor's check was sent to the trust company "for collection" only.—*Id.*

IV. NATIONAL BANKS.

§ 246 (Mont.) Stockholder of national bank held not entitled to recover from former receiver for misconduct for the benefit of the bank, its stockholders or creditors, where no demand on the board of directors, the receiver in charge, or the comptroller of the currency to bring such action was shown.—*Moss v. Goodhart*, 131 P. 1071.

Stockholder of a national bank held not entitled to recover for his own benefit for the misconduct of a former receiver, where it did not appear that he had paid anything to the then receiver or that any assessment had been or would be levied on his stock.—*Id.*

BEST AND SECONDARY EVIDENCE.

See Criminal Law, §§ 402-404; Evidence, §§ 178-186.

BIAS.

See Witnesses, § 372.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, § 51.

BILL OF SALE.

See Shipping, § 33.

BILLS AND NOTES.

See Action, §§ 50, 53; Alteration of Instruments; Banks and Banking, §§ 21, 77, 143, 156; Corporations, §§ 92, 414, 432; Evidence, §§ 418, 423; Executors and Administrators, § 221; Insurance, § 130; Judgment, §§ 240, 596; Mortgages, § 218; Principal and Surety, § 115.

I. REQUISITES AND VALIDITY.

(E) Consideration.

§ 92 (Idaho) The care taken by a young woman of an aged man held sufficient consideration for a check which he gave her.—*Coe v. McGran*, 131 P. 1110.

§ 92 (Wash.) Where certain officers and persons interested in an insolvent fire insurance company pursuant to a demand of the state insurance commissioner that the company reorganize or reinsure in some other company and give security that one of these things would be done as a continuance of the company's license, gave their personal notes for a certain sum, the notes were without consideration and did not become assets of the company, where no insurance was subsequently written on the faith of the notes.—*McConaughy v. Juvenal*, 131 P. 851.

(F) Validity.

§ 105 (Idaho) Preference and good will from one toward another, growing out of kindness and attention paid an aged person, are not sufficient to show undue influence in the execution of a check, in the absence of imposition or fraud.—*Coe v. McGran*, 131 P. 1110.

II. CONSTRUCTION AND OPERATION.

§ 120 (Or.) The makers of a note providing that, "for value received, I promise to pay," were jointly and severally liable to the payee.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 147 (Wash.) Under Negotiable Instrument Law, §§ 1, 10, defining the requisites of a negotiable note, a note binding the makers to pay to the payee named, but not payable to bearer or order, a specified sum with interest as evidenced by interest-bearing notes, and providing that, on default, the mortgagee may foreclose the mortgage, is not negotiable.—*Quast v. Rugles*, 131 P. 202.

Negotiable Instrument Law, § 10, providing that any terms of a note are sufficient which indicate an intention to conform to the requirements of the statute, refers, when construed in connection with section 1, to words of indorsement, and not to words of assignment, and to make an instrument negotiable it is not necessary to use the words "order or bearer," provided other apt words showing intent to make the instrument so payable are sufficient.—*Id.*

§ 155 (Ok.) A clause in a note, whereby indorsers and guarantors waive presentment and protest and consent that time of payment may be extended without notice, does not render it nonnegotiable.—*De Groat v. Focht*, 131 P. 172.

Under Comp. Laws 1909, §§ 4436, 4439, an instrument, to be negotiable, must be payable on demand or at a fixed time, and a fixed time within the act is where the instrument provides for a fixed period after date, or on or before a fixed future time specified therein, or on or at a fixed time after the occurrence of a specific event certain to happen, though the time of happening is uncertain.—*Id.*

§ 161 (Or.) In view of L. O. L. §§ 6033, 6034, *held*, that a promissory note secured by a mortgage to which it refers is not rendered nonnegotiable by a provision in the mortgage that the mortgagor and maker of the note should pay all taxes assessed against them.—*Page v. Ford*, 131 P. 1013.

§ 170 (Or.) Under L. O. L. § 5841, relating to indorsement of negotiable instruments, *held*, that the indorsement of a promissory note in the alternative does not render it nonnegotiable.—*Page v. Ford*, 131 P. 1013.

§ 171 (Or.) Under the direct provisions of L. O. L. § 5871, the indorsement of a note without recourse does not render it nonnegotiable.—*Page v. Ford*, 131 P. 1013.

(B) Transfer by Indorsement.

§ 182 (Or.) Where a note was indorsed to two in the alternative, an indorsement by either is sufficient to transfer title.—*Page v. Ford*, 131 P. 1013.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 246 (Or.) A person indorsing on back of note a guaranty of its payment *held* not an indorser under the Negotiable Instrument Law, having indicated by appropriate words his intention to be bound as guarantor and not as indorser.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

One who guaranteed the payment of a note for the makers' accommodation *held* not an accommodation party within L. O. L. § 5862, being neither a maker, drawer, acceptor, nor indorser.—*Id.*

§ 253 (Or.) Under L. O. L. § 6023, in the absence of a special contract, accommodation makers and accommodation guarantor *held* successively and not concurrently liable.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

In the absence of a special agreement to be bound jointly and not severally, accommodation parties to commercial paper are liable to each other in succession as their names appear upon the instrument.—*Id.*

That an accommodation guarantor of a note knew when he executed the guaranty that certain of the makers were accommodation parties did not make his and their liability concurrent instead of successive in the absence of a special agreement.—*Id.*

§ 260 (Or.) In determining accommodation makers' liability to guarantor, *held*, that it was immaterial whether the guarantor, before paying the note, assented to an agreement by which the creditors of the real debtor accepted their pro rata share of its assets in settlement of their claims.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

Where makers of a note were jointly and severally liable to the payee, their liability to a party who guaranteed payment was also joint and several.—*Id.*

(B) Indorsement for Transfer.

§ 296 (Wyo.) Under the substantially direct provisions of Comp. St. 1910, § 3224, the in-

dorser of a negotiable note impliedly warrants that it is genuine and valid according to its purport, and that the indorser has lawful title thereto.—*Hamilton v. Diefenderfer*, 131 P. 37.

(D) Bona Fide Purchasers.

§ 354 (Wash.) Plaintiff, who purchased defendant's note for \$248 from the payee a day or two after it was executed for a consideration of \$231, after inquiry and information that the maker's credit was good, and who notified the maker of the transfer, was a bona fide holder for value.—*Davis v. Hibbs*, 131 P. 1135.

§ 370 (Or.) A bona fide holder takes a negotiable instrument free from all latent equities between the parties, and therefore evidence of a defense showing a breach of a contract entered into between the maker and the payee in consideration of which the note was given is not admissible.—*Page v. Ford*, 131 P. 1013.

VIII. ACTIONS.

§ 465 (Cal.App.) In an action upon a negotiable instrument, it is unnecessary to allege any consideration in the complaint, as a consideration is presumed.—*Kenison v. Campbell*, 131 P. 89.

§ 519 (Or.) Evidence that accommodation makers were directors of corporation, the real debtor, while accommodation guarantor, was a stranger, *held* to support finding that they were not concurrently liable.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

§ 530 (Or.) A guarantor of a note providing for interest at 8 per cent. *held* entitled to recover interest from the time he paid the note at the legal rate of 6 per cent. provided by L. O. L. § 6028.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

§ 534 (Or.) Action by guarantor against makers *held* not an action on the note but one for reimbursement, and hence he was not entitled to the attorney's fees and interest stipulated in the note; L. O. L. § 5954, remitting parties paying the instrument to their former rights, manifestly referring to indorsers for value.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

§ 534 (Wash.) Where a note provided that the maker would pay such attorney's fee as the court adjudged to be reasonable, and where no attorney's fee was allowed in the first action to recover installments due, the allowance of one attorney's fee in a subsequent action to recover installments subsequently due was proper.—*Davis v. Hibbs*, 131 P. 1135.

§ 539 (Or.) In an action by a guarantor against accommodation makers, the court *held* to have sufficiently found against defendant's contention that plaintiff assented to an agreement by which creditors of the real debtor were to receive their pro rata share of its assets in full settlement of their claims.—*Noble v. Beeman-Spaulding-Woodward Co.*, 131 P. 1006.

BOARDS.

See Municipal Corporations, §§ 48, 282.

BODY EXECUTION.

See Execution.

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 354, 370; Vendor and Purchaser, §§ 229-242.

BONDS.

See Appeal and Error, §§ 373-394; Bail; Costs, § 144; Counties, § 101; Courts, § 202; Evidence, § 183; Executors and Administrators, § 66; False Imprisonment; Interest, § 47; Intoxicating Liquors, §§ 87, 88; Judgment, § 648; Justices of the Peace, § 159; Landlord

and Tenant, §§ 157, 291; Mechanics' Liens, §§ 47, 227; Municipal Corporations, §§ 331, 918; Principal and Surety; Replevin.

BOOKMAKING.

See Gaming, § 1.

BOOKS.

See Evidence, § 354.

BOUNDARIES.

See Fraud, § 13; Municipal Corporations, §§ 12, 29.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 37 (Wash.) Evidence held sufficient to establish plaintiff's boundary as the westerly line of an addition as it was surveyed on the ground by his grantor.—Scheuerman Inv. Co. v. Landowners' Corporation, 131 P. 216.

§ 41 (Wash.) An instruction, that if the original government monuments, known as the initial point, can be definitely ascertained the jury must ascertain from the evidence whether or not the measurements as testified to by the witnesses for plaintiff are correct and if found correct the verdict should be for plaintiff, is not erroneous.—Independent Asphalt Paving Co. v. Hein, 131 P. 471.

§ 47 (Cal.App.) Where adjoining owners were not privy to the making of a private survey, and there was no dispute between them as to the true boundary, and no express agreement as to its location, any conduct from which an agreement as to the boundary might be presumed being under mutual mistake of fact, neither of them was estopped from claiming according to the true boundary when discovered.—Honaker v. Heatly, 131 P. 759.

§ 48 (Utah) Where owners of adjacent lands occupied their respective premises to a fence, recognized as on the boundary line for more than 20 years, and during that time they claimed the land to the line, they and their grantees may not deny that the line is the true line.—Christensen v. Bentler, 131 P. 666.

BRIDGES.

See Municipal Corporations, §§ 387, 396, 404; Statutes, § 76.

BRIEFS.

See Appeal and Error, §§ 758-778; Criminal Law, § 1130.

BROKERS.

See Factors.

II. EMPLOYMENT AND AUTHORITY.

§ 10 (Kan.) An agency to sell real estate and receive the proceeds above a certain amount as commission is not a power coupled with an interest, precluding revocation of the agency.—Chase v. Chapman, 131 P. 615.

IV. COMPENSATION AND LIEN.

§ 40 (Colo.) Where P. obtained the listing of certain land from defendant for the benefit of an undisclosed corporation of which he was manager and for which he was acting, defendant's want of knowledge of the corporation was no bar to its subsequent right to recover commissions for an alleged sale of the land through its efforts.—Satisfaction Title & Investment Co. v. York, 131 P. 444.

§ 40 (Okla.) To entitle an agent to his commission, there must be an employment.—Yarborough v. Richardson, 131 P. 680.

§ 43 (Cal.App.) An oral agreement by a broker to pay part of the commissions on a sale of land to another broker who procured the pur-

chaser was not within the statute of frauds.—Johnston v. Porter, 131 P. 69.

Civ. Code, § 1624, subd. 6, requiring agreements employing brokers to sell real estate to be in writing, does not apply to agreements between brokers as to their commissions earned on such a sale.—Id.

§ 49 (Or.) A contract between an owner of land and certain brokers for the platting and sale of such land held not to vest any interest in the land in the brokers, but only in the proceeds of sales, so that one of such brokers could not maintain a suit against the landowner's administrator or against his fellow brokers for an accounting, and, as to land remaining unsold, without proof of the performance of the contract on his part.—Hobson v. David, 131 P. 297.

§ 51 (Colo.) In order to entitle a broker to commissions, he must have been the procuring cause of the sale and have produced a purchaser ready, willing, and able to purchase at the price asked and on his employer's terms, but he need not have known the purchaser nor introduced him to the owner.—Satisfaction Title & Investment Co. v. York, 131 P. 444.

§ 51 (Okla.) Where, after land is placed in an agent's hands for sale, he introduces the purchaser to the vendor for such purpose, and the sale is then effected, he is entitled to his commission.—Yarborough v. Richardson, 131 P. 680.

§ 53 (Okla.) Where, after land is placed in an agent's hands for sale, the sale is brought about by his exertions, he is entitled to his commission.—Yarborough v. Richardson, 131 P. 680.

To entitle the agent to his commission his service must be the immediate cause of the sale.—Id.

§ 55 (Okla.) If the services of an agent fail to bring about a sale and several weeks thereafter the proposed purchaser is induced by another to buy, the agent has no right to a commission.—Yarborough v. Richardson, 131 P. 680.

§ 60 (Or.) Where a broker produces a purchaser with whom the owner makes a valid and enforceable contract, the broker is entitled to commission, though the contract is never performed.—Stewart v. Will, 131 P. 1027.

§ 63 (Or.) Where a broker employed to make an exchange of property represented to defendant his client that the other party had good title to the land to be exchanged, whereupon the contract was made, but such title was not good and the contract was never completed, the broker could not recover commissions.—Stewart v. Will, 131 P. 1027.

§ 65 (Colo.App.) Where a broker employed to use his best endeavors to sell property at a sum not less than \$20,000 for a commission sought to induce a corporation to take the property at about \$50,000, \$11,000 of which should go to him and the balance of the excess over \$20,000 to stockholders, he was guilty of misconduct depriving him of his right to a commission.—Sankey v. Cramer, 131 P. 288.

§ 69 (Cal.App.) Where a broker agreed to share his commissions on a sale with another broker who procured the purchaser, in the absence of an express agreement as to the second broker's compensation he was entitled to recover a reasonable sum.—Johnston v. Porter, 131 P. 69.

§ 71 (Kan.) Where the vendor refused to perform after the broker had procured a purchaser, ready, willing, and able to buy at a price \$1 per acre more than the vendor asked, the broker was entitled to recover from him \$1 per acre under an implied contract that his commissions should be any amount secured above the vendor's price.—Jones v. Hedstrom, 131 P. 145.

V. ACTIONS FOR COMPENSATION.

§ 82 (Cal.App.) In a broker's action against another broker for a share in the commissions on a sale, where it was shown that defendant

had received a commission on the sale, it was not necessary to show that he had a valid contract entitling him to such commission.—*Johnston v. Porter*, 131 P. 69.

§ 86 (Cal.App.) Broker's testimony in an action against another broker for commissions held to support a finding of a contract to pay commissions notwithstanding other conflicting testimony.—*Johnston v. Porter*, 131 P. 69.

In a broker's action for commissions against another broker, if it was necessary to show defendant's right to a commission on the sale, proof that he was entitled to such commissions under an agreement with a third broker, who had a contract with the owner, was sufficient.—*Id.*

In a broker's action against another broker for a share in the commissions on a sale, jury's finding as to the value of plaintiff's services as reduced by the trial court held not unsupported by the evidence.—*Id.*

§ 86 (Colo.App.) In an action for commissions by a broker employed to procure a purchaser of property, evidence held not to support a finding that the broker rendered services essential to entitle him to a commission.—*Sankey v. Cramer*, 131 P. 288.

§ 88 (Cal.App.) On plaintiff's evidence in an action upon an I. O. U. signed by defendant and followed by the descriptive word "cashier" for the payment of a certain sum on completion of a sale, held, that it was error to direct a nonsuit.—*Hay v. McDonald*, 131 P. 74.

§ 88 (Colo.) In an action for broker's commissions, whether plaintiff was the efficient means of bringing the buyer and seller together held for the jury.—*Satisfaction Title & Investment Co. v. York*, 131 P. 444.

§ 88 (Okl.) A question as to the efficient cause of the sale of land in an action by a broker for a commission held, under the evidence, a question for the jury.—*Yarborough v. Richardson*, 131 P. 680.

BUILDING CONTRACTS.

See Contracts, §§ 198, 306; Principal and Surety, §§ 82, 129, 138, 149.

BUILDINGS.

See Municipal Corporations, § 117.

BY-LAWS.

See Corporations, § 414.

CANCELLATION OF INSTRUMENTS.

See Deeds, § 70; Vendor and Purchaser, § 31.

I. RIGHT OF ACTION AND DEFENSES.

§ 4 (Or.) The party against whom a contract for the sale of real property made under mutual mistake of material facts will not be specifically enforced is generally entitled to rescind.—*McCrea v. Hinkson*, 131 P. 1025.

CANNING FACTORIES.

See Master and Servant, § 13.

CARRIERS.

See Damages, § 158; Frauds, Statute of, §§ 89, 90; Garnishment, § 8; Pleading, § 165; Trial, §§ 252, 260.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 46 (Cal.App.) A contract of carriage, made in one state for delivery in another, is governed with respect to delivery by the laws of the lat-

ter state.—*Jolly v. Atchison, T. & S. F. Ry. Co.*, 131 P. 1057.

§ 51 (Cal.App.) Stipulations in bills of lading should be construed most strongly against the carrier.—*Jolly v. Atchison, T. & S. F. Ry. Co.*, 131 P. 1057.

(D) Transportation and Delivery by Carrier.

§ 85 (Cal.App.) A telephone message and a postal card sent to the consignee on the morning the goods arrived, stating that the car would be delivered in the usual course of business, was at most a notice of intention to make delivery in the future, which should have been followed by actual notice of delivery within business hours.—*Jolly v. Atchison, T. & S. F. Ry. Co.*, 131 P. 1057.

(F) Loss of or Injury to Goods.

§ 108 (Cal.App.) Under Civ. Code, § 2194, providing that unless consignor accompanies the freight and retains exclusive control, the carrier is liable until he relieves himself of liability, pursuant to sections 2118 to 2222, for loss from any cause, and section 2118 requiring a common carrier to deliver the property to the consignee at the place to which it is addressed in the manner usual at that place, a railroad company is liable for freight, as an insurer, until delivery to the consignee as provided.—*Jolly v. Atchison, T. & S. F. Ry. Co.*, 131 P. 1057.

§ 114 (Cal.App.) Under Civ. Code, § 2194, providing that unless consignor accompanies the freight and retains exclusive control, the carrier is liable until he relieves himself of liability, pursuant to sections 2118 to 2222, for loss from any cause, and section 2118 requiring a common carrier to deliver the property to the consignee at the place to which it is addressed in the manner usual at that place, a railroad company is liable for freight, as an insurer, until delivery to the consignee as provided.—*Jolly v. Atchison, T. & S. F. Ry. Co.*, 131 P. 1057.

A bill of lading providing that property destined to a station at which there is no regularly appointed agent shall be entirely at the risk of the owner when unloaded from cars or until loaded into cars, and, when received from or delivered on private or other sidings, shall be at the owner's risk until the cars are attached to and after they are detached from trains, only applies to deliveries at stations where there are no regularly appointed agents.—*Id.*

A contract between a railroad company and a consignee, providing that the company should not be liable for loss by fire to the property or buildings located upon any land owned by the consignee, would not exempt the company from liability for loss of freight by fire while it yet remained in the company's possession as a common carrier in a car standing on a switch track in a public street in front of the consignee's warehouse.—*Id.*

(H) Limitation of Liability.

§ 159 (Cal.App.) Under Civ. Code, § 2176, providing that a consignee, by accepting a bill of lading with knowledge of its terms, assents to the time, place, and manner of delivery and to limitations therein on the amount of the carrier's loss, etc., but his assent to any other modification of liability can only be manifested by the carrier's signature, held, that a written claim need not be filed within 30 days as a condition precedent to recover against the carrier by consignee.—*Jolly v. Atchison, T. & S. F. Ry. Co.*, 131 P. 1057.

(I) Connecting Carriers.

§ 177 (Okl.) In the absence of any joint traffic arrangement, a terminal carrier is not liable for damages on the lines of the initial carrier.—*Missouri, K. & T. Ry. Co. v. Peters*, 131 P. 525.

III. CARRIAGE OF LIVE STOCK.

§ 228 (Okla.) Proof that a shipment of cattle was in good condition when delivered to an initial carrier, and in damaged condition when received from the terminal carrier, does not raise the presumption of negligence against such terminal carrier where the shipper accompanies the stock under contract to look after it.—*Missouri, K. & T. Ry. Co. v. Peters*, 131 P. 525.

IV. CARRIAGE OF PASSENGERS.

(B) Fares, Tickets, and Special Contracts.

§ 256 (Cal.App.) Act April 1, 1878 (St. 1877-78, p. 969), authorizing a carrier to collect from a passenger, entering a train without paying fare, an additional sum, though construed as repealing Civ. Code, § 2189, on the subject, is repealed by St. 1909, p. 515, § 43, creating the state railroad commission, and a carrier may not demand any sum in excess of the regular fare from a passenger unable to procure a ticket because of the absence of the station agent.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

(D) Personal Injuries.

§ 287 (Or.) One may become a passenger by boarding a street car at a point other than at a regular stopping place, where it was customary for persons to board the car at that point when it came to a full stop, and the servants in charge of the car are bound to exercise care in protecting one so boarding the car.—*Devroe v. Portland Ry., Light & Power Co.*, 131 P. 304.

§ 295 (Mont.) Where a telegraph pole is in such dangerous proximity to a street car track as to constitute it a menace to the safety of a passenger, whom the company, owing to want of space inside, permits to stand on the footboard, the moving of the car without properly warning him is culpable negligence.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

§ 303 (Cal.App.) A street railroad company must stop its cars reasonably long enough to allow passengers to alight in safety.—*Franklin v. Visalia Electric R. Co.*, 131 P. 776.

It is negligence to start a street car prematurely after it has stopped for passengers to alight, whether it is started violently or not.—*Id.*

§ 315 (Mont.) In a street car passenger's action for injuries, there was no material variance between an allegation that the pole which struck him was less than four feet from the track and evidence merely that it was in such close proximity to the track as to be likely to collide with a passenger standing on the footboard.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

§ 316 (Mont.) In a street car passenger's action for injuries, the burden was on plaintiff to prove that his injury was the result of defendant's failure to observe such precautions as the exigencies of the case required.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

§ 317 (Cal.App.) In an action for injuries by the sudden, negligent starting of the car while plaintiff was alighting, evidence was admissible by other passengers, who did not see the accident, that they were also passengers and attempted to alight at the same point, but that the car started before they could alight.—*Franklin v. Visalia Electric R. Co.*, 131 P. 776.

§ 318 (Mont.) Evidence, in a street car passenger's action for injuries, held to sustain a verdict for plaintiff.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

§ 318 (Or.) In view of Const. art. 7, § 3, as amended in 1910 (see Laws 1911, p. 7), providing that no fact tried by a jury shall be re-examined, unless the court can affirmatively say there is no evidence in support of the ver-

dict, evidence in an action against a street railway company for wrongful death of a passenger held sufficient to support a verdict.—*Devroe v. Portland Ry., Light & Power Co.*, 131 P. 304.

§ 320 (Or.) In view of L. O. L. § 868, subd. 2, providing that on all proper occasions the jury shall be instructed that they are not bound to find in accordance with the greater number of witnesses, evidence in an action against a street railway company for the wrongful death of a passenger held to present a question for the jury.—*Devroe v. Portland Ry., Light & Power Co.*, 131 P. 804.

(E) Contributory Negligence of Person Injured.

§ 326 (Kan.) One who carelessly sits down on an electric railway track to await a car at a station is not continuously negligent by reason of becoming unconscious from sleep or coma, and thereby unable to avoid a car wantonly run on him.—*Tempfer v. Joplin & P. Ry. Co.*, 131 P. 592.

§ 341 (Kan.) A motorman who realizes the helpless condition and peril of an intending passenger asleep on the track at a station in time to avoid injuring him, but recklessly runs over him, is guilty of wanton negligence rendering his employer liable.—*Tempfer v. Joplin & P. Ry. Co.*, 131 P. 592.

§ 347 (Mont.) Under conflicting evidence in a street car passenger's action for injuries, it was a question for the jury whether he fell or jumped off a car, and whether, in the exercise of ordinary care, he must have known that, in taking a position on the footboard of the car, he was exposing himself to danger arising from the proximity of telegraph poles.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

It is not contributory negligence per se for a street car passenger to ride upon a crowded car or upon the platform or footboard of such car.—*Id.*

§ 348 (Kan.) Where, in an action for death of an intending passenger asleep on a track at a station, defendant pleaded contributory negligence, and the court charged as to concurrent negligence and last clear chance, an instruction that, if deceased was guilty of carelessness contributing to the injury, there could be no recovery unless defendant came within the exceptions to the rule precluding the defense of contributory negligence was applicable.—*Tempfer v. Joplin & P. Ry. Co.*, 131 P. 592.

(F) Ejection of Passengers and Intruders.

§ 370 (Cal.App.) A passenger may obstinately insist on his legal rights and demands, and he need not yield in what may seem of trifling importance and thereby save himself from being ejected from a train.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

§ 380 (Cal.App.) The variance between the complaint in an action for the wrongful ejection of a passenger, alleging that the carrier's servants ejected the passenger, and the proof, relating to the refusal of the conductor relative to a single trip ticket, and the passenger's insistence in his demand for a round-trip ticket, held immaterial.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

§ 382 (Cal.App.) Where a passenger, who had recently submitted to a surgical operation for tonsillitis, was ejected from a train, and he was rendered ill as a result of his walking back to a station through the hot sun so that he was incapacitated from performing his ordinary work for seven months, a verdict for \$1,000 was not excessive.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

A passenger wrongfully ejected from a train must minimize, as far as he can, the effect of the expulsion.—*Id.*

§ 383 (Cal.App.) Whether a passenger wrongfully ejected from a train acted as a reasonably cautious person in going back to the sta-

tion *held* for the jury.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

§ 384 (Cal.App.) An instruction in an action for the wrongful ejection of a passenger that if the passenger, after the ejection, so conducted himself as to expose himself to overexcitement, overexertion, or heat or dust, notwithstanding a prior warning, there could be no recovery was properly refused for ignoring the proper standard of conduct of a reasonably prudent man.—*Clare v. Northwestern Pac. R. Co.*, 131 P. 323.

CATTLE.

See Animals.

CATTLE GUARDS.

See Railroads, § 412.

CERTAINTY.

See Bills and Notes, §§ 155, 161; Pleading, § 403.

CERTIFICATE.

See Appeal and Error, §§ 612-616; Physicians and Surgeons; Taxation, §§ 686, 764.

CERTIORARI.

See Justices of the Peace, §§ 194-209.

I. NATURE AND GROUNDS.

§ 16 (Wash.) Certain orders in a suit to recover corporate stock, requiring the joinder of certain persons alleged to have an adverse interest, *held* interlocutory, and not reviewable on a writ of review prior to final judgment.—*State v. Superior Court in and for Spokane County*, 131 P. 482.

II. PROCEEDINGS AND DETERMINATION.

§ 49 (Cal.App.) The return to a writ of certiorari constitutes the answer as well as the evidence, and the recitals in the petition for a writ were therefore not admitted by the respondent's failure to answer the petition.—*Townsend v. Parker*, 131 P. 766.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Criminal Law, §§ 121-134; Venue, § 41.

CHARACTER.

See Witnesses, § 350.

CHATTEL MORTGAGES.

See Executors and Administrators, § 224; Garnishment, § 51; Husband and Wife, § 267; Pledges; Principal and Surety, § 115.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates and Interests of Parties Therein.

§ 129 (Cal.App.) Under Civ. Code, § 2888, providing that a lien or contract for a lien transfers no title, a chattel mortgagee has merely a lien on the mortgaged property as security for the payment of his debt.—*Flores v. Stone*, 131 P. 348.

(D) Lien and Priority.

§ 136 (Cal.App.) A mortgagee, entitled only to one action, as provided in Code Civ. Proc. § 728, for the recovery of the debt secured, may attach the mortgaged property for an unsecured

debt without waiving the mortgage.—*Flores v. Stone*, 131 P. 348.

An action by an assignee of a chattel mortgage for an unsecured debt, and a levy of an attachment on the mortgaged property, do not constitute a waiver of the lien of the mortgage.—*Id.*

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 213 (Wyo.) Evidence, in an action to recover personally which was the subject of a chattel mortgage, *held* to sustain a finding that the mortgage was not paid.—*Hamilton v. Diefenderfer*, 131 P. 37.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 239 (Cal.App.) A tender by a chattel mortgagor, made after commencement of foreclosure suit, is insufficient where he declines to make any allowance for the attorney's fee provided for in the mortgage.—*Flores v. Stone*, 131 P. 348.

IX. FORECLOSURE.

§ 249 (Cal.App.) Under Civ. Code, §§ 2968-2970, authorizing the attachment of mortgaged chattels on complying with conditions specified, a creditor attaching the mortgaged chattels may obtain an assignment of the mortgage and the notes secured thereby and foreclose the mortgage; the attachment being abandoned.—*Flores v. Stone*, 131 P. 348.

CHEAT.

See Fraud.

CHILDREN.

See Divorce, § 309; Evidence, § 10; Explosives; Parent and Child; Witnesses, § 40.

CITIES.

See Municipal Corporations.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Bankruptcy, § 341; Carriers, § 159; Counties, § 206; Executors and Administrators, §§ 221-261.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL ATTACK.

See Judgment, §§ 479-501.

COLLATERAL SECURITY.

See Assignments.

COLLECTION.

See Banks and Banking, §§ 156, 166.

COMBAT.

See Homicide, §§ 19, 63.

COMMERCE.

II. SUBJECTS OF REGULATION.

§ 27 (Or.) A member of a switching crew, engaged in moving oil from an oil car to provide fuel for engines used in interstate commerce, is within the protection of the federal Employ-

er's Liability Act.—*Montgomery v. Southern Pac. Co.*, 131 P. 507.

The members of a switching crew, switching and spotting cars to be loaded and loaded with interstate commodities and in hauling cars to a station from which they may be conveniently taken by a regular interstate train passing over an interstate railroad, are within the federal Employer's Liability Act.—*Id.*

All employes who participate in the maintenance or operation of the instrumentalities for the general use of an interstate railroad are engaged in interstate commerce within the federal Employer's Liability Act.—*Id.*

In an action under the federal Employer's Liability Act for injuries to a member of a switching crew moving oil from an oil car to provide fuel for engines used in interstate commerce, evidence of the general duties of the members of the crew while the employe had been employed by the railroad company was material.—*Id.*

III. MEANS AND METHODS OF REGULATION.

§ 54 (Mont.) Rev. Codes, § 2897, which provides that any newspaper unable to complete a contract for county printing shall sublet it to some competent printing establishment within the state, is not a regulation of interstate commerce.—*Hersey v. Nelson*, 131 P. 30.

§ 64 (Nev.) Rev. Laws, §§ 3890-3894, inclusive (act approved March 24, 1905 [St. 1905, c. 153] §§ 1-5), making it unlawful for an itinerant merchant to offer goods for sale without a license, and providing that the act shall not apply to commercial travelers representing wholesale houses or to the sale of farm products, held to violate Const. U. S. art. 1, § 8, relating to interstate commerce.—*Ex parte Stoddard*, 131 P. 133.

COMMERCIAL PAPER.

See Bills and Notes.

COMMERCIAL TRAVELERS.

See Commerce, § 64; Constitutional Law, § 230.

COMMISSION.

See Constitutional Law, § 297; Corporations, § 394; Jury, § 12; Railroads, § 9.

COMMISSIONERS.

See Counties, §§ 113, 146; Municipal Corporations, § 450.

COMMISSION FORM OF GOVERNMENT.

See Municipal Corporations, § 48.

COMMISSION MERCHANTS.

See Factors.

COMMISSIONS.

See Brokers, §§ 40-71, 82-88.

COMMON LAW.

See Descent and Distribution, § 5.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 239-274.

COMPENSATION.

See Attorney and Client, §§ 140-143; Brokers, §§ 40-71, 82-88; Coroners, § 7; Corpora-

tions, § 426; Eminent Domain, §§ 60-137; Guardian and Ward, § 150; Insurance, § 84; Officers, § 94; Partnership, § 83; Schools and School Districts, § 144; Sheriffs and Constables, §§ 30, 61.

COMPETENCY.

See Criminal Law, § 386; Evidence, § 151; Jury, § 103; Witnesses, §§ 40-219.

Of experts as witnesses, see Evidence, § 539.

COMPLAINT.

See Pleading.

COMPOSITIONS WITH CREDITORS.

See Accord and Satisfaction; Compromise and Settlement, § 8.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Arbitration and Award.

§ 8 (Wash.) The law favors settlements of claims for personal injuries, and will sustain such a settlement if fairly made and not procured by fraud or overreaching.—*Nath v. Oregon R. & Navigation Co.*, 131 P. 251.

§ 16 (Wash.) A receipt in full of all demands executed by plaintiff on a compromise and settlement of his stock interest, etc., in defendant company held a bar to his subsequent action to recover profits.—*Simons v. Hallidie Co.*, 131 P. 1169.

§ 19 (Colo.) A contract settling a contractor's claim under mutual mistake that a balance of \$2,285 only was due him, whereas the amount due was \$3,285, will be reformed at his suit.—*Beck v. School Dist. No. 2 in Bent County*, 131 P. 398.

§ 23 (Wash.) To avoid a settlement for injuries on the ground of fraud, the fraud must be shown by clear and convincing proof, especially where the validity of the settlement was not questioned for more than two years.—*Nath v. Oregon R. & Navigation Co.*, 131 P. 251.

§ 23 (Wash.) While a receipt in full of all demands pursuant to a compromise and settlement is subject to vacation for fraud, mistake, etc., the burden of proof thereof is on the party seeking to impeach the receipt.—*Simons v. Hallidie Co.*, 131 P. 1169.

COMPUTATION.

See Limitation of Actions, §§ 55-180.

CONCEALMENT.

See Limitation of Actions, § 104.

CONCLUSION.

See Evidence, §§ 471, 473.

CONCLUSIVENESS.

See Judgment, §§ 648-747.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 472, 474.

CONDITIONS.

See Quieting Title, § 14.

CONFESSION.

See Criminal Law, § 409.

CONFIDENTIAL RELATIONS.

See Witnesses, §§ 195, 219.

CONFLICT OF LAWS.

See Carriers, § 46; Descent and Distribution, §§ 5, 62; Insurance, § 147; Wills, § 2.

CONNECTING CARRIERS.

See Carriers, § 177.

CONSENT.

See Vendor and Purchaser, § 144; Waters and Water Courses, § 156.

CONSIDERATION.

See Bills and Notes, §§ 92, 465; Contracts, §§ 73-91; Deeds, § 70; Fraudulent Conveyances, § 95; Guaranty, § 16; Mortgages, § 258; Vendor and Purchaser, §§ 3, 13, 239.

CONSIGNMENT.

See Factors.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

See Carriers, § 318; Corporations, § 394; Counties, § 1; Courts, § 202; Criminal Law, §§ 162, 163, 627-629, 1186; Elections, § 74; Eminent Domain, §§ 69, 100; Gaming, § 63; Intoxicating Liquors, § 10; Judges, § 29; Municipal Corporations, §§ 34, 396, 957; Railroads, § 9; Statutes, §§ 76, 94, 107, 141; Waters and Water Courses, § 128; Weights and Measures, § 1.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 29 (Idaho) Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given or the enforcement of any duty.—Cleary v. Kincaid, 131 P. 1117.

§ 29 (N.M.) A constitutional provision is self-executing when it takes immediate effect, and ancillary legislation is not necessary to the enjoyment of the right given or the enforcement of the duty imposed.—Lanigan v. Town of Gallup, 131 P. 997.

§ 31 (Idaho) Const. art. 18, § 6, as amended November 5, 1912, making the county treasurer tax collector instead of the county assessor, is self-operative.—Cleary v. Kincaid, 131 P. 1117.

§ 31 (N.M.) Const. art. 9, §§ 12, 13, do not empower municipalities to contract indebtedness, independent of legislative authorization.—Lanigan v. Town of Gallup, 131 P. 997.

§ 46 (Mont.) The Supreme Court will not determine the constitutionality of a statute, when the attack on its validity is based on an assumption of fact which is not shown by the record to have any real existence.—Hersey v. Nelson, 131 P. 30.

§ 48 (Or.) L. O. L. § 3206, providing that any portion of a county containing not less than 150 inhabitants and not already incorporated may be incorporated as a municipality, having been on the statute books for many years and been acquiesced in by the public and recognized by the courts, must be held constitutional in the absence of a clear showing of its invalidity.—State v. Bay City, 131 P. 1038.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) Legislative Powers and Delegation Thereof.**

§ 53 (Cal.) Statutes defining terms in existing statutes are upheld except as to past transactions, as an exercise of legislative power to enact a law for the future, and, so construed, are not unconstitutional as a legislative exercise of judicial power.—In re Coburn, 131 P. 352.

V. PERSONAL, CIVIL AND POLITICAL RIGHTS.

§ 87 (Mont.) Rev. Codes, § 2897, providing that any newspaper unable to complete a contract for county printing shall sublet it to some printing establishment within the state, *held* not in conflict with Const. art. 3, § 3, declaring inalienable the rights of acquiring property and seeking happiness.—Hersey v. Nelson, 131 P. 30.

VI. VESTED RIGHTS.

§ 101 (Okla.) The right to practice law is not a vested right, but a mere privilege.—State Bar Commission v. Sullivan, 131 P. 703.

X. EQUAL PROTECTION OF LAWS.

§ 230 (Nev.) Rev. Laws, §§ 3890-3894, inclusive (act approved March 24, 1905 [St. 1905, c. 153] §§ 1-5), making it unlawful for an itinerant merchant to sell goods without a license, and providing that the act shall not apply to drummers and commercial travelers representing wholesale houses or to the sale of farm products, *held* to violate Const. U. S. amend. 14, and article 4, § 2, relating to the equal protection of the laws.—Ex parte Stoddard, 131 P. 133.

XI. DUE PROCESS OF LAW.

§ 276 (Mont.) Rev. Codes, § 2897, which provides that any newspaper unable to complete a contract for county printing shall sublet it to some printing establishment within the state, *held* not to conflict with U. S. Const. amends. 5, 14.—Hersey v. Nelson, 131 P. 30.

§ 297 (N.M.) Const. art. 11, §§ 7, 8, providing for review by the Supreme Court of orders of the state corporation commission, *held* not to deny due process because no additional evidence is allowed on such review.—Seward v. Denver & R. G. R. Co., 131 P. 980.

§ 309 (Colo.App.) Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; Mills' Ann. St. [1912 Ed.] § 3812), providing for service of process in proceedings to secure permission to change the point of diversion of water rights, *held* not violative of the constitutional guaranty of due process of law.—Farmers' High Line Canal & Reservoir Co. v. Wolff, 131 P. 291.

CONSTRUCTION.

See Bills and Notes, § 125; Carriers, § 51; Contracts, §§ 153-198; Principal and Agent, § 97; Principal and Surety, § 59; Sales, §§ 77, 79; Statutes, §§ 200-226; Vendor and Purchaser, § 48; Wills, §§ 448-561.

CONTEMPT.

See Injunction, §§ 223-230.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 61 (Colo.) Where the affidavits supporting an application for a change of judge are not of a contemptuous character, and the answer in a contempt proceeding was not contemptuous per se, the judge could not pronounce judgment without proof that the charges were made with

a reckless disregard of the truth, or with the intention to reflect upon the honor and character of the judge.—*In re Smith*, 131 P. 277.

§ 66 (N.M.) A judgment in a contempt proceeding originating subsequent to the final decree is not reviewable on appeal from such final decree.—*Canavan v. Canavan*, 131 P. 493.

§ 66 (Okl.Cr.App.) The Criminal Court of Appeals has no jurisdiction to review civil contempt proceedings.—*Wells v. State*, 131 P. 725.

§ 66 (Wash.) On an appeal from a judgment for contempt the appellant is entitled to the provisions of law governing appeals, including the right to a stay of execution pending the appeal.—*State v. Superior Court of Washington for King County*, 131 P. 816.

CONTEST.

See Elections, §§ 269-305.

CONTINUANCE.

See Criminal Law, §§ 586, 603, 1151; Elections, § 276.

§ 19 (Cal.App.) On showing by affidavits in support of a motion for a continuance on the ground of the absence of one of the defendants, and counterstatement, *held*, that the denial of a continuance was not an abuse of the trial court's discretion.—*Mead v. Broads*, 131 P. 758.

CONTRACTS.

See Banks and Banking, § 109; Bills and Notes; Brokers, §§ 43, 49, 60, 63, 71; Cancellation of Instruments; Carriers, §§ 46, 51, 114, 159; Chattel Mortgages; Commerce, § 64; Compromise and Settlement; Constitutional Law, §§ 31, 87, 276; Corporations, §§ 83, 92, 120, 183, 456; Counties, §§ 112-122; Customs and Usages; Damages, §§ 24, 40, 77, 80, 117; Deeds; Descent and Distribution, § 62; Evidence, §§ 151, 387-461, 473, 571; Exchange of Property; Fixtures; Frauds, Statute of; Gas, § 14; Guaranty; Husband and Wife, § 30; Insurance; Interest, § 34; Landlord and Tenant; Mechanics' Liens; Mortgages; Municipal Corporations, §§ 331-342; Novation; Pleading, §§ 193, 208, 433; Principal and Agent; Principal and Surety; Reformation of Instruments; Release; Sales; Schools and School Districts, § 144; Specific Performance; Stipulations; Trial, § 398; Usury, § 41; Vendor and Purchaser; Waters and Water Courses, §§ 153-158½, 247, 249, 254, 257; Work and Labor.

I. REQUISITES AND VALIDITY.

(D) Consideration.

§ 73 (Cal.) While forbearance is a good consideration for a contract, it must be under an agreement to forbear; mere forbearance, without an agreement, being insufficient.—*In re Thomson's Estate*, 131 P. 1045.

§ 88 (Cal.) A written contract imports a consideration placing the burden of showing want of consideration upon the party asserting it.—*In re Thomson's Estate*, 131 P. 1045.

Where the consideration declared in a contract is not negated by evidence, the contract itself sufficiently shows that it is supported by a consideration.—*Id.*

§ 91 (Cal.) Whether a contract is supported by a sufficient consideration is a question of fact.—*In re Thomson's Estate*, 131 P. 1045.

(E) Validity of Assent.

§ 93 (Or.) Under ordinary circumstances, one is not excused from the consequences of signing a paper which he has negligently failed to read.—*Foster v. University Lumber & Shingle Co.*, 131 P. 736.

§ 94 (Idaho) False representations, which are relied on and are the inducement which leads

a party to enter into a contract, and which directly affect the subject-matter of the contract, are material affording ground for rescission and not mere expressions of opinion.—*Breshears v. Callender*, 131 P. 15.

(F) Legality of Object and of Consideration.

§ 116 (Colo.) The legality of contracts in restraint of trade is to be resolved on the particular facts of each contract.—*Barrows v. McMurtry Mfg. Co.*, 131 P. 430.

The test of whether a contract in restraint of trade is reasonable is whether the restraint is only such as to afford a fair protection to the promisee, and not so large as to interfere with public interests; and whatever restraint is larger than the necessary protection of the party, if oppressive, is in the eye of the law, unreasonable.—*Id.*

The law looks with disfavor upon any condition which tends to stifle the free course of competitive buying and selling of necessary commodities in the open market.—*Id.*

It is quite as important for the public interest and welfare that individuals be not allowed with impunity to breach their contracts in restraint of trade, advisedly made, as it is that the public be protected from such restraint; and where, without violation of legal principles and public policy, such contracts may be upheld, they should be rigidly enforced.—*Id.*

§ 117 (Colo.) One may lawfully covenant to refrain from pursuing a particular business within certain territory, even if it be an entire state, if the restraint thereby established is reasonable and affords only fair protection to the one for whose benefit it is imposed.—*Barrows v. McMurtry Mfg. Co.*, 131 P. 430.

Whether a restraint of trade is general or partial, extensive or limited, is of itself immaterial, and if the public welfare be not adversely affected thereby the contract should be sustained, if reasonable and imposing only a fair protection within the plain purpose of the contract.—*Id.*

Sale of entire stock in trade, together with the good will of a glass company of which defendant was the president and the largest stockholder, together with a covenant that the sellers would not within 10 years engage in such business within the state, *held* not invalid as in restraint of trade.—*Id.*

Seller's covenant with purchaser of a plate glass business to refrain from engaging in such business within the state for 10 years *held*, in view of the fact that the purchaser had no control over the supply, that other competitors remained, and that capital was free to enter the field, not to give the purchaser an unlawful monopoly of such business.—*Id.*

§ 117 (Wash.) A contract of sale of a plant for the manufacture of concrete products, which covenanted that the seller would not re-enter the same business either in Washington or Oregon within five years, was not void as in restraint of trade; the limit of time and territory being reasonably necessary for the successful conduct of such a business.—*Washington Charcrete Co. v. Campbell*, 131 P. 208.

§ 138 (Cal.) Where defendant continued to occupy premises after the expiration of a lease based on an illegal consideration plaintiff could not recover subsequent rent if he was obliged to rely on the lease to establish his cause of action.—*Howell v. City of Hamburg Co.*, 131 P. 130.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 153 (Cal.App.) In construing a contract every part thereof should be given effect, if reasonably practicable.—*Griffin v. Long*, 131 P. 700.

§ 153 (Wash.) Where a contract is fairly open to two constructions, one lawful and the

other unlawful, the lawful one will be adopted.—*Lay v. Bouton*, 131 P. 1153.

§ 176 (Cal.) The construction of a contract is always a question of law, whether arrived at from merely reading the contract or from the face of the contract, aided by extrinsic evidence.—*In re Thomson's Estate*, 131 P. 1045.

(C) Subject-Matter.

§ 198 (Wash.) Under a building contract requiring a contractor to provide all materials and perform all the work as shown by the specifications, which required the contractor to furnish all rough hardware, such as nails, etc., and allow \$500 for the purchase of the finishing hardware, to be selected by the architect, the contractor was required to furnish the finishing hardware to the amount of \$500, but the owner could be required to pay all in excess of that sum.—*Pacific Hardware Co. v. Olsen*, 131 P. 217.

IV. RESCISSION AND ABANDONMENT.

§ 256 (Wash.) That a contractor to clear land entered into a subcontract with another to complete the work was not an abandonment of the contract.—*Spina v. Arcadia Orchards Co.*, 131 P. 218.

§ 265 (Cal.) Where plaintiff's intestate transferred his water rights to defendants, who expended large sums of money in perfecting them and building an irrigation system, plaintiff cannot rescind the contract; it being impossible to place defendants in statu quo.—*Beckwith v. Sheldon*, 131 P. 1049.

§ 265 (Idaho) The rule that a party rescinding a contract for fraud must place the other party as nearly as possible in statu quo does not apply where the property is worthless or the defrauded party has so dealt with the subject-matter of the contract that it is impossible to put the other in statu quo.—*Breshears v. Callender*, 131 P. 15.

§ 269 (Cal.) A contract whereby plaintiff's intestate transferred his water rights to defendants and to a corporation duly organized by them cannot be rescinded where the corporation, whose stock was sold to third persons, had expended large sums of money in improving the appropriations and perfecting them.—*Beckwith v. Sheldon*, 131 P. 1049.

V. PERFORMANCE OR BREACH.

§ 280 (Wash.) Where plaintiffs installed the heating and plumbing systems in defendant's house in strict conformity with the specifications, any insufficiency therein resulting from defects in the specifications was no defense to plaintiffs' action for the price.—*Ward v. Pantages*, 131 P. 642.

§ 300 (Wash.) Where a contractor agreed to clear land for defendant prior to November 13, 1910, but was prevented by a lumber company, which to the knowledge of defendant, owned a prior right to the timber on the land, delay beyond the contract time was no bar to a recovery of the balance due under the contract.—*Spina v. Arcadia Orchards Co.*, 131 P. 218.

§ 305 (Wash.) The time for performance of a written contract may be waived as well as extended by parol.—*Opejon v. Engebo*, 131 P. 1146.

§ 306 (Cal.App.) An owner, who has complied with a valid building contract, cannot be compelled to pay anything in excess of the contract price; and where he completes the building in accordance with the original plans on the abandonment of the work by the contractor he must, under Code Civ. Proc. § 1200, be allowed credit for what is reasonably and necessarily expended therefor.—*Growall v. Pacific Surety Co.*, 131 P. 73.

VI. ACTIONS FOR BREACH.

§ 324 (Idaho) A party defrauded may either rescind the contract and demand a return of the consideration provided he moves promptly, or he may affirm the bargain and sue for damages.—*Breshears v. Callender*, 131 P. 15.

CONTRADICTION.

See Witnesses, §§ 383, 398, 409.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 72, 132, 136.

CONVERSION.

Wrongful conversion, see Trover and Conversion.

CONVEYANCES.

See Indiana, § 15; Mortgages.

COPY.

See Evidence, §§ 186, 340.

CORONERS.

§ 7 (Colo.) Rev. St. 1908, § 2577, providing compensation to coroners for "each day actually employed in making an inquest," does not allow compensation for services rendered in investigating cases of sudden death in which the coroner deemed no inquest necessary.—*McGovern v. Board of Com'rs of City and County of Denver*, 131 P. 273.

CORPORATION COMMISSION.

See Railroads, § 9.

CORPORATIONS.

See Bankruptcy § 178; Banks and Banking; Bills and Notes, § 92; Carriers; Constitutional Law, § 297; Criminal Law, §§ 444, 472; Embezzlement; Eminent Domain, § 10; Evidence, §§ 244, 471; Ferries; Gas, § 14; Insurance, §§ 33, 60; Jury, § 12; Larceny, §§ 40, 47; Municipal Corporations; Novation, § 2; Principal and Surety, § 59; Railroads; Street Railroads; Telegraphs and Telephones; Tenancy in Common, § 15; Venue, § 22; Waters and Water Courses, §§ 21, 252.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

§ 52 (Wash.) Under Rem. & Bal. Code, §§ 3679, 3708½, authorizing amendments to articles of incorporation, and requiring a corporation removing its place of business into a county to file in the office of the county auditor a certified copy of the articles of incorporation, in order to change residence, the amendment making the change must be certified and filed and not the original articles.—*First Nat. Bank v. Wilcox*, 131 P. 203.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§ 83 (Wash.) A subscription contract for the total stock of a corporation may be canceled by unanimous consent of the subscribers, provided rights of creditors are not involved.—*National Realty Co. v. Neilson*, 131 P. 446.

A cancellation or abandonment of a subscription contract for the total stock of a corporation may be effectual without an express or formal agreement to that effect.—*Id.*

§ 92 (Wash.) A subscriber of corporate stock who gives a note for a part of the price is not entitled, when sued on the note by a bona fide transferee thereof, to a judgment against the

corporation which is insolvent for a sum equal to the judgment for the transferee.—*National Realty Co. v. Neilson*, 131 P. 446.

Where a subscriber of corporate stock of the par value of \$100 a share agreed to pay \$150 per share, and gave a note as full payment, and the fiscal agent of the corporation exchanged the note for bonds of the transferee, who sued on the note, the subscriber was not entitled to judgment against the corporation, which was insolvent, for the difference between the par value and the subscription price.—*Id.*

(D) Transfer of Shares.

§ 117 (Wash.) Though a seller of stock occupied a confidential relation toward the buyer and misrepresented the value of stock, plaintiff, who was experienced in the line of business carried on by the corporation and made an independent investigation, was not entitled to rescind.—*Harris v. Stewart*, 131 P. 212.

Where a sale of corporate stock was induced by a seller's fraudulent misrepresentations and concealment of his ownership, the buyer cannot, after discovering the true facts, stand by for more than a year and then be allowed to rescind.—*Id.*

§ 117 (Wash.) A purchaser of stock of a corporation whose principal office is in a distant state, and whose property is at a distance, may rely on the representations of the seller as to the business and assets of the corporation, and, in case of misrepresentations, may rescind the purchase, and recover the price paid.—*McFeron v. Shoemaker*, 131 P. 1126.

§ 120 (Cal.App.) A written contract held to give plaintiff an option to require defendant to repurchase certain mining stock sold by him, and not to be an absolute contract for repurchase; consequently plaintiff was bound to demand repurchase within the time limited.—*Scott v. Goodin*, 131 P. 76.

§ 121 (Wash.) In an action to rescind the purchase of the capital stock of a drug company on the ground that defendant, as plaintiff's confidential agent, misrepresented the value of the stock, evidence held insufficient to establish a confidential relation.—*Harris v. Stewart*, 131 P. 212.

§ 121 (Wash.) A purchaser of corporate stock who sues to rescind for fraud and to recover the consideration paid within four weeks after the discovery of the fraud is not chargeable with laches, because he did not earlier discover the fraud.—*McFeron v. Shoemaker*, 131 P. 1126.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

§ 177 (Cal.App.) That one suing for services rendered a corporation was a stockholder does not preclude his recovery either upon an express or implied contract, being merely evidentiary as to whether any promise ever existed to pay for such services.—*Allen v. Central Counties Land Co.*, 131 P. 78.

§ 181 (Wash.) A minority stockholder has the right to inspect and examine the books and records of the corporation at all reasonable times.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

§ 183 (Colo.App.) Where property of a corporation had been sold for taxes, a contract by the purchaser to convey the tax title to a stockholder was not contrary to public policy or good morals, and the stockholder could not be deprived of a decree of specific performance on that ground.—*Meyer v. Wright*, 131 P. 787.

§ 186 (Colo.App.) A stockholder, being under no fiduciary relation to a corporation, in the absence of fraud may deal with it, its debts, or property, as a stranger.—*Meyer v. Wright*, 131 P. 787.

(B) Meetings.

§ 196 (Cal.App.) Where stockholders at a meeting for the election of directors discovered before all the ballots were cast and before any canvass or result of the election was announced that the ballots as cast had not expressed their intention, it was proper to return the ballots to them, and to permit a correction so as to express their true intention.—*Zierath Combination Drill Co. v. Croake*, 131 P. 335.

(C) Suing or Defending on Behalf of Corporation.

§ 206 (Wash.) A paid-up stockholder, knowing of a debt due to the corporation other than upon stock or subscriptions, and showing a refusal of the officers of the corporation to bring suit upon demand, may maintain an action therefor without resort to a receivership.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

§ 211 (Mont.) In a stockholder's action, whenever a demand on the corporation or its receiver to bring the action is necessary, the allegation that it was made and refused is an essential ingredient to the statement of a cause of action.—*Moss v. Goodhart*, 131 P. 1071.

(D) Liability for Corporate Debts and Acts.

§ 227 (Wash.) Where capital stock is issued in proportion to the cash payments by the several subscribers, each stockholder is bound for the corporate debts in proportion to his holding.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

§ 240 (Wash.) Under Rem. & Bal. Code, § 3694, defining duties of trustees as to unpaid subscriptions, held, that on their failure to perform such duty for an unreasonably long time equity would permit a paid-up stockholder to enforce unpaid subscriptions in the name and for the benefit of the corporation.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 320 (Wash.) A stockholder on the favorable termination of a suit on behalf of others similarly situated is entitled to an attorney's fee and disbursements if the corporation receives a benefit from the suit, but not if he individually receives the benefit.—*Boothe v. Summit Coal Mining Co.*, 131 P. 252.

Where a suit between the two owners of the entire capital stock of a corporation was treated as one between partners, and litigated by each for his own benefit, costs and disbursements could not be allowed out of the fund under the rule allowing them to a minority stockholder.—*Id.*

§ 320 (Wash.) A court of equity will enjoin the trustees of a corporation from selling its property, where it appears that a fraud is contemplated, or about to be perpetrated, on the stockholders.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 391 (N.M.) The state may regulate rates and compel the performance of other duties on the part of public service corporations, but such rates or regulations must be reasonable, both to the corporation and to the public.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

§ 393 (N.M.) While the fixing of rates or the determination of the facilities to be afforded in the first instance is a legislative question, the determination on the merits of the reasonableness and lawfulness of any requirement is a judicial function and means a decision irrespective of technical or dilatory contentions.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

§ 393 (Wash.) A court will not interfere merely to settle disputes between stockholders, or to substitute its judgment for that of the majority of the trustees, unless some controlling equity warrants its interposition.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

§ 394 (N.M.) On review by the Supreme Court of an order of the state corporation commission pursuant to Const. art. 11, §§ 7, 8, no new evidence may be adduced, but the determination must be upon the evidence before the commission.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

Where it appears that new evidence has been discovered, and there was no lack of diligence, the cause may be remanded to the commission for the taking of such further evidence.—*Id.*

The Supreme Court determines the reasonableness and lawfulness of such order and enforces it only when found to be reasonable and lawful.—*Id.*

The court may of its own motion remand the cause to the commission for the taking of further evidence.—*Id.*

As used in Const. art. 11, § 7, providing that the Supreme Court on review of orders of the corporation commission shall "decide such cases on their merits," the phrase quoted means that the court shall do justice irrespective of informal, technical, or dilatory objections.—*Id.*

Findings of fact made by the corporation commission have no force or effect in the Supreme Court, but such court forms its own independent judgment upon the evidence.—*Id.*

For an order of the state corporation commission to be enforceable it must be definite and certain in its requirements.—*Id.*

(B) Representation of Corporation by Officers and Agents.

§ 403 (Cal.App.) An assignment by the secretary of a corporation, though not authenticated by the corporate seal, is valid, where authorized by the president and manager.—*Leitch v. Marx*, 131 P. 328.

§ 404 (Cal.App.) An assignment by the secretary of a corporation, though not authorized by resolution of the board of directors, is valid, where authorized by the president and manager.—*Leitch v. Marx*, 131 P. 328.

§ 414 (Or.) Under the by-laws of a corporation authorizing certain officers to sign all checks, orders, etc., *held*, that the president was empowered to indorse a note payable to it.—*Page v. Ford*, 131 P. 1013.

§ 426 (Cal.App.) The regular payment of a monthly salary by a corporation at a certain rate, with the full knowledge of the directors, for three years, without objection of any, precludes the corporation from contending in an action for several months' salary that there was no agreement to pay such an amount, or that the services were not reasonably worth such amount.—*Allen v. Central Counties Land Co.*, 131 P. 78.

§ 426 (Cal.App.) Under Civ. Code, § 1589, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, a corporation accepting the benefits of services rendered by an attorney under an employment made by the president is liable for the reasonable value of the services.—*Goodwin v. Central Broadway Bldg. Co.*, 131 P. 896.

§ 432 (Cal.App.) In an action by an employee of a corporation to whom had been assigned a claim for collection, he should, where the assignment is questioned, be allowed to show the circumstances and purpose for which the assignment was made to him, and that it was authorized or ratified by the president, manager, and directors.—*Leitch v. Marx*, 131 P. 328.

§ 432 (Cal.App.) To prove a sale by a corporation it must be shown that it was made on

its behalf by some one having authority to so act for it; and testimony that it "sold" its account, without any testimony as to who represented it in the transaction, involves conclusions.—*Chandler v. Robinett*, 131 P. 891.

§ 432 (Cal.App.) In action against corporation for services in auditing the company's books, evidence *held* sufficient to show president's authority to contract for such services without showing authority by resolution of the board of directors.—*Reardon v. Richmond Land Co.*, 131 P. 894.

§ 432 (Or.) Where a note is made payable to a corporation, and is indorsed by a person signing as an officer thereof, the indorsement will be presumed to be a corporate act.—*Page v. Ford*, 131 P. 1013.

(D) Contracts and Indebtedness.

§ 456 (Cal.App.) It is not necessary that a resolution should be passed by the board of directors to bind a corporation in the matter of the employment of its servants.—*Allen v. Central Counties Land Co.*, 131 P. 78.

(F) Civil Actions.

§ 499 (Wash.) Under Rem. & Bal. Code, §§ 3714, 3715, providing license fees for corporations, based on the amount of its capital stock, and prohibiting the maintenance of an action without payment of such fees, a corporation having no capital stock could maintain an action without payment of any license fee.—*Mutual Home Ass'n v. Joe's Bay Trading Co.*, 131 P. 1140.

§ 503 (Wash.) Where a corporation sent an agent to W. county to purchase lumber, and he purchased the same from plaintiff, such transaction constituted the doing of business in W. county, and the corporation was suable there, under Rem. & Bal. Code, § 206, though the corporation had its principal place of business in another county.—*Strandall v. Alaska Lumber Co.*, 131 P. 211.

§ 507 (Ariz.) To acquire jurisdiction in a tax suit of a domestic corporation, if not voluntarily submitting to jurisdiction, it must be served with process by some method prescribed by law.—*Boyle v. Oro Plata Min. & Mill. Co.*, 131 P. 155.

Under Civ. Code 1901, pars. 1323, 1324, 1334, as to service of summons on corporations and nonresident defendants, a domestic corporation may not be served by mailing a copy of the summons directly to its president out of the territory.—*Id.*

VIII. INSOLVENCY AND RECEIVERS.

§ 544 (Wash.) A domestic corporation may not after insolvency prefer its creditors.—*Benner v. Scandinavian American Bank*, 131 P. 1149.

§ 553 (Wash.) While first object of a receivership is to preserve the assets, the appointment of a receiver to collect unpaid stock subscriptions of a solvent corporation is unauthorized.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

One who was president of a corporation is charged with a knowledge of its business affairs, and after six years the court, on his allegations of a conspiracy on the part of other stockholders to sell the property for less than its value and to render his stock worthless, there having been no change in its business condition since the beginning of his own administration, is not warranted in appointing a receiver.—*Id.*

§ 557 (Wash.) In an action by a corporation to restrain a stockholder from interfering with its business, in which defendant applied for a receiver, the fact that another corporation, controlled by other stockholders of plaintiff corporation, is a competitor does not establish that a sale of the property of plaintiff corporation

would be in fraud of the defendant stockholder.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 614 (Wash.) A majority of stockholders can wind up a corporation.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

XII. FOREIGN CORPORATIONS.

§ 668 (Wash.) The statute authorizing service of process upon the statutory agent of a foreign corporation is not exclusive, and service may be made upon other agents of the corporation in pursuance of the general law.—*Barrett Mfg. Co. v. Kennedy*, 131 P. 1161.

§ 670 (Wash.) Under Rem. & Bal. Code, § 1828, providing that writs of garnishment may be served as summons, and section 226 providing the manner of service of summons in a suit against a foreign corporation, a writ of garnishment may be served by delivery to an agent in charge of a foreign corporation's business, though he be not a general or managing agent.—*Barrett Mfg. Co. v. Kennedy*, 131 P. 1161.

§ 672 (Colo.App.) Noncompliance with state statutes regulating foreign corporations, when suit is brought by them in Colorado, is matter of defense.—*Lougee v. Wilson*, 131 P. 777.

CORROBORATION.

See Rape, § 54.

COSTS.

See Appeal and Error, § 612; Justices of the Peace, § 209; Libel and Slander, § 129.

IV. SECURITY FOR PAYMENT.

§ 144 (Kan.) Under Gen. St. 1909, § 6205 (Code Civ. Proc. § 610), judgment may be entered against sureties on a cost bond on motion by any person having a right to any part of the costs.—*Dabney v. Comes*, 131 P. 150.

COUNCIL

See Municipal Corporations, §§ 110-120, 282.

COUNTIES.

See Constitutional Law, §§ 31, 48; Criminal Law, §§ 87, 104; Highways; Intoxicating Liquors, § 76; Statutes, § 21.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 1 (Mont.) "Municipal corporation" defined, and held, that in view of Const. art. 13, § 4, providing that the state shall not assume the debt of any county or municipal corporation, and article 16, § 6, providing for the election of county and municipal officers, the term did not include counties.—*Hersey v. Nelson*, 131 P. 30.

§ 10 (Mont.) "Counties" defined, and held that Laws 1911, c. 112, providing for the creation of new counties upon petition, etc., did not affect their status as mere political subdivisions of the state for governmental purposes.—*Hersey v. Nelson*, 131 P. 30.

II. GOVERNMENT AND OFFICERS.

(A) Organisation and Powers of Government in General.

§ 21½ (Mont.) County powers are only such as are expressly provided by law, or which are necessarily implied from those expressed.—*Hersey v. Nelson*, 131 P. 30.

Under the maxim, "Expressio unius exclusio alterius," counties do not have any powers other than those indicated in Rev. Codes, § 2870,

which provides that every county is a body politic having the powers specified in the code or in special statutes, and such powers as are necessarily implied from those expressed.—*Id.*

§ 24 (Mont.) The legislative control over counties is supreme, except in so far as it is restricted by the Constitution in express terms or by necessary implication.—*Hersey v. Nelson*, 131 P. 30.

(B) County Seat.

§ 28 (Mont.) An unincorporated town is eligible as a candidate for county seat of a county proposed to be created under Laws 1911, p. 205, notwithstanding Rev. Codes, § 3202, which defines a city or town as a body corporate and politic.—*State v. Dale*, 131 P. 670, 672.

(D) Officers and Agents.

§ 101 (Colo.) A publisher of a newspaper held not entitled to sue on a county clerk's bond for failure to make a publication in the newspaper required by law.—*People v. Hoag*, 131 P. 400.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§ 112 (Mont.) Rev. Codes, § 2897, providing that a newspaper or printing establishment unable to complete a contract for county printing shall sublet it to some establishment in the state, is constitutional.—*Hersey v. Nelson*, 131 P. 30.

§ 113 (Mont.) The board of county commissioners is a body of limited powers, and must in letting a contract for county printing, as in every action, find its authority written in the statute or necessarily implied therefrom.—*Hersey v. Nelson*, 131 P. 30.

§ 122 (Wash.) A county leasing land, on which the lessee intends to put up buildings, may contract what the measure of damages shall be at the termination of the lease, in case the county takes possession for the purpose of leasing the buildings to some one else, and that such measure shall be based, not upon the right of removal, but upon the right of possession.—*Coliseum Inv. Co. v. King County*, 131 P. 245.

(D) Torts.

§ 146 (Wash.) In an action by the lessee of a county for the conversion of his improvements, which the lease provided should be appraised at its termination, it was immaterial whether the county commissioners had the power to delegate to appraisers the power to value the improvements, where they refused to permit the appraisal and took possession.—*Coliseum Inv. Co. v. King County*, 131 P. 245.

V. CLAIMS AGAINST COUNTY.

§ 206 (Nev.) Under Rev. Laws, §§ 1523, 1535, 1541, requiring the filing of claims against counties, and authorizing the party aggrieved by the action of the county commissioners and county auditor to sue, a constable presenting monthly bills made up of various items for services rendered, for which the statute fixes the fees, may accept the amount allowed and sue for the part disallowed, though in case of an unliquidated demand a claimant must accept the part allowed as entire satisfaction for the claim, or sue for the entire amount.—*Wolf v. Humboldt County*, 131 P. 964.

COURTS.

See Contempt; Corporations, § 393; Criminal Law, §§ 83-104; Executors and Administrators, §§ 336, 337, 349, 469; Insane Persons, § 27; Judges; Justices of the Peace; Statutes, § 21.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 30 (Mont.) Where the jurisdiction of a court is exclusive, and has once lawfully at-

tached, it cannot be ousted by subsequent events or facts arising in the cause, but the court may proceed to final judgment unless some constitution or statute operates to divest it of jurisdiction.—Curry v. McCaffery, 131 P. 673; Same v. Drew, Id. 677; Same v. McGrade, Id.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

§ 68 (Mont.) Where the duration of a special term or session is limited to a certain time, any act performed in the matter after the expiration of that time is coram non iudice, and void.—Curry v. McCaffery, 131 P. 673; Same v. Drew, Id. 677; Same v. McGrade, Id.

§ 76 (Mont.) A court of record has authority of its own motion and in the absence of statute to adjourn the hearing of a matter pending before it.—Curry v. McCaffery, 131 P. 673; Same v. Drew, Id. 677; Same v. McGrade, Id.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 91 (Cal.App.) Although a point decided in the Supreme Court is in conflict with the weight of authority and was rendered by a divided court, where it has not been criticised or modified by that court, the appellate court has no option, but must follow its reasoning in disposing of the same point in other cases.—Atkinson v. Golden Gate Tile Co., 131 P. 107.

§ 92 (Cal.App.) A statement in an opinion not necessary to the decision of the case is "dictum."—Boulden v. Thompson, 131 P. 765.

§ 97 (Or.) The decisions of federal courts, construing and applying the federal Employer's Liability Act, will be followed by the state courts.—Montgomery v. Southern Pac. Co., 131 P. 507.

V. COURTS OF PROBATE JURISDICTION.

§ 202 (Kan.) Gen. St. 1909, § 4852, providing that appeals from orders of the probate court may be taken on the same terms as are appeals under the act respecting executors and administrators, refers to the time and manner of appeals, and not to grounds of appeal or to cases in which an appeal may be taken.—Ald's Estate v. Appling, 131 P. 569.

Where an appeal bond in proper form and approved security was received by the probate judge within the time prescribed, and was placed by him on the files without indorsing it, it is filed in contemplation of law.—Id.

§ 202 (Okl.) Under the express provisions of Const. Schedule, § 2, and article 7, § 16, an appeal lies to the district court from the county court in probate matters in those cases in which an appeal was allowed under the statutes of Oklahoma territory.—Barnett v. Blackstone Coal & Milling Co., 131 P. 541.

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

§ 213 (Colo.App.) No appeal to the Supreme Court lies from a judgment less than \$500 and not relating to a franchise or a freehold.—Stevens v. Tompkins, 131 P. 802.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 485 (Okl.) A case pending on appeal in the county court from a justice of the peace court may be transferred on motion of plaintiff to

the superior court.—Yarborough v. Richardson, 131 P. 680.

§ 486 (Okl.) Under Sess. Laws 1909, p. 199, art. 13, §§ 2, 5, relative to the transfer of cases in Wagoner county to the county court nearest defendant's residence, it was error to deny defendant's motion to transfer a case appealed from a justice of the peace to the court nearest his residence, where plaintiff appeared and waived service of notice of the motion.—Dyer v. Chissee, 131 P. 701.

COVENANTS.

See Evidence, § 441; Landlord and Tenant, § 83.

CREDIBILITY.

See Witnesses, §§ 321-409.

CREDITORS.

See Exemptions, § 139; Fraudulent Conveyances, § 95.

CRIMINAL LAW.

See Adultery; Banks and Banking, § 21; Embezzlement; Extradition; Gaming, §§ 63-79; Homicide; Indictment and Information; Intoxicating Liquors, §§ 132, 236; Larceny; Master and Servant, § 18; Perjury; Rape; Receiving Stolen Goods; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 18 (Kan.) One state will not seek to censor the conduct of citizens and residents of other states unless such conduct results in an infraction of its own laws.—In re Fowles, 131 P. 598.

III. PARTIES TO OFFENSES.

§ 59 (Okl.Cr.App.) That a person concerned in the commission of a felony aids his codefendant to escape does not make him an accessory, so as to prevent his conviction as a principal.—Howard v. State, 131 P. 1100.

IV. JURISDICTION.

§ 83 (Okl.Cr.App.) Where there is jurisdiction of the party and of the offense for which accused was tried, the decision of all other questions arising in the case is but an exercise of that jurisdiction.—Ex parte Sizemore, 131 P. 1108.

§ 87 (Okl.Cr.App.) The jurisdiction of a county court in criminal cases is the same in all respects, whether its sessions are held at the county seat or at a county court town.—Ex parte Sizemore, 131 P. 1108.

§ 97 (Kan.) A nonresident may be prosecuted in the state for violating the Desertion Act, through his failure, while outside of the state, to support a child who is within the state.—In re Fowles, 131 P. 598.

Where a father waives extradition on the charge of failure to support his child and is discharged, but is rearrested for failure to support the child after entering the state, the state has no right to try him without showing that after being brought within the state he without lawful excuse knowingly refused to support the child.—Id.

§ 103 (Colo.) A police magistrate's court is a court of inferior jurisdiction, and its record must recite the facts necessary to confer jurisdiction.—Wolfe v. Abbott, 131 P. 386.

§ 104 (Okl.Cr.App.) County courts are courts of record, and entitled to the same presumption of jurisdiction as are the district courts.—Ex parte Sizemore, 131 P. 1108.

V. VENUE.**(B) Change of Venue.**

§ 121 (Okl.Cr.App.) An application of accused for a change of venue is addressed to the discretion of the trial court.—*Edwards v. State*, 131 P. 956.

§ 134 (Okl.Cr.App.) Counter affidavits filed on an application for a change of venue held sufficient to put in issue whether the prejudice against accused in the county would prevent a fair trial therein.—*Edwards v. State*, 131 P. 956.

VII. FORMER JEOPARDY.

§ 162 (Okl.Cr.App.) Under Const. Bill of Rights, § 21, no one can be twice punished for the same offense.—*Rupert v. State*, 131 P. 713.

§ 163 (Okl.Cr.App.) The word "jeopardy" as used in Const. Bill of Rights, § 21, prohibiting a second jeopardy, applies only to criminal prosecutions before courts of competent jurisdiction under an accusation sufficient to sustain a conviction.—*Rupert v. State*, 131 P. 713.

§ 179 (Okl.Cr.App.) Where defendant pleaded guilty and was sentenced to pay a fine authorized by statute, and paid same, a second judgment and sentence imposing a term of imprisonment in the county jail in addition to the fine was void.—*Rupert v. State*, 131 P. 713.

§ 200 (Wash.) Conviction of accused for maintaining a liquor nuisance, in violation of Rem. & Bal. Code, § 6278, held no bar to a subsequent conviction for unlawfully selling liquor in a local option district at the same time and place, in violation of section 6304.—*State v. Hatch*, 131 P. 1130.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 301 (Okl.Cr.App.) A motion for leave to withdraw a plea of not guilty for purpose of moving to quash the information is addressed to the discretion of the court.—*Weatherholt v. State*, 131 P. 185.

Where a motion to quash is not made in good faith, and the rights of the defendant are not prejudiced, an application for leave to withdraw a plea of not guilty to present such motion was properly denied.—*Id.*

X. EVIDENCE.**(A) Judicial Notice, Presumptions, and Burden of Proof.**

§ 308 (Okl.Cr.App.) After conviction the presumption of innocence is destroyed.—*Edwards v. State*, 131 P. 956.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338 (Cal.App.) Evidence as to whether deceased was an Anglo-Saxon was inadmissible.—*People v. Lopez*, 131 P. 104.

§ 366 (Kan.) An exclamation of deceased while coming down a stairway after being shot, and his statement in response to a question, giving the name of the person who shot him, held admissible in evidence.—*State v. Alexander*, 131 P. 139.

§ 366 (Okl.Cr.App.) Where it appears in a prosecution for assault to commit rape upon a child of tender years that immediately after the alleged assault she was crying and met an older sister and then and there made complaint, the complaint as made is admissible as part of the res gestæ.—*Boule v. State*, 131 P. 953.

(C) Other Offenses, and Character of Accused.

§ 369 (Okl.Cr.App.) Any evidence tending to show defendant's guilt is admissible although it also tends to prove a separate and distinct crime.—*Miller v. State*, 131 P. 717.

§ 369 (Okl.Cr.App.) The general rule that proof of other offenses is inadmissible un-

less a part of the res gestæ does not apply to offenses involving sexual intercourse.—*Morris v. State*, 131 P. 731.

Evidence of other acts is admissible in a statutory rape case to show the relation and familiarity of the parties, and as tending to corroborate the testimony of the prosecutrix as to the particular act relied on for conviction.—*Id.*

In a prosecution for statutory rape, evidence is admissible of sexual acts between the prosecutrix and the defendant prior to and subsequent to the one charged and relied upon for a conviction, as indicating continuousness of the illicit relation.—*Id.*

§ 369 (Okl.Cr.App.) Evidence of the contemporaneous possession of recently stolen goods is admissible to throw light upon the larceny for which a defendant is being tried.—*Howard v. State*, 131 P. 1100.

§ 377 (Idaho) The defendant in a homicide case should as a rule be allowed to introduce proof of his good reputation for peace and quiet, and also for truth and veracity, where his truthfulness or honesty is brought in question.—*State v. Allen*, 131 P. 1112.

(D) Materiality and Competency in General.

§ 386 (Mont.) The testimony of witnesses employed to detect crimes and furnish evidence is competent, though they acted as decoys, taking part in the criminal transaction.—*State v. Tudor*, 131 P. 632.

(E) Best and Secondary and Demonstrative Evidence.

§ 400 (Colo.) In a prosecution for embezzlement an impression copy book containing copies of letters written by accused, material to the offense, held admissible.—*Le Master v. People*, 131 P. 269.

§ 402 (Colo.) In a prosecution for embezzlement, carbon copies of letters sent to accused, the originals of which accused failed to produce on request, held admissible.—*Le Master v. People*, 131 P. 269.

§ 404 (Idaho) It was not error to admit a revolver holster in evidence where the witness identifying same, when asked whether it was the holster defendant had, replied: "I think it is, I am not sure; it appears to be."—*State v. Allen*, 131 P. 1112.

(F) Admissions, Declarations, and Hearsay.

§ 406 (Okl.Cr.App.) Admission of evidence that accused made no effort to discover that some other person was guilty of the crime held error.—*Morris v. State*, 131 P. 731.

§ 409 (Cal.) On a trial for giving a worthless check, held, that there was not sufficient independent evidence of the corpus delicti to justify the admission of accused's extrajudicial confessions; the independent testimony being purely hearsay.—*People v. Frey*, 131 P. 127.

A conviction cannot be had upon the extrajudicial confessions of a defendant, unless corroborated by independent proof of the corpus delicti.—*Id.*

§ 413 (Okl.Cr.App.) Accused cannot introduce evidence of his own self-serving acts and declarations not constituting a part of the res gestæ.—*Morris v. State*, 131 P. 731.

§§ 419, 420 (Cal.) Courts cannot authorize hearsay evidence on a prosecution for passing worthless checks to establish the nonexistence of funds or credit to meet the check, merely because of the inconvenience of obtaining other evidence of such fact; that being a matter for legislative adjustment.—*People v. Frey*, 131 P. 127.

In prosecution for passing worthless check, letter received by a bank stating that another bank had succeeded to the rights and business of the drawee bank was hearsay, and improperly admitted.—*Id.*

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 442 (Colo.) In a prosecution for embezzlement letters written by accused in the regular course of business and received as such may be admitted without expert proof of accused's signature.—*Le Master v. People*, 131 P. 269.

§ 444 (Colo.) In a prosecution for embezzlement by the head of a corporation, corporate books held sufficiently identified to be admitted in evidence.—*Le Master v. People*, 131 P. 269.

(I) Opinion Evidence.

§ 471 (Okl.Cr.App.) Expert or opinion evidence is not ordinarily admissible on matters within the common knowledge and understanding of mankind.—*Miller v. State*, 131 P. 717.

§ 472 (Colo.) In a criminal prosecution, where corporate books, which were voluminous and intricate, were in evidence, testimony by an expert accountant explaining the books, is admissible.—*Le Master v. People*, 131 P. 269.

§ 476 (Okl.Cr.App.) Where a wound is of an extraordinary nature and upon a portion of the body of which men have little knowledge, expert evidence, contrary to the general rule, is admissible to show whether such wound was self-inflicted.—*Miller v. State*, 131 P. 717.

Medical experts may be permitted to state their opinions as to the cause and manner of death.—*Id.*

§ 478 (Okl.Cr.App.) Experts are persons professionally acquainted with some science or skilled in some art or trade, or having knowledge or experience in relation to matters not generally known.—*Miller v. State*, 131 P. 717.

Within the rule that persons are competent to testify as experts who are skilled in some art or trade, the term "art or trade" includes every business or employment which requires peculiar knowledge or experience, and which has a class of persons devoted to its pursuit.—*Id.*

§ 481 (Okl.Cr.App.) The admissibility of expert testimony is a question of law for the court.—*Miller v. State*, 131 P. 717.

(J) Testimony of Accomplices and Codefendants.

§ 507 (Cal.App.) In a prosecution for pandering, a witness who was the keeper of a house of prostitution, to which prosecutrix was alleged to have been taken, held an accomplice within Pen. Code §§ 31, 111.—*People v. Lawlor*, 131 P. 63.

§ 507 (Okl.Cr.App.) That a person was present when the fatal shot was fired did not make him an accomplice of defendant, unless he encouraged, aided, or abetted defendant in the homicide.—*Maggard v. State*, 131 P. 549.

§ 510 (Okl.Cr.App.) A verdict of guilty under the uncorroborated testimony of an accomplice is contrary to law and the testimony, and will be set aside.—*Head v. State*, 131 P. 937.

(L) Evidence at Preliminary Examination or at Former Trial.

§ 543 (Okl.Cr.App.) Evidence held to justify the trial court in admitting the testimony given at the preliminary hearing by a witness absent at the final trial.—*Edwards v. State*, 131 P. 956.

Testimony given at a preliminary trial at which the witness was cross-examined by defendant held admissible where the attendance of the witness could not be produced.—*Id.*

(M) Weight and Sufficiency.

§ 562 (Mont.) A conviction sustained by the testimony of two persons employed to detect crimes and to furnish evidence, and contradicted by the testimony of accused and a third person, will not be disturbed.—*State v. Tudor*, 131 P. 632.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 576 (Okl.Cr.App.) A defendant who has never demanded or been refused a trial is not entitled to be discharged for failure to prosecute, under Const. art. 2, § 20, and the statutory provision (Comp. Laws 1909, § 6498).—*Head v. State*, 131 P. 937.

§ 586 (Okl.Cr.App.) An application by accused for a continuance is addressed to the trial court's discretion.—*Edwards v. State*, 131 P. 956.

§ 603 (Okl.Cr.App.) Application by accused for a continuance held insufficient on the question of diligence and on the merits in the case.—*Edwards v. State*, 131 P. 956.

XII. TRIAL.**(A) Preliminary Proceedings.**

§ 622 (Idaho) In view of the discretion given by Rev. Codes, § 7860, as amended by Laws 1911, p. 368, it was not an abuse of discretion to refuse to grant separate trials to defendants jointly indicted, where each desired to be a witness for the other and also a witness on his own behalf.—*State v. Allen*, 131 P. 1112.

§ 622 (Okl.Cr.App.) Defendants, jointly charged with a felony, are entitled to separate trials on demand.—*Rogers v. State*, 131 P. 941.

§ 627 (Okl.Cr.App.) The right of a defendant under the Constitution (Bill of Rights, § 20) to a copy of the accusation is waived unless he demands the same before announcing ready for trial.—*Franklin v. State*, 131 P. 133.

§ 628 (Okl.Cr.App.) Where the witnesses, whose names were indorsed on the information, were relatives and near neighbors of defendant, the words "all of Konawa, Okla.," sufficiently designated their post office addresses within the requirement of Const. Bill of Rights, § 20.—*Franklin v. State*, 131 P. 133.

§ 628 (Okl.Cr.App.) The court, in its discretion, may, after trial has begun, permit the names of additional witnesses to be indorsed upon an accusation charging a felony, and such action is not reviewable, in the absence of an abuse of discretion.—*Star v. State*, 131 P. 542.

The statute authorizing the indorsement of the names of additional witnesses upon the accusation in misdemeanor cases has no application to felony cases.—*Id.*

§ 629 (Okl.Cr.App.) The right of defendant in a capital case under Constitution (Bill of Rights, § 20) to be furnished with a list of the witnesses that will be called in chief, together with their post office addresses, at least two days before the case is called for trial, may be waived.—*Franklin v. State*, 131 P. 133.

Where counsel for defendant objects to going to trial without a list of witnesses, but refuses to consent to a continuance until another case on call for that day is tried, this constitutes a waiver of any right defendant may have to a continuance.—*Id.*

(B) Course and Conduct of Trial in General.

§ 642 (Cal.App.) Under Code Civ. Proc. § 1884, requiring the court to appoint an interpreter where the witness does not understand or speak the English language, the matter of such appointment is within the court's discretion.—*People v. Lopez*, 131 P. 104.

§ 655 (Idaho) Remarks of court that too much time was being consumed through needless repetition, and that nine out of ten questions asked were useless repetitions, held not to constitute error.—*State v. Allen*, 131 P. 1112.

§ 656 (Cal.App.) Where the court thought defendant's counsel was threatening and menacing prosecutrix in his cross-examination of her, it was improper for the court to say to her

that all the police force would be used if necessary to protect her.—*People v. Lawlor*, 131 P. 63.

(C) Reception of Evidence.

§ 663 (Idaho) Where a state's witness on cross-examination produces and testifies concerning an article of personal property, the trial court on request should have such article marked for identification and retained in the court's possession for future use.—*State v. Allen*, 131 P. 1112.

§ 673 (Okla.Cr.App.) On the joint trial of two defendants, evidence competent against either is admissible, though inadmissible as against one defendant if he were tried separately, when properly limited by instructions confining it to the particular defendant against whom it is admissible.—*Rogers v. State*, 131 P. 941.

§ 678 (Cal.App.) Where evidence showed two operations and the use of drugs pursuant to an agreement to procure a miscarriage, the prosecution was not required to elect on which act it would rely, they being parts of the same crime, notwithstanding Pen. Code, § 274, under which it is not necessary that a miscarriage be produced.—*People v. Simon*, 131 P. 102.

While if on a trial under an indictment charging only one offense evidence is introduced of two or more separate offenses, either of which would support the charge in the indictment, an election should be required if requested, the rule does not apply where a series of acts form part of one and the same transaction, and constitute but one offense.—*Id.*

§ 678 (Wash.) State held to have elected to rely on a particular act of adultery shown by the evidence, although there was no demand for an election where the case was tried and the instructions given without objection on that theory.—*State v. Moss*, 131 P. 1132.

(E) Arguments and Conduct of Counsel.

§ 699 (Cal.App.) Where counsel for accused in his cross-examination of prosecutrix assumed a menacing and threatening attitude, it was proper exercise of the trial court's discretion to restrain counsel in the manner of his further examination of the witness.—*People v. Lawlor*, 131 P. 63.

§ 719 (Kan.) Where there was no evidence that the trouble had been caused by the carrying of razors, it was error for counsel to remark in his argument as to turning defendants loose to get into trouble in other places for carrying razors, and on timely objection the jury should have been instructed to disregard same.—*State v. Alexander*, 131 P. 139.

§ 720 (Cal.App.) In a trial for murder, the statement of the district attorney that he believed upon his oath as an attorney that the defendant had not told what happened at the time, based upon the evidence, was not misconduct.—*People v. Lopez*, 131 P. 104.

§ 720 (Okla.Cr.App.) The prosecuting attorney may properly refer in his argument to the evidence, make deductions therefrom, and urge its truth or falsity.—*Bouie v. State*, 131 P. 953.

§ 726 (Okla.Cr.App.) Defendant's counsel cannot complain that the county attorney was permitted in his closing argument to go outside the record, where the argument objected to was merely in reply to arguments made by defendant's counsel, which were also outside the record.—*Star v. State*, 131 P. 542.

§ 730 (Cal.App.) Where the court upon a statement by the district attorney alleged to constitute misconduct instructed that the jury should consider it as an argument, and not as a statement of fact, defendant was not prejudiced by such statement.—*People v. Lopez*, 131 P. 104.

§ 730 (Wash.) Where the court, on objection to improper argument of the prosecuting attorney, specifically charged the jury to disregard the argument, which was not borne out by

the evidence, and the prejudicial effect of the argument could be removed, there was no ground for reversal.—*State v. Pacific American Fisheries*, 131 P. 452.

(F) Province of Court and Jury in General.

§ 741 (Okla.Cr.App.) The weight and credibility to be given to the opinions of experts is for the jury.—*Miller v. State*, 131 P. 717.

§§ 763, 764 (Okla.Cr.App.) The jury are the exclusive judges of the weight of the evidence, and it is error to give any instruction which in the least trenches upon the prerogative.—*Williams v. State*, 131 P. 179.

§§ 763, 764 (Okla.Cr.App.) An instruction given on expert testimony held proper.—*Miller v. State*, 131 P. 717.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 772 (Wash.) Notwithstanding Rem. & Bal. Code, § 2000, court held to have erred in charging that time of adultery was not material and in allowing a latitude of one year, where the evidence fixed the exact date of the act charged, but showed distinct acts at other times.—*State v. Moss*, 131 P. 1132.

§ 780 (Cal.App.) Where, in a prosecution for pandering, a witness, who was the keeper of a house of prostitution to which prosecutrix was alleged to have been taken, was an accomplice, it was error to refuse to charge on accomplice testimony, and that corroboration was essential.—*People v. Lawlor*, 131 P. 63.

§ 781 (Cal.) On a trial for giving a worthless check, accused held entitled to an instruction that, unless there was some other evidence tending to show the commission of the crime, his confession was not competent.—*People v. Frey*, 131 P. 127.

§ 784 (Okla.Cr.App.) An instruction on circumstantial evidence is sufficient if it states that the circumstances proven must not only be consistent with defendant's guilt but must also be inconsistent with his innocence.—*Star v. State*, 131 P. 542.

An instruction on circumstantial evidence should never be given unless the state's testimony is wholly circumstantial.—*Id.*

§ 784 (Okla.Cr.App.) An instruction on circumstantial evidence need be given only where the state relies entirely upon such evidence.—*Price v. State*, 131 P. 1102.

§ 800 (Cal.) Instruction in prosecution for passing worthless check that the corpus delicti must be proved, that this term meant exactly what it said, and involved the element of the crime, and that it was not sufficient to show that accused drew a check which he had no funds or credit to meet, was properly refused because it failed to define the term "corpus delicti."—*People v. Frey*, 131 P. 127.

§ 804 (Mont.) Under Rev. Codes, § 9271, requiring the instructions to be in writing and filed, the court must submit all instructions in writing in the absence of a waiver of written instructions by the parties.—*State v. Tudor*, 131 P. 632.

§ 807 (Okla.Cr.App.) It is improper for the court to give argumentative instructions as to the weight and credibility of expert testimony.—*Miller v. State*, 131 P. 717.

§ 814 (Okla.Cr.App.) Where the evidence failed to show that the alleged accomplice aided, abetted, or encouraged defendant, the court properly refused to instruct on the law applicable to the testimony of an accomplice.—*Maggard v. State*, 131 P. 549.

§ 822 (Colo.) In a prosecution for embezzlement, an instruction, when considered with others, held not erroneous.—*Le Master v. People*, 131 P. 269.

(H) Requests for Instructions.

§ 829 (Cal.App.) Requested instructions which in so far as they state the law applicable to the case are included in instructions given are properly refused.—*People v. Lopez*, 131 P. 104.

(K) Verdict.

§ 874 (Cal.App.) Where the clerk upon request to poll the jury again read the verdict, and asked each juror, "Is this your verdict?" to which each replied in the affirmative, there was a sufficient compliance with Pen. Code, § 1163, providing that the jury may be polled at the request of either party by being severally asked whether it is their verdict.—*People v. Lopez*, 131 P. 104.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 915 (Okla.Cr.App.) Where defendant in a felony case is taken by surprise by the indorsement upon the accusation of the names of additional witnesses after he has announced ready for trial, he should move for continuance setting out the facts constituting the surprise and the evidence he could produce, if continuance be granted.—*Star v. State*, 131 P. 542.

§ 927 (Okla.Cr.App.) Under Comp. Laws 1909, § 8851, providing that jurors may at any time before submission of the cause be allowed to separate, that a juror in a capital case became separated during a recess is not ground for new trial, where he had no communication with any one concerning the cause.—*Weatherholt v. State*, 131 P. 185.

§ 954 (N.M.) A matter outside the record, to be available as ground for motion for new trial, should be clearly pointed out in the motion.—*State v. Frazier*, 131 P. 502.

§ 956 (N.M.) On a motion for new trial for misconduct of a juror, the affidavit should identify him and clearly specify the facts constituting the misconduct.—*State v. Lucero*, 131 P. 491.

§ 957 (Okla.Cr.App.) The affidavits or testimony of jurors cannot be used to impeach their verdict, but may be considered to sustain it.—*Star v. State*, 131 P. 542.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 977 (Cal.App.) Under Pen. Code, § 1191, fixing the time for pronouncement of judgment after a plea or verdict of guilty, judgment held properly pronounced May 31st under a verdict returned May 16th.—*People v. Flavin*, 131 P. 321.

XV. APPEAL AND ERROR, AND CERTIORARI.**(B) Presentation and Reservation in Lower Court of Grounds of Review.**

§ 1038 (Cal.App.) Under Pen. Code, § 1093, requiring the court to charge on any points pertinent to the issue if requested by either party, a defendant cannot complain of the court's failure to instruct upon his good character, even though pertinent to the issue, where no request for such an instruction was made.—*People v. Lopez*, 131 P. 104.

§ 1040 (Cal.App.) Defendant who did not request the approved form of polling a jury, nor object to the form followed by the court, was not in a position to complain thereof on appeal.—*People v. Lopez*, 131 P. 104.

§ 1044 (Cal.App.) Improper remarks by the court to counsel for accused concerning his mode of cross-examining prosecutrix held not available for error, in the absence of an objection at the time and a motion to instruct the jury not to consider the same.—*People v. Lawlor*, 131 P. 63.

§ 1048 (Okla.Cr.App.) Errors not excepted to below are not available on appeal.—*Steward v. State*, 131 P. 725.

§ 1056 (N.M.) The correctness of an instruction will not be reviewed unless objection is interposed to the giving of such instruction and an exception saved.—*State v. Eaker*, 131 P. 489.

§ 1056 (N.M.) The correctness of an instruction will not be reviewed unless exceptions are taken and opportunity given to correct the error.—*State v. Lucero*, 131 P. 491.

§ 1059 (Okla.Cr.App.) A mere general exception to instructions is insufficient on appeal; it being essential that the attention of the trial court be directly called to the instruction objected to.—*Star v. State*, 131 P. 542.

§ 1064 (N.M.) Where defendant complains of rulings on evidence, he must point out in his motion for new trial the particular evidence referred to; otherwise the Supreme Court will not consider such alleged erroneous decision.—*State v. Eaker*, 131 P. 489.

§ 1064 (N.M.) Where a matter outside the record, available as ground for new trial, is not clearly pointed out in the motion for new trial, it will not be considered on appeal.—*State v. Frazier*, 131 P. 502.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1069 (Okla.Cr.App.) No appeal can be taken in misdemeanor cases after 60 days from the date of judgment, unless the trial judge for good cause shown extends the time, not exceeding 60 days additional.—*High v. State*, 131 P. 189.

§ 1069 (Okla.Cr.App.) The time prescribed by statute for perfecting an appeal is mandatory; and where counsel delay perfecting an appeal until the last moment, and the time expires before it is perfected, the Criminal Court of Appeals cannot grant relief.—*Gorman v. State*, 131 P. 939.

§ 1069 (Okla.Cr.App.) Where an appeal is not taken within the time prescribed by law, the appellate court is without jurisdiction to review the judgment.—*Gilbreath v. State*, 131 P. 941.

(D) Record and Proceedings Not in Record.

§ 1088 (Mont.) Where the record is silent on the question whether the instructions were reduced to writing except the title "Oral Instructions of the Court to the Jury," and contains no exception or other intimation that the court violated the statute, the record does not show that the instructions were not in writing.—*State v. Tudor*, 131 P. 632.

§ 1090 (Okla.Cr.App.) Misstatements in argument of counsel are not reviewable when shown in the record only by recitals in the motion for new trial.—*Bouie v. State*, 131 P. 953.

§ 1099 (Okla.Cr.App.) If there is any question about making and serving a case-made within the statutory time, counsel should file in the Appellate Court a transcript of the record and a petition in error, and apply to have the time extended.—*Gorman v. State*, 131 P. 939.

§ 1114 (Okla.Cr.App.) Where accused desires to present a question for review, he should bring up enough of the proceedings to enable the reviewing court to pass intelligently upon the question presented.—*Star v. State*, 131 P. 542.

§ 1119 (Cal.App.) Where the record on appeal fails to show that defendant was unable to speak or understand the English language, the action of the trial court in appointing an interpreter will not be disturbed.—*People v. Lopez*, 131 P. 104.

§ 1128 (Okla.Cr.App.) Improper remarks of counsel must ordinarily be presented for re-

view in a certified case-made and cannot be presented by affidavit or otherwise, unless the trial judge refused to have the remarks taken down that they might be incorporated in the record.—*Miller v. State*, 131 P. 717.

(E) Assignment of Errors and Briefs.

§ 1130 (Okla.Cr.App.) Where defendant appeals, but files no brief and presents no argument, the record proper will be examined, and, if no fundamental error appears, the conviction will be affirmed.—*White v. State*, 131 P. 189.

(F) Dismissal, Hearing, and Rehearing.

§ 1131 (Okla. Cr. App.) Where defendant has been convicted and sentenced and has escaped from custody, his appeal will be dismissed.—*Peel v. State*, 131 P. 548.

(G) Review.

§ 1144 (Okla.Cr.App.) It will be presumed on appeal that the court properly exercised its discretion in admitting testimony given by a witness at the preliminary hearing.—*Edwards v. State*, 131 P. 956.

On appeal in a criminal case every presumption will be indulged in favor of the trial court's rulings, the regularity of the proceedings, and the correctness of the verdict.—*Id.*

§ 1150 (Okla.Cr.App.) Since Comp. Laws 1909, § 6768, leaves an application for a change of venue to the sound discretion of the trial court, a refusal to grant such change will not be disturbed in the absence of an abuse of discretion to defendant's prejudice.—*Bouie v. State*, 131 P. 953.

§ 1150 (Okla.Cr.App.) The trial court's ruling on a motion by accused for a change of venue will not be reviewed in the absence of an abuse of discretion.—*Edwards v. State*, 131 P. 956.

§ 1151 (Okla.Cr.App.) The ruling of the trial court on an application by accused for a continuance will not be reviewed in the absence of an abuse of discretion.—*Edwards v. State*, 131 P. 956.

§ 1151 (Okla.Cr.App.) A refusal of a continuance will not be reviewed, unless there has been a clear abuse of discretion.—*Cox v. State*, 131 P. 1109.

§ 1152 (Okla.Cr.App.) The action of the court, in permitting, after trial has begun, the names of additional witnesses, to be indorsed upon an accusation charging a felony, is not reviewable in the absence of an abuse of discretion.—*Star v. State*, 131 P. 542.

§ 1158 (N.M.) Finding of fact of a trial court will not be disturbed when supported by any substantial evidence.—*State v. Eaker*, 131 P. 489.

§ 1158 (N.M.) Ordinarily, the findings of fact of a trial court will not be disturbed on appeal when supported by any substantial evidence.—*State v. Frazier*, 131 P. 502.

§ 1159 (N.M.) A verdict will not be disturbed when supported by any substantial evidence.—*State v. Eaker*, 131 P. 489; *Same v. Lucero*, *Id.* 491; *Same v. Frazier*, *Id.* 502.

§ 1159 (N.M.) It is for the jury to pass upon conflicting testimony and determine its weight, and hence a conviction will not be disturbed on appeal because the evidence was conflicting.—*State v. Frazier*, 131 P. 502.

While a verdict on insufficient evidence may be set aside on appeal, it will not be set aside merely because the Supreme Court is not satisfied beyond all reasonable doubt of defendant's guilt.—*Id.*

§ 1159 (Okla.Cr.App.) A conviction sustained by any evidence will not be disturbed, unless it appears that the jury were influenced by improper motives.—*Maggard v. State*, 131 P. 549.

§ 1159 (Okla.Cr.App.) Where the evidence is insufficient to show the commission of the offense charged, a conviction will be reversed.—*Marston v. State*, 131 P. 716.

§ 1159 (Okla.Cr.App.) Conviction on accomplice's testimony when clear and direct will not be reversed, unless there is no evidence independent of such testimony which tends to connect defendant with the commission of the offense.—*Rhea v. State*, 131 P. 729.

§ 1159 (Wash.) A verdict sustained by any evidence will not be disturbed on appeal, though the evidence is not of the most convincing kind.—*State v. Pacific American Fisheries*, 131 P. 452.

§ 1160 (Okla.Cr.App.) Where a conviction has been approved and there is evidence to sustain it, though conflicting, the judgment will be affirmed.—*Cox v. State*, 131 P. 1109.

§ 1163 (Cal.App.) Under Const. Amend. art. 6, § 4½, providing that a conviction shall not be set aside for misdirection of a jury unless there has been a miscarriage of justice, it is the duty of the appellate court, on determining that an error resulted from the refusal of an instruction, to examine the evidence and determine whether, on the whole case, a miscarriage of justice has resulted, since there is no presumption that prejudice resulted.—*People v. Lawlor*, 131 P. 63.

§ 1163 (Mont.) Where counsel for accused, alleging error in rulings on evidence sought to be elicited on cross-examination, does not point out wherein the rulings are prejudicial, the court on appeal need not examine the rulings to determine whether they are prejudicial.—*State v. Tudor*, 131 P. 632.

§ 1163 (Okla.Cr.App.) Where a jury separated without leave of court after retiring to deliberate on their verdict in violation of Comp. Laws 1909, § 6896, the burden is on the prosecution to show that defendant was not prejudiced thereby.—*Weatherholt v. State*, 131 P. 185.

§ 1163 (Okla.Cr.App.) Refusal of the court to cause improper remarks to be taken down by the stenographer is ground for reversal.—*Miller v. State*, 131 P. 717.

§ 1168 (Idaho) Refusal of the court to require an exhibit to be marked for identification and retained in the court's possession held harmless.—*State v. Allen*, 131 P. 1112.

§ 1168 (Okla.Cr.App.) Rulings on evidence, which subsequent developments conclusively show did not harm accused, are not ground for reversal.—*Rogers v. State*, 131 P. 941.

§ 1169 (Cal.App.) The admission in a trial for murder of evidence as to whether deceased was an Anglo-Saxon was harmless error.—*People v. Lopez*, 131 P. 104.

§ 1169 (Okla.Cr.App.) The admission of testimony of doubtful competency in a criminal case, if error, is harmless, where the court afterwards excludes it.—*Rogers v. State*, 131 P. 941.

§ 1170 (Colo.) In a criminal prosecution the rejection of evidence subsequently admitted is harmless error.—*Le Master v. People*, 131 P. 269.

§ 1170 (Idaho) Exclusion of evidence of a conversation which defendant claimed he overheard and which he sought to introduce in support of his proof of alibi held harmless, where the evidence admitted covered substantially all the facts tending to corroborate his evidence as to the alibi.—*State v. Allen*, 131 P. 1112.

Where, in a prosecution for murder, the court admitted evidence of defendant's good reputation for peace and quietude, it was not error to exclude a general offer to prove his good reputation "for truth and veracity and honesty and integrity, morality and immorality, sobriety and inebriety."—*Id.*

§ 1170½ (Mont.) Errors in rulings on the cross-examination of state's witnesses, employed by third persons to detect crimes and furnish evidence, are not prejudicial where substantially all the pertinent facts were brought before the jury.—*State v. Tudor*, 131 P. 632.

§ 1171 (Okla. Cr. App.) Comment of the prosecuting attorney in his argument upon facts not in evidence or admissible in evidence and which were prejudicial to accused *held* prejudicially erroneous, though the court instructed the jury to disregard them.—*Morris v. State*, 131 P. 731.

§ 1171 (Okla. Cr. App.) Improper argument of counsel *held* harmless, where defendant, though shown to be guilty of murder, was convicted only of manslaughter.—*Edwards v. State*, 131 P. 956.

§ 1173 (Cal.) On a trial for giving a worthless check, accused being entitled to an instruction that, unless there was some other evidence tending to show the commission of the crime, his confession was not competent, *held*, that failure to give it was reversible error.—*People v. Frey*, 131 P. 127.

§ 1173 (Cal. App.) A conviction of pandering will not be set aside on appeal because of the court's error in refusing to charge on accomplice testimony; there being sufficient other evidence, other than that of the accomplice, to sustain the conviction under Const. Amend. art. 6, § 4½.—*People v. Lawlor*, 131 P. 63.

§ 1178 (Ariz.) Assignments of error which appellant does not argue in his brief will not be considered.—*Webb v. State*, 131 P. 970.

(H) Determination and Disposition of Cause.

§ 1186 (Cal.) In a prosecution for passing worthless checks, where there was no competent evidence of want of funds, the judgment could not be affirmed under Const. art. 6, § 4½, relative to disregarding errors not resulting in a miscarriage of justice.—*People v. Frey*, 131 P. 127.

§ 1186 (Okla. Cr. App.) A conviction will not be reversed unless it clearly appear in the record that error was committed which deprived defendant of a substantial right to his injury.—*Edwards v. State*, 131 P. 956.

CROSS-EXAMINATION.

See Witnesses, § 208.

CROSSINGS.

See Railroads, §§ 324, 352.

CUSTODY.

See Divorce, § 309.

CUSTOMS AND USAGES.

§ 15 (Wash.) Where defendant hired plaintiff to work in its Alaska mine during the season of 1911, plaintiff may, in case of breach, recover damages for his loss of services during the entire mining season, as defined by custom in Alaska.—*Cholokovitch v. Porcupine Gold Mining Co.*, 131 P. 459.

DAMAGES.

See Banks and Banking, § 143; Carriers, § 382; Counties, § 122; Death, § 99; Eminent Domain, §§ 69-137; Evidence, § 501; Judgment, § 253; Landlord and Tenant, § 292; Municipal Corporations, §§ 385-404; Principal and Agent, § 41; Telegraphs and Telephones, § 70; Trover and Conversion, § 46; Vendor and Purchaser, § 329; Waters and Water Courses, § 158½.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 24 (Or.) Damages for breach of contract, which are speculative and so dependent on contingencies that their amount is not susceptible

of actual proof with any reasonable degree of certainty, cannot be recovered.—*Bredemeier v. Pacific Supply Co.*, 131 P. 312.

The rule that uncertain or contingent damages cannot be recovered for breach of contract applies only to uncertainty whether any gain or benefit would be derived from performance, and not to an uncertainty as to the amount of benefit which will be so derived.—*Id.*

§ 40 (Or.) In general, lost profits cannot be recovered as damages for breach of contract, unless they entered into the contract itself, and were within the contemplation of the parties at the time the contract was executed.—*Bredemeier v. Pacific Supply Co.*, 131 P. 312.

Where plaintiff, in an action for breach of contract, is entitled to recover for loss of profits, the amount of such loss is to be determined by the jury from the nature of the contract, the circumstances surrounding and flowing from its breach, and the consequences naturally and plainly traceable thereto.—*Id.*

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 60 (Wash.) That a policeman, injured by being struck by a taxicab of the defendant company, was partly reimbursed for his injuries from a pension fund, kept up in part by dues received from him, could not inure to defendant's benefit, so as to lessen its pecuniary liability for the negligence of its driver.—*Heath v. Seattle Taxicab Co.*, 131 P. 843.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 77 (Or.) The question whether a provision in a contract for damages is a penalty or liquidated damages must be determined upon the facts of each case; the intention of the parties must control, if that can be ascertained.—*Strode v. Smith*, 131 P. 1032.

The intention of the parties controls in determining whether damages stipulated for are liquidated damages or a penalty, and if it satisfactorily appears that the damages were stipulated for because the parties at the time anticipated the possible injury resulting from the breach, and fixed upon a reasonable sum to cover the damages resulting therefrom, such sum may be recovered as liquidated damages.—*Id.*

§ 80 (Or.) Unless the court can declare as a matter of law from an inspection of the contract sued on that the damages stipulated for therein are so excessive as to amount to a penalty, a demurrer to the complaint on the ground that it sought to enforce a penalty should be overruled, and the question determined after the answer is filed.—*Strode v. Smith*, 131 P. 1032.

A sum of \$4,000 stipulated for in a contract requiring the execution of a \$50,000 bond by the lessee in a long term lease, conditioned for his erection on the property of a \$100,000 building, *held* to be liquidated damages, and not a penalty.—*Id.*

V. EXEMPLARY DAMAGES.

§ 87 (Okla.) Exemplary damages are imposed on the theory of punishment for the general benefit of society and as a restraint on the transgressor.—*Rhyn v. Turley*, 131 P. 695.

§ 91 (Okla.) Exemplary damages are allowed only where there has been malice, fraud, oppression, or gross negligence.—*Rhyn v. Turley*, 131 P. 695.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

§ 113 (Idaho) The measure of damages for injury to personal property is its value at the time of the injury when it is totally destroyed, but when merely damaged the measure is the

value of its use during the time it would take to make the repairs and the cost of repairs.—*McGuire v. Post Falls Lumber & Mfg. Co.*, 131 P. 654.

(C) Breach of Contract.

§ 117 (Or.) Where a contract is repudiated, the compensation of the complaining party should be the value of the contract.—*Bredemeier v. Pacific Supply Co.*, 131 P. 312.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 131 (Mont.) A recovery of \$5,000 for personal injuries held excessive in so far as it exceeded \$2,500, where it appeared that the injured party was already or would presently be restored to full health.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

§ 131 (Wash.) A recovery of \$4,500 for partial dislocation of the right shoulder, leaving it lame and painful at the time of trial, and an injury to the right knee and to the back was excessive above \$3,000, where it was not shown that any of the injuries were permanent.—*Heath v. Seattle Taxicab Co.*, 131 P. 843.

§ 132 (Idaho) A recovery of \$10,000 for injuries to a man 76 years old with a life expectancy of about 6 years, as a result of which injuries he is maimed and rendered a permanent sufferer, held excessive and reduced to \$9,000.—*Keim v. Gilmore & P. R. Co.*, 131 P. 656.

§ 132 (Okl.) A verdict for \$2,000 held not excessive, where plaintiff's injuries were apparently permanent, would probably render her a cripple for life, and greatly decreased her earning capacity; she being a music teacher 42 years of age and earning \$12 or \$15 per week at the time of her injury.—*Town of Fairfax v. Giraud*, 131 P. 159.

§ 132 (Wash.) In an action for personal injuries, a verdict for \$9,750 held not excessive.—*Williams v. City of Spokane*, 131 P. 833.

§ 132 (Wash.) For permanent injuries to a servant 34 years of age, and earning \$4 a day, consisting of fractured ribs and organic injury to the spine, producing traumatic neurosis, and which will probably result in paralysis of the lower limbs, a verdict of \$12,500 held not excessive.—*Marks v. Hurley Mason Co.*, 131 P. 1122.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

§ 158 (Or.) That plaintiff, on falling from one of defendant's street cars, suffered a hernia at a point where an incision had been made at an operation six years before, did not necessarily show that plaintiff's hernia was a mere aggravation of a previous injury, for which she could not recover because it was not so pleaded.—*Guild v. Portland Ry. Light & Power Co.*, 131 P. 310.

§ 158 (Or.) Where the complaint which alleged that the injured servant was permanently disabled and his earning capacity greatly lessened was denied by the answer, evidence that plaintiff could only do farm chores after the injury is admissible.—*Marien v. M. J. Walsh & Co.*, 131 P. 505.

(C) Proceedings for Assessment.

§ 208 (Or.) Where plaintiff suffered a hernia as the result of a fall from defendant's street car, the fact that she had not submitted to a surgical operation for the cure thereof did not entitle defendant to a charge that the injury was not permanent.—*Guild v. Portland Ry. Light & Power Co.*, 131 P. 310.

§ 208 (Wash.) In an action for damages by the obstruction of navigable waters so as to prevent the use thereof for the transportation of shingle bolts to a shingle mill, held, that the

question of the reasonableness of efforts to supply the mill with bolts from other sources was for the jury.—*Ebby Shingle Co. v. Snohomish River Boom Co.*, 131 P. 466.

DAMNUM ABSQUE INJURIA.

See *Ferries*.

DATE.

See *Wills*, § 130.

DEATH.

See *Carriers*, § 348; *Master and Servant*, §§ 118, 228; *Negligence*, § 39; *Trial*, §§ 229, 260.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 31 (Kan.) Gen. St. 1909, § 4992, giving a right of action to the widow of a mine employé losing his life through the employer's failure to comply with the act to protect coal mine workers, authorizes the action to be prosecuted by the widow without a personal representative of the deceased having been appointed.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

(B) Damages, Forfeiture, or Fine.

§ 99 (Kan.) In an action for the death of plaintiff's son 19 years old and earning from \$1.50 to \$1.75 a day, a verdict of \$10,000 will be reduced to \$8,000.—*Aaron v. Missouri & K. Telephone Co.*, 131 P. 582.

DEBTOR AND CREDITOR.

See *Exemptions*, § 139.

DECEDENTS.

See *Executors and Administrators*; *Witnesses*, §§ 133, 159.

DECEIT.

See *Fraud*.

DECLARATION.

See *Pleading*.

DECLARATIONS.

See *Criminal Law*, § 413; *Evidence*, § 278.

DEDICATION.

I. NATURE AND REQUISITES.

§ 17 (Cal.App.) Strip of land upon which lots abutted held established as an alleyway as to purchasers purchasing with reference to a map, and told that it was an alleyway.—*Smith v. Smith*, 131 P. 890.

§ 39 (Or.) The public is not estopped by laches to claim an alley against one who bought lots according to a recorded plat showing the alley through them; the improvements placed on it being only lawn, bushes, and trees.—*Cru-son v. City of Lebanon*, 131 P. 316.

DEEDS.

See *Evidence*, §§ 353, 387-461; *Indiana*, § 15; *Lost Instruments*; *Mortgages*; *Taxation*, §§ 749-788, 790-813; *Vendor and Purchaser*, §§ 147, 148, 323.

I. REQUISITES AND VALIDITY.

(B) Validity.

§ 70 (Okl.) While mere inadequacy of consideration is not ordinarily ground for cancellation of a deed, it may constitute such ground, when so gross as to amount to fraud.—*Bruner v. Cobb*, 131 P. 165.

Where it does not appear that the parties to a deed knowingly and deliberately fixed upon the price, a disproportion between the value of

the subject-matter and the price may be so great as to warrant the court in inferring therefrom the fact of fraud.—*Id.*

IV. PLEADING AND EVIDENCE.

§ 194 (Cal.App.) It is presumed that a deed was delivered as of its date.—*Gernon v. Sisson*, 131 P. 85.

§ 207 (Cal.App.) Evidence held to show that a deed was genuine.—*Gernon v. Sisson*, 131 P. 85.

§ 211 (Okla.) Evidence, in an action to cancel a deed executed by an ignorant Creek freedman, considered together with the inadequacy of consideration, held to show such constructive fraud as required a cancellation of the deed.—*Bruner v. Cobb*, 131 P. 165.

DEFAULT.

See Appeal and Error, § 113; Judgment, § 159; Justices of the Peace, §§ 127, 197.

DELAY.

See Taxation, § 749; Vendor and Purchaser, § 144; Waters and Water Courses, § 27.

DELIVERY.

See Deeds, § 194; Frauds, Statute of, § 90; Sales, §§ 79, 159-176.

DEMAND.

See Banks and Banking, § 246; Vendor and Purchaser, § 147.

DEMONSTRATIVE EVIDENCE.

See Evidence, § 188.

DEMURRER.

See Pleading, §§ 193-214, 418, 418.
To evidence, see Trial, § 150.

DEPARTURE.

See Pleading, § 180.

DEPOSITIONS.

§ 90 (Colo.) Depositions of nonresident witnesses, taken in presence of accused, held properly admitted, under Rev. St. 1908, § 7278, providing that such depositions shall not be used, if, in the opinion of the court, the personal attendance of a witness might be procured.—*Le Master v. People*, 131 P. 269.

DEPOSITS.

See Banks and Banking, §§ 143, 152.

DEPOTS.

See Railroads, §§ 58, 217, 228.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Indiana, § 18; Jury, § 14; Wills.

I. NATURE AND COURSE IN GENERAL.

§ 5 (Cal.) The common-law rule that distribution of personal property is governed by the law of the domicile is limited under Civ. Code, § 946, by the requirement that there shall be no law to the contrary in the place where the property is situated.—*In re Lathrop's Estate*, 131 P. 752.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(B) Surviving Husband or Wife.

§ 62 (Kan.) The validity of the relinquishment by the husband of his prospective rights of inheritance in the wife's land situated in the state must be determined by the laws of the state, though the relinquishment contract was made in another state.—*Eberhart v. Rath*, 131 P. 604.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

§ 75 (Wash.) Under Rem. & Bal. Code, § 1366, the failure to mention land in a petition for letters of administration does not affect or cloud the title of the heir.—*Buchser v. Buchser*, 131 P. 193.

DESCRIPTION.

See Mortgages, § 134; Municipal Corporations, § 12; Names; Trade-Marks and Trade-Names, § 3; Vendor and Purchaser, § 334; Wills, § 561.

DIRECTING VERDICT.

See Trial, § 169.

DISBARMENT.

See Attorney and Client, §§ 36-53; Jury, § 19.

DISCHARGE.

See Principal and Surety, §§ 115, 129.

DISCONTINUANCE.

See Dismissal and Nonsuit.

DISCRETION OF COURT.

See Appeal and Error, §§ 927-979; Continuance, § 19; Criminal Law, §§ 121, 301, 586, 622, 628, 642, 699, 1150, 1151; Dismissal and Nonsuit, § 15; Evidence, § 498½; Mandamus, § 28; Prohibition, § 4; Trial, § 66; Witnesses, § 321.

DISMISSAL AND NONSUIT.

See Abatement and Revival, § 15; Appeal and Error, §§ 14, 154, 323, 511, 607, 612, 632, 758, 773, 795-801, 866, 927; Brokers, § 88; Criminal Law, § 1131; Landlord and Tenant, § 291; Parties; Trial, § 165.

I. VOLUNTARY.

§ 12 (N.M.) A party usually has the right to discontinue any action or proceeding instituted by him, when such dismissal will not work an injury to the rights of others.—*Andrews v. French*, 131 P. 996.

Where a claim is filed with a referee pursuant to Laws 1905, c. 79, § 82, a jury trial demanded, and such claim is certified to the district court, the claimant has a right to discontinue such proceeding, in the absence of any showing that such discontinuance will prejudice the rights of other interested parties.—*Id.*

§ 15 (N.M.) The court has no discretion to refuse a voluntary dismissal by plaintiff, where it does not appear that such dismissal will violate any rights of the adverse party.—*Andrews v. French*, 131 P. 996.

DISQUALIFICATION.

See Judges, § 51.

DISSOLUTION.

See Corporations, § 614.

DISTRIBUTION.

See Executors and Administrators, § 314.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, §§ 720-730, 1171.

DISTRICTS.

See Waters and Water Courses, §§ 225, 242.

DITCHES.

See Waters and Water Courses, §§ 156, 158½.

DIVERSION.

See Waters and Water Courses, § 86.

DIVORCE.

See Appearance, § 20; Attorney and Client, § 129; Dower; Witnesses, § 64.

IV. JURISDICTION. PROCEEDINGS, AND RELIEF.

(E) Dismissal, Trial or Hearing, and New Trial.

§ 151 (Nev.) The fact that plaintiff moved from the state after rendition of a judgment of divorce in his favor could not be considered as newly discovered evidence affecting the material issues in an action for divorce for cruelty.—Whise v. Whise, 131 P. 967.

(F) Judgment or Decree.

§ 152 (Or.) The court has no jurisdiction to grant a divorce on the pleadings without hearing evidence, and a decree so granted is absolutely void.—Miller v. Miller, 131 P. 308.

(G) Appeal.

§ 179 (N.M.) An objection that the complaint in divorce fails to state that the plaintiff has resided in the state the required length of time presents fundamental error and must be reviewed, though presented for the first time in appellant's brief.—Canavan v. Canavan, 131 P. 493.

§ 184 (Cal.App.) Whether a delay of about six years in bringing an action for divorce on the ground of extreme cruelty was reasonable, within Civ. Code, § 124, providing that a divorce must be denied when there is an unreasonable lapse of time before commencement of the action, was a question for determination in the trial court.—Johnston v. Johnston, 131 P. 81.

§ 186 (N.M.) Where appellee asserts that the findings were inadvertently made by the trial court without notice to his counsel, and that they do not correctly represent the actual facts, the decree, the validity of which is in doubt in view of the findings, will be reversed and the cause remanded.—Tietzel v. Tietzel, 131 P. 498.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 199 (Cal.App.) Where an action is for divorce and for alimony, the application for alimony, though not a separate suit, is a proceeding for a separate judgment which, when granted, has nothing to do with the final judgment.—Simpson v. Simpson, 131 P. 99.

§ 209 (Cal.App.) Alimony is a provision which the court may make for the support of the wife pending a suit for divorce, and, strictly speaking, proceeds only from husband to wife.—Simpson v. Simpson, 131 P. 99.

§ 219 (Cal.App.) Where a wife, suing for divorce and alimony, obtained a decree for alimony, and thereafter the court rendered a decree adjudging that she take nothing by her action and granting a divorce to the husband, the decree for maintenance terminated on the divorce.—Simpson v. Simpson, 131 P. 99.

§ 285 (Or.) On appeal from an order denying a motion to modify a divorce decree so as to relieve the husband from the payment of alimony, the original complaint, answer, and reply were a proper part of the transcript.—Miller v. Miller, 131 P. 308.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 309 (Or.) A decree rendered by the Supreme Court on appeal which grants a divorce, and awards the custody of the children, and makes provisions for their maintenance and control, is subject to modification in the circuit court as to maintenance and control as if originally entered there.—Gadsby v. Gadsby, 131 P. 1022.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 326 (Kan.) Laws 1907, c. 184, entitled "An act in relation to foreign judgments of divorce and defining the faith and credit to be given them," was never a part of the Code of Procedure and was not repealed by the revision of 1909.—Carter v. Carter, 131 P. 561.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTARY EVIDENCE

See Criminal Law, §§ 442, 444.

DOCUMENTS.

See Evidence, §§ 332-354.

DOMICILE.

See Appeal and Error, § 912; Corporations, § 52; Elections, § 74.

§ 4 (Nev.) Residence is a matter of intention.—Whise v. Whise, 131 P. 967.

§ 4 (Okl.) It is exclusively within the province of every citizen to determine where his residence shall be, and such determination is binding upon all parties.—Cornelison v. Blackwelder, 131 P. 701.

DOWER.**III. RIGHTS AND REMEDIES OF WIDOW.**

§ 79 (Okl.) In an action by a woman having a living husband, for dower out of the Indian allotment of a man with whom she had contracted a common-law marriage, the presumption was that she was divorced from her common-law husband; and hence she was not dowable out of his allotment.—Clarkson v. Washington, 131 P. 935.

DRAINS.

See Evidence, § 471; Municipal Corporations, §§ 918, 957.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Master and Servant, § 247; Negligence, § 132.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 276-309.

DURESS.

See Fraud.

EASEMENTS.

See Waters and Water Courses, § 156.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 5 (Cal.App.) Prescriptive title to alleyway on which lots abutted *held* established without showing payment of taxes thereon, where none were shown to have been levied or assessed in view of Code Civ. Proc. § 325.—*Smith v. Smith*, 131 P. 890.

§ 21 (Cal.App.) Purchasers of alley in which were private easements *held* to have only the naked legal title and a purchaser at a sale for taxes assessed against them acquired only such title subject to the easements.—*Smith v. Smith*, 131 P. 890.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 48 (Cal.App.) Where an unlocated right of way is granted or reserved, the owner of the servient estate may in the first instance designate a reasonable way; and, where he fails to do so, the owner of the dominant estate may designate it.—*Brown v. Ratliff*, 131 P. 769.

§ 53 (Cal.App.) The owner of the servient estate may make repairs and improvements in the easement without changing its character, or affecting its substance.—*Brown v. Ratliff*, 131 P. 769.

§ 61 (Cal.App.) Where an actual exercise of an easement for a right of way shows that the servient estate suffers unnecessarily great or irreparable injury, equity may in a proper proceeding make such changes in the manner of the exercise of the easement as will conserve his estate, and protect the owner of the easement.—*Brown v. Ratliff*, 131 P. 769.

§ 61 (Cal.App.) Lot owners having private easements in an alleyway on which the lots abutted could maintain an action to restrain the owner of the legal title from obstructing such alleyway under Code Civ. Proc. § 731.—*Smith v. Smith*, 131 P. 890.

EJECTION.

See Carriers, §§ 370-384.

EJECTMENT.

See Judgment, §§ 525, 570, 617.

I. RIGHT OF ACTION AND DEFENSES.

§ 9 (Wash.) Plaintiff in ejectment must recover on the strength of his own title.—*Hauge v. Walton*, 131 P. 248.

ELECTION.

See Wills, §§ 792-797.

ELECTION OF REMEDIES.

§ 3 (Colo.) Where a purchaser of land requiring water for irrigation, with knowledge of all the facts, has elected to proceed for a decree as to the water rights claimed to have been conveyed by his deed, he is bound by such election and is thereafter estopped from an inconsistent claim against the purchaser for damages for alleged misrepresentations as to the rights conveyed by the deed.—*Norcross v. Cunningham*, 131 P. 423.

ELECTIONS.

See Judges, § 15; Municipal Corporations, § 913.

IV. QUALIFICATIONS OF VOTERS.

§ 74 (Or.) Under Const. art. 2, § 4, providing that, for the purpose of voting, no person

shall be deemed to have gained or lost a residence by reason of his presence or absence while in the service of the state, the question of the voting residence of attendants at a state institution is to be determined by evidence outside of the fact of their employment and attendance.—*Day v. City of Salem*, 131 P. 1028.

X. CONTESTS.

§ 269 (Mont.) Under Rev. Codes, §§ 7234-7249, inclusive, providing for the contest of an election, such contest, while partaking of the nature of a civil action, is not one, but is a statutory special proceeding.—*Curry v. McCaffery*, 131 P. 673; *Same v. Drew*, Id. 677; *Same v. McGrade*, Id.

§ 276 (Mont.) Rev. Codes, § 7244, providing that, upon application of either party, the court may continue the trial of a contested election before its commencement for not more than 20 days, where the applicant presents a good cause by affidavit and pays the cost of the continuance, has no application to a case in which neither party asked for a continuance, but the continuance was had upon the court's own motion.—*Curry v. McCaffery*, 131 P. 673; *Same v. Drew*, Id. 677; *Same v. McGrade*, Id.

Under Rev. Codes, § 7241, providing a special term for the hearing of an election contest and section 7244, defining the court's power of adjournment and continuance, *held*, that there was no constitutional or statutory limitation to a special term or session called to try an election contest.—Id.

Under Rev. Codes, § 7244, defining the power of the trial court as to adjournments and continuances in election contests, *held*, that the trial court had authority of its own motion to postpone trial of such contest before the actual commencement of the trial.—Id.

§ 285 (Mont.) A verification attached to the statement of an election contest which is to all intents the same as that required for a pleading in an ordinary civil action is sufficient.—*Curry v. McCaffery*, 131 P. 673; *Same v. Drew*, Id. 677; *Same v. McGrade*, Id.

§ 305 (Mont.) In view of constitutional provisions conferring jurisdiction of election contests, and Rev. Codes, § 7248, providing an appeal therein, *held*, that section 6329, authorizing any suitable proceeding applied and that thereunder a record on appeal, such as would be appropriate in an ordinary civil action, was sufficient.—*Curry v. McCaffery*, 131 P. 673; *Same v. Drew*, Id. 677; *Same v. McGrade*, Id.

Erroneous orders for continuance made in an election contest and within the court's jurisdiction are to be treated as errors without prejudice, in the absence of any showing of injury arising therefrom.—Id.

ELEVATORS.

See Master and Servant, §§ 137, 289.

EMBEZZLEMENT.

See Criminal Law, §§ 400, 442, 822.

§ 23 (Colo.) Where moneys of an insolvent corporation were fraudulently taken, it is no defense to a prosecution for embezzlement to show that they were taken with the consent of the officers and stockholders.—*Le Master v. People*, 131 P. 269.

§ 39 (Colo.) In a prosecution for embezzlement of the funds of an insolvent corporation, a certified copy of the annual report of the corporation which accused dominated is admissible, when tending to show the intent of accused.—*Le Master v. People*, 131 P. 269.

In a prosecution for embezzlement by the dominating member of an insolvent corporation, who took the funds of the corporation claiming them to be due him for back salary, the books of

the corporation showing payment of accused's salary account are admissible.—Id.

In a prosecution for embezzlement against accused, who dominated a corporation, and who took, under a claim of back salary, the proceeds of sales of goods which he purchased on credit, evidence of the insolvency of a corporation is admissible on the question of his criminal intent.—Id.

EMERGENCIES.

See Negligence, § 72.

EMINENT DOMAIN.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 1 (Wyo.) Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses to promote the general welfare.—Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43.

§ 10 (Wyo.) A foreign corporation duly authorized to do business in Wyoming held not authorized either by Comp. St. 1910, § 3874, or independent thereof, to condemn land in Wyoming for irrigation works to reclaim lands solely located in Colorado.—Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43.

§ 13 (Wyo.) That the people of another state will be benefited by a particular improvement or use for which private property is sought to be condemned will not prevent the taking if the use will also be a direct benefit to the people of the state.—Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43.

That condemnation of land in Wyoming for an irrigation headgate and ditch to be used in the reclamation of land immediately across the border in Colorado would indirectly benefit the neighboring property in Wyoming and the inhabitants of a neighboring Wyoming city was insufficient to justify a conclusion that the proceeding was for the benefit of the people of Wyoming.—Id.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

§ 69 (Colo.) Under Const. art. 2, § 15, requiring compensation for private property taken or damaged for public use, article 15, § 11, prohibiting street railroads without consent of city authorities, and Rev. St. 1908, § 5420, providing that such consent shall not protect the road from any claim for damages to private property otherwise maintainable, the liability of the railroad for damage to property is only such as would have been incurred by the city had it built and run the road.—Harrison v. Denver City Tramway Co., 131 P. 409.

(B) Taking or Injuring Property as Ground for Compensation.

§ 93 (Kan.) In condemnation proceedings, damages to property not taken should be confined to those reasonably expected to result.—Kansas Postal Telegraph Cable Co. v. Leavenworth Terminal Ry. & Bridge Co., 131 P. 143.

§ 95 (Wash.) Danger resulting from the tendency to propagate gophers or squirrels along the right of way if imminent may be considered in determining the damage to land not taken for a railroad right of way in so far as the market value is thereby depreciated.—Idaho & W. Ry. Co. v. Coey, 131 P. 810.

§ 100 (Colo.) Physical damage to private property by the construction of a street railroad, as distinguished from personal annoyance or inconvenience from operating the cars, is necessary to entitle a property owner to damages under Const. art. 2, § 15, prohibiting the damaging of private property for public or private

use without compensation.—Harrison v. Denver City Tramway Co., 131 P. 409.

Incidental injuries arising from a careful exercise of the right given by a city to use streets are *damnum absque injuria*, unless the use be extraordinary or unusual, or causes unreasonable changes in the street, when damages to private property therefrom may be recovered by the property owner.—Id.

An abutting property owner was not entitled to damages from the construction of a street railroad track in the street before his property, where the only alleged damage was the running of additional cars on the line, which increased the vibration and noise; such damage being merely incidental to the proper use of the street by street cars.—Id.

The mere fact that street railroad tracks are laid so close to an abutting owner's property that vehicles cannot stand between the tracks and the sidewalk does not entitle such owner to recover for property damaged under the damage clause of Const. art. 2, § 15.—Id.

Mere annoyance and discomfort from loud and disagreeable noises and vibrations produced by the operation of street cars, and of the fact that a conveyance could not stand between the curb and the tracks, would not entitle an abutting property owner to recover damages under the damage clause of Const. art. 2, § 15.—Id.

§ 102 (Wash.) In determining the damage to land not taken for a railroad right of way any unsightliness to such land from the construction of the road, the destruction of any natural water supply, and the inconvenience of transporting crops, etc., between the part of the land separated by the railroad, may be considered.—Idaho & W. Ry. Co. v. Coey, 131 P. 810.

§ 111 (Wash.) Danger from fire communicated from passing engines, if imminent, may be considered in estimating the damages to the land not taken for a railroad right of way in so far as its market value is thereby depreciated, though merely possible damages from such cause cannot be considered.—Idaho & W. Ry. Co. v. Coey, 131 P. 810.

§ 113 (Wash.) In determining the damage to land not taken for a railroad right of way, the effect upon its market value by the construction and operation of the railroad is the principal question for consideration.—Idaho & W. Ry. Co. v. Coey, 131 P. 810.

§ 119 (Colo.) As the act of the city and county of Denver in vacating a part of a street over which an approach of the viaduct should be constructed did not vest the fee of the street in abutting owners, but the fee remained in the city, the taking of the street for the work is not a taking of the property of abutting owners.—Albi Mercantile Co. v. City and County of Denver, 131 P. 275.

(C) Measure and Amount.

§ 137 (Wash.) In determining damage to land not taken for a railroad right of way, the entire tract should be considered as one farm, and the damages determined upon the basis of one tract, and not of several tracts.—Idaho & W. Ry. Co. v. Coey, 131 P. 810.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 178 (Wash.) An owner of property liable to be assessed for a public improvement has no legal right to appear by counsel in the trial of the condemnation cases against the persons whose property will be taken and damaged by the improvement; the duty of conducting such proceedings devolving upon the city.—In re Leary Ave. in City of Seattle, 131 P. 225.

§ 200 (Kan.) In proceedings to condemn a right to string wires over defendant's railroad bridge, where there was no evidence to show the presence of any personal property on the bridge liable to be damaged by the wires, an allow-

ance for such damage was improper.—*Kansas Postal Telegraph Cable Co. v. Leavenworth Terminal Ry. & Bridge Co.*, 131 P. 143.

§ 243 (Wash.) Where damage to private property has accrued from a change of street grade prior to a condemnation suit under Rem. & Bal. Code, § 7820, the amount of such damage is within the issues and the judgment res judicata thereof.—*Carpenter-McNeill Inv. Co. v. City of Spokane*, 131 P. 823.

§ 244 (Wash.) Under Rem. & Bal. Code, § 927, providing that the legal title shall vest in a condemning corporation upon payment of damages and decree of appropriation, and section 931 providing that an appeal from a judgment for damages shall bring up the propriety and justice of the amount of damages, construed with sections 929 and 932, and held that the legal title to condemned property vested in condemnor upon payment of the award into court and procurement of a decree of appropriation, and was not divested by an appeal to the Supreme Court.—*North Coast R. Co. v. Gentry*, 131 P. 856.

§ 245 (Wash.) Under Rem. & Bal. Code, §§ 7816, 7817, providing that a city may advance money in payment of a judgment in condemnation, and reimburse itself from the special assessment levied, and that it may discontinue the proceedings by paying all taxable costs into court, held, that an owner whose property had been condemned, but not actually taken, is entitled to satisfaction of the judgment without waiting until such assessment was collected, where the time to appeal or abandon has passed.—*State v. Herdlick*, 131 P. 1139.

§ 246 (Wash.) In the absence of statute the effect of condemnation proceedings is simply to fix the price for which the condemnor can have the property, and the proceedings may be abandoned, even after judgment of appropriation, without incurring any liability to pay the damages awarded.—*North Coast R. Co. v. Gentry*, 131 P. 856.

In view of Rem. & Bal. Code, § 929, providing that, in cases of appeal in condemnation proceedings, the amount paid into the superior court shall remain in that court until final determination of the appeal, the payment of money into court suspends the right of abandonment of the proceedings pending appeal, so that an attempted withdrawal of the money in violation of the statute could not operate as an abandonment.—*Id.*

§ 263 (Wash.) The retrial of a case in condemnation proceedings upon remand, after reversal on an appeal involving the propriety and justice of the amount of damages, is confined to that same issue, though the retrial is de novo.—*North Coast R. Co. v. Gentry*, 131 P. 856.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 271 (Kan.) Where land was subject to overflow from the erection of a permanent dam, the owner who was not compensated for appropriation of his lands may recover all damages, present and prospective, in an action brought at the time of the appropriation.—*Hubbard v. Spring River Power Co.*, 131 P. 1182.

§ 274 (Colo.) An abutting lot owner may not under the Constitution or under the statute of eminent domain enjoin the construction of a viaduct or its approach on the street merely because the damages to his premises are not compensated in advance.—*Albi Mercantile Co. v. City and County of Denver*, 131 P. 275.

EMPLOYERS' LIABILITY ACTS.

See Commerce, § 27; Courts, § 97.

EMPLOYÉS.

See Master and Servant.

ENTRY.

See Evidence, § 354.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, § 230.

EQUITABLE ASSIGNMENTS.

See Assignments.

EQUITABLE ESTOPPEL

See Estoppel.

EQUITY.

See Assignments, § 78; Cancellation of Instruments; Corporations, § 320; Estoppel; Injunction; Judgment, § 204; Jury, § 14; Quieting Title; Reformation of Instruments; Specific Performance; Subrogation; Trade-Marks and Trade-Names, § 70; Trial, § 373; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(C) Principles and Maxims of Equity.

§ 65 (Cal.) The act of a grantor conveying real estate subject to an enforceable parol trust in procuring the grantee to make the statutory affidavit under the McEnerney act in which his interest is not disclosed is not guilty of such fraud as will prevent the enforcement of the trust under the maxim as to clean hands.—*Bradley Co. v. Bradley*, 131 P. 750.

ESTATES.

See Dower; Executors and Administrators; Tenancy in Common; Wills.

ESTOPPEL

See Accord and Satisfaction, § 10; Banks and Banking, § 166; Boundaries, § 47; Dedication, § 39; Exemptions, § 139; Frauds, Statute of, § 89; Judgment, §§ 948, 951; Landlord and Tenant, § 63; Mortgages, § 534; Municipal Corporations, §§ 488, 489; Waters and Water Courses, § 225; Wills, § 796.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

§ 72 (Colo.App.) Where a misrepresentation as to the recordation of a plat of land is made by inadvertence or honest mistake, the loss must fall upon the party first at fault in making the misrepresentation.—*Wellington Realty Co. v. Gilbert*, 131 P. 803.

ESTRAYS.

See Animals, § 100.

EVICITION.

See Landlord and Tenant, §§ 172-180.

EVIDENCE.

See Accord and Satisfaction, § 26; Account Stated, § 19; Adultery, § 11; Adverse Possession, § 95; Appeal and Error, §§ 204, 206, 837, 882, 907-920, 987-1011, 1047-1058; Attachment, § 308; Attorney and Client, § 53; Bankruptcy, § 303; Banks and Banking, §§ 109, 152; Bills and Notes, §§ 370, 465, 519; Boundaries, § 37; Brokers, § 86; Carriers, §§ 228, 318; Chattel Mortgages, § 213; Commerce, § 27; Compromise and Settlement, § 23; Contracts, § 88; Corporations, §§ 121,

432, 557; Criminal Law, §§ 308-562; Deeds, §§ 194-211; Depositions, § 90; Divorce, § 151; Dower; Embezzlement, § 39; Executors and Administrators, §§ 221, 348, 380; Factors; Fraud, § 58; Homicide, §§ 151-254; Injunction, § 261; Insane Persons, § 2; Insurance, §§ 646, 817; Intoxicating Liquors, §§ 88, 236; Judgment, §§ 291, 950; Landlord and Tenant, §§ 63, 180; Larceny, §§ 47-55; Logs and Logging; Lost Instruments; Marriage; Master and Servant, §§ 80, 265-278; Mines and Minerals; Mortgages, § 460; Municipal Corporations, § 817; Names; Navigable Waters, §§ 1, 39; Negligence, §§ 131-134; New Trial, §§ 35, 99-108; Novation, § 12; Partnership, §§ 49, 217, 258; Payment, § 89; Pleading, §§ 427, 428; Property, § 9; Quietening Title, § 44; Railroads, §§ 441, 442; Rape, §§ 52-54, 66; Reformation of Instruments, §§ 43, 45; Release, § 57; Taxation, §§ 531, 788, 810; Telegraphs and Telephones, § 66; Trade-Marks and Trade-Names, § 92; Trespass, §§ 45, 46; Trover and Conversion, §§ 35, 40; Trusts, § 44; Vendor and Purchaser, §§ 242, 329; Waters and Water Courses, §§ 152, 158½; Witnesses; Work and Labor, § 28. Reception at trial, see Criminal Law, §§ 663-678; Trial, §§ 63-95.

I. JUDICIAL NOTICE.

§ 7 (Kan.) Since Gen. St. 1909, § 4987, required bore holes where working places in a coal mine are in close proximity to an abandoned mine suspected of containing inflammable gases, the courts will take judicial notice that abandoned coal mines generate such gases.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

§ 10 (Utah) The Supreme Court will take judicial notice that there are many miles of small streams that flow in ditches or flumes in the state which may be more or less attractive to children.—*Charvoz v. Salt Lake City*, 131 P. 901.

§ 32 (Colo.) The district court could not take judicial notice of town ordinances.—*Wolfe v. Abbott*, 131 P. 386.

II. PRESUMPTIONS.

§ 54 (Utah) Inferences cannot be bottomed upon inferences, and an instruction upon defendant's counterclaim for conversion of scrap iron which allowed the basing of inferences upon inferences by assuming wrongdoing by plaintiff is erroneous.—*Utah Foundry & Machine Co. v. Utah Gas & Coke Co.*, 131 P. 1173.

§ 82 (Wash.) A state court must assume that everything necessary to make a sale in bankruptcy regular was done by the bankruptcy court and that the trustee, in making a sale, proceeded with due regularity.—*Shinn v. Kemp & Hebert*, 131 P. 822.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 113 (Wash.) In an action for damages from misquoting the price at which sheep were ordered to be purchased at D. by plaintiff's agent, evidence that the price at D. was determined by the market price at Portland and Chicago by deducting from those prices the freight and the losses incident to transportation, and that at that time the prevailing prices at Chicago and Portland were \$5.25 a hundredweight, which would make the price at D. a certain amount, was competent.—*Henry v. Western Union Telegraph Co.*, 131 P. 812.

(E) Competency.

§ 151 (Idaho) A party to a contract may testify, in an action to rescind, that he would not have executed same but for the other party's representations, where the facts are peculiarly

within the witness' knowledge.—*Breshears v. Callender*, 131 P. 15.

§ 151 (Wash.) Whenever motive, belief, or intention is material, the direct testimony of the person as to what his motive, belief, or intention was, is competent.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

V. BEST AND SECONDARY EVIDENCE.

§ 178 (Okla.) Where the execution, delivery, and loss of an instrument of conveyance has been proved, secondary evidence of its existence and contents is admissible.—*Adkins v. Wright*, 131 P. 686.

§ 183 (Colo.) To establish the loss of an instrument so as to authorize parol evidence of its contents, the proof must show with reasonable certainty the loss of the instrument, which may be done by proof that diligent search and inquiry in places and of persons in whose custody the law presumes the instrument to be have failed to discover it.—*Empire State Surety Co. v. Lindenmeier*, 131 P. 437.

Where an action on a building contractor's bond did not involve any failure to comply with the plans and specifications, which remained the property of the architect, and both he and the owner testified to their inability to find them or any blue prints, the court did not err in admitting in evidence the contract exclusive of the plans and specifications which could be proved by parol.—*Id.*

§ 186 (Kan.) What purports to be a copy of the official county paper, containing notice of conveyance of unredemmed lands sold for taxes, found among the files of the county treasurer, though not required by law to be kept there, is sufficient to establish prima facie the contents of the notice.—*Morrow v. Inge*, 131 P. 1184.

VI. DEMONSTRATIVE EVIDENCE.

§ 188 (Okla.) In an action for damages for rape, a child 2¼ years of age alleged to be the fruit of the illicit intercourse may be exhibited to the jury to establish the facts of birth and of prior unlawful intercourse.—*Watson v. Taylor*, 131 P. 922.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 211 (Colo.App.) Where plaintiff attempted to prove that an assessment on a benefit insurance certificate was paid before it was overdue, defendant should have been permitted to introduce the testimony of a beneficiary on the first trial that it was not so paid, although she did not testify on the second trial.—*Grand Lodge A. O. U. W. of Colorado v. Taylor*, 131 P. 783.

(D) By Agents or Other Representatives.

§ 244 (Utah) A statement or declaration by the secretary and bookkeeper of a corporation long after the transaction as to the purposes for which checks were given was not binding on the corporation as an admission.—*Utah Foundry & Machine Co. v. Utah Gas & Coke Co.*, 131 P. 1173.

(E) Proof and Effect.

§ 258 (Okla.) In an action on a fire insurance policy, evidence of a corrupt offer made by defendant's secretary held admissible without proof of his authority to make such offer.—*Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co.*, 131 P. 691.

§ 262 (Colo.App.) Rev. St. 1908, § 7284, does not prevent proof of the admissions of an adverse party without calling him for cross-examination.—*Grand Lodge A. O. U. W. of Colorado v. Taylor*, 131 P. 783.

§ 265 (Wash.) Verbal admissions should be received with caution and subject to careful scrutiny, since no class of evidence is more sub-

ject to error or abuse.—*Ludberg v. Barghoorn*, 131 P. 1165.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 273 (Okl.) Acts and declarations of a possessor of personalty concerning the same are admissible to determine the nature of such possession.—*Ragan v. Citizens' State Bank of Forker*, 131 P. 1093.

IX. HEARSAY.

§ 314 (Cal.App.) In an action on a novation, evidence that plaintiff in the absence of defendant stated that he was willing to accept defendant in lieu of his debtor was admissible, and was not hearsay as against defendant.—*Young v. Benton*, 131 P. 1051.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

§ 332 (Colo.App.) The record of a judgment is sufficient to prove the contents of the judgment, or its rendition.—*Empire Ranch & Cattle Co. v. Lumelius*, 131 P. 796.

(B) Exemplifications, Transcripts, and Certified Copies.

§ 340 (Colo.App.) An authenticated copy is sufficient to prove the contents of a judgment, or its rendition.—*Empire Ranch & Cattle Co. v. Lumelius*, 131 P. 796.

(C) Private Writings and Publications.

§ 353 (Cal.App.) Under Code Civ. Proc. § 1951, a deed of conveyance was competent evidence of a grant from grantor to grantee.—*Geron v. Sisson*, 131 P. 85.

§ 353 (Kan.) Recitals of heirship in a recent deed are not binding against strangers to the instrument.—*Dyer v. Marriott*, 131 P. 1185.

§ 354 (Cal.App.) Debit entries not showing for what made, but merely referring to pages of another book, unsupported by testimony of one knowing of the transactions culminating therein, are inadmissible.—*Chandler v. Robinett*, 131 P. 891.

A debit entry in a book merely to "Bal." is inadmissible, as charges must be specific and not lumped.—*Id.*

A debit entry in a book to "Bal." violates the rule that to be admissible it must be contemporaneous with the transaction to which it refers.—*Id.*

Entries in a book account not such as to make them admissible, and so meager as not to be a sufficient account of any transaction, are not aided by testimony of one having no knowledge of the transactions, that the account was a true and correct account of the transaction.—*Id.*

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 387 (Idaho) Parol evidence is not admissible to complete or correct the description in an assessment, where the property is to be sold for delinquent taxes.—*Wilson v. Jarron*, 131 P. 12.

§ 418 (Ariz.) A negotiable instrument passes solely on the credit of the maker, and it is not permissible, in an action thereon, to show that the maker was agent for a third person so as to charge such third person.—*Richards v. Warnekros*, 131 P. 154.

§ 423 (Or.) An agreement between parties to negotiable instruments, to be equally liable instead of being liable to each other in succession as their names appear, may be proved by

parol.—*Noble v. Beeman-Spaulling-Woodward Co.*, 131 P. 1006.

(B) Invalidating Written Instrument.

§ 433 (Kan.) In a purchaser's action for a deficiency in the amount of land conveyed, evidence of the oral negotiations between the parties was admissible to show mutual mistake as to the quantity of land.—*Maffet v. Schaar*, 131 P. 589.

§ 434 (Kan.) In a purchaser's action for a deficiency in the amount of land conveyed, evidence of the oral negotiations between the parties was admissible to show misrepresentations by the vendor as to the quantity of land.—*Maffet v. Schaar*, 131 P. 589.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Okl.) In an action of covenant, parol evidence is inadmissible to show at the time of the delivery of the deed containing the covenant against all incumbrances that the grantee agreed to take the land subject to an outstanding lease.—*Mandler v. Starks*, 131 P. 912.

§ 444 (Okl.) Evidence is admissible to show that a written instrument was delivered conditionally.—*Colonial Jewelry Co. v. Brown*, 131 P. 1077.

(D) Construction or Application of Language of Written Instrument.

§ 459 (Cal.App.) Where a written contract is signed by one describing himself as cashier, etc., parol evidence is admissible to identify the party against whom the obligation is legally chargeable.—*Hay v. McDonald*, 131 P. 74.

§ 461 (Colo.App.) Parol evidence of the attending circumstances surrounding the making of a written contract for the sale of land is admissible to show the real intentions of the parties at the time the instrument was signed, when not used to add or take anything from the agreement itself.—*Wellington Realty Co. v. Gilbert*, 131 P. 803.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Cal.App.) A question to a witness whether it was the intention of the officers of a corporation in constructing an irrigation ditch that it should be a permanent ditch across the land of another was objectionable as calling for the conclusion of the witness.—*Brown v. Ratliff*, 131 P. 769.

§ 471 (Cal.App.) In proving a sale by a corporation, testimony that it sold the property without stating who represented it in the transaction *held* to involve a conclusion.—*Chandler v. Robinett*, 131 P. 891.

§ 473 (Cal.App.) In an action on a contract where a witness had narrated the facts and circumstances of the transaction as he understood them, a question calling for his conclusion as to whether or not the contract was entered into was properly excluded.—*Reardon v. Richmond Land Co.*, 131 P. 894.

§ 474 (Wash.) Where a witness is testifying to the value of his own property, the strict rule as to the qualification of expert witnesses in testifying to value is not applied; it being sufficient that the witness have some idea as to the value of his property.—*Hertzog v. Star Logging Co.*, 131 P. 806.

§ 498½ (Cal.) The trial court has a wide discretion in determining whether a nonexpert witness testifying to another's sanity is an "intimate acquaintance" as required by Code Civ. Proc. § 1870, subd. 10.—*In re Coburn*, 131 P. 352.

§ 501 (Idaho) Witnesses should not be allowed to testify as to the gross damages to personal property but should be required to

state the detailed items and incidents of damage, so that the jury may make their own calculation therefrom.—*McGuire v. Post Falls Lumber & Mfg. Co.*, 131 P. 664.

(B) Subjects of Expert Testimony.

§ 506 (Okla.) In an action on an accident insurance policy defended on the ground of misrepresentations by the insured, insurance experts may not state that facts suppressed or falsified were material and that the policy would not have been issued if the truth had been known, but they can state the usage of insurance companies in respect to charging higher rates or canceling policies when made aware of the particular facts in question.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

(C) Competency of Experts.

§ 539 (Cal.App.) One who has had seven years' experience in the manufacture of gas, and who has made a study of the process by means of text-books, treatises, and actual experience, is competent to testify on the subject of what is necessary to make a gas factory reasonably safe for employes.—*Mulholland v. Western Gas Const. Co.*, 131 P. 110.

(D) Examination of Experts.

§ 553 (Cal.App.) That the opinion of an expert was not founded upon all the facts of the case went to its weight rather than to its competency and materiality.—*Reardon v. Richmond Land Co.*, 131 P. 894.

(F) Effect of Opinion Evidence.

§ 571 (Kan.) Opinions of witnesses, practicing lawyers of Nebraska, that a contract executed in Nebraska and specifying the part that the surviving husband or wife should take in the other's estate was invalid, held not conclusive in the absence of controlling decisions of Nebraska.—*Eberhart v. Rath*, 131 P. 604.

XIV. WEIGHT AND SUFFICIENCY.

§ 594 (Kan.) The jury should not arbitrarily and capriciously disregard unimpeached evidence.—*Healer v. Inkman*, 131 P. 611.

EXAMINATION.

See Witnesses, §§ 236-294.

Of expert witnesses, see Evidence, § 553.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 544, 690; Attorney and Client, § 26; New Trial, § 131.

II. SETTLEMENT, SIGNING, AND FILING.

§ 43 (Cal.) A showing by the managing officer of a corporation as to the reason why a bill of exceptions was not proposed within the time limited held not to establish that the corporation was entitled to be relieved from its default under Code Civ. Proc. § 473, so as to render a ruling of the trial court refusing relief an abuse of discretion.—*Oppenheimer v. Radke & Co.*, 131 P. 365.

EXCESSIVE DAMAGES.

See Damages, §§ 131, 132.

EXCHANGE OF PROPERTY.

See Vendor and Purchaser, § 3.

§ 11 (Idaho) That a person is induced to enter into a contract to exchange personal property through reliance on false and fraudulent representations made by the other contracting party and known by him to be such is sufficient ground to rescind the contract.—*Breshears v. Callender*, 131 P. 15.

§ 13 (Idaho) The burden was on plaintiffs to prove their contention that defendant made fraudulent representations of a material fact to induce them to contract, and that by reason of such representations plaintiffs entered into the contract and thereby suffered loss.—*Breshears v. Callender*, 131 P. 15.

Evidence, in an action to rescind a contract whereby a horse was traded for mining stock and to recover damages, held to show that plaintiffs were induced to contract as a result of their own examination and not in reliance upon defendant's representations, and that they were not deceived.—*Id.*

EXECUTION.

See Contempt, § 66; Exceptions, Bill of; Exemptions; Garnishment, § 8.

XI. EXECUTION AGAINST THE PERSON.

§ 423 (Colo.) An action by the purchasers of mining property to recover back the purchase price, the sale having been induced by defendants' fraud, under Rev. St. 1908, § 3024, was one founded on tort entitling plaintiffs to body execution.—*Springhetti v. Hahnwald*, 131 P. 266.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, § 719; Descent and Distribution; Mortgages, § 587; Stipulations; Wills; Witnesses, § 133.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 17 (Wash.) A surviving husband's claim to land which the court believes to be community property does not justify a denial of his statutory right to letters of administration, nor can he be compelled to yield such claim as a condition precedent to the granting of letters.—*Buchser v. Buchser*, 131 P. 193.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 39 (Cal.) An executor holds all the property of the estate, including land specifically devised, subject, if necessary, to disposition for payment of debts.—*In re De Bernal's Estate*, 131 P. 375.

§ 41 (Cal.) An executor holds the rents and profits of lands specifically devised, subject, if necessary, to subjection to the payment of debts and expenses of administration.—*In re De Bernal's Estate*, 131 P. 375.

§ 66 (Wash.) Under Rem. & Bal. Code, §§ 1450, 1457, the court may take testimony as to the title to property claimed by an interested party for the purpose of determining whether the administrator should include it in his inventory.—*Buchser v. Buchser*, 131 P. 193.

Where a husband, who was administrator, claimed land as his separate estate, while others claimed it as community property, the court could order him to inventory it as community property and accept a bond to cover the rents and profits to protect the estate if it should be subsequently adjudged that the land was community property.—*Id.*

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 221 (Cal.) Evidence in a claim on a contract of guaranty executed by testator held to sustain a finding that a trust deed was executed primarily for grantor's personal indebtedness, as distinguished from his liability as indorser upon certain notes.—*In re Thomson's Estate*, 131 P. 1045.

(B) Presentation and Allowance.

§ 224 (Cal.App.) An assignee of a chattel mortgage, given to secure notes executed by the

mortgagor, since deceased, and a third person, may under Code Civ. Proc. § 1500, sue to foreclose the mortgage without presenting a claim against decedent's estate.—*Flores v. Stone*, 131 P. 348.

(D) Priorities and Payment.

§ 261 (Kan.) The expenses of erecting a suitable monument over the grave of deceased is to be classed among the "funeral expenses" within Gen. St. 1909, § 3515, which gives funeral expenses priority over all other demands against decedent's estate.—*Nelson v. Schoonover*, 131 P. 147.

VII. DISTRIBUTION OF ESTATE.

§ 314 (Cal.App.) Where an administrator filed a petition asking distribution of the entire estate to himself, but on the hearing stipulated with the other claimants that the matter should be submitted to the court on an agreed statement of facts, he thereby waived the filing of formal written objections to his petition.—*In re Davidson's Estate*, 131 P. 67.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

§ 326 (Colo.) A widow's allowance, which she elected to take in money in lieu of the specific property allowed her by the appraisers, was a sufficient claim against the estate to support a proceeding to sell the realty to pay debts.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

§ 327 (Kan.) Where a wife wills her property to her husband under an agreement founded upon a valuable consideration, such property is subject to sale by the executor in so far as is necessary for the payment of valid demands against the estate and costs of administration.—*Nelson v. Schoonover*, 131 P. 147.

(B) Application and Order.

§ 336 (Colo.) An administrator's petition for leave to sell decedent's realty to pay debts *held* sufficient to give the county court jurisdiction to order such sale.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

§ 337 (Colo.) The county court had no jurisdiction to order the sale of a decedent's realty to pay debts on the first day of a term, unless the parties were served at least 10 days prior thereto; and if not so served the judgment was voidable, and would be set aside.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

§ 348 (Colo.) A decree ordering sale of realty to pay debts *held* voidable and subject to be set aside as to children of the decedent not served with process, although the record recited such service.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

Before a decree of the county court ordering the sale of a decedent's realty to pay debts can be set aside for want of service of process, where the decree and the sheriff's return recite such service, the proof must be clear, unequivocal, and convincing, or, in other words, beyond a reasonable doubt.—*Id.*

§ 349 (Colo.) A county court's decree ordering the sale of land to pay debts is void, if the want of jurisdiction appears on an inspection of the record, but is voidable only and good until set aside, where such want of jurisdiction can be discovered only by evidence aliunde the record.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

(C) Sale.

§ 367 (Colo.) An administrator's sale of the decedent's realty for the payment of debts was not fraudulent or invalidated because the purchaser bought the land for the purpose of per-

fecting his title under a conveyance from the widow; the purchaser's intent in bidding ordinarily being immaterial.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

§ 380 (Colo.) A county court's finding that personalty was insufficient to pay debts *held* not open to attack in an action to set aside the sale of the realty, in the absence of a direct issue that such finding was based on fraud.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

In an action to set aside the sale of a decedent's realty to pay debts, brought 11 years after the sale, evidence *held* insufficient to overcome the recitals in the decree and the sheriff's return of the service of process, or to support a finding that process was not served on the decedent's children.—*Id.*

In an action to set aside the sale of a decedent's realty to pay debts, evidence *held* insufficient to support a finding that process was served on decedent's infant children less than 10 days before the return day.—*Id.*

Where the decree ordering the sale of a decedent's realty to pay debts and the sheriff's return showed a proper service of process, the sale would be set aside, on the ground that process was served within 10 days of the return day, only on evidence clearly establishing the untruthfulness of the record.—*Id.*

If proceedings in the county court to sell a decedent's realty were void on account of the administrator's fraud of which subsequent purchasers had knowledge, the district court could only declare such purchasers constructive trustees and compel a reconveyance, and could not set aside the county court proceedings and conveyances thereunder.—*Id.*

§ 388 (Colo.) Subsequent purchaser of part of the land sold by an administrator to pay debts *held* not charged with constructive notice of any fraud on the part of the administrator in connection with such sale.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

XI. ACCOUNTING AND SETTLEMENT.

(B) Proceedings for Accounting.

§ 469 (Cal.) The superior court, sitting in probate in proceedings for final settlement, has jurisdiction, as between the executor and residuary legatee and the devisees of a specific part of mortgaged realty, to determine their rights and liabilities as to the payment of debts and expenses, the payment of interest, and the application of the rents and profits of the realty specifically devised.—*In re De Bernal's Estate*, 131 P. 375.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 523 (Cal.) Code Civ. Proc. § 1667, authorizing the delivery of property in California to the domiciliary executors of the nonresident owner, is not mandatory, but vests a discretion which will not be exercised in favor of such delivery, contrary to the statutes and public policy of California.—*In re Lathrop's Estate*, 131 P. 752.

EXEMPLARY DAMAGES.

See Damages, §§ 87, 91.

EXEMPTIONS.

I. NATURE AND EXTENT.

(A) Nature, Creation, Duration, and Effect in General.

§ 4 (Okla.) The exemption laws are intended for the protection of families, to preserve them from want and make them independent.—*Anderson v. Canaday*, 131 P. 697.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 139 (Okla.) A petition, alleging that plaintiff and defendants were residents of the state, that

defendants conspired together to defraud plaintiff of his rights under the exemption laws by bringing an action in another state and garnishing his wages earned within 60 days, *held* to state a cause of action for damages against both defendants.—*Anderson v. Canaday*, 131 P. 697.

A resident debtor may recover damages against a person who has brought suit in a foreign jurisdiction to evade the exemption laws of the state, and in violation of such laws has collected from the debtor a judgment obtained in such jurisdiction.—*Id.*

That a resident debtor sued by a resident creditor in another state, in order to evade the exemption laws, does not appear in that state and defend the suit will not estop him from recovering his damages arising from the violation of his exemption right.—*Id.*

EXHIBITIONS.

See Evidence, § 188.

EXHIBITS.

See Appeal and Error, § 695.

EXPERT TESTIMONY.

See Evidence, §§ 471-571.

EXPLOSIVES.

See Master and Servant, §§ 107, 288, 289.

§ 8 (Colo.) Whether caps used in excavating for a city and left by employees at the door of a shed containing explosives where boys of tender years secured them were negligently so left so as to render the city liable for injuries to a boy by an explosion *held* for the jury.—*City of Victor v. Smilanich*, 131 P. 392.

EXPULSION.

See Carriers, §§ 370-384.

EXTRADITION.

II. INTERSTATE.

§ 41 (Kan.) Where a nonresident is brought into the state upon a criminal process to answer for an offense alleged to have been committed while in the state of his residence, the state will not, upon his discharge and before he has had an opportunity to return, forcibly retain him to answer for a like act of omission occurring since he was thus brought here, unless such omission was conscious and willful on his part.—*In re Fowles*, 131 P. 598.

FACTORS.

See Brokers; Trial, §§ 25, 252.

§ 12 (Wyo.) A factor does not guarantee that he will not commit error, and he is liable only for negligence, bad faith, and dishonesty; hence a principal cannot recover where an un instructed factor held the property for a rise and the market weakened.—*Justice v. Brock*, 131 P. 38.

§ 22 (Wyo.) While a factor is not obliged at the request of his principal, to sell at a price which would be less than his lien for advances, commission, and just charges, unless the latter pays, or tenders such charges, yet he is bound to exercise ordinary care to obtain the market price of the merchandise; and, if the sale at such price would more than pay his charges, he is bound to sell at his principal's request.—*Justice v. Brock*, 131 P. 38.

§ 43 (Wyo.) In an action by factors for advances, where defendant counterclaimed, for amounts he claimed were due him, evidence *held* insufficient to show that the factors were negligent or unfaithful in selling the property.—*Justice v. Brock*, 131 P. 38.

Where a principal counterclaimed in an action by factors for advances, setting up a loss occasioned by their negligence, evidence of the

value of the goods in other markets than that to which they were consigned was inadmissible.—*Id.*

In an action by factors for advances where defendant counterclaimed, setting up a loss which he averred was occasioned by their negligent failure to sell at the market price, an instruction that they were under obligation to carry out all of defendant's positive instructions was erroneous because disregarding the factor's lien for advances.—*Id.*

FAIRS.

See Agriculture.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7 (Nev.) Where a justice of the peace had jurisdiction, a party prejudiced by his decision or acts in committing him to jail has no recourse in a civil action for damages against the justice or his sureties, even though he acted with malice.—*Gordon v. District Court of Fifth Judicial Dist.*, 131 P. 134.

A complaint, charging that accused cut and carried away a detonator in the possession of another, *held*, in an action against a justice of the peace and his sureties for false imprisonment, to sufficiently aver, as against collateral attack, ownership by another than accused, within Comp. Laws, § 4780.—*Id.*

§ 8 (Nev.) Where a justice of the peace fixed the bond of one charged with a misdemeanor at \$1,000 cash, the erroneous requirement of cash bail did not deprive the justice of jurisdiction so as to render him liable for the improper order; it appearing that the accused made no offer of any sort of bail.—*Gordon v. District Court of Fifth Judicial Dist.*, 131 P. 134.

FALSE SWEARING.

See Perjury.

FEDERAL COURTS.

See Courts, § 97.

FEEES.

See Attorney and Client, §§ 140-143; Corporations, § 499; Officers, § 94.

FELLOW SERVANTS.

See Master and Servant, §§ 170-201.

FEMALES.

See Master and Servant, § 13.

FENCES.

See Animals, § 100; Railroads, § 411.

FERRIES.

See Injunction, § 230; Municipal Corporations, § 285.

I. ESTABLISHMENT AND MAINTENANCE.

§ 10 (Cal.) A "ferry franchise" is a grant from the state or its authorized subdivisions to a named person empowering him to continue a land highway over interrupting waters.—*Vallejo Ferry Co. v. Solano Aquatic Club*, 131 P. 864, 874.

§ 11 (Cal.) The authority to grant ferry franchises is within the undelagated powers reserved to the states, and a ferry franchise granted by a city under a state statute is not invalid because one of its termini is on United States land acquired and used for military and naval

purposes.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 874.

A nonprofit co-operative corporation formed by United States employes at Mare Island to transport by ferry the employes and others becoming members of the corporation to and from the island may not attack the validity of a franchise to operate a ferry with the island as one of its termini, on the ground that the franchise interferes with the exclusive jurisdiction of the government.—Id.

The point of departure is the basis and home of a ferry, and the fact that one terminus is in a foreign jurisdiction does not take it out of the jurisdiction of the authority which granted it.—Id.

§ 16 (Cal.) An exclusive franchise within the limitation of Pol. Code, § 2853, forbidding the erection and operation of a second ferry within one mile above or below a regularly established ferry, does not invade private rights nor bestow special privileges, nor interfere with the free right of navigation.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 874.

A revocable permit given by the United States to a nonprofit co-operative corporation formed by its employes to land its launches at the government floats *held* not to amount to a license paramount to any ferry franchise granted under state authority.—Id.

An exclusive franchise to operate a ferry, having Mare Island as one of its termini, granted under state authority, does not exclude from its operation the agents and employes of the government in case the franchise tends in the slightest way to impede the work of the government.—Id.

§ 19 (Cal.) The rule that a man may in his own boat transport his family, goods, and servants, notwithstanding the existence of a ferry franchise, is based on the fact that such transportation constitutes such slight interference with the franchise rights as to amount to *damnum absque injuria*.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 874.

The United States may in the exercise of its inherent powers of sovereignty transport its employes, notwithstanding the existence of any exclusive ferry franchise, but its employes may not combine and form a nonprofit co-operative corporation to maintain a ferry, and thereby interfere with an existing ferry franchise.—Id.

An injunction restraining a domestic corporation formed by employes of the government at Mare Island from conducting a ferry within specified points forbids an unlawful interference with a franchise under state authority, and the government alone may complain that the injunction is an invasion of a federal right.—Id.

A clause in a temporary injunction pendente lite which forbids a domestic corporation formed by government employes at Mare Island from conducting a ferry from any point on Mare Island within one mile of the terminal of a ferry operated under a franchise to any point within the city of Vallejo, which is within one mile of the ferry terminal therein, if beyond the power of the court, may be stricken from the judgment and the judgment allowed to stand.—Id.

The employes of the government at Mare Island may not be allowed to depart therefrom, and go into the state with their ferry business, in violation of the laws of the state granting to one a franchise to operate a ferry with one terminus on Mare Island.—Id.

Where defendant, in a suit to restrain interference with a ferry franchise did not claim that he maintained a ferry beyond a mile in either direction from plaintiff's ferry slip, a clause in a temporary injunction pendente lite which prohibited defendant from operating a ferry was not objectionable as interfering with

the rights of defendant to maintain a ferry.—Id.

Injunction is the appropriate remedy to restrain unlawful interference with a franchise granted under state authority to operate a ferry, one terminus of which is on Mare Island, owned and used by the government for military and naval purposes.—Id.

Where the holder of a ferry franchise obtained an injunction restraining defendants actually engaged in the ferriage of members of a club from carrying on the business and the members thereafter hired boats and boatmen, and subsequently organized a corporation to continue the ferriage business, the holder of the franchise suing the corporation to restrain it was not guilty of laches.—Id.

FIDELITY INSURANCE

See Insurance, § 430.

FILING.

See Mechanics' Liens, § 156; Municipal Corporations, § 604; Sales, § 474.

FINAL JUDGMENT.

See Appeal and Error, § 78.

FIRE INSURANCE

See Insurance.

FIRES.

See Eminent Domain, § 111; Municipal Corporations, § 117; Railroads, § 483.

FIXTURES.

See Mechanics' Liens, § 32.

§ 4 (Colo.) In determining whether machinery placed in a plant by a lessee became a fixture, the question is whether the machinery was attached to the building or ground with an intention that it should become a part of the plant as a whole, in which case it became part of the leasehold interest, if essential to the successful operation of the plant.—Horn v. Clark Hardware Co., 131 P. 405.

§ 14 (Colo.App.) Machinery purchased by the lessee of mine for the operation of a reduction plant *held* to constitute a part of the freehold; and hence replevin could not be maintained by the seller to recover the same.—Puzzle Mining & Reduction Co. v. Morse Bros. Machinery & Supply Co., 131 P. 791.

§ 27 (Colo.) No agreement between lessor and lessee as to the removal of machinery after the lease expired would affect the character of such machinery as a fixture or otherwise with reference to the rights of third persons claiming a lien thereon as realty.—Horn v. Clark Hardware Co., 131 P. 405.

FORCIBLE ENTRY AND DETAINER.

See Landlord and Tenant, §§ 63, 291.

FORECLOSURE.

See Chattel Mortgages, § 249; Mechanics' Liens, §§ 263, 291; Mortgages, §§ 410-587.

FOREIGN ADMINISTRATION.

See Executors and Administrators, § 523.

FOREIGN CORPORATIONS.

See Corporations, §§ 668-672; Eminent Domain, § 10.

FOREIGN JUDGMENTS.

See Divorce, § 826; Limitation of Actions, § 87.

FOREIGN WILLS.

See Wills, § 2.

FORFEITURES.

See Agriculture; Bail, §§ 77, 84.

FORMER JEOPARDY.

See Criminal Law, §§ 162-200.

FRANCHISES.

See Agriculture; Ferries; Municipal Corporations, § 285.

FRAUD.

See Bills and Notes, § 105; Compromise and Settlement, § 23; Contracts, §§ 94, 265; Corporations, §§ 117, 121; Equity; Evidence, § 506; Exchange of Property; Execution; Executors and Administrators, §§ 367, 380, 388; Frauds, Statute of; Fraudulent Conveyances; Insurance, § 256; Mines and Minerals; Mortgages, § 267; Payment, § 89; Release; Vendor and Purchaser, § 33; Wills, § 168.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 13 (Wash.) Where a vendor undertakes to point out to the purchaser boundaries of the land, and makes an honest mistake, without intention to deceive, the purchaser, relying on the representation, may recover the damages sustained.—Bradford v. Adams, 131 P. 449.

II. ACTIONS.**(C) Evidence.**

§ 58 (Colo.App.) Evidence, upon a cross-complaint seeking damages for misrepresentations as to the value of a stock of goods, held sufficient to sustain a judgment against the cross-complainant.—Park v. McKee, 131 P. 279.

§ 58 (Okla.) Where fraud in the procurement of a written instrument is alleged, such allegation must be proved by a preponderance of evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith.—Owen v. United States Surety Co., 131 P. 1091.

FRAUDS, STATUTE OF.

See Specific Performance, § 41.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.

§ 18 (Cal.App.) An agreement made in forming a partnership, as a part of the consideration thereof, to assume the debts of one of the partners was an original obligation, and hence not required to be in writing by the statute of frauds (Civ. Code, § 2794).—Stover v. Stevens, 131 P. 332.

VII. SALES OF GOODS.**(B) Acceptance of Part of Goods.**

§ 87 (Cal.App.) Code Civ. Proc. § 1973, as amended by St. 1907, p. 563, providing that a contract for the sale of personalty may be valid where the buyer "accepts or receives" part of the goods, does not repeal or modify Civ. Code, § 1739, requiring a buyer to "accept and receive" a part of the goods or pay a part of the price, to make a valid contract, unless in writing.—Booth v. A. Levy & J. Zentner Co., 131 P. 1062.

§ 89 (Cal.App.) A delivery of goods to a carrier for transportation and delivery to a buyer

is not such acceptance by the buyer as obviates the necessity of a writing containing the terms of the contract as required by Civ. Code, § 1739.—Booth v. A. Levy & J. Zentner Co., 131 P. 1062.

Where a seller in a parol contract of sale within the statute of frauds ships goods to a distant buyer who refuses to accept them, the buyer is not estopped from relying on the statute of frauds.—Id.

§ 90 (Cal.App.) Delivery to a carrier is not such receipt by the buyer as obviates the necessity of a writing as required by Civ. Code, § 1739.—Booth v. A. Levy & J. Zentner Co., 131 P. 1062.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 112 (Cal.App.) A written order for goods signed by the agents of the parties, which declares that it is subject to confirmation by the buyer when "opening price is made by the shipper," is not sufficient within the statute of frauds.—Booth v. A. Levy & J. Zentner Co., 131 P. 1062.

A written contract of sale that leaves the price to be subsequently fixed by agreement of the parties is not sufficient within the statute of frauds.—Id.

IX. OPERATION AND EFFECT OF STATUTE.

§ 129 (Kan.) Part performance and possession take an oral contract for the sale of real estate out of the statute of frauds.—Smethers v. Lindsay, 131 P. 563.

§ 131 (Okla.) Where the purchaser owes the seller the price under a written contract, a verbal direction from the seller to pay a part of it, when due to third persons, is an original undertaking and does not contradict the contract for the sale of the land required by the statute to be in writing.—Foster v. Hoff, 131 P. 531.

FRAUDULENT CONVEYANCES.**I. TRANSFERS AND TRANSACTIONS INVALID.****(E) Consideration.**

§ 95 (Or.) Where a wife with her own money joined others in the purchase of land, but the deed was taken in the name of her husband by mistake of the scrivener, a deed executed by the husband to her to correct the mistake was not fraudulent, and was exempt from the claims of the husband's creditors, under Const. art. 15, § 5.—First Nat. Bank of Arvada, Colo., v. Bradburn, 131 P. 301.

FUNERAL EXPENSES.

See Executors and Administrators, § 261.

GAMING.

See Agriculture; Indictment and Information, § 120; Municipal Corporations, §§ 590, 594.

I. GAMBLING CONTRACTS AND TRANSACTIONS.**(A) Nature and Validity.**

§ 1 (Kan.) Ordinarily bookmaking and pool selling by which bets on horse races are recorded and tickets sold, showing the purchaser's proportion of the money won on such races, constitute "gambling."—State v. Anthony Fair Ass'n, 131 P. 628.

III. CRIMINAL RESPONSIBILITY.**(A) Offenses.**

§ 63 (Utah) Under Const. art. 6, § 28, the Legislature has no power to legalize any form of gambling within the state.—Salt Lake City v. Doran, 131 P. 636.

§ 68 (Utah) Comp. Laws 1907, § 4261, as amended by Laws 1911, c. 134, *held* to prohibit the maintenance and use of slot machines as a means of stimulating trade.—Salt Lake City v. Doran, 131 P. 636.

The use of slot machines by a merchant to stimulate trade *held* to constitute gambling, though the customer was given the value of his money, deposited in the machine, in goods in any event.—*Id.*

The use of a slot machine by a merchant to stimulate trade is within Comp. Laws 1907, § 208, subd. 40, authorizing cities of a certain class to suppress and prohibit all kinds of gaming played with dice, cards, or other games of chance.—*Id.*

§ 79 (Mont.) Rev. Codes, § 8416, punishing gaming, making it a crime for any person to open, carry on, or conduct any games of chance, applies to those who act for him as agents or employes.—State v. Tudor, 131 P. 632.

GARNISHMENT.

See Corporations, § 670; Exemptions, § 139.

I. NATURE AND GROUNDS.

§ 8 (Kan.) Where plaintiff by execution could have seized defendant's goods in the hands of a carrier, and thus relieved the carrier from determining ownership, it was an abuse of the remedy given by Gen. St. 1909, § 6524, authorizing garnishment after the return of execution unsatisfied, for the creditor to attempt to garnish the property in the carrier's possession, although one execution had been issued and returned unsatisfied.—Madden v. Union Pac. R. Co., 131 P. 552.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 51 (Kan.) Where the buyer agrees to pay the price to a third person who claims a lien under a chattel mortgage, the purchase money while in the buyer's hands is not subject to garnishment by another creditor of the seller, though the chattel mortgage is not in fact a lien upon the property; but the purchase money will be applied as agreed.—Mason v. Sanders, 131 P. 562.

GAS.

See Evidence, §§ 7, 539.

§ 14 (Kan.) The authorities of a city of the third class had under Laws 1897, c. 82, § 2, power in 1902 to contract with a gas company to furnish gas to the city and its inhabitants, and fix the charges therefor.—City of Moline v. Moline Drilling & Development Co., 131 P. 1189.

A formal acceptance by a gas company of an ordinance containing a contract for furnishing gas is unnecessary to bind the company where it enjoyed all the privileges granted for a term of years during which its charges were made in accordance with the rates prescribed.—*Id.*

GENERAL DENIAL.

See Pleading, § 382.

GOOD WILL.

See Bills and Notes, § 105.

GRAZING.

See Public Lands, § 185.

GUARANTY.

See Bills and Notes, §§ 246, 253, 260, 530, 534, 539; Executors and Administrators, § 221; Insurance, § 60; Principal and Surety.

I. REQUISITES AND VALIDITY.

§ 16 (Cal.) A contract of guaranty, which was not made concurrently with the original obligation, must be supported by an additional consideration.—In re Thomson's Estate, 131 P. 1045.

GUARDIAN AND WARD.

See Appeal and Error, § 1097; Insane Persons, §§ 30-34; Jury, § 25; Witnesses, § 293½.

VI. ACCOUNTING AND SETTLEMENT.

§ 146 (Kan.) A ward's action for an accounting against the representatives of the deceased guardian was barred by laches, when not brought for more than six years after the final settlement and where the mistake could have been discovered at the time of the settlement.—Rogers v. Lindsay, 131 P. 611.

§ 150 (Kan.) Mere mistakes in keeping accounts with an estate, where no fraud is shown, do not forfeit a guardian's right to compensation.—Rogers v. Lindsay, 131 P. 150.

HACKMEN.

See Municipal Corporations, §§ 614, 625.

HARMLESS ERROR.

See Appeal and Error, §§ 1026-1073; Criminal Law, §§ 1163-1173.

HAWKERS AND PEDDLERS.

See Licenses, § 7.

HEARSAY.

See Criminal Law, §§ 419, 420; Evidence, § 314.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 181 (Kan.) The expression, "Look out," uttered by the driver of a horse and buggy to an automobilist on a public highway, without any accompanying signals, is not a request to the operator of the automobile to stop, within the meaning of Gen. St. 1909, § 452.—Stern v. Issitt, 131 P. 551.

(C) Injuries from Defects or Obstructions.

§ 187 (Okl.) In the absence of an express statute imposing a liability on townships for injuries from defects in highways, townships contrary to the rule applicable to ordinary municipal corporations, are not liable therefor.—Howard v. Rose Tp., Payne County, 131 P. 683.

HOLIDAYS.

See Sunday.

HOLOGRAPHIC WILLS.

See Wills, § 130.

HOMESTEAD.

See Exemptions.

HOMICIDE.

See Criminal Law, §§ 366, 377, 507, 720, 1169; Indictment and Information, § 122.

II. MURDER.

§ 19 (Okl.Cr.App.) Where the killing was done in mutual combat entered into willingly, all parties engaging therein are guilty of murder or first-degree manslaughter, unless before the fatal shot was fired they had withdrawn and sought to avoid further conflict, and the killing was then done in self-defense.—Weatherholt v. State, 131 P. 185.

§ 30 (Okl.Cr.App.) One aiding and abetting in a murder is a principal, though another does the killing.—Weatherholt v. State, 131 P. 185.

III. MANSLAUGHTER.

§ 63 (Okl.Cr.App.) Where the killing was done in mutual combat entered into willingly, all parties engaging therein are guilty of murder or first-degree manslaughter, unless before the fatal shot was fired they had withdrawn and sought to avoid further conflict, and the killing was then done in self-defense.—Weatherholt v. State, 131 P. 185.

§ 78 (Okl.Cr.App.) To convict of manslaughter in the second degree, it is not necessary to show an intent to kill, but it is sufficient to show an unlawful killing.—Franklin v. State, 131 P. 183.

VII. EVIDENCE.**(A) Presumptions and Burden of Proof.**

§ 151 (Okl.Cr.App.) Where the state proves the killing without showing that the offense only amounted to manslaughter, or any facts raising a reasonable doubt as to defendant's excuse, the burden shifts to defendant to produce testimony raising a reasonable doubt as to such excuse under Comp. Laws 1909, § 6854.—Williams v. State, 131 P. 179.

(B) Admissibility in General.

§ 166 (Idaho) In a prosecution for murder committed in an attempt to commit robbery, evidence that defendant was not "broke" as the state's evidence tended to show was admissible.—State v. Allen, 131 P. 1112.

§ 166 (Okl.Cr.App.) In a trial for the murder of a girl, evidence of the relations between deceased and defendant, that defendant attempted to have an abortion performed on deceased, and that he had become estranged from his wife, held admissible to prove motive.—Miller v. State, 131 P. 717.

(C) Weight and Sufficiency.

§ 234 (Okl.Cr.App.) Evidence held sufficient, though circumstantial, to sustain a conviction of murder.—Miller v. State, 131 P. 717.

§ 253 (N.M.) Evidence held to warrant a conviction of murder in the first degree.—State v. Granado, 131 P. 497.

§ 254 (Cal.App.) Evidence held to sustain a conviction of murder in the second degree.—People v. Lopez, 131 P. 104.

VIII. TRIAL.**(C) Instructions.**

§ 288 (Kan.) Where the issue was whether defendants or one B. fired the fatal shot, an instruction that the jury had nothing to do with the charge against B. was misleading in the use of the word "charge," since it might be taken to refer to the evidence as to B.'s guilt and not merely to the information against him.—State v. Alexander, 131 P. 139.

§ 308 (N.M.) Where, on a trial for murder in the first degree, there are no facts or circumstances in evidence reducing the offense to murder in the second degree, the court is not authorized to instruct as to murder in the second degree.—State v. Granado, 131 P. 497.

X. APPEAL AND ERROR.

§ 339 (Idaho) In a prosecution for murder with intent to rob, exclusion of evidence that

defendant was not "hard up and broke" as tending to show want of motive was not prejudicial to defendant.—State v. Allen, 131 P. 1112.

§ 340 (Okl.Cr.App.) Where the evidence did not justify a conviction of so low a degree as second-degree manslaughter, a defendant convicted thereof cannot complain that the court charged the law as to such degree.—Weatherholt v. State, 131 P. 185.

§ 342 (Cal.App.) Where the evidence justified a verdict of murder in the second degree, defendant could not claim that, if testimony of a certain witness was true, defendant was guilty of murder, since a defendant cannot complain because the verdict is more favorable to him than the evidence warrants.—People v. Lopez, 131 P. 104.

§ 342 (Okl.Cr.App.) Where the court submits the issue of manslaughter in the second degree of which accused is convicted, where the law and facts make the crime murder or manslaughter in the first degree, being error in defendant's favor, was harmless.—Steward v. State, 131 P. 725.

XI. SENTENCE AND PUNISHMENT.

§ 354 (Okl.Cr.App.) The protection of female purity requires that men who seduce young and inexperienced girls and then murder them to cover up their own infamy should receive the most severe possible punishment.—Miller v. State, 131 P. 717.

HORSE RACING.

See Gaming, § 1.

HOSPITALS.

§ 7 (Cal.App.) It was as much the duty of a nurse in a hospital dealing with an unconscious patient unable to care for himself in applying hot-water bags to observe the effect of such application as to test the temperature of the water before applying.—Williams v. Pomona Valley Hospital Ass'n, 131 P. 888.

§ 8 (Cal.App.) Under complaint alleging that patient was injured by the careless and negligent manner in which a nurse placed hot-water bags, instructions that there could be no recovery if the injuries resulted because the hot-water bag was too hot, and that if she was not negligent in applying the hot-water bag, what afterwards happened could not show negligence, held erroneous in view of Code Civ. Proc. § 452.—Williams v. Pomona Valley Hospital Ass'n, 131 P. 888.

HOURS OF LABOR.

See Master and Servant, § 18.

HUSBAND AND WIFE.

See Action, § 50; Descent and Distribution, § 62; Divorce; Executors and Administrators, §§ 17, 66, 326, 327; Fraudulent Conveyances, § 95; Indians, § 18; Marriage; Stipulations; Witnesses, §§ 52, 56, 64, 78, 159, 195.

II. MARRIAGE SETTLEMENTS.

§ 30 (Kan.) A written agreement by a husband and wife after marriage similar to an antenuptial oral agreement providing that the husband, if the survivor, should receive nothing of the wife's estate, held valid, though it did not recite or refer to the oral agreement.—Eberhart v. Rath, 131 P. 604.

A postnuptial written agreement providing that the husband should receive nothing of the wife's estate, if she died first, and that she should receive the sum of \$1,000 only of his estate if he died first, held valid, though it does not refer to an antenuptial oral agreement of like import.—Id.

VI. ACTIONS.

§ 239 (Wash.) Where a purchaser of corporate stock for which he conveyed real estate to one of two parties associated in the transaction obtained a judgment for rescission for fraud, a personal judgment against the wife of the grantee, who, with the grantee, had mortgaged the land to a third person, *held erroneous*.—McFeron v. Shoemaker, 131 P. 1128.

VII. COMMUNITY PROPERTY.

§ 267 (Ariz.) Under Civ. Code 1901, par. 3104, providing that personal property of the community estate may be disposed of by the husband only, a chattel mortgage on such property given by the wife to secure a note issued by her in her own name but as her husband's agent is unenforceable.—Richards v. Warnekros, 131 P. 154.

§ 274 (Cal.App.) Civ. Code, § 1386, subd. 8, relative to distribution of community property upon the death of the surviving spouse intestate, applied, although the husband who died first left a will giving all of his estate to the wife.—In re Davidson's Estate, 131 P. 67.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 285½ (Cal.App.) When a wife has a cause for divorce, she may, under Civ. Code, § 137, sue for support and maintenance without applying for a divorce; but the right rests upon the existence of the marriage relation.—Simpson v. Simpson, 131 P. 90.

ICE.

See Municipal Corporations, § 771.

IMPEACHMENT.

See Account Stated, § 8; Witnesses, §§ 321-400.

IMPLIED CONTRACTS.

See Work and Labor.

IMPRISONMENT.

See False Imprisonment.

IMPROVEMENTS.

See Easements, § 53; Landlord and Tenant, § 157; Mechanics' Liens; Municipal Corporations, §§ 271-538; Negligence, § 131.

INCONSISTENCY.

See Pleading, § 93; Witnesses, §§ 379-388.

INCORPORATION.

See Municipal Corporations, §§ 7-18.

INDEMNITY.

See Principal and Surety.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 318.

INDIANS.

See Deeds, § 211; Dower; Marriage.

§ 15 (Okl.) Where a Creek freedman selected an allotment under Curtis Bill, § 11, but died before the adoption of the original Creek treaty, and the land was afterwards allotted and patented to her heirs, it was not impressed with homestead character, and all restrictions upon alienation were removed by act of Congress approved April 21, 1904.—Woodward v. De Graffenried, 131 P. 162.

§ 15 (Okl.) A Creek freedman under 18 years of age, although a married woman, cannot convey her allotment, except under authority of the county court.—Bruner v. Cobb, 131 P. 165.

§ 16 (Okl.) Under Act Cong. June 7, 1897, modifying Act March 2, 1895, a Quapaw Indian may lease his allotted land for farming purposes for not exceeding three years, or for mining or business purposes not exceeding ten years, without approval of the Secretary of the Interior, except where he is incompetent to properly manage his allotment.—Tidwell v. Dobson, 131 P. 693.

An assignment of royalty due under a mining lease given by a Quapaw Indian on his allotment is valid under Act March 2, 1895, as modified by Act June 7, 1897.—Id.

§ 18 (Okl.) Where a Creek freedman selects an allotment under the Curtis Bill, § 11, and dies before the adoption of the original Creek treaty, the Creek law of descent and distribution, and not the Arkansas law, governs the descent of the land.—Woodward v. De Graffenried, 131 P. 162.

A husband, not a member of the Creek Nation, may inherit land as his wife's heir under the Creek law of descent and distribution.—Id.

Where a Creek freedman selected her allotment under Curtis Bill, § 11, and died before the adoption of the original Creek treaty, the fee did not vest in her, but was first vested in her heirs under sections 6 and 28 of the original Creek treaty.—Id.

§ 18 (Okl.) Under Mansf. Dig. Ark. § 2531, relative to the descent of a new acquisition, an allotment of a duly enrolled Creek Indian, who died July 12, 1905, after receiving her patent, not being a new acquisition but coming to her by the blood of her tribal parents, passed to her parents who took full title to the exclusion of her brothers and sisters all of full blood.—Pigeon v. Buck, 131 P. 1083.

INDICTMENT AND INFORMATION.

See Banks and Banking, § 21; Larceny, §§ 28-40; Perjury, § 25.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 60 (Okl.Cr.App.) An indictment is sufficient if the offense charged is clearly set forth without repetition in such manner as to enable a person of common understanding to know what is intended.—Star v. State, 131 P. 542.

§ 71 (Okl.Cr.App.) The common-law doctrine of a strict construction, and that an indictment should be certain in every particular, is not in force in Oklahoma.—Price v. State, 131 P. 1102.

An indictment which enables a person of common understanding to know what is intended, and enables the defendant to prepare his defense and to plead a judgment in bar to a subsequent prosecution for the same offense, is sufficient.—Id.

§ 72 (Cal.App.) Any one of the acts defined by St. 1911, p. 9, and stated disjunctively, constitutes the offense of pandering, so that an information alleging one or more of such acts was not defective for failure to allege them all conjunctively.—People v. Lawlor, 131 P. 63.

§ 87 (Okl.Cr.App.) In an indictment, it is sufficient to allege merely that the offense was committed at a time prior to the filing of the indictment, except where time is a material ingredient of the offense.—Star v. State, 131 P. 542.

§ 120 (Mont.) An information, alleging that accused carried on, as owner and proprietor, a game of chance for money, charges a violation of Rev. Codes, § 8416, punishing gaming; the term "as owner and proprietor" being surplusage.—State v. Tudor, 131 P. 632.

§ 122 (Okl.Cr.App.) That the complaint averred that the killing was by means of a shotgun, and the information averred that it was by means of a Winchester rifle, is a sufficient compliance with Bill of Rights, § 17, as the means by which the offense was committed are not a constituent element of the crime of murder, and the variance was immaterial.—*Weathervolt v. State*, 131 P. 185.

VIII. AMENDMENT.

§ 161 (Okl.Cr.App.) An information may be amended as to matters of substance or form after a plea of not guilty has been entered and before trial under Wilson's Rev. & Ann. St. 1903, § 5307.—*Cox v. State*, 131 P. 1109.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

§ 196 (Mont.) Under Rev. Codes, §§ 9157, 9200, 9201, 9208, providing for the raising of objections to informations by demurrer distinctly specifying the grounds, where accused fails to raise questions touching the form of the information by demurrer, the objections are waived.—*State v. Tudor*, 131 P. 632.

INDORSEMENT.

See Bills and Notes, §§ 147, 170, 171, 182, 246-296.

INFANTS.

See Explosives; Guardian and Ward; Negligence, §§ 39, 134; Parent and Child; Witnesses, § 40.

INITIATIVE AND REFERENDUM.

See Municipal Corporations, § 34.

INJUNCTION.

See Appeal and Error, § 920; Corporations, §§ 320, 557; Easements, § 61; Eminent Domain, § 274; Ferries; Judgment, § 249; Landlord and Tenant, §§ 172, 178; Municipal Corporations, §§ 536, 538; Nuisance, § 72; Trade-Marks and Trade-Names, § 92.

I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

§ 5 (Colo.App.) Evidence held to warrant a finding that a bank receiving a deposit of \$35 issued by mistake to the depositor a certificate of deposit of \$315, authorizing a mandatory injunction to compel the surrender of the certificate on the bank offering to deliver a certificate for the true amount of the deposit.—*Johnson v. First Nat. Bank*, 131 P. 284.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Public Officers and Boards and Municipalities.

§ 85 (Wash.) Injunction lies to test the validity of police regulations and ordinances governing hackmen while at a passenger depot in a city; the remedy by submission to arrest and suing for damages being inadequate.—*City Cab, Carriage & Transfer Co. v. Hayden*, 131 P. 472.

(G) Personal Rights and Duties.

§ 101 (Cal.) The maxim that what a man may do many may do in combination is not universally true; and it is only those acts which work no invasion of rights when done in combination that may be so done.—*Vallejo Ferry Co. v. Solano Aquatic Club*, 131 P. 864, 874.

VII. VIOLATION AND PUNISHMENT.

§ 223 (Cal.) Petitioners having been enjoined from asserting any title to land covered by a

state land certificate, invalidated by a prior judgment, held guilty of contempt in thereafter filing a cross-complaint in the subsequent action, involving the land, by which they sought to attack such original judgment directly.—*Lake v. Superior Court in and for Kern County*, 131 P. 371.

§ 226 (Cal.) Where an attorney filed a cross-complaint in violation of an injunction, and insisted on maintaining it after his attention was called to the injunction, his contumacious conduct was not excused by the fact that he overlooked the injunctive provisions of the decree when he filed the cross-complaint.—*Lake v. Superior Court in and for Kern County*, 131 P. 371.

§ 228 (Cal.) Where certain claimants under a state land certificate were enjoined from making any further claim thereunder, a successor in interest of one of such claimants was bound by the judgment and punishable for contempt in violating it.—*Lake v. Superior Court in and for Kern County*, 131 P. 371.

§ 230 (Cal.) A proceeding to punish for contempt any violation of an injunction may be properly initiated by citation.—*Lake v. Superior Court in and for Kern County*, 131 P. 371.

§ 230 (Cal.) Under Code Civ. Proc. § 1209, declaring disobedience of orders of court contempt, where petitioner was enjoined from operating its ferry service its violation of the injunction, on several days though continuous, constituted separate contempts which might be punished as such.—*Solano Aquatic Club v. Superior Court of Solano County*, 131 P. 874.

IX. WRONGFUL INJUNCTION.

§ 261 (Wash.) A sublease furnishes no basis for measuring the damages sustained by the tenant from an injunction against such sublease, unless the original lease was made in contemplation of a sublease, so that evidence of such damages is inadmissible.—*Tennes v. American Bldg. Co.*, 131 P. 201.

INNKEEPERS.

See Licenses, § 6.

INSANE PERSONS.

See Evidence, § 498½; Jury, § 25; Statutes, §§ 107, 111, 141.

I. DISABILITIES IN GENERAL.

§ 2 (Cal.) Evidence, in proceedings for the appointment of a guardian for one claimed to be mentally incompetent, held to sustain a finding that the alleged incompetent because of old age and mental weakness, was unable, unassisted, to properly manage himself and property.—*In re Coburn*, 131 P. 852.

II. INQUISITIONS.

§ 12 (Cal.App.) The affidavit or complaint for arrest of a person for examination as to his sanity held to set forth not a mere conclusion, but some description of his acts, conduct, or condition, as required by Pol. Code, § 2168, so as to give the court jurisdiction to issue the warrant of arrest.—*Hall v. Superior Court in and for Orange County*, 131 P. 321.

§ 27 (Kan.) An appeal may be taken from a decision of the probate court, under Gen. St. 1909, § 4852, adjudging a person of feeble mind and appointing a guardian for him.—*Ald's Estate v. Appling*, 131 P. 569.

III. GUARDIANSHIP.

§ 30 (Cal.) The inability authorizing the appointment of a guardian for one mentally incompetent under Code Civ. Proc. § 1767, and St. 1891, p. 68, defining "mentally incompetent," "incapable," etc., as used in the statute, means any person who, by reason of old age, etc., is unable to properly manage and care for himself

or property, means mental, rather than physical, inability.—*In re Coburn*, 131 P. 352.

Under Code Civ. Proc. § 1763, providing for a hearing on an incompetent's inability to manage his property, section 1764, authorizing the appointment of a guardian if he is incapable of taking care of himself and managing his property, and section 1767, defining an incompetent as one unable to manage and care for himself or his property, it need not be shown to authorize the appointment that the incompetent cannot take care of his person.—*Id.*

§ 33 (Cal.) Petition for the appointment of a guardian for an incompetent, which alleged that he was "mentally incompetent to manage his property," held sufficient under the direct provisions of Code Civ. Proc. §§ 1763, 1764, irrespective of section 1767.—*In re Coburn*, 131 P. 352.

§ 34 (Cal.) The court may select a proper person to act as guardian of an insane or mentally incompetent person, whether he is a stranger to the incompetent or not; it not being necessary to appoint incompetent's wife.—*In re Coburn*, 131 P. 352.

INSOLVENCY.

See Bankruptcy; Banks and Banking, §§ 77, 166; Corporations, §§ 544-557.

INSPECTION.

See Corporations, § 181.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 772-829; Homicide, §§ 288, 308; Trial, §§ 191-296.

INSTRUMENTS.

See Bills and Notes.

INSURANCE.

See Appeal and Error, §§ 1047, 1048; Bills and Notes, § 92; Evidence, §§ 211, 258, 506; Trial, § 261.

II. INSURANCE COMPANIES.

(A) Stock Companies.

§ 33 (Or.) A resolution of the stockholders and directors of a life insurance company that certain securities of a fixed value of the company shall constitute its capital set apart as a basis of credit for policy holders and creditors converts the assets into cash capital within L. O. L. § 4610, prohibiting insurance companies from doing business until they shall have a paid-up cash capital equal to a specified sum.—*Union Pac. Life Ins. Co. v. Ferguson*, 131 P. 1012.

(B) Mutual Companies.

§ 60 (Wash.) Where a mutual fire insurance company wrote a large amount of insurance on the faith of a guaranty contract, the subscribers to such guaranty were estopped to deny their liability thereunder, on the ground that it was invalid, for fire losses falling within its terms.—*McConaughy v. Juvenal*, 131 P. 851.

An insurance company was without power to release a subscriber to a guaranty contract created for the payment of fire losses, where there was a large amount of outstanding insurance written upon the faith of such guaranty.—*Id.*

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§ 84 (Cal.App.) An insurance agent working under a contract providing for return of commissions retained by him from premiums on policies afterwards canceled was liable for such commissions, irrespective of whether the policies were canceled before or after the termina-

tion of his agency.—*National Union Fire Ins. Co. v. Nason*, 131 P. 755.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 130 (Wyo.) A note given for the first premium on an insurance policy was not collectible where the applicant canceled his application before acceptance by the insurer.—*Wheelock v. Clark*, 131 P. 35.

(B) Construction and Operation.

§ 147 (Ok.) Where insured resides and the policy is signed, delivered, and the premiums paid in Oklahoma, it is governed by the laws of Oklahoma, though the insurer is a foreign corporation and the policy was executed at its home office.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) Grounds in General.

§ 250 (Ok.) Comp. Laws 1909, § 3784, providing that statements in an application for insurance shall be deemed representations and not warranties, is within the police power of the state.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

The requirement of Comp. Laws 1909, § 3784, that statements in the insured's application must be construed as representations and not warranties cannot be evaded by indorsing such statements upon the policy, which also contains a provision stating that it is issued in consideration of such statements, each of which the insured warrants to be complete and true.—*Id.*

§ 256 (Ok.) A misrepresentation in an application for an insurance policy renders the policy void on the ground of fraud.—*Owen v. United States Surety Co.*, 131 P. 1091.

§ 267 (Ok.) Noncompliance with a warranty in an application for insurance operates as an express breach of contract.—*Owen v. United States Surety Co.*, 131 P. 1091.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 335 (Ok.) An unjustifiable breach of the iron safe and inventory clauses in fire insurance policies will prevent recovery.—*Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co.*, 131 P. 691.

That inventories and books kept by the insured as required by the policy have been lost without negligence or design of the insured will not bar recovery on the policy.—*Id.*

XII. RISKS AND CAUSES OF LOSS.

(C) Guaranty and Indemnity Insurance.

§ 430 (Wash.) A fidelity bond protecting against pecuniary loss by any act of "larceny or embezzlement" of plaintiff's employé would not include loss from poor business judgment exercised by the employé resulting in her becoming indebted to plaintiff beyond an agreed amount.—*John Lee Clarke v. Fidelity & Deposit Co. of Maryland*, 131 P. 468.

XVII. ACTIONS ON POLICIES.

§ 633 (Or.) A complaint in an action upon an insurance policy on a horse held to sufficiently aver an insurable interest.—*Martin v. National Live Stock Ins. Ass'n*, 131 P. 511.

§ 639 (Or.) In an action on an insurance policy, a complaint which averred a loss under the terms of the policy held sufficient, though not

negating defenses.—*Martin v. National Live Stock Ins. Ass'n*, 131 P. 511.

§ 646 (Okl.) Under Comp. Laws 1909, § 3784, providing that statements in an application for insurance procured without medical examination shall, in the absence of fraud, be deemed representations and not warranties, the burden is on the insurer to prove that such statements are willfully false or misleading.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

§ 646 (Okl.) Under Comp. Laws 1909, § 3784, the burden of proving the materiality of a misrepresentation or concealment in the application for insurance, as well as the fraudulent intention of the insured, is upon the insurance company, and is not shifted by showing that the insured made an untrue answer concerning other insurance.—*Owen v. United States Surety Co.*, 131 P. 1091.

§ 655 (Okl.) Comp. Laws 1909, § 3784, as to representations made in the insurance application, does not exclude proof that statements made in the application were willfully false, fraudulent, or misleading by the introduction of the application, even where the policy contains no reference thereto.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

§ 668 (Okl.) The questions of the falsity of statements contained in an insurance policy and of the applicant's intent in making them are ordinarily for the jury.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

Under the evidence in an action on an accident insurance policy, held a question for the jury whether insured was suffering from a "defect in the body," within the meaning of that phrase in his statement indorsed on the policy.—*Id.*

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

§ 693 (Colo.App.) The rules of benefit insurance societies, providing such discipline as will enable them to promptly collect their dues and meet their obligations, will be enforced by the courts.—*Grand Lodge A. O. U. W. of Colorado v. Taylor*, 131 P. 783.

§ 695 (Or.) The clerk of the local circle of a benefit insurance society, in receiving and forwarding assessments from members, acted as the agent of the society; the character of the duties performed, rather than any declaration in the by-laws, determining the question whether she is the agent of the society or of the member.—*Patton v. Women of Woodcraft*, 131 P. 521.

(D) Forfeiture or Suspension.

§ 755 (Or.) An apparent default in the payment of assessments by a member was waived by a benefit insurance society by the subsequent receipt and acceptance of such assessments and the collection and retention of subsequent assessments.—*Patton v. Women of Woodcraft*, 131 P. 521.

(F) Actions for Benefits.

§ 817 (Or.) In an action on a benefit certificate, where defendant pleaded that the member was suspended for the nonpayment of certain assessments and not reinstated, defendant assumed the burden of showing that such assessments were not paid prior to the member's death.—*Patton v. Women of Woodcraft*, 131 P. 521.

§ 825 (Or.) Where benefit insurance society claimed that member was suspended for nonpayment of assessments, but the undisputed evidence showed the acceptance of such assessments before the death of the member, a verdict for plaintiff was properly directed.—*Patton v. Women of Woodcraft*, 131 P. 521.

INTENT.

See Domicile; Evidence, § 151; Principal and Surety, § 59; Wills, § 448.

INTEREST.

See Alteration of Instruments; Bills and Notes, §§ 530, 534; Master and Servant, § 71; Mechanics' Liens, § 161; Powers; Principal and Agent, § 34; Principal and Surety, §§ 73, 155; Usury; Witnesses, § 372.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 17 (Cal.App.) Civ. Code, § 1919, providing that in a writing by which a debt is secured the parties may agree that overdue interest shall itself bear interest, does not prevent interest included in an account stated being compounded without an agreement in writing.—*Atkinson v. Golden Gate Tile Co.*, 131 P. 107.

II. RATE.

§ 34 (Cal.App.) Civ. Code, § 1917, providing that an express contract in writing is necessary to fix interest in excess of 7 per cent., does not apply to interest included in and agreed to upon an account.—*Atkinson v. Golden Gate Tile Co.*, 131 P. 107.

III. TIME AND COMPUTATION.

§ 47 (Wash.) Interest was properly allowed on the amount found due plaintiff from the time the action was filed, in an action on a bond for the construction of a building to be constructed for plaintiff.—*Ellers Music House v. Hopkins*, 131 P. 838.

INTERPRETATION.

See Bills and Notes, § 120; Carriers, § 51; Contracts, §§ 153-198; Principal and Agent, § 97; Principal and Surety, § 59; Vendor and Purchaser, § 48; Wills, §§ 448-561.

INTERPRETERS.

See Criminal Law, § 642.

INTERSTATE EXTRADITION.

See Extradition.

INTOXICATING LIQUORS.

See Criminal Law, § 200; Judgment, § 648; Municipal Corporations, §§ 112, 183.

I. POWER TO CONTROL TRAFFIC.

§ 1 (Cal.App.) The sale of spirituous liquors is subject to regulation under the police power, there being no vested right in any one to engage in that business.—*Guzzi v. McAlister*, 131 P. 336.

§ 10 (Cal.App.) Under Const. art. 11, § 11, authorizing a city to enforce police regulations and under ordinances regulating the sale of intoxicating liquors, the question whether a license shall issue to retail liquors held entirely under the control of the city council.—*Guzzi v. McAlister*, 131 P. 336.

§ 10 (Colo.) Rev. St. 1908, § 6525, par. 53, authorizing towns to prohibit any offensive or unwholesome business, does not apply to sales of intoxicating liquors.—*Wolfe v. Abbott*, 131 P. 386.

IV. LICENSES AND TAXES.

§ 45 (Or.) Since in amending by initiative the charter of the city of Woodburn on April 27, 1909, chapter 10, § 2, of the charter, as amended by the Legislature February 7, 1899 (Sp. Laws 1899, p. 526) requiring "two or more sufficient sureties" on liquor bonds, was copied without change, it is not to be regarded as a new statement of the law, and is controlled by Laws 1899, p. 193, enacted February 20, 1899, providing that where a surety company executes a bond there is a full compliance with any law, charter, or ordinance, demanding that such

bond be signed by one or more sureties.—City of Woodburn v. Aplin, 131 P. 516.

§ 59 (Cal.App.) Under Act March 25, 1909 (St. 1909, p. 722), an application for a liquor license *held* improperly granted, where the place was situated more than one mile outside the limits of an incorporated city and within four miles of a camp of men engaged in working on public improvements.—Great Western Power Co. v. Board of Sup'rs of Plumas County, 131 P. 88.

§ 64 (Cal.App.) Under an ordinance requiring an application for a license to retail intoxicating liquors to present to the city council a petition stating the names of applicants, etc., an application signed "Guzzi Bros., by C. Guzzi" is insufficient.—Guzzi v. McAlister, 131 P. 336.

§ 74 (Cal.App.) Writ of mandate will not issue to compel city officers to issue a license to sell intoxicating liquors where payment or tender of the license fee prescribed by ordinance, a condition precedent to the license, is not alleged.—Guzzi v. McAlister, 131 P. 336.

§ 76 (Cal.App.) The action of county commissioners in granting a liquor license is a judicial act reviewable on certiorari.—Great Western Power Co. v. Board of Sup'rs of Plumas County, 131 P. 88.

§ 87 (Or.) In an action on a liquor dealer's bond given in connection with a license to do business in a certain place, and conditioned for the keeping of an orderly house and compliance with law, etc., violations of law at that particular place must be shown to render the surety liable.—City of Woodburn v. Aplin, 131 P. 516.

§ 88 (Or.) In an action on a liquor dealer's bond for sale to a minor, proceedings in the recorder's court, wherein defendant pleaded guilty to the charge on the same facts, except that the place of the sale was charged to have been within the city, and not at defendant's place of business, are competent evidence to show at least the sale, on the same footing as any other oral admission.—City of Woodburn v. Aplin, 131 P. 516.

In an action on a liquor dealer's bond given in connection with a license to do business at a certain place, evidence *held* to warrant a finding that the breach complained of was committed at such place.—Id.

In an action on a liquor dealer's bond, evidence *held* sufficient to warrant a finding that defendant allowed a minor to loiter in his place of business.—Id.

In a suit on a liquor dealer's bond, the admission of the records of the common council declaring a forfeiture of the bond was not erroneous, where such forfeiture had been alleged in the complaint and admitted by the answer.—Id.

VII. OFFENSES.

§ 132 (Wash.) Since Rem. & Bal. Code, § 6278, makes the keeping and maintaining of a place for the wrongful sale of intoxicating liquors a nuisance, while section 6304 makes the place where the liquors are wrongfully kept for sale a nuisance, the two sections are not repugnant; and hence the latter does not repeal the former.—State v. Hatch, 131 P. 1130.

VIII. CRIMINAL PROSECUTIONS.

§ 236 (Okla.Cr.App.) The payment of the special tax required of liquor dealers by the United States constitutes prima facie evidence of the intent during the term of the license to violate the prohibitory law.—Greenwood v. State, 131 P. 940.

X. ABATEMENT AND INJUNCTION.

§ 259 (Colo.) Rev. St. 1908, § 6525, par. 45, is not self-executing, and the power therein conferred to declare and abate nuisances can be

exercised only through an ordinance; and hence a police magistrate could not order a nuisance abated where there was no ordinance providing for its abatement.—Wolfe v. Abbott, 131 P. 386.

§ 260 (Colo.) Under Rev. St. 1908, § 6525, par. 18, 45, the sale of liquor within one mile of the boundaries of a town contrary to an ordinance of the town can be punished only by a fine, and not by abating it as a nuisance.—Wolfe v. Abbott, 131 P. 386.

If Rev. St. 1908, § 6525, par. 53, relative to prohibiting an offensive or unwholesome business outside the boundaries of a town, applies to liquor selling, a town cannot abate such sales as a nuisance, but can only prohibit them, and enforce the prohibition by fine and imprisonment.—Id.

The mere sale of or keeping for sale intoxicating liquors is not a nuisance per se.—Id.

XII. RIGHTS OF PROPERTY AND CONTRACTS.

§ 327 (Wash.) Where defendant executed a note to plaintiff for part of the price of a liquor business belonging to a minor who was indebted to plaintiff for liquors sold to him in violation of Rem. & Bal. Code, § 2963, the consideration of the note was not the liquor sold to the minor, but the transfer of the business, and was not therefore illegal.—Lackaff v. Hinz, 131 P. 207.

INTOXICATION.

See Master and Servant, § 247.

INVENTORY.

See Executors and Administrators, § 66.

IRON SAFE CLAUSE.

See Insurance, § 335.

IRRIGATION.

See Waters and Water Courses, §§ 21, 156, 158½, 225-263.

ISLANDS.

See Navigable Waters, §§ 37, 42.

ITINERANT MERCHANTS.

See Licenses, § 7.

JOINDER.

See Action, §§ 45-50.

JOINT TENANCY.

See Tenancy in Common.

JOINT TORT-FEASORS.

See Torts, § 22.

JUDGES.

See Justices of the Peace.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 11 (Colo.) The mere fact that one county is detached from one judicial district and attached to another will not remove the judges of either of the districts; the same still remaining duly constituted districts.—In re Senate Resolution No. 9, 131 P. 257.

II. SPECIAL OR SUBSTITUTE JUDGES.

§ 15 (Mont.) A district judge disqualified to hear an election contest was authorized to call

one trial judge after another until he finally secured the services of one who could preside at the trial of the cause.—Curry v. McCaffery, 131 P. 673; Same v. Drew, Id. 677; Same v. McGrade, Id.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 29 (Mont.) Under the express provision of Const. art. 8, § 12, any judge of the district court may hold court for any other district judge, and shall do so when required by law.—Curry v. McCaffery, 131 P. 673; Same v. Drew, Id. 677; Same v. McGrade, Id.

IV. DISQUALIFICATION TO ACT.

§ 51 (Colo.) In presenting an application for another judge on the ground of bias, it is necessary to set out the facts in detail upon which the alleged prejudice is predicated.—In re Smith, 131 P. 277.

§ 51 (Mont.) A district judge disqualified to hear an election contest is not compelled to call upon the other district judges unless his disqualification is brought about as provided by section 6315, subd. 4, as amended by Laws 1909, c. 114, declaring a judge disqualified when either party files an affidavit that he has reason to believe that he cannot have a fair and impartial trial before such judge.—Curry v. McCaffery, 131 P. 673; Same v. Drew, Id. 677; Same v. McGrade, Id.

JUDGMENT.

See Appeal and Error; Contempt, § 66; Corporations, § 92; Criminal Law, § 977; Divorce, §§ 152, 219, 285, 309; Eminent Domain, § 243; Evidence, §§ 332, 340; Execution; Executors and Administrators, §§ 348, 349; Justices of the Peace, §§ 127, 197; Landlord and Tenant, § 291; Limitation of Actions, § 87; Maritime Liens; Mechanics' Liens, § 291; Mortgages, § 218; Motions; Pleading, §§ 277, 349; Prohibition, § 19; Quieting Title, § 52; Replevin, § 107; Taxation, § 813; Time, § 10.

IV. BY DEFAULT.

(B) Opening or Setting Aside Default.

§ 159 (Cal.App.) An affidavit supporting a motion to vacate a default judgment for plaintiff, which stated that "I have fully and fairly stated the case of the defendants in this action," instead of the "facts of the case," was wholly insufficient.—Forrest v. Knox, 131 P. 894.

An affidavit cannot be considered in support of a motion to vacate a default judgment, where no notice of the filing of the affidavit was given to the adverse party or his attorney until the motion was granted contrary to Code Civ. Proc. § 1010, and the affidavit was not referred to in the notice of the motion.—Id.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (Wyo.) Fatal defects in substance in a petition may be taken advantage of, by motion for judgment non obstante veredicto.—Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43.

§ 204 (Okla.) Equity looking beyond the mere form to the substance can decree such relief as appears just and best calculated to protect the rights of the parties.—Foster v. Hoff, 131 P. 531.

§ 217 (Wash.) "Final judgment" defined, and held that an order for the dismissal of a disbarment proceeding upon the happening of a contingency, which might or might not occur, was not a final judgment, and that subsequent orders denying a motion to set the cause for hearing, on the ground that it had been dismissed by the first order, were not final judgments.

—State v. Superior Court for King County, 131 P. 1136.

(B) Parties.

§ 237 (Or.) In an action against joint debtors, where only common defenses are maintained, the judgment should be rendered against all or none.—Templeton v. Morrison, 131 P. 319.

§ 237 (Or.) A default judgment against one of several parties to an action, who were jointly and severally liable on a contract, was not a bar to a recovery against others of such parties.—Noble v. Beeman-Spaunding-Woodward Co., 131 P. 1006.

§ 240 (Or.) Judgment for plaintiff on a joint note should be entered against all the defendants shown to be liable alike as between themselves and the plaintiff.—Wagenaar v. Beeman-Woodward Co., 131 P. 1023.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 249 (Wash.) In an action to enjoin interference with a lessee's removal of improvements, a decree, based on the lessee's right to possession until payment of the appraised value of the improvements, as provided in the lease, which required the lessor to pay over the balance of the profits above the rent, though a judgment at law, was not erroneous because of the equitable nature of the pleadings.—Coliseum Inv. Co. v. King County, 131 P. 245.

§ 253 (Cal.App.) In general, a judgment cannot award damages in excess of the amount claimed in the petition.—Goodman v. Dailey, 131 P. 335.

§ 256 (Ariz.) Where two causes of action, set up in the complaint, are submitted to the jury, a general verdict for plaintiff will support an adjudication as to both causes of action.—Shannon Copper Co. v. Potter, 131 P. 157.

§ 256 (Colo.App.) General findings in a suit to reform an agreement for the transfer of water rights, with a cross-action for damages for plaintiff's misrepresentations as to the value of a stock of goods taken in exchange, were sufficient to support a decree for plaintiff, although it was silent as to any affirmative finding on the cross-complaint.—Park v. McKee, 131 P. 279.

(D) Arrest of Judgment.

§ 263 (Wyo.) Fatal defects in substance in a petition may be taken advantage of by motion in arrest of judgment.—Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43.

VII. ENTRY, RECORD, AND DOCKETING.

§ 291 (Mont.) An abstract of a justice's judgment does not make out a prima facie case that the justice had jurisdiction, though the docket has been lost, under Rev Codes, § 7071, providing that a justice's docket, or a transcript thereof, is prima facie evidence of the facts there stated, or section 7962, subs. 15 and 16, providing that it is presumed that official duty has been regularly performed, and that a court or judge was acting in his jurisdiction.—Miller v. Miller, 131 P. 23.

IX. OPENING OR VACATING.

§ 337 (Nev.) Comp. Laws, § 3163, permitting the court, in furtherance of justice, upon just terms, to relieve a party from a judgment, order or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect, should be very liberally construed in furtherance of its purpose.—Whise v. Whise, 131 P. 967.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

§ 479 (Wash.) A decree quieting title, regular upon its face, cannot be collaterally attacked.—Phillips v. Thompson, 131 P. 461.

(B) Grounds.

§ 489 (Colo.App.) A district court may decree that a judgment of a county court is void, even on collateral attack, if it affirmatively appears from the judgment roll that the county court had no jurisdiction.—*Empire Ranch & Cattle Co. v. Farmer*, 131 P. 799.

§ 495 (Okla.) Under the laws in force in Indian Territory prior to statehood, where the judgment of a domestic court comes collaterally into question, the presumption that it had jurisdiction is conclusive, unless want of jurisdiction distinctly appears.—*Hocker v. Johnson*, 131 P. 1094.

§ 497 (Ariz.) A default judgment may be collaterally attacked for nonservice of defendant, though it recites that "it was shown to the satisfaction of the court that defendant was duly and regularly served with process"; the return on the summons, which is part of the record, the summons and return, under Civ. Code 1901, par. 1443, being part of the judgment roll, showing service has not properly been made, controlling the recital of the judgment.—*Boyle v. Oro Plata Min. & Mill. Co.*, 131 P. 155.

§ 501 (Colo.) Mistakes, errors, and irregularities, although they might reverse a case on review, are not jurisdictional, and will not render the judgment void.—*Pinnacle Gold-Mining Co. v. Popst*, 131 P. 413.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

§ 525 (Kan.) A recital in the record in ejectment that a judgment on a first trial was vacated for good cause shown on application of the unsuccessful party, on notice, shows, in the absence of anything to the contrary, that the judgment was vacated as a matter of right.—*Bank of Topeka v. Sadler*, 131 P. 585.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.**(A) Judgments Operative as Bar.**

§ 565 (Kan.) The dismissal without prejudice of a motion for the allowance of a claim of a creditor of a firm seeking to intervene in a suit for an accounting between the partners does not bar an independent action on the claim.—*Graves v. Neosho Falls Bank*, 131 P. 146.

§ 570 (Kan.) Where plaintiff in ejectment had voluntarily dismissed his action after a judgment on a first trial has been set aside under a statute since repealed, allowing a second trial as a matter of right, it is a permanent abandonment of his claim, and he can maintain no further action thereon.—*Bank of Topeka v. Sadler*, 131 P. 585.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 589 (Wash.) An action to establish a legal title and obtain possession of real estate and an action to foreclose a lien for taxes assessed against the premises are independent, and an adverse judgment in the former action does not bar the latter action.—*Egbers v. Fischer*, 131 P. 1128.

§ 596 (Wash.) A judgment of a court of competent jurisdiction for plaintiff in an action to recover an installment of a note, defended on the ground that it had been obtained by fraud, from which no appeal was taken, was conclusive of that issue in a subsequent action on installments subsequently due.—*Davis v. Hibbs*, 131 P. 1135.

§ 598 (Kan.) Where the owner of lands adjacent to a permanent dam sued to recover damages because they were made subject to overflow, and the answer set up the record in a former action wherein the plaintiff recovered damages from the erection of the dam, the facts pleaded constituted *res judicata*.—*Hubbard v. Spring River Power Co.*, 131 P. 1182.

§ 617 (Kan.) Where plaintiff in ejectment has voluntarily dismissed his action after judgment had been set aside, and has thus lost a right to maintain such an action, he cannot by taking possession of the land while temporarily unoccupied assert his claim of title by way of defense.—*Bank of Topeka v. Sadler*, 131 P. 585.

XIV. CONCLUSIVENESS OF ADJUDICATION.**(A) Judgments Conclusive in General.**

§ 648 (Or.) In an action on a liquor dealer's bond for a violation of law, the plaintiff was bound to prove the breach as a new proposition without reference to a prior conviction for the same violation in the recorder's court.—*City of Woodburn v. Aplin*, 131 P. 516.

(C) Matters Concluded.

§ 743 (Cal.) A judgment establishing title under the McEnerney act in a grantee holding real estate under an enforceable parol trust does not bar the right of the grantor to enforce the trust.—*Bradley Co. v. Bradley*, 131 P. 750.

(D) Judgments in Particular Classes of Actions and Proceedings.

§ 747 (Okla.) Judgment in partition suit in the Indian territory held not a bar to an action in ejectment between the same parties to establish plaintiff's title to the land; it being impossible for title to have been properly in issue in the partition suit.—*Woodward v. De Grafenried*, 131 P. 162.

XVII. FOREIGN JUDGMENTS.

§ 818 (Okla.) The full faith and credit required to be given to the judgments of another state do not preclude recovery of damages from a creditor who has seized a debtor's exempt wages through garnishment proceedings instituted in another state without personal service upon the debtor.—*Anderson v. Canaday*, 131 P. 697.

XXI. ACTIONS ON JUDGMENTS.**(A) Domestic Judgments.**

§ 910 (Cal.App.) An action on a judgment for maintenance rendered in favor of a wife is barred by the five-year statute of limitations (Code Civ. Proc. § 336, subd. 1), and limitations will begin to run against the judgment on the date thereof.—*Simpson v. Simpson*, 131 P. 89.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 948 (Cal.App.) A judgment cannot be supported on a theory of estoppel, where the issue of estoppel is not presented by the pleadings, and where the court makes no findings thereon.—*Booth v. A. Levy & J. Zentner Co.*, 131 P. 1062.

§ 950 (Colo.App.) Where, in an action to recover possession of land sold for taxes, defendant did not plead a judgment or decree quieting its title in its answer, plaintiff was entitled to show, under a general denial in his replication, that the decree was invalid, after it had been offered as evidence of estoppel or title.—*Empire Ranch & Cattle Co. v. Farmer*, 131 P. 799.

§ 950 (Mont.) Rev. Codes, § 6571, relieving a party pleading a judgment from setting forth the facts as to jurisdiction, and providing that if such allegation be controverted he must establish such facts, does not relieve him of the burden of proving such facts if his abbreviated allegation is controverted.—*Miller v. Miller*, 131 P. 23.

§ 951 (Colo.App.) Where a judgment is offered to prove an estoppel or adjudication of facts, the judgment roll must be produced.—*Empire Ranch & Cattle Co. v. Lumelius*, 131 P. 796.

§ 956 (Mont.) Under Rev. Codes, § 7917, *held*, that there was no presumption that the rights of defendants inter sese were adjudicated in an action for the protection of water rights, and that the court properly admitted parol evidence to show that there was no controversy as between them.—*Bennett v. Quinlan*, 131 P. 1067.

If a decree in a suit to determine water rights adjudging that three defendants were the owners of four hundred inches furnished a basis for a presumption that they each owned a one-third interest, *held*, that it was *prima facie* only, and could be overturned by evidence.—*Id.*

JUDICIAL DISTRICTS.

See Statutes, § 2.

JUDICIAL NOTICE.

See Evidence, §§ 7-32.

JUDICIAL SALES.

See Executors and Administrators, §§ 326-388.

JURISDICTION.

See Corporations, § 507; Courts, § 30; Criminal Law, §§ 83-104; Executors and Administrators, §§ 336, 337, 349, 469; False Imprisonment; Maritime Liens, § 60; Receivers, § 29.

JURY.

See New Trial, §§ 44, 49, 143.

II. RIGHT TO TRIAL BY JURY.

§ 12 (Colo.App.) A defendant in an action at law is entitled, as a matter of right, to a jury trial.—*Johnson v. First Nat. Bank*, 131 P. 284.

§ 12 (N.M.) On review by the Supreme Court of an order of the corporation commission, defendant is not entitled to a jury trial, and the denial of such trial does not violate either the federal or state Constitution.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

§ 14 (Colo.App.) A complaint in an action by a bank alleging the issuance by it of a certificate of deposit in an erroneous amount, its inability to procure the depositor to surrender the certificate or to permit its correction, and praying for a mandatory injunction requiring the depositor to surrender the certificate, states a cause of action in equity.—*Johnson v. First Nat. Bank*, 131 P. 284.

§ 14 (Kan.) An action against heirs or devisees to acquire title to realty, because decedent had agreed to will it to plaintiff, being in the nature of an action for specific performance, a jury cannot be demanded as of right.—*Nelson v. Schoonover*, 131 P. 147.

§ 19 (Okla.) A disbarment proceeding under Comp. Laws 1909, § 267, being a civil proceeding, the accused cannot demand a trial by jury as a matter of right.—*State Bar Commission v. Sullivan*, 131 P. 703.

§ 25 (Cal.) There was no absolute right to a jury trial in a proceeding to appoint a guardian for one mentally incompetent in the absence of a demand therefor, since a demand was necessary by the direct provisions of Code Civ. Proc. § 1717, if the proceeding was a probate matter, and the question was discretionary if it was an equitable proceeding.—*In re Coburn*, 131 P. 352.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 103 (Cal.App.) A person called as a juror in a grand larceny prosecution was not incompetent because stating that defendants' failure to testify and the fact of their being accused would create a suspicion of guilt, where he afterwards stated that he would be governed

by the law, and would require the prosecution to prove defendants' guilt beyond a reasonable doubt, etc.—*People v. Flavin*, 131 P. 321.

A person called as a juror in a grand larceny prosecution *held* not incompetent because he had talked and read about the case, and had formed an opinion as to defendants' guilt, where he stated that he would be governed solely by the evidence and the instructions.—*Id.*

JUSTICES OF THE PEACE.

See False Imprisonment; Judgment, § 291; Time, § 10.

IV. PROCEDURE IN CIVIL CASES.

§ 127 (Cal.App.) A justice could not set aside a default on the ground of defendant's excusable neglect, where the notice of motion and the affidavit in support thereof based the motion on the ground that defendant's time for answering had not expired.—*Storey v. Mueller*, 131 P. 763.

Nor on the ground that defendant's time for answering had not expired when the judgment was entered.—*Id.*

§ 127 (Cal.App.) Where a motion to open a default in a justice's court was made within ten days after notice of the entry of the judgment, as required by Code Civ. Proc. § 859, the court did not lose jurisdiction of the application by continuing the hearing beyond the ten days on plaintiff's application.—*Townsend v. Parker*, 131 P. 766.

Under Code Civ. Proc. § 1012, affidavit of service of notice of entry of justice's judgment could not be received upon an application to open the default, as evidence of the date of service by mail, where it did not show that the party making the service and the party upon whom it was made resided or had offices in different places.—*Id.*

On an application in justice's court to open a default, where defendant's affidavit that he received notice of the entry of the judgment within ten days prior to the application, and that he had no knowledge or notice of such entry prior to that date, was uncontradicted, the court properly *held* that the application was made in time and granted the application.—*Id.*

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 159 (Okla.) Where a bond on appeal from justice court is correct in every respect, except that the statutory words "to prosecute without delay" are omitted, it is error to refuse to permit the bond to be corrected by filing a new bond.—*Roberts v. Converse*, 131 P. 539.

(B) Certiorari.

§ 194 (Wash.) The \$25 which Rem. & Bal. Code, § 6562, provides shall be awarded as damages to a successful plaintiff in an action on a paper issued for wages, if defendant does not show a sufficient excuse for default, being demanded in the complaint and awarded by the justice, is part of the "amount in controversy," within section 1910, allowing appeal from a justice when the amount in controversy exceeds \$20, so that certiorari, not allowable under section 1002, when there is a remedy by appeal, will not lie.—*State v. Superior Court for King County*, 131 P. 466, 468.

§ 197 (Cal.App.) The setting aside of a default judgment by a justice's court, without making the order conditional upon the payment of costs by defendant, was a mere error of law, not jurisdictional, which could not be corrected by certiorari.—*Townsend v. Parker*, 131 P. 766.

§ 205 (Cal.App.) In the return to a writ of certiorari to review an order of a justice of the peace setting aside a default judgment, it was proper for the justice to certify the evidence taken at the hearing on controverted jurisdictional facts.—*Townsend v. Parker*, 131 P. 766.

§ 209 (Cal.App.) Under Code Civ. Proc. § 683, where the superior court on certiorari taxed costs against a justice of the peace and another defendant, it did not err in modifying and vacating the judgment as to costs against the justice.—*Townsend v. Parker*, 131 P. 766.

LABOR.

See Master and Servant, §§ 13, 18.

LACHES.

See Corporations, § 121; Ferries; Guardian and Ward, § 146; Mandamus, § 143; Prohibition, § 18; Quieting Title, § 29; Waters and Water Courses, § 247.

LANDLORD AND TENANT.

See Action, § 48; Contracts, § 138; Counties, §§ 122, 146; Fixtures; Indians, § 16; Injunction, § 261; Mechanics' Liens, §§ 75, 263; Sheriffs and Constables, § 116; Use and Occupation.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

§ 29 (Cal.) A lease providing for the erection and maintenance of a frame and corrugated iron building within the limits of the city of San Francisco, in violation of an ordinance, *held* void in toto.—*Howell v. City of Hamburg Co.*, 131 P. 130.

III. LANDLORD'S TITLE AND REVERSION.

(B) Estoppel of Tenant.

§ 63 (Wash.) The court in unlawful detainer may not try title to the property; and, where plaintiff alleged ownership in fee, evidence that the deed to him was void was inadmissible.—*Decker v. Verloop*, 131 P. 190.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

§ 76 (Cal.App.) Where the contrary was not shown, it will be presumed that a subletting by a lessee who had covenanted not to sublet without the lessor's consent was with the consent of the lessor.—*Stevenson Bros. Co. v. Robertson*, 131 P. 326.

(C) Extensions, Renewals, and Options to Purchase or Sell.

§ 83 (Cal.) A covenant for renewal in a lease contemplates the giving of a new lease.—*Howell v. City of Hamburg Co.*, 131 P. 130.

§ 86 (Cal.) An option for an extension merely entitles the lessee to hold for the additional term under the original lease.—*Howell v. City of Hamburg Co.*, 131 P. 130.

(D) Termination.

§ 109 (Cal.App.) An agreement to surrender and accept leased premises need not be shown by express agreement, but may be implied from the facts and acts of the parties.—*Rauer's Law & Collection Co. v. Third Street Improvement Co.*, 131 P. 77.

§ 110 (Cal.App.) Where a tenant of a store abandoned it because of alterations in the building made by the landlord, so as to prevent the tenant from carrying on his business, and the landlord was notified and obtained the keys on request, and agreed to settle the question of the return of the deposit as security for rent the lease was terminated by mutual consent.—*Rauer's Law & Collection Co. v. Third Street Improvement Co.*, 131 P. 77.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

§ 157 (Or.) A lease which required the lessee to give a \$50,000 bond for the erection of a building on the property not less than 65 days before the commencement of the removal of the old building therefrom was not indefinite as to time of executing the \$50,000 bond, where it also provided for the commencement of a new building within one year from the date of the lease.—*Strode v. Smith*, 131 P. 1032.

Under a lease providing that a bond to be given by lessee for the construction of a building on the premises "shall be made to the lessors, and in form and condition as they may desire and which must be satisfactory to them," lessors could only demand a bond so framed that its conditions would include those specified in the lease, and so plain that there would be no probability of nonperformance because of its form, and could not arbitrarily refuse to accept a bond on the ground that it was not satisfactory to them, if, in fact, it met such requirements.—*Id.*

§ 157 (Wash.) The lessor of land for an amusement park, who took possession of the lessee's improvements at the termination of the lease without notice, and refused to appraise their value, as provided by the lease, and continued to rent concessions therein, *held* not entitled to contend that he did not take possession with intent to lease, nor to claim the buildings because not removed before the lease expired.—*Coliseum Inv. Co. v. King County*, 131 P. 246.

Where a lessor agreed to arbitrate the value of improvements on the land at the termination of the lease if it elected to use such buildings, but took possession and refused to arbitrate and converted buildings thereon, the measure of damages was the value of the buildings at the time of conversion, not for wreckage, but for the use they were put to; and the time they were used and may be used in the future should be considered.—*Id.*

(F) Eviction.

§ 172 (Mont.) Under a lease of premises for a lodging house, *held*, that the lessor's construction and lease of a garage on his adjoining property, so that the noise, smells, and smoke therefrom interfered with the quiet and profitable enjoyment of such house, was tantamount to an eviction justifying its tenant in quitting the premises.—*Blaustein v. Pincus*, 131 P. 1064.

§ 172 (Wash.) A tenant *held* entitled to treat as a constructive eviction the landlord's injunction sued out to prevent a sublease authorized by the lease.—*Tennes v. American Bldg. Co.*, 131 P. 201.

§ 173 (Mont.) Acts of third persons impairing the usefulness or enjoyment of demised premises do not amount to an eviction by the lessor.—*Blaustein v. Pincus*, 131 P. 1064.

§ 178 (Wash.) Where a tenant does not treat his landlord's injunction to prevent a sublease as a constructive eviction, he waives his right to assert an eviction, since there can be no constructive eviction without a surrender of possession.—*Tennes v. American Bldg. Co.*, 131 P. 201.

§ 180 (Mont.) Evidence in a tenant's action for eviction from premises leased and used as a lodging house by reason of the lessor's act in erecting and leasing a garage on adjoining premises *held* sufficient to sustain an award of damages in the amount of \$3,395.—*Blaustein v. Pincus*, 131 P. 1064.

In a tenant's action for eviction from premises leased and used as a lodging house, evidence showing a loss of business *held* admissible on the question of damages.—*Id.*

VIII. RENT AND ADVANCES.**(A) Rights and Liabilities.**

§ 194 (Cal.) Clause in a void lease *held* a mere provision for extension and not a covenant to renew; and hence no recovery of rent could be had for a part of the unexpired term after the tenant attempted to surrender.—*Howell v. City of Hamburg Co.*, 131 P. 130.

§ 199½ (Cal.) In an action for rent declaring upon the lease, provision for termination thereof by order of municipal authorities for removal of the building *held* to terminate the lease when such order was made, and to be a good defense to the action.—*Levin v. Pabst Brewing Co.*, 131 P. 118.

§ 199½ (Cal.App.) Where a lease provided that the premises should not be used except for a saloon, the fact that after the lease was made the lessee lost his license *held* no defense to an action for rent; it not appearing that the lessor refused to permit the property to be used for other purposes or that it could not be used as a lodging house.—*Burke v. San Francisco Breweries*, 131 P. 83.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 277 (Cal.App.) A landlord's right of entry for nonpayment of rent reserved in the lease can be exercised before the termination of the lease by lapse of time only after notice.—*Stevenson Bros. Co. v. Robertson*, 131 P. 326.

§ 290 (Wash.) Where a daughter took possession with the consent of her father of his property, her possession was permissive, and where he subsequently notified her to vacate or pay rent, and she refused, it became unlawful.—*Decker v. Verloop*, 131 P. 190.

§ 291 (Wash.) The court rendering judgment for plaintiff in unlawful detainer may enter judgment for double the amount of rent due from defendant.—*Decker v. Verloop*, 131 P. 190.

§ 291 (Wash.) A motion to increase the penalty of a bond *held* not to render a writ of restitution previously issued and served ineffective or make defendant's removal thereunder a voluntary surrender where no new bond was given and plaintiff directed the execution of the writ, and hence defendant could sue on the bond actually given.—*Corman v. Sanderson*, 131 P. 198.

Voluntary dismissal of action for unlawful detainer after recovery of possession *held* prima facie proof that the writ was wrongfully sued and to justify recovery on the bond especially where it was also shown that, to the landlord's knowledge, the tenant had possession under a lease from a former owner.—*Id.*

§ 292 (Wash.) In an action for wrongfully suing out a writ of restitution under which possession was recovered, the advance rent paid by the tenant, her damages on account of the removal, and her attorney's fees in successfully defending the action of unlawful detainer were recoverable.—*Corman v. Sanderson*, 131 P. 198.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, § 369; Jury, § 103; Receiving Stolen Goods.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 27 (Okla.Cr.App.) Under Comp. Laws 1909, §§ 2045, 6715, abolishing the distinction between accessories before the fact and principals, and authorizing conviction of an accessory under an accusation good as against the principal, a defendant who advised his employés to steal certain cattle and received the cattle after they were stolen could be convicted of stealing the cattle.—*Rhea v. State*, 131 P. 729.

II. PROSECUTION AND PUNISHMENT.**(A) Indictment and Information.**

§ 28 (Okla. Cr. App.) An accusation charging larceny may allege the offense to have been committed in any town, city, or county into or through which the stolen property is taken.—*Howard v. State*, 131 P. 1100.

§ 31 (N.M.) Where, under a larceny statute, the value of the stolen article is not material, it need not be alleged nor proven.—*State v. Lucero*, 131 P. 491.

§ 32 (N.M.) The ownership of a stolen animal may be laid either in the true owner or the person in lawful possession.—*State v. Lucero*, 131 P. 491.

§ 40 (Ariz.) Under an indictment charging larceny from a corporation, it was sufficient to prove that the owner was a corporation de facto doing business as such.—*Webb v. State*, 131 P. 970.

(B) Evidence.

§ 47 (Ariz.) Since, under an indictment charging larceny from a corporation, it was sufficient to prove that the owner was a corporation de facto doing business as such, its articles of incorporation, although not in full compliance with the law, were admissible as tending to show its de facto existence.—*Webb v. State*, 131 P. 970.

On a trial for larceny from a corporation, its articles of incorporation and evidence that S. was its president and secretary were sufficient evidence of its existence as a corporation to justify the admission of evidence of its ownership of the stolen property.—*Id.*

On trial for larceny of cattle, bill of sale *held* admissible to show ownership, although not recorded with the live stock sanitary board until after the commission of the offense; Laws 1905, c. 51, § 63, applying to sales of brands and marks, and not to sales of animals.—*Id.*

Under Laws 1905, c. 51, §§ 67, 68, brand tax receipt issued subsequent to larceny of cattle *held* admissible to show ownership of the brand set forth therein and, in connection with a bill of sale, to constitute prima facie evidence of ownership of the cattle bearing such brand.—*Id.*

§ 55 (Okla.Cr.App.) Evidence *held* sufficient to sustain a conviction of larceny of live stock.—*Rhea v. State*, 131 P. 729.

§ 55 (Okla.Cr.App.) Evidence in a prosecution for larceny of a horse *held* not to show that defendant should have been acquitted upon the ground that he was only the receiver of stolen goods.—*Howard v. State*, 131 P. 1100.

LAW OF THE CASE.

See Appeal and Error, §§ 1097, 1195.

LEADING QUESTIONS.

See Witnesses, § 240.

LEASE.

See Landlord and Tenant.

LETTERS.

See Criminal Law, § 442; Witnesses, § 331½.

LEX LOCI.

See Carriers, § 46; Wills, § 2.

LIBEL AND SLANDER.

See Attachment, § 105.

IV. ACTIONS.**(E) Trial, Judgment, and Review.**

§ 129 (Cal.App.) The costs imposed by Libel and Slander Act, § 7 (St. 1871-72, p. 634), al-

owing plaintiff recovering judgment \$100 for counsel fees, are penal and may only be taxed after final judgment.—*Pouchan v. Godeau*, 131 P. 879.

LICENSES.

See Corporations, § 499; Ferries; Intoxicating Liquors, §§ 45-88.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 6 (Cal.) A restaurant being primarily a public eating place, and not a place where the business of selling merchandise is carried on, is subject to a license tax under San Francisco charter (St. 1899, p. 248, § 1, subsec. 15), authorizing the imposition of business licenses except on persons engaged in selling and manufacturing goods, wares, and merchandise, etc.—*City and County of San Francisco v. Larsen*, 31 P. 366.

§ 7 (Nev.) Rev. Laws, §§ 3890-3894, inclusive (Act approved March 24, 1905 [St. 1905, p. 153] §§ 1-5), making it unlawful for an itinerant merchant to sell goods without a license, and providing that the act shall not apply to drummers and commercial travelers representing wholesale houses or to the sale of farm products, *held* unconstitutional.—*Ex parte Toddard*, 131 P. 133.

LIENS.

See Chattel Mortgages, §§ 129, 136; Factors; Logs and Logging, § 33; Maritime Liens; Mechanics' Liens; Taxation, § 531.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Attorney and Client, § 46; Judgment, § 910; Mechanics' Liens, § 132; Principal and Surety, § 149; Quieting Title, § 29.

I. STATUTES OF LIMITATION.

B) Limitations Applicable to Particular Actions.

§ 19 (Wash.) An action against the widow of plaintiff's deceased partner to recover an undivided interest in certain tide lands to which plaintiff claimed an equitable title *held* not a suit to establish a trust, but an action to recover real estate, and not barred by limitations.—*Lehman v. Heuston*, 131 P. 825.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 55 (Okla.) An action for personal injuries, being an action not arising on a contract, must under Comp. Laws 1909, § 5550, subd. 3, be brought within two years after cause of action accrues.—*Waugh v. Guthrie Gas, Light, Fuel & Improvement Co.*, 131 P. 174.

B) Absence, Nonresidence, and Concealment of Person or Property.

§ 87 (Cal.App.) Under Code Civ. Proc. § 336, subd. 1, prescribing a five-year limitation for actions on foreign judgments, and section 351, providing that an action accruing against a person out of a state may be commenced within the prescribed period, and that absence from the state is no part of such period, action on a foreign judgment against defendant who had resided in this state not more than 2½ years was not barred.—*Chappell v. Thompson*, 131 P. 82.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 96 (Cal.App.) Record of conveyance of water rights *held* not constructive notice to subsequent grantee of a mistake in the amount of water conveyed within Civ. Code, § 19, so as to bar an action to reform the conveyance within three years thereafter under Code Civ. Proc. § 338, subd. 4.—*Lillis v. Silver Creek & Panoche Land & Water Co.*, 131 P. 344.

§ 104 (Okla.) A party who wrongfully conceals material facts, or the fact that a cause of action has accrued against him, cannot plead the statute of limitations.—*Waugh v. Guthrie Gas, Light, Fuel & Improvement Co.*, 131 P. 174.

The mere failure to disclose that a cause of action exists will not prevent the running of the statute. There must be some actual artifice to prevent knowledge of the fact or some affirmative act of concealment.—*Id.*

(H) Commencement of Action or Other Proceeding.

§ 119 (Kan.) Under Code Civ. Proc. § 19 (Gen. St. 1909, § 5612), where an alias summons was issued and served more than 60 days after confession of a motion to set aside a summons, *held* that the action was not begun until the date of the alias summons.—*Brock v. Francis*, 131 P. 1179.

§ 130 (Or.) In view of L. O. L. §§ 68, 71, *held*, that under the express provisions of section 20 the time during which an appeal from a voluntary nonsuit was pending should be excluded in computing the time for the commencement of a second action.—*Hutchings v. Royal Bakery & Confectionery Co.*, 131 P. 514.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 179 (Cal.App.) Under Code Civ. Proc. § 338, subd. 4, in action based on fraud or mistake, the facts, time, and circumstances must be alleged, so that the court may determine whether the fraud or mistake was discovered within three years, it not being sufficient to merely allege such discovery within three years or ignorance at the time of the occurrence of the facts.—*Lillis v. Silver Creek & Panoche Land & Water Co.*, 131 P. 344.

LIMITATION OF LIABILITY.

See Carriers, §§ 114, 159.

LIQUIDATED DAMAGES.

See Damages, §§ 77, 80.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

See Abatement and Revival, § 15.

§ 3 (Wash.) In an action attacking the decree in an action to quiet title against unknown heirs, it will be presumed, in the absence of any allegation that a lis pendens was not filed therein, that the proceedings were regular and that a lis pendens was filed as required by Rem. & Bal. Code, § 232.—*Phillips v. Thompson*, 131 P. 461.

LIVE STOCK.

See Carriers, § 228.

LOGS AND LOGGING.

See Navigable Waters, § 39; Negligence, §§ 43, 52; Trespass, §§ 45, 46.

§ 19 (Wash.) Where the issue was whether one contracting to drive logs and deliver them in

his boom was negligent in operating the boom, evidence that the boom was not properly constructed and was of insufficient strength to securely retain the logs, and that the boom broke and the logs escaped, was admissible.—Sutherland & Brewer v. Lewis River Boom & Logging Co., 131 P. 455.

§ 33 (Idaho) Evidence in an action where an intervener claimed a lien for advances on lumber and logs of the defendant company, which were in the possession of a receiver, held to sustain findings that defendant was not indebted to the intervener, and that he was entitled to no lien.—Wittenberg v. Northern Idaho Pine Lumber Co., 131 P. 1.

LOST INSTRUMENTS.

See Evidence, §§ 178, 183.

§ 8 (Okla.) Direct proof of a written conveyance which has been lost or destroyed may be aided by the presumption arising from long peaceable possession and repeated acts of ownership, though during a time less than the limitation period.—Adkins v. Wright, 131 P. 686.

Evidence of the execution, delivery, and loss of a deed which would supply a missing link in a chain of title in a suit to quiet title, together with evidence of long peaceable possession without adverse claim and payment of taxes, is admissible on the question whether the lost deed ever existed.—Id.

LUNATICS.

See Insane Persons.

MACHINERY.

See Master and Servant, §§ 121, 201, 258.

MAGISTRATES.

See Criminal Law, § 103.

MAINTENANCE.

See Husband and Wife, § 285½.

MALICIOUS PROSECUTION.

See False Imprisonment; Trial, § 350.

I. NATURE AND COMMENCEMENT OF PROSECUTION.

§ 3 (Okla.) Where an attorney is actuated by malicious motives in bringing an action or proceeding for his client, he is liable for damages therefor.—Anderson v. Canaday, 131 P. 697.

II. WANT OF PROBABLE CAUSE.

§ 24 (Utah) Plaintiff, in an action for malicious prosecution, makes out a prima facie case as to want of probable cause by showing his discharge in a criminal prosecution upon a hearing before a magistrate.—McKenzie v. Canning, 131 P. 1172.

III. MALICE.

§ 27 (Kan.) The malice essential to a right of action for malicious prosecution is not restricted to the personal hatred, spite, or revenge of the one who instituted the prosecution.—Foltz v. Buck, 131 P. 587.

V. ACTIONS.

§ 71 (Utah) Where defendant substantially stated to counsel all the material facts known to him and upon their advice instituted a criminal prosecution in good faith and upon a well-grounded belief of plaintiff's guilt, the defense is a question for the jury.—McKenzie v. Canning, 131 P. 1172.

§ 72 (Kan.) In an action for malicious prosecution, an instruction that the prosecution with any other motive than to bring the guilty person to justice is a malicious prosecution held not erroneous, though a very condensed statement of the law.—Foltz v. Buck, 131 P. 587.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

§ 4 (Wash.) The writ of mandamus will not be allowed to issue where there is an adequate remedy by appeal.—State v. Superior Court for King County, 131 P. 1136.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 28 (Wash.) The judgment or discretion of the trial court cannot be controlled by mandamus.—State v. Superior Court for King County, 131 P. 1136.

§ 31 (Wash.) Where a trial court refuses to proceed in a cause, it may be required to do so by a writ of mandamus, without determining how the cause shall be disposed of.—State v. Superior Court for King County, 131 P. 1136.

A motion in a disbarment proceeding to set the cause for trial, or to otherwise proceed therewith, those being the only two ways in which the court could proceed, was in effect a request that if the motion to set for trial was denied the proceeding should be dismissed so that, on refusal of the request, mandamus might be maintained to compel the court to proceed.—Id.

§ 57 (Wash.) Where the court refuses to fix a supersedeas bond, he may be compelled to do so by mandamus.—State v. Superior Court of Washington for King County, 131 P. 816.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 72 (N.M.) Mandamus will not lie to compel the performance of a duty calling for the exercise of judgment and discretion.—Seward v. Denver & R. G. R. Co., 131 P. 980.

§ 73 (Idaho) A water consumer within an irrigation district who is also within a town, may by mandamus compel the district to deliver to him water under the regulations prescribed by the town.—City of Nampa v. Nampa & Meridian Irr. Dist., 131 P. 8.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 143 (Wash.) Where an order refusing a motion to set a disbarment proceeding for hearing was entered on February 25th, relator, who on March 24th applied for a writ of mandamus, was not guilty of such laches as would deprive him of his right to the writ.—State v. Superior Court for King County, 131 P. 1136.

MANSLAUGHTER.

See Homicide, §§ 63, 78.

MARITIME LIENS.

III. ENFORCEMENT.

(A) In Admiralty.

§ 60 (Wash.) The superior court has jurisdiction of an action for the price of machinery used in the construction and equipment of a vessel and for the price of machinery becoming a part of the vessel and to grant a judgment constituting a paramount lien thereon.—McCreery v. Carter, 131 P. 1125.

§ 67 (Wash.) The court, in an action for a judgment constituting a paramount lien on a vessel, for the price of machinery used in the construction and equipment thereof, and for the

price of machinery entering into and becoming a part thereof, may enter a deficiency judgment.—*McCreery v. Carter*, 131 P. 1125.

MARRIAGE.

See Divorce; Husband and Wife.

§ 20 (Ok.). Evidence that a single man and single woman, citizens of the Creek Nation, secured the consent of her parents to get married and thereafter lived together as man and wife for two years, *held* to show an agreement constituting a marriage per verba de presenti.—*Clarkson v. Washington*, 131 P. 935.

MASTER AND SERVANT.

See Commerce, § 27; Corporations, § 456; Damages; Ferries; Hospitals, § 8; Insurance, § 430; Negligence, §§ 43, 138; Telegraphs and Telephones, § 15; Trial, §§ 63, 251, 252, 295; Witnesses, § 46.

I. THE RELATION.

(A) Creation and Existence.

§ 5 (Ok.). Under a contract between a construction company and B., *held*, that a foreman whose duty it was to supervise the work and see that it was performed in accordance with the specifications, and to keep time, was engaged in duties imposed upon the company by the contract, and was not a laborer for whose compensation B. was responsible.—*Shallenberger v. Brady*, 131 P. 1096.

(B) Statutory Regulation.

§ 13 (Wash.) Laws 1911, c. 37, prohibiting the employment of females more than eight hours per day except in enumerated employments, including females employed in canning fish, does not exempt establishments within the exemption; but an employé therein, not engaged in the canning of fish, is within the act.—*State v. Pacific American Fisheries*, 131 P. 452.

§ 18 (Wash.) An instruction on the trial of an employer for violating the Womens' Eight Hour Law (Laws 1911, c. 37) *held* sufficiently favorable to accused.—*State v. Pacific American Fisheries*, 131 P. 452.

(C) Termination and Discharge.

§ 39 (Wash.) Under Rem. & Bal. Code, § 299, the variance between the allegation in a complaint seeking recovery for breach of contract of employment as to the date of the contract and proof thereof *held* immaterial.—*Cholokovitch v. Porcupine Gold Mining Co.*, 131 P. 459.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 71 (Cal.App.) In an action for services under an express contract to pay a certain monthly salary, interest should be allowed on each payment as it fell due.—*Allen v. Central Counties Land Co.*, 131 P. 78.

§ 80 (Wash.) In an action against a corporation for services rendered, evidence *held* to support a finding that the services were rendered for another corporation.—*Jensen v. T. H. Williams Co.*, 131 P. 204.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 88 (Wash.) An agreement binding one to furnish at a mine specified timbers for specified prices during a specified period does not make him an independent contractor.—*Simila v. Northwestern Improvement Co.*, 131 P. 831.

§ 97 (Wash.) It is a master's duty to guard against such danger as would be anticipated by

one of ordinary prudence.—*Villani v. Washington Brick, Lime & Sewer Pipe Co.*, 131 P. 219.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Wash.) It is a master's duty to furnish a reasonably safe place to work.—*Villani v. Washington Brick, Lime & Sewer Pipe Co.*, 131 P. 219.

§§ 101, 102 (Wash.) A master is bound to exercise reasonable care to furnish a servant a reasonably safe place to work; the term "reasonable care" meaning care commensurate with the danger to be anticipated.—*Williams v. City of Spokane*, 131 P. 833.

§§ 101, 102 (Wash.) A master being bound to furnish a servant a safe place to work is equally bound to refrain from causing the place to become unsafe by his positive act, or that of his foreman for which he is responsible.—*Marks v. Hurley Mason Co.*, 131 P. 1122.

§ 107 (Wash.) The safe place doctrine applies to the tearing down of an old building; the fact that the necessary dangers are more numerous by reason of the nature of the work not absolving the master from the exercise of care to eliminate unnecessary dangers.—*Rogers v. Valk*, 131 P. 231.

§ 107 (Wash.) A master employing explosives must exercise a degree of care for the safety of the servant commensurate with the danger reasonably to be anticipated, in order that extra hazards may be eliminated or reduced to a minimum.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

§ 107 (Wash.) Where an employé engaged at work on the side of a mountain in making a cut for a mill could not see workmen above him making a cut for a water flume, and the foreman placed brush below the cut for the flume to prevent material from rolling down, the rule of safe place in which to work applied.—*Feraglio v. Paulsen*, 131 P. 1163.

§ 113 (Cal.App.) Railroad company *held* not liable for injury to employé where the roof causing his injury is so constructed as to permit a passageway thereunder without injury to those on passing cars, and the company has discharged all duties devolving upon it in its relation with the employé.—*Campbell v. Southern Pac. Ry. Co.*, 131 P. 80.

§ 118 (Kan.) In an action against a mining company for wrongful death of an employé, it is no defense that the state mining inspector had neglected to require the appointment of a fire boss in a mine generating fire damp, as required by Gen. St. 1909, § 4903.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

Gen. St. 1909, § 4992, giving a right of action in case of loss of life from "any violation" of or "willful failure" to comply with the statute enacted for the protection of coal miners, embraces voluntary acts done in violation of the statute and voluntary inaction when the statute requires something to be done.—*Id.*

In order to constitute a "willful failure" to comply with the mining act, as the term is used in Gen. St. 1909, § 4992, it is not necessary that there be either bad purpose or determined obstinacy, but it is sufficient that there be an intentional suffering of mining operations to proceed without taking the prescribed precautionary measures.—*Id.*

The requirement of Gen. St. 1909, § 4987, that holes be drilled as a protection against fire damp in coal mines, is not met by a mere ordering of such holes to be drilled.—*Id.*

Under Gen. St. 1909, § 4987, requiring bore holes not less than 12 feet in advance of every working place in dangerous proximity to an abandoned mine suspected of containing inflammable gases, it is not necessary that bore holes be drilled a reasonable distance beyond 12

feet, although by so doing danger might be averted.—*Id.*

The mining act does not abrogate the common-law duty of coal mine owners and operators to furnish their employes safe places in which to work.—*Id.*

§ 121 (Kan.) Where a railway company maintains a manufacturing establishment, it is not relieved from compliance with factory act because the establishment is a mere incident to its business as a common carrier and because manufacturing is not within its charter powers.—*Bubb v. Missouri, K. & T. Ry. Co.*, 131 P. 575.

A separate building maintained by a railway company as a carpenter shop, containing machinery wherein lumber is sawed and converted into forms for mold patterns, repairs on buildings, etc., is a "manufacturing establishment" within Gen. St. 1909, § 4682.—*Id.*

§ 124 (Kan.) Gen. St. 1909, §§ 4986, 5006, requiring examination of coal mines generating fire damp, applies to all mines generating such gas in appreciable quantities.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

Liability attaches for the results of an explosion of gas released from an abandoned mine in dangerous proximity to working places, when its presence would have been disclosed by examinations, such as are required by Gen. St. 1909, §§ 4986, 5006.—*Id.*

§ 124 (Wash.) Foreman tearing down old building held negligent in failing to satisfy himself that a floor would sustain the added weight before directing workmen to tear down a portion of the roof so that it would fall thereon, to direct the workmen to a reasonably safe place to stand, or to adopt some other reasonably safe plan.—*Rogers v. Valk*, 131 P. 231.

§ 125 (Kan.) As used in Gen. St. 1909, § 4987, providing that bore holes shall be kept not less than 12 feet in advance of every working place in dangerous proximity to an abandoned mine suspected of containing inflammable gases, the word "suspected" does not necessarily involve knowledge, belief, or likelihood, but a slight or vague idea is sufficient.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

(C) Methods of Work, Rules, and Orders.

§ 130 (Wash.) Where a plan or method of operation deliberately adopted by a master is unnecessarily dangerous, its adoption is actionable negligence.—*Williams v. City of Spokane*, 131 P. 833.

§ 133 (Idaho) Where the place of work is inherently dangerous and signals are required for the protection of employes, and are relied upon by the employes, it is the master's nonassignable duty to give such signals.—*Lucey v. Stack-Gibbs Lumber Co.*, 131 P. 897.

§ 137 (Colo.App.) Where an employer instructing an employe to varnish the top of elevators in the building knew that the elevators would be running, it was his duty to exercise at least ordinary care in warning the employe of contemplated movements of such elevators.—*Finding v. Gitzen*, 131 P. 1042.

§ 137 (Wash.) In an action for injuries to plaintiff by falling from a concrete pier in course of construction with a part of the form which he had been directed to remove, defendant's plan for removing such forms without providing adequate supports held actionable negligence as failing to provide a safe plan and method of work.—*Williams v. City of Spokane*, 131 P. 833.

§ 141 (Idaho) A master engaged in a hazardous business must promulgate such regulations as will afford reasonable protection to his employes, and for negligence in not doing so he is liable.—*Lucey v. Stack-Gibbs Lumber Co.*, 131 P. 897.

(E) Fellow Servants.

§ 170 (Colo.App.) Where an employer, instructing an employe to varnish the top of ele-

vators in a building, knew that the elevators would be running, he must exercise at least ordinary care in furnishing a competent pilot for the elevators.—*Finding v. Gitzen*, 131 P. 1042.

§ 185 (Idaho) Negligence of co-employe engaged with plaintiff in felling trees in failing to give the proper signal held to be the negligence of the employer, for which it was liable, and not merely the negligence of a fellow servant.—*Lucey v. Stack-Gibbs Lumber Co.*, 131 P. 897.

A master cannot instruct his servant to perform a nonassignable duty, and thereby escape liability for injury resulting to an employe where the servant neglects to perform such duty.—*Id.*

§ 190 (Wash.) Where plaintiff was injured by the act of his foreman in loosening a brace on which plaintiff stood at the foreman's direction, and without warning from him, the foreman's act was not a mere detail of the work, but negligence in the performance of his duty as a vice principal.—*Marks v. Hurley Mason Co.*, 131 P. 1122.

The rule that a master is not liable for injuries caused by a defect in a scaffold constructed by the workmen from suitable materials furnished held inapplicable to a case of injury to a servant by the negligence of his foreman in loosening a brace on which the servant stood by the foreman's direction without warning to him.—*Id.*

§ 196 (Wash.) A carpenter engaged in framing timbers for the roof of a railroad roundhouse held a fellow servant of other carpenters engaged in erecting a scaffold, and could not recover for injuries sustained by a fall due to the insufficient nailing of a board forming a part of the scaffold.—*Eckert v. Sound Construction & Engineering Co.*, 131 P. 1121.

§ 201 (Kan.) Where an injury has occurred through negligent failure of an employer to warn a servant, a recovery may not be defeated by evidence of negligence of a fellow servant, while the employe was operating the machinery by which he was injured.—*Seward v. Kaw Valley Ice & Cold Storage Co.*, 131 P. 568.

(F) Risks Assumed by Servant.

§ 203 (Wash.) A servant usually assumes only the risk of those ordinary dangers necessarily incident to the work.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

§ 204 (Kan.) Assumed risk is not a defense to an action prosecuted under the mining act for loss of life, due to failure to take precautions against fire damp.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

§ 205 (Cal.App.) An inexperienced employe in the generating department of a gas factory may, while working in that department, rely on the employer's assurances of safety, unless by observation he learns of dangers.—*Mulholland v. Western Gas Const. Co.*, 131 P. 110.

§ 205 (Wash.) A servant engaged upon the construction of a temporary arch, requiring engineering oversight, had a right to proceed with his work in confidence that the master had guarded against such dangers as might arise from outside causes, and hence did not assume the risk of the falling of the arch from an outside cause as a heavy wind, as distinguished from those incidental to the work itself.—*Wolpers v. City of Spokane*, 131 P. 230.

§ 206 (Wash.) An employe assumes the ordinary risks incident to the work in which he is engaged, and the employer has furnished him a safe place where the dangers are known or are as apparent to him as to the employer.—*Feroglio v. Paulsen*, 131 P. 1163.

§ 217 (Wash.) Equal knowledge of a danger is not alone the test of whether a servant assumes extraordinary and unnecessary risks created by the master's negligence; and added danger, in order to be assumed, must be patent, open, obvious, and voluntarily, as well as know-

ingly, encountered.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

§ 217 (Wash.) An employé may not assume that the employer has furnished him a safe place, where the dangers are known or are as apparent to him as to the employer.—*Feroglio v. Paulsen*, 131 P. 1163.

§ 219 (Wash.) The servant assumes those risks which are open and obvious and incident to the work, while the master is bound to exercise reasonable care, considering the nature of the work in hand, to eliminate from the place of work unnecessary dangers, and to keep the servant's environment reasonably safe.—*Rogers v. Valk*, 131 P. 231.

§ 219 (Wash.) Whether a servant assumes the risk of extraordinary dangers resulting from a dangerous plan depends on the obviousness and imminence of the danger, and the servant's appreciation thereof.—*Williams v. City of Spokane*, 131 P. 833.

A servant only assumes the risk when the danger is obvious and apparent alike to the servant and the master, equally appreciated by both, and is so imminent and certain of disastrous results as to make it incumbent on the servant to quit work.—*Id.*

§ 222 (Wash.) A servant assumes the risk by obeying an order only when the danger therefrom is open, patent, and obvious to all parties, so plain that reasonable men might not differ as to its existence, and so imminent that a reasonably prudent man would not obey the order.—*Rogers v. Valk*, 131 P. 231.

§ 223 (Wash.) While a servant assumes all the usual risks, he does not assume the risks arising from a sudden peril not incident to his employment.—*Villani v. Washington Brick, Lime & Sewer Pipe Co.*, 131 P. 219.

§ 226 (Colo.App.) An employé's assumption of the risks ordinarily incident to the service does not relieve the employer from using reasonable care in furnishing competent servants, reasonably safe appliances, and a reasonably safe place in which to work, as well as reasonable care to prevent injuries to the employé.—*Finding v. Gitzen*, 131 P. 1042.

§ 226 (Wash.) An employé engaged at work on the side of a mountain in making a cut does not assume dangers not incident to the work, and does not assume risks resulting from the master's negligence in failing to protect him from workmen above him.—*Feroglio v. Paulsen*, 131 P. 1163.

(G) Contributory Negligence of Servant.

§ 228 (Kan.) Contributory negligence is not a defense to an action prosecuted under the mining act for loss of life, due to failure to take precautions against fire damp.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

§ 233 (Wash.) Where a master supplied a safe way through its sand bunkers, a servant who in his haste chose a more dangerous course cannot recover for injuries resulting therefrom.—*Garstad v. Pioneer Sand & Gravel Co.*, 131 P. 1168.

§ 245 (Colo.App.) An employé working at the time of an accident at the very place and time the employer had instructed him to work, and doing the work he had instructed him to do, is not chargeable with negligence by reason of working at such time and place.—*Finding v. Gitzen*, 131 P. 1042.

§ 245 (Wash.) A servant is guilty of contributory negligence by obeying an order only when the danger therefrom is open, patent, and obvious to all parties, so plain that reasonable men might not differ as to its existence, and so imminent that a reasonably prudent man would not obey the order.—*Rogers v. Valk*, 131 P. 231.

A workman tearing down an old building was not guilty of contributory negligence in

obeying an order of the foreman to pull down a portion of the roof so that it would fall on the floor on which he was standing, and which gave way under the added weight, unless there was a safer place to stand, of which he knew.—*Id.*

§ 246 (Wash.) Where a servant is injured as the result of a sudden peril not incident to his employment, he is not chargeable with contributory negligence because he failed to exercise a deliberation which one of ordinary prudence would do when confronted with a known danger.—*Villani v. Washington Brick, Lime & Sewer Pipe Co.*, 131 P. 219.

§ 247 (Colo.App.) Drunkenness of an employé is not of itself negligence, unless such a condition caused or contributed to the accident complained of.—*Finding v. Gitzen*, 131 P. 1042.

(H) Actions.

§ 252 (Okla.) A contract with a railway shop employé, providing that failure of the employé to give notice of injury within 30 days "shall be a bar to the institution of any suit on account of such injuries," being violative of the express provisions of Const. art. 23, § 9, is void.—*Brakebill v. Chicago, R. I. & P. Ry. Co.*, 131 P. 540.

A provision of an employé's contract that failure to give notice of injury within 30 days should bar any action for such injury, which contract could be terminated at the option of either party, was abrogated by the adoption of Const. art. 23, § 9, making void any such contract, where the injury sued for did not occur until the adoption of the Constitution.—*Id.*

§ 258 (Kan.) The issue of negligence of an employer in failing to provide a safe place in which to work may be presented by allegations of specific acts or omissions without in so many words referring to the safety of the working place.—*McIntosh v. Standard Oil Co.*, 131 P. 151.

§ 258 (Kan.) In an action for damages under the factory act for failure to provide a safeguard for a circular saw, it is not necessary that plaintiff should have alleged the practicability of such a safeguard.—*Bubb v. Missouri, K. & T. Ry. Co.*, 131 P. 575.

§ 259 (Wash.) An employé suing for a personal injury must, to state a cause of action, allege that the injury was inflicted by persons for whose acts the employer is responsible.—*Simila v. Northwestern Improvement Co.*, 131 P. 831.

§ 264 (Wash.) Where a coal miner was injured by a car which another miner lost control of and which ran down the incline and struck him, *held*, that the term "obstructions," as used in the complaint, charging that such obstructions caused the second miner to lose control of his car, includes a depression so that proof that the second miner stumbled in a depression did not constitute a variance.—*La Caff v. Roslyn-Cascade Coal Co.*, 131 P. 194.

§ 264 (Wash.) That the person causing an injury to an employé was an independent contractor of the employer may be shown under the general denial, whether the complaint specifically points out the particular persons charged with causing the injury, or contains a mere general allegation in that respect.—*Simila v. Northwestern Improvement Co.*, 131 P. 831.

§ 265 (Cal.App.) In an employé's action for injuries, the burden is on plaintiff to affirmatively prove his employer's negligence.—*Campbell v. Southern Pac. Ry. Co.*, 131 P. 80.

That an employé is injured in the course of his employment raises no presumption of negligence on the part of his employer.—*Id.*

§ 265 (Wash.) Presumptively one employed to work on the premises of another for the latter's benefit is an employé, and the employer, seeking to avoid liability on the ground that the

employé is an independent contractor, has the burden of establishing it.—*Simila v. Northwestern Improvement Co.*, 131 P. 831.

§ 270 (Okla.) In a suit for the death of an engineer by collision with a switch engine, it was error to exclude evidence of a custom that a rule requiring decedent to take a side track, which he failed to do, had been abandoned and disregarded with knowledge of defendant employer.—*Clemens v. St. Louis & S. F. R. Co.*, 131 P. 169.

§ 270 (Or.) Where the jury viewed the machine which caused the injury to a servant, evidence of changes since the accident is admissible.—*Marien v. M. J. Walsh & Co.*, 131 P. 505.

§ 276 (Cal.App.) Where an employé was injured in a gas factory by being struck by an iron plate moved by an explosion of a gas tank, and the explosion and the moving of the plate happened simultaneously, the jury could find that the explosion was the proximate cause of the injury.—*Mulholland v. Western Gas Const. Co.*, 131 P. 110.

§ 276 (Kan.) Evidence in an action for the wrongful death of a mine employé from an explosion of fire damp held to sustain a verdict and findings for plaintiff.—*Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617.

§ 278 (Cal.App.) In an action for injuries to an employé in a gas factory, caused by an explosion of a gas tank by sparks from a generator falling into it, evidence held to support the finding of actionable negligence by the employer in causing the opening into which the sparks fell to be left uncovered.—*Mulholland v. Western Gas Const. Co.*, 131 P. 110.

§ 278 (Kan.) Testimony of witnesses describing a circular saw and the danger to be apprehended from it held sufficient to sustain a finding that it was practicable to safeguard it.—*Bubb v. Missouri, K. & T. Ry. Co.*, 131 P. 575.

§ 278 (Wash.) Evidence in a servant's action for injuries from the falling of a temporary arch on which he was working, in which defendant claimed that its fall was due to an unusual and violent windstorm which ordinary prudence could not have guarded against, held to sustain a verdict for plaintiff.—*Wolpers v. City of Spokane*, 131 P. 230.

§ 278 (Wash.) Where plaintiff, while employed in a sawmill, was injured by the automatic reversal of certain rolls, the jury might find negligence in defendant's not having the rolls properly adjusted, though there was no proof of the specific defect that caused them to reverse.—*Wainwright v. United States Lumber Co.*, 131 P. 820.

§ 284 (Wash.) Whether one was an independent contractor held, under the evidence, for the jury.—*Simila v. Northwestern Improvement Co.*, 131 P. 831.

§ 286 (Kan.) The question whether, in the exercise of reasonable care, an employer should have warned an inexperienced employé of the danger in starting a drivewheel before he directed him to do so is one of fact.—*Seward v. Kaw Valley Ice & Cold Storage Co.*, 131 P. 568.

§ 286 (Or.) In an action by an injured servant, evidence of the master's negligence held sufficient to go to the jury.—*Marien v. M. J. Walsh & Co.*, 131 P. 505.

§ 286 (Wash.) In an action by a miner who was run down by a coal car which another miner was lowering on the incline behind him, held that, under the evidence, the question whether the master furnished defendant with a reasonably safe place to work was for the jury.—*La Caff v. Roslyn-Cascade Coal Co.*, 131 P. 194.

§ 286 (Wash.) Evidence held to make a question for the jury as to whether a foreman in charge of the work of tearing down an old building was negligent in adopting a dangerous plan of work, or in failing to tell work-

men of a safer place to stand.—*Rogers v. Valk*, 131 P. 231.

§ 286 (Wash.) Whether it was negligence for an employer, in blasting, to explode several charges of powder simultaneously with only one report, making it impossible to know whether all had exploded, held to be a question for the jury.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

§ 286 (Wash.) In an action for injuries to a servant by being thrown against a cut-off saw, evidence held to require the submission to the jury of the question of defendant's negligence in permitting the appliances of the mill to be and remain in a defective condition and failing to inform plaintiff of the danger.—*Wainwright v. United States Lumber Co.*, 131 P. 820.

§ 287 (Wash.) In an action for injuries to a servant by the alleged negligence of plaintiff's foreman, whether he was a fellow servant or vice principal was a question of fact for the jury.—*Marks v. Hurley Mason Co.*, 131 P. 1122.

§ 288 (Cal.App.) Whether an employé in a gas factory, injured by an explosion of a gas tank caused by sparks from a generator, assumed the risk held for the jury.—*Mulholland v. Western Gas Const. Co.*, 131 P. 110.

§ 288 (Wash.) A coal miner run down by a car which another miner lost control of in the incline held not, as matter of law, to assume the risk of injury from the accident which was caused by defects in the track.—*La Caff v. Roslyn-Cascade Coal Co.*, 131 P. 194.

§ 288 (Wash.) Whether the danger of obeying an order to pull down a part of the roof of a building so that it would fall on the floor on which the workmen were standing was so obvious that they assumed the risk held to be for the jury.—*Rogers v. Valk*, 131 P. 231.

§ 288 (Wash.) Whether a servant assumes unnecessary risks imposed by the master's negligence is usually a question of fact.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

Whether the danger from an employer's negligence in exploding blasts simultaneously with only one report, so that it could not be determined whether all had exploded, was so imminent and certain that an employé assumed the risk by continuing in the employment held to be a question for the jury.—Id.

§ 288 (Wash.) In an action for injuries to a servant from a fall from a bridge pier in process of construction, plaintiff's assumption of risk held a question for the jury.—*Williams v. City of Spokane*, 131 P. 833.

§ 289 (Cal.App.) Whether an employé in a gas factory, injured by an explosion of a gas tank caused by sparks from a generator falling into it, was guilty of contributory negligence held for the jury.—*Mulholland v. Western Gas Const. Co.*, 131 P. 110.

§ 289 (Wash.) A coal miner required to lower empty cars down the incline, who was injured by a car which got away from a miner following him, held not guilty of contributory negligence, as a matter of law, in stopping his car a moment so he could more effectually brake it.—*La Caff v. Roslyn-Cascade Coal Co.*, 131 P. 194.

§ 289 (Wash.) Where an employé was injured by having his finger crushed on an elevator drum by the elevator cable when it suddenly started without cause, whether plaintiff by catching hold of the wrong cable acted as a prudent man would have done was for the jury.—*Villani v. Washington Brick, Lime & Sewer Pipe Co.*, 131 P. 219.

§ 289 (Wash.) In a workman's action for injuries, caused by the floor of a building which was being torn down giving way under the weight of a portion of the roof which he had been ordered to pull down, evidence as to whether there was any safer place for him to stand, of which he knew, held to make a ques-

tion for the jury as to his contributory negligence.—*Rogers v. Valk*, 131 P. 231.

§ 289 (Wash.) In an action for injuries to a workman engaged in blasting, sustained, while cleaning out holes after charges of powder were exploded, by the steel drill which he was using exploding a charge not previously exploded, evidence held to make a question for the jury as to whether he was negligent in using the drill.—*Jobe v. Spokane Gas & Fuel Co.*, 131 P. 235.

§ 289 (Wash.) In an action for injuries to a servant from a fall from a concrete bridge pier in process of construction, whether plaintiff was negligent was for the jury.—*Williams v. City of Spokane*, 131 P. 833.

§ 293 (Wash.) Where plaintiff was injured by the automatic reversal of certain rolls in a saw-mill, but there was no direct evidence that defendant knew of the defect, the court properly charged that, if it had existed so long that defendant ought to have known it, it would be charged with knowledge as a matter of law.—*Wainwright v. United States Lumber Co.*, 131 P. 820.

Where a servant was injured by the involuntary reversal of certain rolls, the court properly charged that if defendant knew of the defect and placed plaintiff to work on the rolls, without warning him, plaintiff was entitled to recover.—*Id.*

§ 297 (Wash.) A special verdict in an action for injuries to an employé that the negligence of the foreman caused the accident is consistent with the general verdict for plaintiff.—*Feroglio v. Paulsen*, 131 P. 1163.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302 (Wash.) Where defendant's servant, by permission of defendant's wife, took his automobile, and, while using it on a personal errand of his own or of his father, ran into and injured plaintiff, who was standing in the public street, the accident occurred while the servant was acting beyond the scope of defendant's employment, and hence defendant was not liable.—*Ludberg v. Barghoorn*, 131 P. 1165.

(B) Work of Independent Contractor.

§ 318 (Or.) A general contractor is not liable to a servant of an independent contractor for personal injuries caused by the negligence of such independent contractor, who was in possession of the premises, under Laws 1911, p. 16, relating to the duties of owners, contractors, subcontractors, or corporations, or persons whatsoever, engaged in the construction of any buildings, etc.—*Lawton v. Morgan, Fliedner & Boyce*, 131 P. 314.

(C) Actions.

§ 330 (Wash.) Evidence, in an action for personal injuries by being struck by defendant's automobile on a public street, held to establish, that the errand upon which the automobile was being run by defendant's servant was not for defendant, but only of the driver personally or of his father who had obtained the use of it for his own private purpose.—*Ludberg v. Barghoorn*, 131 P. 1165.

The fact that the automobile by which plaintiff was struck and injured was admitted to belong to defendant and that its driver was the employé of defendant put defendant upon proof that the automobile was not used in his business or for his employment.—*Id.*

§ 332 (Wash.) Under Rem. & Bal. Code, § 340, providing for the direction of verdicts, held that, where defendant in an action for injuries from being struck by his automobile, conclusively showed that it was not being used in

his employment but on business of some other person, the court properly directed a judgment for defendant.—*Ludberg v. Barghoorn*, 131 P. 1165.

MAXIMS.

See Equity.

MEASURE OF DAMAGES.

See Damages, §§ 113, 117.

MECHANICS' LIENS.

See Appeal and Error, § 719.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 20 (Colo.) Under Rev. St. 1908, § 4027, providing that any lien provided for by the act shall extend to any assignable, transferable, or conveyable interest of the owner in land upon which the building is erected, a mechanic's lien may attach to a leasehold interest.—*Horn v. Clark Hardware Co.*, 131 P. 405.

II. RIGHT TO LIEN.

(A) Nature of Improvement.

§ 32 (Colo.) An engine and boiler which were attached to the ground in a building of the plant, and used to generate motive power which was communicated to shafting attached to the building which operated other machinery, held fixtures, and subject to a mechanic's lien as a part of the leasehold estate.—*Horn v. Clark Hardware Co.*, 131 P. 405.

(B) Services Rendered and Materials Furnished.

§ 47 (Kan.) The lumber furnished and used in making forms for a concrete structure as provided by the contract and specifications held lienable material within Mechanic's Lien Law (Code Proc. Civ. §§ 649-662 [Gen. St. 1909, §§ 6244-6257]), and within the provisions of a surety company's bond prescribed by Code Civ. Proc. § 660 (Gen. St. 1909, § 6255), obligating the contractor to pay all indebtedness incurred for material which might become the basis of a lien.—*Chicago Lumber Co. v. Douglas*, 131 P. 563.

§ 48 (Colo.) Under Rev. St. 1908, § 4025, a materialman furnishing in good faith materials to a contractor for use in the building, and delivering the same on the ground, is entitled to a lien, though part of the materials were not used in the building.—*B. F. Salzer Lumber Co. v. Lindenmeier*, 131 P. 442.

§ 52 (Colo.) A materialman furnishing materials to a contractor, with knowledge that the contractor is engaged in the construction of two buildings for different persons, is not entitled to a lien on either building, in the absence of an agreement that the materials should be used in such building.—*B. F. Salzer Lumber Co. v. Lindenmeier*, 131 P. 442.

(C) Agreement or Consent of Owner.

§ 75 (Cal.) An owner of a lot was chargeable with constructive notice of the construction of lienable improvements made by a lessee where the lease required such improvements, as was another lessor under a lease which did not require, but which contemplated, the making of such improvements.—*S. H. Harmon Lumber Co. v. Brown*, 131 P. 368.

Owners of adjoining lots who leased them under leases requiring or contemplating the construction of improvements thereon were chargeable with notice of the construction of a single building extending over both lots, where, by diligent inquiry, they would have discovered that the building was being erected under single

authorization of persons claiming a leasehold interest in both lots.—Id.

(E) Subcontractors, and Contractors' Workmen and Materialmen.

§ 113 (Cal.) Under Code Civ. Proc. § 1184, the owner of a building on being given notice of claims against the contractor must withhold enough to meet them from the first payments due the contractor; and his failure to do so cannot affect the rights of others later giving him like notice.—*Diamond Match Co. v. Silberstein*, 131 P. 874.

The provision of a building contract for certain payments to the contractor as the work progresses is subordinate to Code Civ. Proc. § 1184, requiring the owner on notice of claims for work and material to withhold from the first moneys due to the contractor enough to answer such claims.—Id.

Under Code Civ. Proc. § 1184, notice to the owner of a building of claims against the contractor serves as an equitable garnishment; and it is not necessary to liability of the owner for the claims that liens be established therefor.—Id.

§ 115 (Cal.) Prematurely making a payment which, under a building contract, was to be made to the contractor on completion of the building, could not avail the owner to defeat either those established liens or those who, under Code Civ. Proc. § 1184, served timely notices on the owner to withhold from the contractor money to answer their claims for labor and material.—*Diamond Match Co. v. Silberstein*, 131 P. 874.

III. PROCEEDINGS TO PERFECT.

§ 132 (Colo.) The owner's acceptance of the building from the principal contractor would not start limitations running against one furnishing materials to such contractor, where substantial materials were put into the building after such acceptance.—*Curtis v. Nunns*, 131 P. 403.

§ 156 (Colo.) Since, under Rev. St. 1908, § 4025, providing that if the contract between the owner and original contractor is not filed labor done is deemed done at the owner's personal instance, a subcontractor performing labor before the contract is filed occupies the same position as the principal contractor, and a copy of the lien statement need not be served upon the owner by him, as is required by section 4033 to give a lien to subcontractors.—*Curtis v. Nunns*, 131 P. 403.

§ 157 (Colo.) The fact that certain articles furnished in the construction of a plant were not lienable would not defeat the entire liens of mechanics' lien claimants, but they would be entitled to liens for the value of such articles furnished as were lienable.—*Horn v. Clark Hardware Co.*, 131 P. 406.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

§ 161 (Cal.) Claimants for labor and material done for and furnished a building contractor, having served notice of their claims on the building owner under Code Civ. Proc. § 1184, may recover interest thereon of him from the time provided by the contract for the last payment to the contractor.—*Diamond Match Co. v. Silberstein*, 131 P. 874.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(B) Bond or Deposit to Prevent or Discharge Lien.

§ 227 (Kan.) In an action on a surety company's bond to discharge liens for material furnished a building contractor, held no defense that money paid the contractor by the owner was applied by the latter in the discharge of an earlier indebtedness for material used on other

buildings.—*Chicago Lumber Co. v. Douglas*, 131 P. 563.

(C) Extinguishment, Release, or Payment.

§ 231 (Or.) Where the building was destroyed before completion a mechanic, under L. O. L. §§ 7416, 7417, 7419, providing for mechanics' liens, will not take any lien upon the land of defendant, who did not own the building or cause it to be constructed.—*Chenoweth v. Spencer*, 131 P. 302.

VII. ENFORCEMENT.

§ 263 (Colo.) Rev. St. 1908, § 4035, providing that the owner of the property to which a mechanic's lien shall have attached and all other parties claiming any interest therein shall be made parties to the proceedings, would not require the lessor owner to be made a party to a mechanic's lien foreclosure against the lessee.—*Horn v. Clark Hardware Co.*, 131 P. 406.

§ 291 (Cal.) Judgment against the owner of a building for one who has merely served on him under Code Civ. Proc. § 1184, notice of claims against the contractor, and has not established a lien, should not provide for its payment out of proceeds of the building; the remedy being by execution.—*Diamond Match Co. v. Silberstein*, 131 P. 874.

MEETINGS.

See Corporations, § 196.

MERCHANTS.

See Licenses, § 7.

MILEAGE.

See Sheriffs and Constables, § 61.

MINES AND MINERALS.

See Action, § 45; Customs and Usages; Death, § 31; Evidence, § 7; Fixtures; Master and Servant, §§ 88, 118, 124, 264, 276, 286, 288, 289.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

§ 59 (Colo.) In an action to recover back the purchase price of a mining claim which plaintiffs had bought because of defendants' fraudulent misrepresentations, evidence that defendants exhibited a fake check for a large amount as showing the price one of them paid for a share in the mine is admissible.—*Springhetti v. Hahnwald*, 131 P. 266.

MISREPRESENTATION.

See Estoppel; Evidence, § 434; Fraud; Payment, § 89; Vendor and Purchaser, § 33.

MISTAKE.

See Banks and Banking, § 152; Cancellation of Instruments; Compromise and Settlement, § 19; Contracts, § 93; Estoppel; Evidence, § 433; Fraud, § 13; Vendor and Purchaser, §§ 31, 82, 334.

MODIFICATION.

See Vendor and Purchaser, § 82.

MONEY RECEIVED.

See Vendor and Purchaser, § 334.

MONUMENTS.

See Executors and Administrators, § 261.

MORTGAGES.

See Chattel Mortgages; Principal and Agent, § 31; Subrogation.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 32 (Okla.) Under Comp. Laws 1900, § 1196 (Sess. Laws 1897, c. 8, § 12), a deed absolute on its face, but intended to be defeasible, is a mortgage.—Kinney v. Heatherington, 131 P. 1078.

As used in Comp. Laws 1900, § 1196 (Sess. Laws 1897, c. 8, § 12), providing that every instrument purporting to be an absolute conveyance but intended to be defeasible shall be deemed a mortgage, the word "defeasible" means capable of being, or liable to be, avoided, annulled, or undone.—Id.

A quitclaim deed absolute upon its face, which the evidence showed the parties intended should be defeasible and not divest the grantor of any beneficial interest in the land, held a mortgage.—Id.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

§ 134 (N. M.) Where a mortgage deed specifically described certain real estate and concludes with the words, "and all other real estate which we may own in C. County, New Mexico, or have an interest in," nothing passes under such concluding clause, except such property as is then vested in grantors by legal title.—Ames v. Robert, 131 P. 994.

(D) Lien and Priority.

§ 163 (N. M.) A deed, though not recorded, is good between the parties and divests the title of the grantor so that it does not pass to a subsequent mortgagee who takes a conveyance only of the estate belonging to the grantor at the time of the grant.—Ames v. Robert, 131 P. 994.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 218 (Or.) In view of L. O. L. § 429, held, that section 426, which was part of Sess. Laws 1903, p. 252, and provides that no deficiency judgment could be recovered upon the foreclosure of a purchase-money mortgage, did not preclude the holder of a note given for the purchase price of land and secured by the mortgage from disregarding the mortgage, and bringing an action for personal judgment on the note.—Page v. Ford, 131 P. 1013.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 258 (Cal.) Since a mortgaged real estate note is not negotiable, a transferee thereof from the mortgagee takes subject to all equities between the original parties.—Taylor v. Jones, 131 P. 114.

Defense of failure of consideration held available against the transferee of a second mortgage on real estate.—Id.

§ 267 (Cal. App.) The fact that a mortgagor, after conveying the land, took an assignment of the mortgage in the name of the attorney employed by the mortgagee to foreclose, was not fraudulent on the part of the mortgagor as to his grantee who had assumed payment.—Beach v. Waite, 131 P. 880.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 283 (Cal. App.) The grantee of mortgaged lands who agrees to pay the indebtedness be-

comes the principal debtor of the mortgagee with the mortgagor as surety.—Beach v. Waite, 131 P. 880.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

§ 410 (Okla.) The existence of a prior mortgage in excess of the value of the land does not disentitle a junior mortgagee to a decree of foreclosure.—Kahn v. McConnell, 131 P. 682.

§ 417 (Cal. App.) A mortgagor who has conveyed the mortgaged land may afterwards purchase and take an assignment of the mortgage and foreclose it against his own grantee who had assumed payment.—Beach v. Waite, 131 P. 880.

(F) Pleading and Evidence.

§ 460 (Or.) The burden was upon defendant, in an action to foreclose, to prove an alleged agreement to extend the time upon a secured note, and that additional interest was paid and accepted pursuant to such agreement.—Lovelace v. Meyer, 131 P. 1028.

(J) Sale.

§ 534 (Kan.) At a foreclosure sale the purchaser takes the title of all the parties to the action.—Ferguson v. Cloon, 131 P. 144.

Where one having a reversionary interest prosecutes a foreclosure against mortgagors whose interest is subject to that right, without claiming the reversion, and causes the property to be sold, he is estopped from asserting title under the reversion.—Id.

(O) Operation and Effect.

§ 587 (Wash.) A mortgage foreclosure and sale in a suit brought by the mortgagee and defended by the administrator of the mortgagor did not divest the title of the mortgagor's non-resident heir.—Phillips v. Tompson, 131 P. 461.

MOTIONS.

See Courts, § 486; Criminal Law, § 801; Judgment, § 159; Justices of the Peace, § 127; New Trial, § 116; Pleading, §§ 349, 359.

§ 44 (Cal. App.) Where an application to renew a motion to vacate a judgment, made about a month after the original motion was denied, did not show why the same proofs then offered could not have been offered at the hearing of the first motion, the application to renew was properly denied.—Beaumont v. Midway Provident Oil Co., 131 P. 106.

MOTIVE.

See Evidence, § 151.

MUNICIPAL CORPORATIONS.

See Constitutional Law, §§ 31, 48; Counties; Dedication; Easements, §§ 5, 21, 61; Eminent Domain, §§ 119, 178; Evidence, § 32; Ferries; Gas, § 14; Injunction, § 85; Intoxicating Liquors, §§ 10, 45-88; Landlord and Tenant, § 29; Schools and School Districts; Street Railroads; Towns; Weights and Measures, §§ 1, 6.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(A) Incorporation and Incidents of Existence.

§ 7 (Or.) Under L. O. L. § 3206, the county court may grant a petition for the incorporation of a municipality even though the same includes tide and agricultural lands lying within the boundaries of the county.—State v. Bay City, 131 P. 1038.

§ 12 (Or.) Where the journal entry of the county court granting a petition for the in-

corporation of a municipality did not correctly contain the order made in that it did not correctly describe the territory of the Corporation, the error may be corrected by an order nunc pro tunc which will validate the description.—*State v. Bay City*, 131 P. 1038.

The incorporation of a municipality is not invalid for vagueness of description where the beginning point was block 20 and there was only one block 20 appearing on any plat of the town.—*Id.*

In view of L. O. L. § 878, the description of land incorporated in a municipality will be held sufficient where there are monuments which will enable the last call to be run, even though the courses and distances fixed are not correct.—*Id.*

§ 18 (Or.) Persons aggrieved or desiring to object to the inclusion of their land within the limits of a municipality must present their objections at the hearing on the petition for incorporation and correct any errors of the county court by review or appeal, and cannot subsequently test the validity of the proceedings by quo warranto.—*State v. Bay City*, 131 P. 1038.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 29 (Or.) A municipality, being an arm of the state, may include within its territorial boundaries state property, such as a state institution, so long as the municipal laws do not encroach upon the sovereign rights of the state.—*Day v. City of Salem*, 131 P. 1028.

§ 34 (Or.) The constitutional provision that a warning clause against illegal signing shall be placed at the head of an initiative petition is not mandatory, and its omission does not render the petition void.—*Day v. City of Salem*, 131 P. 1028.

§ 43 (Or.) Under L. O. L. § 3206, providing for the vacation of lots or streets in unincorporated towns, the vacation of a block contained in the original plat of the town cannot be had without the application provided for in the statute.—*State v. Bay City*, 131 P. 1038.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

§ 48 (Wash.) In view of Spokane Charter, §§ 22, 23, 119, 120, *held*, that the adoption of the commission form of government did not repeal Ordinance No. A-4658, regulating the construction and use of buildings, because abolishing the board of public works; the duties of that board being given to the commissioner of public works.—*City of Spokane v. Lemon*, 131 P. 853; *Same v. Wilson*, *Id.* 856.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 64 (Mont.) Municipal corporations are relieved to a considerable extent from legislation respecting their private or proprietary functions; the theory of local self-government for municipal corporations being established in this state.—*Hersey v. Nelson*, 131 P. 30.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 110 (Colo.) Under Rev. St. 1908, § 6673, where part of an ordinance was omitted from the ordinance as published, it was in force as published, and the unpublished portion did not take effect.—*Wolfe v. Abbott*, 131 P. 386.

§ 112 (Cal.App.) An ordinance entitled "Relating to regulating and licensing the business of selling and furnishing of spirituous, vinous and malt liquors in the city of San Luis Obispo," and another ordinance entitled "An ordinance to amend sections 12, 13 and 15 of Ordinance No. 128, relating," etc., sufficiently ex-

pressed their subject-matter in the title, as required by San Luis Obispo Charter, art. 6, subsec. 4.—*Guzzi v. McAllister*, 131 P. 338.

§ 112 (Idaho) Title of a street improvement ordinance *held* sufficient, where it stated the general purpose of the ordinance and met the substantial requirements of the statute as to title and subject-matter of city ordinances.—*Clyde v. City of Moscow*, 131 P. 381.

§ 112 (Wash.) Provision of ordinances requiring weight or measure to be stamped on the package in which commodities were sold *held* germane to the title, reciting that it related to the weighing, measuring, and inspecting of commodities and the keeping of proper legal weights and measures.—*City of Seattle v. Goldsmith*, 131 P. 456.

§ 112 (Wash.) An ordinance fixing the number of horses allowed to be kept in a stable, entitled "An ordinance regulating the construction, * * * maintenance, use, * * * and equipment of buildings," is not invalid under Spokane Charter, art. 3, § 13, requiring the subject of every ordinance to be set out clearly in the title thereof.—*City of Spokane v. Lemon*, 131 P. 853; *Same v. Wilson*, *Id.* 856.

§ 117 (Cal.) An ordinance establishing fire limits within which wooden buildings should be prohibited, having been established by San Francisco Charter, c. 11, § 5, such ordinance was not suspended by an unofficial announcement, after the conflagration of April, 1906, that wooden buildings would be permitted within the limits, subject to removal at the pleasure of the authorities.—*Howell v. City of Hamburg Co.*, 131 P. 130.

§ 120 (Wash.) In a prosecution for violating a municipal ordinance regulating the use of stables, it is no defense that the stable was not in violation of law before the adoption of the ordinance; it appearing that it had been maintained in violation of such law thereafter.—*City of Spokane v. Lemon*, 131 P. 853; *Same v. Wilson*, *Id.* 856.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(B) Municipal Departments and Officers Thereof.

§ 183 (Colo.) Police magistrate's docket entries showing that plaintiff was charged with selling liquors, but found guilty of maintaining a nuisance, *held* not a justification for the acts of the town marshals in abating the nuisance by destroying liquor found in his residence.—*Wolfe v. Abbott*, 131 P. 386.

§ 189 (Wash.) It is the duty of a policeman charged with enforcing speed regulations to stop and place under arrest the driver of a taxicab who is violating a speed ordinance.—*Heath v. Seattle Taxicab Co.*, 131 P. 843.

§ 191 (Wash.) Under Spokane Charter, §§ 24, 53, 119, relating to the appointment, tenure, and removal of officers, *held*, that the office of a sanitary inspector who was in office at the adoption of the charter could be discontinued only by the council, and that the discontinuance of his office by the mayor and commissioner of public works was a nullity.—*Foster v. Hindley*, 131 P. 197.

A sanitary inspector who, though wrongfully deprived of his office, held himself ready to perform his official duties, was entitled to his salary while unlawfully separated from such office, and the fact that he declined temporary employment tendered by the city did not affect his right thereto.—*Id.*

Under Spokane City Charter, § 55, providing for suspension from office and appeal therefrom to the civil service commission, a sanitary inspector whose office was discontinued by the mayor, which discontinuance was a nullity, was not required to appeal to the commission.—*Id.*

IX. PUBLIC IMPROVEMENTS.**(A) Power to Make Improvements or Grant Aid Therefor.**

§ 271 (Wash.) Rem. & Bal. Code, §§ 8005, 8006, authorizing any city to construct and operate waterworks within and without its limits to supply water to its inhabitants and others, and providing for the submission of the question to the voters, empower a city to provide for the construction of a water supply system and for the construction of a distributing system as independent systems.—*Matthews v. City of Ellensburg*, 131 P. 839.

§ 279 (Wash.) Under Laws 1911, c. 98, § 8, 19, providing that any local improvement may be initiated by the city council, a city may provide by resolution for a water distributing system at the cost of property benefited without submitting the question to the voters.—*Matthews v. City of Ellensburg*, 131 P. 839.

A city may, without evading the requirement of the statute to submit questions to the voters, provide for the construction of a water distributing system at the cost of property specially benefited as a system independent of a water supply system, the question of the acquisition of which was submitted to the voters.—*Id.*

§ 282 (Cal.App.) That a city council had previously prescribed general plans and specifications for cement work, which was invalid because done by resolution instead of by ordinance, did not prevent the board of trustees from thereafter adopting the plans and specifications as the special specification for a particular improvement.—*Burnham v. Abrahamson*, 131 P. 338.

§ 284 (Cal.App.) Certain clauses in specifications for the construction of cement sidewalks in a city held not to render the same invalid as delegating to the superintendent of streets or contractor a discretion in determining the materials to be used in the work.—*Burnham v. Abrahamson*, 131 P. 338.

§ 285 (Cal.) The city of Vallejo has authority under its charter to grant a ferry franchise whose termini are within the limits of the city.—*Vallejo Ferry Co. v. Solano Aquatic Club*, 131 P. 864, 874.

The limitation on the power of the city of Vallejo to grant ferry franchises is not violated by the granting of a ferry franchise across a navigable stream within the city limits to Mare Island within the geographical boundaries of the city, but owned by the United States, and over which by virtue of Const. U. S. art. 1, § 8, it exercises exclusive jurisdiction.—*Id.*

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 293 (Idaho) An ordinance giving the name and description of the streets to be improved and the character of the improvement, and designating a time on or before which protest may be made, is sufficient to comply with the requirements of Sess. Laws 1911, c. 81, § 4, relative to such ordinances.—*Clyde v. City of Moscow*, 131 P. 381.

§ 304 (Idaho) That an ordinance providing for street improvements also authorizes the mayor and council to appoint an advisory committee to aid them in the construction of the improvement held not to invalidate the ordinance.—*Clyde v. City of Moscow*, 131 P. 381.

§ 311 (Wash.) Under Rem. & Bal. Code, §§ 7769, 7790, an ordinance initiating a public improvement and defining the assessment district could be subsequently amended so as to leave the determination of the limits of such district to the eminent domain commission; this not affecting any vested rights of the persons whose property was assessed for the improvement.—

In re Leary Ave. in City of Seattle, 131 P. 225.

Amendment of section of ordinance initiating public improvement held not invalid because the section which it purported to amend had previously been repealed, as it in effect added an additional section.—*Id.*

§ 317 (Idaho) Where the initial street improvement ordinance stated that the streets would be paved for a width of 56 feet, but the ordinance providing for the contract showed the width to be paved to be only 18 feet, only the abutting owners on the portion of the street where the width of the pavement was reduced could complain thereof.—*Clyde v. City of Moscow*, 131 P. 381.

§ 321 (Wash.) Under Laws 1911, c. 98, § 10, authorizing any city council to initiate local improvements and determine the property specially benefited thereby, the question whether a water distributing system constitutes a general benefit only can only be urged before the council on a hearing on the assessment roll for the cost of the work.—*Matthews v. City of Ellensburg*, 131 P. 839.

§ 323 (Wash.) While owners of property liable to be assessed for a contemplated improvement may have a natural right to peaceably assemble and protest against the improvement, they have no absolute right to have their protest granted or to maintain an action or proceeding in the courts if the protest is not granted.—*In re Leary Ave. in City of Seattle*, 131 P. 225.

(C) Contracts.

§ 331 (Wash.) Under Laws 1911, c. 98, §§ 46, 48, authorizing the issuance of bonds for local improvements to the contractor for improvements, the fact that notices for bids for a work did not state that the work would be paid for in bonds was a mere irregularity, where the blank form required to be used for the bids provided for payment in bonds.—*Matthews v. City of Ellensburg*, 131 P. 839.

§ 339 (Wash.) A city contracting for the construction of a local improvement may stipulate for a reservation of 15 per cent. of the estimate until 30 days after completion of the work, though an ordinance provides for a reservation of 25 per cent. of the estimate.—*Matthews v. City of Ellensburg*, 131 P. 839.

§ 340 (Idaho) A contract for "Dolarway" pavement, which is a standard pavement, held sufficiently authorized by an ordinance naming proposed pavements and also any other "standard pavement."—*Clyde v. City of Moscow*, 131 P. 381.

An estimate of cost made in the initial ordinance held not to prevent the city from contracting for paving at a lower rate than the estimate so made.—*Id.*

§ 341 (Wash.) Where it was held on appeal that a city ordinance by which the city contracted with a reclamation company for the construction of a water distribution system was invalid for improper interest of the members of the council, such determination did not necessarily invalidate a contract between the city and L. for the construction of the system, in which it was not shown that the council had any interest.—*Gantenbein v. City of Pasco*, 131 P. 461.

§ 342 (Idaho) Where an ordinance was passed providing for a contract for street improvement, and prescribing its terms, and providing that a formal contract should be executed, signed, and attested by the mayor and city clerk, there is a substantial compliance with Sess. Laws 1911, c. 81, § 16, requiring that all contracts for any improvement be made by the council in the name of the city.—*Clyde v. City of Moscow*, 131 P. 381.

(D) Damages.

§ 385 (Wash.) An abutting owner cannot recover damages resulting from an original grade of a street in front of his property.—*Stern v. City of Spokane*, 131 P. 476.

§ 387 (Wash.) A city held not liable for injuries to property abutting on a street due to the operation of instrumentalities used in constructing a bridge over a river, in the absence of proof of negligence.—*Stern v. City of Spokane*, 131 P. 476.

§ 387 (Wash.) Where a city erected a hoisting engine in a street in constructing a bridge, an abutting property owner could not recover for injuries resulting from smoke and soot from such engine in the absence of proof of negligence.—*Hieber v. City of Spokane*, 131 P. 478.

§ 396 (Wash.) Damage to adjoining property by a municipality in the construction of a bridge due to a physical invasion of the property is subject to a set-off for benefits as provided by Const. art. 1, § 16.—*Hieber v. City of Spokane*, 131 P. 478.

§ 404 (Wash.) Where there is a physical invasion of the property of an adjoining owner by a city in constructing a bridge, he may restrain prosecution of the work or permit it to continue and recover damages at law.—*Hieber v. City of Spokane*, 131 P. 478.

Under Rem. & Bal. Code, § 7995, and Spokane City Charter, art. 12, § 115, plaintiff in an action against a city for injuries to his property in the construction of a bridge was not required to wait until the work was finished before filing a claim but could anticipate his damages; it appearing that the trespass would continue until the work was completed.—*Id.*

(E) Assessments for Benefits, and Special Taxes.

§ 413 (Idaho) Rev. Codes, § 2238, subd. 6, imposing upon the city the expense of all improvements in the spaces formed by the junction of streets, does not impose upon the city at large the obligation to pay for the improvement of spaces in street opposite alleys.—*Clyde v. City of Moscow*, 131 P. 381.

§ 437 (Wash.) Where no special benefit accrued to a city at large in consequence of a street improvement, no part of the cost thereof could be assessed to it.—*City of Spokane v. Miles*, 131 P. 206.

§ 444 (Cal.App.) Where the construction of city sidewalks was in fact done under the direction of a superintendent of streets, as provided by Vrooman Act, § 8, it was immaterial that the work was ordered done under the supervision of an inspector appointed by the superintendent.—*Burnham v. Abrahamson*, 131 P. 333.

While statutes authorizing the making of public improvements must be strictly followed, yet courts are not now disposed to sustain defenses to the enforcement of assessments for such improvements, based on technicalities having no substance behind them.—*Id.*

§ 444 (Wash.) The variance between an ordinance directing a suit to fix the damages for regrading a street to be paid wholly or in part by special assessment on property benefited, and the order of reference to the board of commissioners, reciting that the ordinance directs that the improvement should be paid for wholly by special assessment, and directing the board to levy an assessment on the property benefited, does not affect the validity of the report of the board establishing a special assessment district and imposing the entire cost on the property therein.—*City of Spokane v. Miles*, 131 P. 206.

§ 450 (Wash.) The court will not change an assessment district established by the commissioners appointed under Rem. & Bal. Code, § 7788, except where the commissioners acted arbitrarily or fraudulently, or proceeded on a

fundamentally wrong basis.—*City of Spokane v. Miles*, 131 P. 206.

The testimony of witnesses that in their opinion the assessment district contained only a small part of the property benefited, and that the district should have included at least additional territory specified, did not overcome the probative force of the report of the commissioners, and the court would not interfere with the district as established by the commissioners.—*Id.*

§ 474 (Wash.) Under Rem. & Bal. Code, § 7707, requiring assessment for local improvements on the property benefited, that certain lots in an assessment district were not assessed for a sewer, without proof that the officers acted fraudulently or that the property was benefited, did not invalidate the assessment.—*Aumiller v. City of North Yakima*, 131 P. 470.

§§ 488, 489 (Cal.App.) Under Vrooman Act (St. 1885, p. 156) § 11, as amended, providing for the publication of notice of an appeal of property owners to the city council, and section 12, authorizing a contractor to sue for unpaid assessments after the council's decision of an appeal, held, that publication of notice was jurisdictional, so that defendant by not objecting to the want of such notice was not thereby estopped from urging the want of such notice as a defense to a contractor's action.—*Southern Const. Co. v. Howells*, 131 P. 756.

(F) Enforcement of Assessments and Special Taxes.

§ 535 (Wash.) Under Rem. & Bal. Code, §§ 7532, 7533, an owner of property assessed for a trunk sewer, not having appeared and objected to the assessment before confirmation by the common council, could not sue to restrain its collection for irregularities in the improvement and assessment ordinances, or in the method of the assessment.—*Ferrall v. City of Spokane*, 131 P. 808.

§ 538 (Or.) A complaint, in an action to enjoin the collection of assessments upon land included in the city by the initiative petition, held insufficient to show that the petition was defective in that more than 20 names of each sheet of the petition were committed in violation of the constitutional provision.—*Day v. City of Salem*, 131 P. 1028.

X. POLICE POWER AND REGULATIONS.**(A) Delegation, Extent, and Exercise of Power.**

§ 590 (Utah) The power of a city to suppress gambling conferred by Comp. Laws 1907, § 206, subd. 40, held not limited to the precise games specified in section 4261, as amended by Laws 1911, c. 134.—*Salt Lake City v. Doran*, 131 P. 636.

§ 594 (Utah) An ordinance of Salt Lake City, prohibiting slot machines, held to include a machine used by a merchant to stimulate trade, though the customer using the same was given value received in merchandise for all money deposited therein in any event.—*Salt Lake City v. Doran*, 131 P. 636.

Salt Lake City ordinance prohibiting gambling and the use of slot machines held not invalid as prohibiting the use of such machines for an innocent purpose not amounting to gambling.—*Id.*

§ 614 (Wash.) A city has power to regulate and control the conduct of hackmen and others soliciting the privilege of carrying travelers from railroad depots in the city to their destination.—*City Cab, Carriage & Transfer Co. v. Hayden*, 131 P. 472.

§ 625 (Wash.) A regulation of a city, which requires hackmen to keep themselves and their vehicles within an assigned space while soliciting passenger traffic at a depot, is not unreasonable, though the places assigned to them are not of equal value as positions for soliciting

business.—City Cab, Carriage & Transfer Co. v. Hayden, 131 P. 472.

§ 625 (Wash.) Spokane City Ordinance, regulating weights and measures (sections 22-25) held not void for unreasonableness.—City of Spokane v. Arnold, 131 P. 815.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 657 (Colo.) The act of the city and county of Denver in vacating a part of a street over which an approach of the viaduct should be constructed does not vest the fee of the street in abutting owners, but the fee remains in the city.—Albi Mercantile Co. v. City and County of Denver, 131 P. 275.

§ 663 (Cal.App.) A city ordinance, making it unlawful to injure trees planted in any of the streets of the city, held to relate only to those planted on the sidewalk lines and not to make it unlawful for a person who had planted trees in the portion of the street designed for vehicles to remove them when ordered by the court.—Humphrey v. Dunnells, 131 P. 761.

§ 669 (Cal.App.) Abutting owner held entitled to compel the removal of trees from street which interfered with his right of ingress and egress, even though planted with the passive consent or permission of the city authorities.—Humphrey v. Dunnells, 131 P. 761.

§ 703 (Wash.) It was a violation of the speed ordinance, limiting the speed of automobiles to 12 miles per hour on paved streets, to drive an automobile at a greater speed over a planked street.—Heath v. Seattle Taxicab Co., 131 P. 843.

§ 706 (Cal.App.) Whether walking upon a street, instead of the sidewalk, was negligent, if a sidewalk existed at the place plaintiff was injured by being struck by an automobile, held a question for the jury.—Blackwell v. Benwick, 131 P. 94.

The mere fact that there was a sidewalk which was customarily used by pedestrians would not make one guilty of contributory negligence as a matter of law for using the street.—Id.

Whether plaintiff was guilty of contributory negligence in not looking back up the street for vehicles held a jury question.—Id.

Whether defendant was negligent in such case held a question for the jury.—Id.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 741 (Colo.) An allegation in a complaint in an action against a city for injuries of the service of notice on the mayor, and that the mayor, council, and clerk were presented with such notice, and acted thereon in their official capacity within the time required by law, held to show a substantial compliance with Rev. St. 1908, § 6661, requiring the notice to be served on the city clerk.—Powers v. City of Boulder, 131 P. 395.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 757 (Okla.) A municipality is relieved from liability for the defective condition of its streets only when it has no means within its control to effect repairs.—Town of Fairfax v. Giraud, 131 P. 159.

§ 771 (Colo.App.) A municipal corporation is under a duty to keep its sidewalks in a reasonably safe condition and is liable where accumulations of ice render them dangerous.—City and County of Denver v. Rhodes, 131 P. 786.

§ 806 (Okla.) A traveler on a city street has a right to presume that it is in a reasonably

safe condition for ordinary travel by day or night, throughout its entire width, and that it is free from dangerous holes and obstructions.—Town of Fairfax v. Giraud, 131 P. 159.

§ 817 (Okla.) In an action against a municipality for personal injuries due to a defective street, there is no presumption of negligence on either party, and the burden is on defendant to prove plaintiff's contributory negligence.—Town of Fairfax v. Giraud, 131 P. 159.

§ 821 (Colo.App.) It is usually a question for the jury whether the city had notice of the unsafe condition of a sidewalk by reason of snow, ice, etc.—City and County of Denver v. Rhodes, 131 P. 786.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(O) Bonds and Other Securities, and Sinking Funds.

§ 918 (N. M.) Where a town board of trustees proceeded under Const. art. 9, §§ 12, 13, and held an election on the issuance of bonds for waterworks and sewers without following the procedure required by Comp. Laws 1897, § 2402, subsec. 67, the bonds authorized at such election were invalid.—Lanigan v. Town of Gallup, 131 P. 997.

Cities, towns, and villages are not authorized to submit to the voters the joint proposition of issuing bonds for constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question.—Id.

(D) Taxes and Other Revenue, and Application Thereof.

§ 957 (N. M.) Const. art. 9, § 12, fixing a 12-mill levy limitation, does not apply to debts contracted for a water or sewer system in cities, towns, or villages.—Lanigan v. Town of Gallup, 131 P. 997.

§ 974 (Cal.) A proper notice to taxpayers is a jurisdictional prerequisite to the right of the board of trustees of a city sitting as a board of equalization to proceed in the matter of the raising of assessments.—Huntley v. Board of Trustees of City of Auburn, 131 P. 859.

Under an ordinance requiring notice by the board of trustees sitting as a board of equalization before the raising of assessments, held, that an order raising petitioner's assessment could not be supported, where the notice stated that the assessment had already been raised, although the minutes showed that it was not raised until the time fixed in the notice for hearing of complaints.—Id.

MURDER.

See Homicide, §§ 19, 80, 234-254.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 693-825.

NAMES.

See Vendor and Purchaser, § 82.

§ 18 (Cal. App.) An assignment to plaintiff from "Matthews Harris" is sufficiently shown by a written assignment signed "M. Harris," and proof that the signature was that of "Matt A. Harris."—Chandler v. Robinett, 131 P. 891.

NATIONAL BANKS.

See Banks and Banking, § 246.

NAVIGABLE WATERS.

See Damages, § 208; Ferries.

I. RIGHTS OF PUBLIC.

§ 1 (Wash.) The navigability of streams, or that they possess a capacity for valuable floatage, is a question of fact which he who asserts it must prove.—*Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 131 P. 220.

A stream on which, between defendant power company's intake and its tailrace, it was impossible to float shingle bolts without men and teams assisting in breaking up jams, opening up new channels, and keeping logs from lodging on the banks and bars held not a "navigable or floatable stream."—*Id.*

That a stream is not meandered does not, of itself, establish its character as a navigable or nonnavigable stream, and indicates nothing more than that, in the opinion of the officers ordering the survey, the stream was not navigable.—*Id.*

The floatability of rivers and streams is not to be determined by their size, but by their capacity for valuable public use in their natural condition.—*Id.*

§ 22 (Wash.) The right of a power company, a riparian owner, to use the water of a floatable stream for power purposes by the construction of a dam, intake, storage reservoir, and a tailrace returning the water to the stream at a distance below the intake, and the right of the boom company to drive shingle bolts, are correlative, and each must use his right with due regard to the existence and protection of the other.—*Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 131 P. 220.

II. LANDS UNDER WATER.

§ 36 (Wash.) The title to the bed of a small stream which is only navigable for the purpose of floating timber is in the riparian owner.—*Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 131 P. 220.

§ 36 (Wash.) The federal government has granted to the state of Washington title to all tide and shore lands, and to the beds of all navigable streams and lakes.—*Hauge v. Walton*, 131 P. 248.

§ 37 (Wash.) The owner of a government lot who purchased the abutting shore land from the state took to ordinary high-water mark, but took no title to an island which in the dry season was connected with his lot by a strip of uncovered land.—*Hauge v. Walton*, 131 P. 248.

III. RIPARIAN AND LITTORAL RIGHTS.

§ 39 (Idaho) A person who engages in floating logs and lumber down a navigable stream must exercise reasonable care to avoid injury to the property of others.—*McGuire v. Post Falls Lumber & Mfg. Co.*, 131 P. 654.

In an action for injuries to plaintiff's property due to defendant's permitting a jam to form of logs which he was floating down a navigable stream, the question whether defendant had a sufficient number of drivers to care for the logs and exercised reasonable care was for the jury.—*Id.*

Evidence in an action for injuries to plaintiff's property due to a jam being permitted to form out of logs being floated down a navigable stream by defendant held insufficient to sustain a verdict for plaintiff for \$2,250.—*Id.*

§ 42 (Wash.) Rem. & Bal. Code, § 6641, which declares that "shore lands" are lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water, was not intended to affect the title to any island, although it might be joined with the mainland by a strip of shore land.—*Hauge v. Walton*, 131 P. 248.

Where the law of the state is that the owner of the upland has a riparian proprietorship and ownership in the bed of a stream or lake extending to the thread thereof, an unconsidered fragment of land along the shore of the stream

or lake will attach to the government subdivision adjoining it, and an island with no navigable channel intervening will pass to the nearest land abutting the shore by virtue of riparian ownership.—*Id.*

The owner of a government lot who purchased the abutting shore land from the state took to ordinary high-water mark, but took no title to an island which in the dry season was connected with his lot by a strip of uncovered land, and which in the winter time was covered by about a foot of water, since such strip was without water intervening between the shore, and was to be treated as land.—*Id.*

NAVIGATION.

See Navigable Waters, §§ 1, 22.

NEGLIGENCE.

See Attorney and Client, § 129; Bailment, § 31; Carriers, §§ 228, 287-348; Contracts, § 93; Explosives; Factors; Highways, §§ 181, 187; Hospitals, §§ 7, 8; Logs and Logging, § 19; Master and Servant, §§ 88-330; Municipal Corporations, §§ 387, 706, 817; Navigable Waters, § 39; Railroads, §§ 324-364, 405-483; Release, § 16; Street Railroads, §§ 90-117; Telegraphs and Telephones, §§ 15-70; Towns, § 45; Trial, § 252.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 2 (Wash.) Negligence arises only from an omission of duty.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 39 (Utah) A thing may be attractive to children and inherently dangerous without being an attractive nuisance, within the doctrine of the turntable cases, which requires that the thing be in an unprotected condition, as well as attractive and dangerous.—*Charvoz v. Salt Lake City*, 131 P. 901.

A small stream of warm mineral water conducted into a ditch and through a culvert by the city after it had been used for bathing and medicinal purposes, would not constitute an attractive nuisance, so as to make the city liable for a child's death therein, under the doctrine of the turntable cases.—*Id.*

§ 43 (Or.) A landowner who has a spur track upon his property is liable for his negligence in piling lumber so close to the track that a servant of the railroad company in switching cars thereon was injured.—*Breese v. Wildwood Lumber Co.*, 131 P. 299.

§ 52 (Wash.) It was the duty of a lumber company to inform an employé of a contracting stevedore, engaged in loading lumber for the stevedore from a tram car, of the fact that one rail of the track was shorter than the others and of the want of bumpers on the car, or of the grade in the track, if those things added to the danger of the work; his coemployés not being required to inform him thereof.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

II. PROXIMATE CAUSE OF INJURY.

§ 56 (Utah) To bring a case within the doctrine of the turntable cases, the attractiveness of the alleged nuisance must have been the proximate cause of the injury.—*Charvoz v. Salt Lake City*, 131 P. 901.

§ 61 (Wash.) If plaintiff was injured by the negligence of defendant, the latter is liable for the injury irrespective of whether the negligence of others also contributed to the injuries.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

§ 72 (Cal.App.) That one acting in an emergency does not act the way that a reasonably prudent man having time for deliberation would act would not make him guilty of contributory negligence.—*Blackwell v. Benwick*, 131 P. 94.

§ 72 (Wash.) One was entitled to act upon appearances in stopping a tram car in an emergency, and was not negligent if he acted as a reasonably prudent person under the circumstances, though he may have been deceived as to the danger.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

IV. ACTIONS.**(A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.**

§ 119 (Ok.) In an action for personal injuries, where defendant alleges contributory negligence and denies negligence generally, there is no admission of negligence limiting the issues to that of contributory negligence.—*Clemens v. St. Louis & S. F. R. Co.*, 131 P. 160.

(B) Evidence.

§ 131 (Or.) While evidence of subsequent repairs and improvements is inadmissible to show previous negligence, it is admissible to show its condition at the time of the accident, in cases where the jury has viewed the machinery.—*Foster v. University Lumber & Shingle Co.*, 131 P. 736.

§ 132 (Kan.) On an issue whether at a particular time a person was exercising due care for his own safety, evidence of his intoxication is admissible as a circumstance to be considered in determining the matter.—*McIntosh v. Standard Oil Co.*, 131 P. 151.

§ 132 (Wash.) In an action by an employé of a contractor to load lumber onto a vessel brought against the owner of the lumber for injuries by a tram car load of lumber falling on him while trying to stop the car, evidence by plaintiff that he tried to stop the car because he thought that injury might otherwise result to persons or property was admissible on the question of contributory negligence.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

§ 134 (Utah) Evidence, in an action against a city for the death of a child by being drowned in a stream conducted through a ditch by the city, held not to sustain a finding that the child was attracted by the warm water in the ditch.—*Charvoz v. Salt Lake City*, 131 P. 901.

Evidence, in an action against a city for the death of a young child by falling into warm mineral water conducted into a ditch by the city, held not to sustain a finding that the attractiveness of the water was the proximate cause of the child's death.—*Id.*

(C) Trial, Judgment, and Review.

§ 136 (Or.) In a personal injury action, when the defense of contributory negligence is urged, it must be submitted to the jury unless from all the evidence it appears that reasonable men acting would necessarily find, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under the same circumstances would have acquired such knowledge and appreciation.—*Breese v. Wildwood Lumber Co.*, 131 P. 290.

Where a brakeman riding on a car switched onto a private side track was injured because of the close proximity of a pile of lumber which was only a few inches from the car, held, that the question of his contributory negligence was for the jury.—*Id.*

§ 136 (Wash.) An action against the seller of lumber for injuries to a stevedore employed by a contractor for the job to help load the lum-

ber into a vessel, by a lumber car running off the tramroad and the lumber falling upon plaintiff, whether plaintiff was guilty of contributory negligence, held a question for the jury.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

Negligence is a question of law only when the facts authorize but one inference, and is for the jury if different minds might honestly reach a different conclusion.—*Id.*

§ 136 (Wash.) What is reasonable care in a given situation is always a question for the jury, whenever on the evidence reasonable minds might reach different conclusions.—*Williams v. City of Spokane*, 131 P. 833.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Divorce, § 151; New Trial, §§ 99-106.

NEWSPAPERS.

See Commerce, § 54; Constitutional Law, §§ 87, 276; Counties, §§ 101, 112; Statutes, § 94; Taxation, § 662.

§ 3 (Cal.App.) A newspaper of general circulation, within Pol. Code, § 4460, need not publish both local and telegraphic news, and the question of general circulation depends on the diversity of its subscribers rather than on mere numbers.—*In re Green*, 131 P. 91.

A newspaper which is published daily except Mondays and legal holidays, which has a circulation among various classes of people in the county, and which, in addition to items of local news, publishes real estate transfers, court news, and telegraphic dispatches of general interest, is a newspaper of general circulation within Pol. Code, § 4460.—*Id.*

NEW TRIAL.

See Appeal and Error, §§ 281, 302, 562, 978; Appearance, § 26; Criminal Law, §§ 915-957; Divorce, § 151.

I. NATURE AND SCOPE OF REMEDY.

§ 2 (Ok.) The court has a right to grant a new trial during the term where it has rendered a judgment on an agreed statement of facts.—*Shallenberger v. Brady*, 131 P. 1096.

II. GROUNDS.**(B) Misconduct of Parties, Counsel, or Witnesses.**

§ 29 (Wash.) Conduct of counsel, who, as corporation counsel, had rejected plaintiff's claim for personal injuries against a city in afterwards appearing as counsel for plaintiff, held, in view of his explanation and of the fact that the case had been twice tried and twice appealed, not to entitle the city to a new trial after verdict for plaintiff.—*Wolpers v. City of Spokane*, 131 P. 230.

(C) Rulings and Instructions at Trial.

§ 35 (Kan.) Refusal to allow defendant to cross-examine on an important matter is a ground for a new trial without showing the answers plaintiff would have returned; Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), providing that on motion for new trial for excluding evidence such evidence shall be produced, not applying to that situation.—*McIntosh v. Standard Oil Co.*, 131 P. 151.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 44 (Colo.) A new trial sought on the ground that one juror consented to the verdict to escape having to sleep in vermin infested beds

held properly denied, where the other jurors heard the remarks in regard to the beds and treated it as a joke, and the verdict was rendered long before bedtime.—*Lutz v. Denver City Tramway Co.*, 131 P. 258.

§ 49 (Colo.) Where a litigant made it a practice to attempt to influence jurors, verdicts in its favor by jurors so influenced should be set aside.—*Lutz v. Denver City Tramway Co.*, 131 P. 258.

The fact that the attorney for the successful litigant treated four of the jurors to a cigar each in response to a jocular suggestion is not ground for a new trial.—*Id.*

(H) Newly Discovered Evidence.

§ 99 (Okla.) Where newly discovered material evidence would probably produce a different result, and no lack of diligence is shown, a new trial should be granted.—*Roeser v. Pease*, 131 P. 534.

§ 103 (Nev.) The alleged newly discovered evidence must be material or important to the party seeking a new trial.—*Whise v. Whise*, 131 P. 967.

Newly discovered evidence on a matter collateral to the issues is seldom ground for a new trial.—*Id.*

§ 108 (Nev.) Newly discovered evidence, which could only be used by way of impeachment, is not ground for granting a new trial, unless evidence of the witness sought to be impeached was so important, and the impeaching evidence so convincing, that a different result would necessarily follow the admission of the impeaching evidence.—*Whise v. Whise*, 131 P. 967.

In order to compel the granting of a new trial, newly discovered evidence must be so strong as to make it probable that a different result would be obtained in another trial; it not being sufficient merely that it "might" change the result.—*Id.*

§ 108 (Okla.) A motion for a new trial for newly discovered evidence should be granted where the evidence, if produced, would probably bring a different result.—*Roeser v. Pease*, 131 P. 534.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 116 (Okla.) The filing of a written motion for new trial with the clerk, containing the grounds therefor, within three days after verdict, is sufficient compliance with Comp. Laws 1909, § 5827, as to the time within which the application has been made without an actual presentation thereof to the court.—*Burcham v. Edwards*, 131 P. 528.

§ 123 (Mont.) A notice of intention to move for a new trial, reciting that it would be based upon a bill of exceptions and upon the "pleadings, papers, minutes, files, and records of said cause," was sufficient to support a motion on the minutes of the court.—*Moore v. Butte Electric Ry. Co.*, 131 P. 635.

§ 131 (Mont.) Under Rev. Codes, § 6795, a party is not required, in moving for a new trial on grounds as to which he may move either on the minutes or a bill of exceptions, to adopt the same method as to all of such grounds, but may move on one ground on the minutes and on another ground on the bill of exceptions.—*Moore v. Butte Electric Ry. Co.*, 131 P. 635.

§ 143 (Ariz.) An affidavit of a juror could not be received to impeach the verdict by showing that it was a quotient verdict.—*Hull v. Larson*, 131 P. 668.

§ 143 (Colo.) Under Rev. Code, § 236, providing that affidavits of jurors may be used to impeach the verdict for misconduct in resorting to the determination of chance, an affidavit can be used to impeach the verdict for no other

misconduct.—*Lutz v. Denver City Tramway Co.*, 131 P. 258.

In general, affidavits of jurors stating the ground upon which they rendered their verdict will not be received to impeach it.—*Id.*

§ 143 (N.M.) Affidavits of jurors to show the misconduct of the jury are inadmissible in support of a motion for a new trial.—*Goldenberg v. Law*, 131 P. 499.

NON OBSTANTE VEREDICTO.

See Judgment, § 199.

NONRESIDENCE.

See Limitation of Actions, § 87.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, §§ 373, 414-430; Carriers, § 85; Evidence, § 186; Executors and Administrators, § 388; Justices of the Peace, § 127; Landlord and Tenant, §§ 277, 290; Master and Servant, § 252; Mechanics' Liens, §§ 75, 113, 115; Municipal Corporations, §§ 331, 488, 489, 741, 821, 974; Negligence, § 52; New Trial, § 123; Receivers, § 35; Sales, §§ 168, 176, 285; Sunday; Taxation, §§ 662, 810; Time, § 9; Vendor and Purchaser, §§ 229-242; Waters and Water Courses, § 152.

NOVATION.

See Evidence, § 814.

§ 1 (Cal.App.) The requisites of a novation are a previous valid obligation, and agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one.—*Young v. Benton*, 131 P. 1051.

§ 2 (Cal.App.) An agreement by a transferee of the property of a corporation to assume the obligations of the corporation, as shown by the books, includes a note given by the corporation as shown in the book of minutes and in the book of notes and bills payable.—*Young v. Benton*, 131 P. 1051.

§ 4 (Cal.) Under Civ. Code, § 1531, the substitution of a new contract for an old one held to constitute a valid novation, wholly extinguishing the original contract.—*Beckwith v. Sheldon*, 131 P. 1049.

§ 10 (Cal.) Where the parties effect a complete novation, extinguishing the original contract, the failure of one of the parties to perform the new contract will not revive the original one upon any theory of rescission, so as to permit the injured party to sue on the first obligation.—*Beckwith v. Sheldon*, 131 P. 1049.

§ 11 (Cal.App.) A complaint which alleges that a corporation was indebted on a note to plaintiff, that, after its maturity, the corporation transferred its property to defendant, who assumed the corporate debts, that plaintiff released the corporation and accepted defendant's agreement in lieu thereof, states a cause of action on the theory of a novation within Civ. Code, § 1531, subd. 2, though it may state a cause of action within section 1559, on a contract for the benefit of third persons.—*Young v. Benton*, 131 P. 1051.

§ 12 (Cal.App.) In an action founded on the theory of a novation, evidence held to show a prior valid obligation.—*Young v. Benton*, 131 P. 1051.

In an action founded on the theory of a novation, evidence held to support a finding that, after the execution of the agreement, plaintiff

released his debtor, and accepted the agreement of defendant in lieu thereof.—Id.

In an action founded on the theory of a novation, the agreement of defendant to pay the debts and the conveyance by the debtor to defendant of his property *held* admissible.—Id.

NUISANCE.

See Intoxicating Liquors, §§ 259, 260; Municipal Corporations, § 183; Negligence, §§ 39, 56.

II. PUBLIC NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 61 (Kan.) Ordinarily the place where gambling is carried on is a nuisance.—*State v. Anthony Fair Ass'n*, 131 P. 626.

(B) Rights and Remedies of Private Persons.

§ 72 (Cal.App.) Private citizen *held* entitled to sue to abate a nuisance affecting him under Code Civ. Proc. § 731, although city charter authorized the common council to declare and abate a nuisance, and the common council had not declared the thing sought to be abated a nuisance.—*Humphrey v. Dunnells*, 131 P. 761.

NUNC PRO TUNC.

See Municipal Corporations, § 12.

OBJECTIONS.

See Appeal and Error, §§ 193-231; Parties.

OBSTRUCTIONS.

See Easements, § 61.

OFFICERS.

See Constitutional Law, § 31; Coroners; Counties, §§ 21½-24, 101; Municipal Corporations, §§ 183, 191; Receivers; Sheriffs and Constables; Towns, § 45; Trial, § 13.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(G) Resignation, Suspension, or Removal.

§ 74 (N.M.) An action for the removal of an officer, under the provisions of Laws 1909, c. 36, is a civil, and not a criminal, proceeding.—*State v. Medler*, 131 P. 976.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 94 (Colo.) Rev. St. 1908, § 1219, providing that where no specific fees are allowed by law the time necessarily devoted to any service charge in an account submitted to the board of commissioners shall be specified, does not provide for compensation, but only directs how bills for services for which compensation is actually allowed, where no specific fee is fixed, shall be made out.—*McGovern v. Board of Com'rs of City and County of Denver*, 131 P. 273.

OPEN AND CLOSE.

See Trial, § 25.

OPENING.

See Judgment, § 337.

OPINION EVIDENCE.

See Criminal Law, §§ 471-481; Evidence, §§ 471-571.

OPTIONS.

See Sales, § 24; Vendor and Purchaser, § 3.

ORDERS.

See Certiorari, § 16.

ORDINANCES.

See Municipal Corporations, §§ 48, 110-120, 293-317, 340, 342, 590-625, 703.

OWNERSHIP.

See Property, § 9; Sales, § 135.

PARENT AND CHILD.

See Criminal Law, § 97; Divorce, § 309; Guardian and Ward; Indians, § 18.

§ 2 (Cal.) Under Civ. Code, § 246, requiring the court's discretion in appointing a guardian for a minor to be exercised for the minor's welfare, *held*, that it had no power to take an infant of 18 months from the safe protection of an aunt and award his temporary custody to the dissolute and neglectful mother, with the view of seeing whether his presence might not work her reformation.—*In re Lee*, 131 P. 749.

§ 17 (Kan.) To convict a nonresident parent of falling while outside of the state to support his child who was within the state, the state must show that the father knew the location and condition of the child or that he by some act of omission or commission permitted him to be in necessitous circumstances.—*In re Fowles*, 131 P. 598.

PAROL EVIDENCE.

See Evidence, §§ 387-461.

PARTIES.

See Appeal and Error, §§ 323, 327; Criminal Law, § 59; Judgment, §§ 237, 240; Mechanics' Liens, § 263; Prohibition, § 19; Quieting Title, § 31.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 38 (Colo.) Under Mills' Ann. St. § 55, providing that objections to misjoinder must be taken either by demurrer or answer, *held*, that that objection could not be raised by motion for nonsuit, where the right to object to the overruling of a demurrer for misjoinder was waived by an answer to the merits.—*Springhetti v. Hahnwald*, 131 P. 266.

PARTITION.

See Judgment, § 747.

PARTNERSHIP.

See Frauds, Statute of, § 13.

I. THE RELATION.

(C) Evidence.

§ 49 (Wash.) A partnership alleged to exist between defendants having been denied by them, declarations of each at different times to different persons, in the absence of the other, *held* admissible against both to establish the partnership.—*Nilsson v. McDole*, 131 P. 1141.

Where goods were sold to an alleged firm in 1910 and 1911, alleged declarations of the partners as to the existence of the firm, made in 1908 and 1909, *held* not objectionable for remoteness.—Id.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

(A) Firm Property and Business.

§ 83 (Wash.) A partner cannot claim compensation from the partnership in the absence of an agreement therefor, even though he is more active in the business or performs greater or

more valuable service than his copartner.—*Boothe v. Summit Coal Mining Co.*, 131 P. 252.

Where it was agreed on a sale of a half interest in a corporation that each of the parties should draw the same amount for his services, one of the parties was not entitled to more than that amount, although he rendered exceptional services to the corporation.—*Id.*

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 157 (Kan.) A ratification by one partner of the unauthorized act of his copartner in guaranteeing in the firm name payment of the note of a third person is equivalent to antecedent authority.—*Garden City Nat. Bank v. Schulman*, 131 P. 559.

(B) Nature and Extent of Firm Liabilities.

§ 165 (Cal.App.) Partners are jointly liable for the debts of the firm.—*Stover v. Stevens*, 131 P. 332.

(D) Actions by or Against Firms or Partners.

§ 217 (Cal.App.) Evidence, in an action against a partnership, held to sustain a finding that the assumption of the debts of one of the partners was a part of the consideration of the partnership agreement.—*Stover v. Stevens*, 131 P. 332.

§ 217 (Kan.) In an action on a written guaranty in the name of a trading partnership indorsed on the note of a third person, it will be presumed, until proof to the contrary is produced, that it was made in the course of the firm's business.—*Garden City Nat. Bank v. Schulman*, 131 P. 559.

VI. DEATH OF PARTNER, AND SURVIVING PARTNERS.

§ 258 (Wash.) Where partners terminated their relations, and executed mutual releases, after which plaintiff transferred to his former partner all interest in certain tide land applications, evidence of subsequent admissions that plaintiff was still interested therein held insufficient to establish such interest as against the former partner's widow.—*Lehman v. Heuston*, 131 P. 825.

PASSENGERS.

See Carriers, §§ 256-384.

PAVING.

See Municipal Corporations, § 340.

PAYMENT.

See Bills and Notes, § 155; Chattel Mortgages, § 239; Executors and Administrators, §§ 39, 41; Mechanics' Liens, § 115; Mines and Minerals; Pleading, § 433; Principal and Surety, § 138; Subrogation; Tender; Vendor and Purchaser, § 334.

V. RECOVERY OF PAYMENTS.

§ 89 (Wash.) In an action against an attorney to recover a fee paid on the ground that the attorney misrepresented the seriousness of the offense charged and the value of his services, the burden of proof was on plaintiff to show such misrepresentations.—*Johnson v. Mann*, 131 P. 213.

PENALTIES.

See Damages, §§ 77, 80.

PENDENCY OF ACTION.

See Lis Pendens.

PENSIONS.

See Damages, § 60.

PERJURY.

See Trial, § 29.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 11 (Okl.Cr.App.) Any false statement by a witness, which detracts from or adds weight to the testimony of any witness upon matters directly material, constitutes "perjury," and the degree of its materiality is wholly immaterial.—*Miller v. State*, 131 P. 181.

II. PROSECUTION AND PUNISHMENT.

§ 25 (Okl.Cr.App.) An indictment for perjury need not set out facts showing the materiality of the alleged false testimony, but it is sufficient that it expressly aver such materiality.—*Miller v. State*, 131 P. 181.

PERSONAL INJURIES.

See Carriers, §§ 287-348; Compromise and Settlement, § 8; Damages; Explosives; Limitation of Actions, § 55; Master and Servant, §§ 88-330; Municipal Corporations, §§ 741, 817; Negligence; Railroads, §§ 324-364; Release, § 57.

PETITION.

See Descend and Distribution, § 75; Executors and Administrators, § 336; Pleading; Receivers, § 35.

PHYSICIANS AND SURGEONS.

See Criminal Law, § 476; Witnesses, § 219.

§ 6 (Okl.Cr.App.) An unrevoked certificate issued by the state board of medical examiners is a complete defense in a prosecution for practicing medicine without a license.—*Gobin v. State*, 131 P. 546.

A person who aids and abets another in violating the medical practices act is subject to prosecution, though he himself is licensed to practice.—*Id.*

A person not possessing a valid and unrevoked certificate is not entitled to practice medicine except in emergencies and cases specifically exempted by the statute, even though he works on a salary as assistant of a duly authorized practitioner.—*Id.*

The medical practices act, as well as all other laws are enacted to be observed and enforced and not to be evaded and violated.—*Id.*

PLATS.

See Vendor and Purchaser, §§ 83, 183.

PLEADING.

See Account Stated, § 18; Appeal and Error, §§ 102, 193, 197, 592, 888, 889, 917, 1039-1041, 1075; Bills and Notes, § 465; Brokers, § 82; Carriers, § 380; Corporations, § 211; Damages, § 158; Exemptions, § 139; False Imprisonment; Insane Persons, § 33; Insurance, §§ 633, 639; Limitation of Actions, § 179; Lis Pendens; Master and Servant, §§ 39, 258-264; Municipal Corporations, §§ 538, 741; Negligence, § 119; Novation, § 11; Parties; Principal and Surety, § 155; Reformation of Instruments, § 36; Sales, § 353; Waters and Water Courses, §§ 152, 158½.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 48 (Okl.) A petition alleging facts showing that plaintiff had been wronged by defendant, and what such wrong consisted in, and the amount of damages, and that defendant was liable therefor, and asking judgment for such amount, held to state a cause of action under the rules of code pleading and Comp. Laws

1909, § 5627, relative thereto.—*Smith v. Gardner*, 131 P. 538.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 93 (Cal.App.) The effect of denials in a defense, constituting a complete answer to the cause of action sued on, is not destroyed through any inconsistency between such denials and the allegations of a second and separate defense.—*Tustin Packing Co. v. Pacific Coast Fruit Auction Co.*, 131 P. 338.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 165 (Mont.) An allegation of the answer in a street car passenger's action for injuries *held* a mere traverse of an allegation of the complaint, and hence it was neither necessary nor proper that plaintiff file a reply thereto.—*Previsich v. Butte Electric Ry. Co.*, 131 P. 25.

§ 180 (Wash.) In action on bond in claim and delivery, reply alleging excuse for refusal to accept the return of the property *held* not to depart from a complaint alleging a failure to return it, especially where the reply was not objected to until the trial five months after the service and filing thereof.—*Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co.*, 131 P. 1156.

V. DEMURRER OR EXCEPTION.

§ 193 (Colo.App.) A demurrer to a complaint on the ground that the contract set forth was illegal and void, contrary to public policy and to good morals, *held* not within any of the grounds of demurrer authorized by *Mills' Ann. Code*, § 50.—*Meyer v. Wright*, 131 P. 787.

§ 193 (Wyo.) Fatal defect in substance in a petition may be taken advantage of by demurrer.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

§ 202 (Colo.App.) The practice of challenging the sufficiency of the complaint by a clause incorporated in the answer not called to the court's attention until trial, instead of filing a separate demurrer, is not to be commended.—*Mountain Supply Ditch Co. v. Lindekugel*, 131 P. 789.

§ 208 (Cal.App.) In the absence of a demurrer specifically objecting that the complaint in an action for breach of contract did not allege that complainant at the commencement of the action was the owner of the claim assigned to and sued upon by him, the point would not be considered.—*A. Widemann Co. v. Digges*, 131 P. 882.

§ 214 (Wyo.) A demurrer to a pleading does not admit the facts except to test their legal sufficiency, so that after the overruling of the demurrer issue may be joined on the facts.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 237 (N.M.) Where a material fact omitted from the complaint is as fully litigated without objection as if it had been put in issue, the complaint should be amended in aid of the judgment by the trial court so as to allege the omitted fact.—*Canavan v. Canavan*, 131 P. 493.

§ 277 (Or.) Default judgment against another defendant *held* not available as a bar to a recovery against the answering defendant unless he pleaded it by supplemental answer as permitted by L. O. L. § 108.—*Noble v. Beeman-Spaulling-Woodward Co.*, 131 P. 1006.

§ 277 (Or.) Under L. O. L. § 108, relating to supplemental complaints and answers, defend-

ant, intending to rely on a default judgment against a codefendant as a bar to a judgment against himself, should do so by a supplemental answer.—*Wagenaar v. Beeman-Woodward Co.*, 131 P. 1023.

§ 280 (Colo.App.) In a suit for reformation of an agreement transferring water rights, with cross-action for damages for misrepresentation as to the value of a stock of goods, the overruling of defendant's supplemental plea in bar, filed more than a year after the original answer, was not error.—*Park v. McKee*, 131 P. 279.

VII. SIGNATURE AND VERIFICATION.

§ 290 (Ok.) Where a petition alleged the appointment and authority of an agent, and no verified denial thereof was made, as required by *Comp. Laws 1909*, § 5648, evidence tending to dispute such allegation was properly excluded.—*Ft. Smith & W. R. Co. v. Solsberger*, 131 P. 1078.

§ 291 (Ok.) Where the petition sets forth in full the written instrument sued on, and its execution is not put in issue by a verified answer under *Comp. Laws 1909*, § 5648, such execution need not be proved.—*Owen v. United States Surety Co.*, 131 P. 1091.

§ 304 (Cal.App.) An affidavit filed under *Code Civ. Proc.* § 448, providing that when a defense is founded on a written instrument its genuineness and execution are deemed admitted unless plaintiff files an affidavit denying same, is not evidence; its only effect being to relieve the party filing it from having admitted its genuineness and due execution.—*Gernon v. Sisson*, 131 P. 85.

XI. MOTIONS.

§ 349 (Ok.) Where a petition alleges defects in a note by mutual mistake, and the answer admits the defects, it is not error to render judgment on the pleadings reforming the same.—*De Groat v. Focht*, 131 P. 172.

§ 359 (Or.) Where, on the other pleadings and the evidence, it was undisputed that plaintiff was a guarantor of a note, a defense alleging in effect that he was the payee might have been disregarded as sham.—*Noble v. Beeman-Spaulling-Woodward Co.*, 131 P. 1006.

XII. ISSUES, PROOF, AND VARIANCE.

§ 377 (Cal.App.) Affirmative matter pleaded by way of defense is deemed to be denied, and, in the absence of proof, must be deemed untrue.—*Tustin Packing Co. v. Pacific Coast Fruit Auction Co.*, 131 P. 338.

§ 382 (Wash.) The pleadings must disclose the contentions of the parties, and a distinctive affirmative defense cannot be proved under a general denial.—*Simila v. Northwestern Improvement Co.*, 131 P. 831.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 402 (Colo.App.) Error in that a declaration was so artificially drawn as to more nearly state a cause of action based on use and occupation than one based on trespass *held* cured where the subsequent pleadings and the evidence, admitted without objection, supported the latter theory of the cause of action.—*Nathan v. Crouse*, 131 P. 287.

§ 403 (Cal.App.) A complaint to foreclose a sidewalk assessment lien, failing to allege the establishment of grades, *held* cured by an answer filed without demurrer, to which the specifications were attached, from which the establishment of the grades could be inferred.—*Burnham v. Abrahamson*, 131 P. 338.

§ 403 (Cal.App.) The defect in the complaint in a suit to quiet title to a right of way for an irrigation ditch arising from the failure to show whether plaintiff relies on a grant of a specific right of way or on a way located under a general grant is cured by answer putting in issue the questions essential to a determination of the case.—*Brown v. Ratliff*, 131 P. 768.

The error in overruling a demurrer to a complaint which is defective because uncertain is cured by an answer raising issues involving the questions in the case.—*Id.*

§ 403 (Colo.App.) Alleged defects in the complaint were cured by the answer which put in issue the very matters which defendant contended should have been pleaded in the complaint, in order to state a cause of action.—*Mountain Supply Ditch Co. v. Lindekugel*, 131 P. 789.

§ 406 (Colo.) Where an allegation in a complaint is ambiguous, but no motion is made to have it made more specific, and no demurrer is filed on such ground, the ambiguity is waived.—*Powers v. City of Boulder*, 131 P. 395.

§ 416 (Colo.) Where defendants answered and went to trial on the merits, they waived the right to question the ruling on their demurrer for misjoinder.—*Springhetti v. Hahnwald*, 131 P. 266.

§ 418 (Wyo.) Where a petition was demurred to for want of facts necessary to state a cause of action, the defect was not waived by answer after the overruling of the demurrer.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

The rule that error in overruling a demurrer is waived by pleading over does not apply to a complaint or petition which fails to state facts sufficient to constitute a cause of action or where there is want of jurisdiction of the subject-matter.—*Id.*

§ 427 (Colo.App.) Where defendant introduced certain county court decrees quieting its tax title, without having pleaded them, and without the judgment roll, plaintiff's failure to object did not preclude him from producing the judgment roll, even under a general denial in the replication, to show that the decrees were void.—*Empire Ranch & Cattle Co. v. Farmer*, 131 P. 799.

§ 428 (Okla.) A challenge to the sufficiency of a petition by an objection to evidence will ordinarily be sustained only when there is a total failure to allege some essential matter, and not merely because the allegations are incomplete, indefinite, or conclusions of law.—*Johnston v. Chapman*, 131 P. 1076.

§ 428 (Wyo.) Fatal defects in substance in a petition may be taken advantage of by objections to the introduction of evidence.—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

§ 433 (Cal.App.) Where the allegations in an action for breach of contract to buy grain did not entirely fail to plead nonpayment, such defect, if any, in the absence of special demurrer, was cured by judgment.—*A. Widemann Co. v. Digges*, 131 P. 882.

§ 433 (Mont.) Where a complaint fails to allege a fact necessary to a cause of action, but evidence to prove such fact is received without objection, the complaint will be treated after judgment as amended to admit such proof.—*Moss v. Goodhart*, 131 P. 1071.

§ 436 (Or.) Allegations in a replication that a release signed by plaintiff had been procured by fraud held sufficient, after verdict, to justify the admission of plaintiff's evidence as to such fraud.—*Foster v. University Lumber & Shingle Co.*, 131 P. 786.

PLEDGES.

See Assignments; Bailment, § 31.

§ 58 (N.M.) The holder of collateral paper may recover against the maker regardless of

any defense which the pledgor has to the debt for which the paper was pledged as security, unless the maker is deprived of some equitable defense which he might have against the payee.—*Medler v. Childers*, 131 P. 490.

POLICE.

See Municipal Corporations, § 189.

POLICE POWER.

See Municipal Corporations, §§ 590-625.

POSSESSION.

See Adverse Possession; Replevin, § 8.

POWERS.

See Brokers, § 10; Principal and Agent.

II. CONSTRUCTION AND EXECUTION.

§ 27 (Kan.) To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power.—*Chase v. Chapman*, 131 P. 615.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREDICATE.

See Witnesses, § 398.

PREMIUMS.

See Insurance, § 180.

PRESCRIPTION.

See Adverse Possession; Easements, § 5; Limitation of Actions; Waters and Water Courses, § 137.

PRESENTMENT.

Of claims, see Executors and Administrators, § 224.

PRESUMPTIONS.

See Appeal and Error, §§ 907-920; Criminal Law, § 1144; Evidence, §§ 54, 82.

PRINCIPAL AND ACCESSORY.

See Criminal Law, § 59; Homicide, § 30; Larceny, § 27.

PRINCIPAL AND AGENT.

See Attorney and Client; Banks and Banking, § 109; Brokers; Corporations, §§ 121, 206, 320, 403-432, 668; Evidence, §§ 113, 244, 258, 418; Factors; Gaming, § 79; Insurance, § 84; Partnership, § 157; Railroads, § 226; Telegraphs and Telephones, § 66; Tenancy in Common, § 20; Witnesses, § 56.

I. THE RELATION.

(A) Creation and Existence.

§ 28 (Or.) Where a power of attorney authorizing sale or mortgage of real property is unlimited as to time, it must be exercised within a reasonable time, and a sale made after more than 10 years had expired is too late.—*Marquam v. Ray*, 131 P. 523.

(B) Termination.

§ 31 (Or.) A power of attorney to sell and convey, or, if unable to do so, to mortgage the property to raise money for the grantor, held exhausted by the mortgage of the property.—*Marquam v. Ray*, 131 P. 523.

§ 31 (Wash.) Where an attorney in fact had absolute power to convey his principal's realty, such power was not surrendered by any provi-

sion in a contract executed by the attorney to convey land, though the full extent of his powers are not exercised by such contract.—*Ross v. Kenwood Inv. Co.*, 131 P. 649.

§ 34 (Kan.) A managing agent's agreement to be responsible to the principal for all general losses in the conduct of the business does not make him an agent with a power coupled with an interest precluding revocation of the agency.—*Chase v. Chapman*, 131 P. 615.

§ 41 (Or.) Where a contract gave plaintiffs the exclusive agency to sell a washing compound in a limited district for a specified time, loss of profits was contemplated as an element of damages flowing from defendant's breach thereof, so that defendant could not escape liability because the losses sustained and gains prevented were to some extent speculative and problematical.—*Bredemeier v. Pacific Supply Co.*, 131 P. 312.

In an action for breach of an exclusive agency contract, for the sale of a washing compound, plaintiffs having pleaded and proved the cost of creating a market therefor, evidence as to the cost of performing the contract after the market was established was admissible.—*Id.*

In an action for breach of an exclusive agency contract for the sale of a washing compound, proof of the amount of goods sold in the contract territory by defendant's successor, after breach and before trial, *held* admissible.—*Id.*

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) Execution of Agency.

§ 78 (Kan.) Where the relation of a general manager to property in his control was merely an agency, and not an agency coupled with an interest, the principal could maintain a suit before the expiration of his agency contract to compel an accounting, and to rescind and annul the contract on the ground of his misconduct.—*Chase v. Chapman*, 131 P. 615.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 97 (Wash.) While powers of attorney to convey realty are generally construed strictly, they should not be so construed as to defeat the evident intent of the principal.—*Ross v. Kenwood Inv. Co.*, 131 P. 649.

§ 103 (Wash.) The power to sell and convey only authorized the agent to sell and convey for a fair money consideration and not to make an exchange of property.—*Ross v. Kenwood Inv. Co.*, 131 P. 649.

A power of attorney authorizing the agent "to bargain, contract, agree for, purchase, receive, and take lands," and to "bargain, sell, remise, release, convey, mortgage, and hypothecate lands," authorized the attorney to exchange land as well as to buy and sell.—*Id.*

(B) Undisclosed Agency.

§ 145 (Wash.) Where an agent procuring in his own name, but for the benefit of the principal, an option, assigned the contract to the principal, who agreed to make the deferred payments, vendor could not compel the principal to make the deferred payments called for by the option.—*Rockwell v. Edgcomb*, 131 P. 191.

(C) Unauthorized and Wrongful Acts.

§ 148 (Wash.) Persons dealing with property sold pursuant to a recorded power of attorney are only charged with such knowledge as to the extent of the powers of the attorney in fact as the power of attorney conveys, in the absence of actual knowledge as to the extent of the powers; the agent's apparent authority

being his real authority.—*Ross v. Kenwood Inv. Co.*, 131 P. 649.

PRINCIPAL AND SURETY.

See Bail; Costs, § 144; Guaranty; Intoxicating Liquors, § 87.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 59 (Colo.) A contract of suretyship of a corporation organized to make bonds for profit must be construed most strongly in favor of the obligee.—*Empire State Surety Co. v. Lindenmeier*, 131 P. 437.

§ 59 (Kan.) The law does not have the same solicitude for incorporated surety companies as it has for voluntary sureties, and, such corporations being essentially insurers, the rules peculiar to suretyship do not apply.—*Chicago Lumber Co. v. Douglas*, 131 P. 563.

§ 59 (Or.) The principal purpose of construing all contracts, including building bonds, is to ascertain the intention of the parties.—*Strode v. Smith*, 131 P. 1032.

§ 73 (Colo.) A surety is liable only to the extent of the penalty of the bond, but interest may be allowed from the time of default, though the judgment may then exceed the penalty.—*Empire State Surety Co. v. Lindenmeier*, 131 P. 437.

Interest against a surety may only be computed from the time of the demand, if a demand is necessary, and not from the time of default; and, where the complaint in an action against a surety of a building contractor did not allege any demand prior to the commencement of the action, interest is allowable only from that time.—*Id.*

§ 82 (Cal.App.) Where an owner completed the building on the abandonment of the work by the contractor, and had in his hands a sum due under the contract sufficient to pay for the work done by him and legal liens, the surety on the contractor's bond was not liable to the owner voluntarily making payments in excess of what he was legally liable for.—*Growall v. Pacific Surety Co.*, 131 P. 73.

The surety on the bond of a building contractor abandoning the work is not liable to the owner for attorney's fees and costs incurred by him in defending against lien claimants.—*Id.*

III. DISCHARGE OF SURETY.

§ 115 (Kan.) That the chattel mortgage securing the note upon which a person was surety was withheld from record without his knowledge *held* not to discharge him as surety, where the mortgage was invalid because on a stock of goods out of which the mortgagor, with the surety's consent, was permitted to make sales.—*First Nat. Bank v. Hardman*, 131 P. 602.

§ 129 (Wash.) A surety on a building contract, who, upon receiving formal notice of default by the principal, did not object thereto because not given within 30 days, as required in the bond, and notified the owner to complete the work at its expense, thereby waived the provision requiring notice of default within 30 days.—*Eilers Music House v. Hopkins*, 131 P. 838.

A surety company on a building contract cannot complain that a certain sum was paid to the contractors by the principal after the contractors had defaulted, where it was paid to the receiver of the contractors by direction of the surety company.—*Id.*

IV. REMEDIES OF CREDITORS.

§ 138 (Colo.) A bond conditioned on a building contractor performing a contract requiring him to provide all materials and perform all work obligates the contractor and surety to pay

for materials, and where the contractor fails to pay, and liens are claimed, established, and foreclosed, and the property of the owner ordered sold, the surety is liable, though the judgments have not been paid.—*Empire State Surety Co. v. Lindenmeier*, 131 P. 437.

§ 149 (Wash.) Where the surety on a building contract had the suit upon its bond delayed at its request, it cannot afterwards complain that the suit was not brought within six months after the work was completed, as required by the contract, having waived that provision.—*Eilers Music House v. Hopkins*, 131 P. 838.

§ 155 (Colo.) A complaint in an action against a surety must claim interest.—*Empire State Surety Co. v. Lindenmeier*, 131 P. 437.

PRIORITIES.

See Waters and Water Courses, § 21.

Of claims, see Executors and Administrators, § 261.

PRIVILEGE.

See Witnesses, §§ 293½, 294.

PRIVILEGED COMMUNICATIONS.

See Witnesses, §§ 195, 219.

PROBABLE CAUSE.

See Malicious Prosecution, § 24.

PROBATE.

See Wills, § 358.

PROBATE COURTS.

See Courts, § 202; Insane Persons, § 27.

PROCESS.

See Appearance; Constitutional Law, § 309; Corporations, §§ 507, 668; Execution; Executors and Administrators, §§ 337, 348; Judgment, § 497; Limitation of Actions, § 119; Statutes, § 85; Waters and Water Courses, § 128.

II. SERVICE.

(A) Personal Service in General.

§ 68 (Cal.App.) A second service of process does not waive the first service nor effect a shortening of the time allowed a defendant to do an act under the law applying to the first service.—*Townsend v. Parker*, 131 P. 766.

(B) Return and Proof of Service.

§ 141 (Colo.) A sheriff's return of service of process is controlling, even over the recitals in the judgment, and if defective or erroneous must be amended.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

§ 148 (Colo.) A sheriff's return of service of process cannot be impeached by a record or statements made by him.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 154 (Colo.) A defendant may not raise the question of the sufficiency of service of summons on a codefendant, where the sheriff's return showing personal service is regular on its face.—*B. F. Salzer Lumber Co. v. Lindenmeier*, 131 P. 442.

PROFITS.

See Damages, § 40; Wills, § 728.

PROHIBITION.

I. NATURE AND GROUNDS.

§ 3 (Cal.App.) Prohibition does not lie to restrain the superior court which issued an in-

junction from proceeding to determine whether the persons enjoined had violated the injunction, on the ground of want of jurisdiction to issue the injunction, because of the adequacy of the remedy by writ of review.—*Hill v. Superior Court in and for Los Angeles County*, 131 P. 1061.

Prohibition ordinarily will not issue where certiorari lies, unless the applicant for prohibition will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed.—*Id.*

§ 3 (Nev.) Where it is sought to prevent the enforcement of a void judgment upon which execution is about to be levied, prohibition is the proper remedy; for an appeal from an order denying a motion to quash the summons and set aside the judgment does not afford sufficient relief.—*Gordon v. District Court of Fifth Judicial Dist.*, 131 P. 134.

§ 3 (N.M.) A writ of prohibition is not available as a writ of error, but only where there is a lack of jurisdiction.—*State v. Medler*, 131 P. 976.

§ 3 (Wash.) Prohibition will not lie to prevent a lower court exceeding its jurisdiction, where there is an adequate remedy by appeal.—*State v. Superior Court of Washington for King County*, 131 P. 816.

The adequacy of the remedy by appeal which will prevent resort to prohibition does not depend upon the question of delay or expense.—*Id.*

Under Rem. & Bal. Code, § 1062, parties found guilty of contempt by the superior court and ordered arrested and imprisoned had an adequate remedy by appeal, and could not resort to prohibition.—*Id.*

§ 4 (Colo.) The granting of a writ of prohibition rests in the sound discretion of the court, and is not a writ of right.—*People v. District Court of Sixth Judicial Dist.*, 131 P. 424.

§ 12 (Cal.App.) A district court of appeal will not issue an alternative writ of prohibition to restrain the superior court from proceeding to determine whether petitioners are guilty of contempt for violating an injunctive order.—*Hill v. Superior Court in and for Los Angeles County*, 131 P. 1061.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 18 (Colo.) Where receivers were appointed February 7, 1911, and petitioners filed a petition to intervene on March 1st, and on January 6, 1912, again filed a petition to intervene, giving, as excuse for delay in presenting the second petition, an understanding by which the financial embarrassment of the corporation was to have been relieved, *held*, that an application for prohibition filed November 22, 1912, to restrain further action by the court would be refused for laches.—*People v. District Court of Sixth Judicial Dist.*, 131 P. 424.

§ 19 (Nev.) Where prohibition is sought to restrain the enforcement of a judgment, a sheriff, who was seeking to levy execution, is a proper party.—*Gordon v. District Court of Fifth Judicial Dist.*, 131 P. 134.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Fixtures; Mines and Minerals.

§ 4 (Cal.) Water stored by an irrigation company in its reservoir was real property, the right to use which could become appurtenant to land.—*Copeland v. Fairview Land & Water Co.*, 131 P. 119.

§ 9 (Okla.) Possession of personal property, if unexplained, is prima facie evidence of ownership.—*Ragan v. Citizens' State Bank of Foraker*, 131 P. 1093.

PROSTITUTION.

See Criminal Law, §§ 507, 780, 1178.

PROXIMATE CAUSE.

See Negligence, §§ 56, 61.

PUBLICATION.

See Taxation, § 662.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 271-538.

PUBLIC LANDS.

See Waters and Water Courses, §§ 21-33.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(M) Conveyances, Contracts, and Exemptions.

§ 135 (Kan.) Where plaintiff obtained authority to graze certain cattle on government land inclosed with his own, in a national forest reserve, and illegally assigned the right to defendant, who made no use of it, through his failure to procure cattle, defendant was liable to plaintiff for the stipulated rent; he not being deprived of the use of the pasture by the government authorities.—Finnup v. Burnside, 131 P. 556.

PUBLIC NUISANCE.

See Nuisance.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Corporations, § 391; Gas, § 14; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 225-263.

PUNISHMENT.

See Homicide, § 354.

PUNITIVE DAMAGES.

See Damages, §§ 87, 91.

QUIETING TITLE.

See Appeal and Error, § 1176; Judgment, §§ 479, 743; Lis Pendens; Taxation, §§ 790-813; Waters and Water Courses, §§ 33, 158½.

I. RIGHT OF ACTION AND DEFENSES.

§ 14 (Cal.App.) Where a tender is a condition precedent to a decree quieting title, a payment to the party entitled thereto must be provided for or made before a decree is entered, but a personal tender is not requisite to the bringing of the action.—Smith v. J. R. Newberry Co., 131 P. 1055.

Where a grantee in a deed in fact a mortgage conveyed the property to a third person who insisted that he purchased without notice, and there was no intent to assign the debt, the grantor suing to quiet title need not tender the debt to the third person.—Id.

§ 21 (Colo.App.) Under Mills' Ann. Code, § 255, an action may be maintained by one in possession against one claiming under an instrument void on its face.—Empire Ranch & Cattle Co. v. Wilson, 131 P. 779.

II. PROCEEDINGS AND RELIEF.

§ 29 (Colo.App.) In a statutory action to quiet title, plaintiff's right to relief cannot be barred by laches.—Lougée v. Wilson, 131 P. 780.

§ 31 (Wash.) The provision of Rem. & Bal. Code, §§ 229-232, that the unknown heirs, proper parties to an action relating to real property, may be proceeded against by service by publication, is valid, and where complied with in an action to quiet title, a proceeding in rem, the court having jurisdiction of the realty may adjudicate and quiet title.—Phillips v. Tompson, 131 P. 461.

Statutory provision for service upon "unknown heirs" by publication in actions involving title to real property held to contemplate grandchildren as heirs at law of their deceased grandmother, as well as the heirs at law of their deceased father, her son and heir at law.—Id.

§ 44 (Colo.App.) Recitals in a trustee's deed held sufficient, in an action to quiet title, to establish prima facie that the grantor was a corporation so as to require defendant claiming title in himself to prove it.—Lougée v. Wilson, 131 P. 777.

In a code action to quiet title if defendant denies plaintiff's title and pleads an adverse title, void on its face, plaintiff must produce sufficient proof only to show possession, or, in case of vacant or unoccupied land, show constructive possession, after which the burden is on defendant to prove title as in ejectment.—Id.

§ 44 (Colo.App.) Recitals in a trustee's deed, introduced as part of plaintiff's title in a statutory action to quiet title, held prima facie evidence of the facts recited.—Empire Ranch & Cattle Co. v. Howell, 131 P. 798.

§ 44 (Idaho) Evidence in an action to quiet title held to sustain a finding that the strip of land in controversy was part of defendant's lot.—Brinton v. Steele, 131 P. 662.

§ 49 (Colo.App.) In a suit to quiet title authorized by Mills' Ann. Code, § 255, the cancellation of an instrument or the setting aside of a deed, constituting an alleged cloud on title, is an incident to, rather than the primary object of, the action.—Empire Ranch & Cattle Co. v. Wilson, 131 P. 779.

§ 52 (Colo.App.) In a statutory action to quiet title against an instrument void on its face, under Mills' Ann. Code, § 255, it is sufficient that the judgment state that plaintiff's title is quieted as to such instrument without further recitals.—Empire Ranch & Cattle Co. v. Wilson, 131 P. 779.

QUO WARRANTO.

See Agriculture; Municipal Corporations, § 18.

RACE.

See Gaming, § 1.

RAILROADS.

See Carriers; Eminent Domain; Master and Servant; Street Railroads.

I. CONTROL AND REGULATION IN GENERAL.

§ 9 (N.M.) Where a railroad entered a general appearance before the state corporation commission, it waived all prior irregularities.—Seward v. Denver & R. G. R. Co., 131 P. 980.

In determining what are "adequate facilities" within the provision of the Constitution, authorizing the corporation commission to require carriers to furnish same, the court must consider the volume of business, revenue therefrom, the people accommodated, the present facilities, and all the circumstances and rights involved.—Id.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

§ 58 (N.M.) While it is the absolute duty of a railroad company to transport freight and passengers, it is not its prime duty to provide depots and waiting rooms.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

The corporation commission cannot arbitrarily establish a railroad station regardless of the expense or benefit.—*Id.*

X. OPERATION.

(A) Duty to Operate.

§ 214 (N.M.) So long as a railroad company continues to exercise its charter rights, it will be required to perform its duties to the public, even though such performance entail a pecuniary loss.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

When the duty of a railroad company sought to be enforced is only an incident to the main duty, the question of expense may be considered in connection with the public necessities.—*Id.*

§ 217 (N.M.) While it is the absolute duty of a railroad company to transport freight and passengers, it is not its prime duty to provide waiting rooms, station agents, and telegraph and telephone facilities.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

The facilities afforded at a railway station must be commensurate with the patronage and receipts from that portion of the public to whom the service is rendered.—*Id.*

(B) Statutory, Municipal, and Official Regulations.

§ 226 (N.M.) The corporation commission cannot arbitrarily require a station agent, regardless of the expense or benefit.—*Seward v. Denver & R. G. R. Co.*, 131 P. 980.

It is unreasonable to require the installation of telegraph service to bulletin trains, where the cost thereof is out of proportion to the revenue derived from that portion of the traveling public benefited thereby.—*Id.*

(F) Accidents at Crossings.

§ 324 (Kan.) Where a traveler at a railroad crossing stepped in front of moving cars which he saw, or which there was nothing to prevent him from seeing, he was guilty of contributory negligence barring recovery.—*Crane v. Missouri Pac. Ry. Co.*, 131 P. 1188.

§ 352 (Kan.) Where the special findings of the jury show that the injury sustained at a crossing was due to the want of care of the traveler, a general verdict in his favor will be set aside.—*Crane v. Missouri Pac. Ry. Co.*, 131 P. 1188.

(G) Injuries to Persons on or near Tracks.

§ 358 (Idaho) A railroad company owed to a person walking from a market to his residence along a footpath across a railroad right of way and alongside the track the duty to exercise reasonable care, and to take reasonable precaution not to inflict injury upon him.—*Keim v. Gilmore & P. R. Co.*, 131 P. 656.

§ 359 (Idaho) A greater degree of care is required of a railroad company to protect even a trespasser from injury upon a right of way at a station or depot grounds than to protect a trespasser at an unfrequented place.—*Keim v. Gilmore & P. R. Co.*, 131 P. 656.

§ 364 (Idaho) Where the jackarms of a steam shovel car extended beyond the ordinary width of cars, and struck a truck on the station ground, hurling it upon a passing pedestrian, the railroad company was liable for the resulting injuries.—*Keim v. Gilmore & P. R. Co.*, 131 P. 656.

(H) Injuries to Animals on or near Tracks.

§ 405 (Okl.) The duty of train operatives in respect to stock trespassing upon a track fenced

as required by statute is to exercise ordinary care to avoid injury after their presence and peril are discovered.—*Midland Valley R. Co. v. Bryant*, 131 P. 678.

§ 411 (Okl.) Comp. Laws 1909, § 1389, requiring railroad companies to fence except at public highways and stations, contemplates the erection of wing fences and cattle guards at public highway crossings.—*Midland Valley R. Co. v. Bryant*, 131 P. 678.

The purpose of Comp. Laws 1909, § 1389, requiring railroad companies to fence their roads, is to prevent the intrusion of domestic animals upon the right of way.—*Id.*

§ 412 (Okl.) A railroad company is not an insurer of the efficacy of its cattle guards against frightened or breachy animals, but has discharged its duty when it keeps in repair cattle guards of the most approved kind in general use.—*Midland Valley R. Co. v. Bryant*, 131 P. 678.

§ 441 (Okl.) In an action for injury to stock due to defective cattle guards, the burden was on plaintiff to prove the negligence charged; the accident itself raising no presumption of negligence.—*Midland Valley R. Co. v. Bryant*, 131 P. 678.

§ 442 (Okl.) Evidence that other stock had gone over the defendant railroad company's cattle guards was not competent to establish the insufficiency of the cattle guard, in the absence of evidence tending to show the size, length, depth, and construction of the guards.—*Midland Valley R. Co. v. Bryant*, 131 P. 678.

§ 446 (Colo.) Evidence held to make it a jury question whether animals were killed by defendant's negligence.—*Denver, B. & W. R. Co. v. McDonough*, 131 P. 402.

(I) Fires.

§ 483 (Kan.) In an action against a railroad company for destruction of property by fire, the statutory attorney's fee cannot be assessed by the court, where there is a jury trial, but the facts showing the basis for an allowance must be pleaded and proved, and the allowance left to the determination of the jury.—*Gray v. Missouri Pac. Ry. Co.*, 131 P. 555.

RAPE.

See Appeal and Error, § 171; Criminal Law, §§ 366, 369; Evidence, § 188.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 13 (Okl.Cr.App.) An act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under the age of 16 years is rape in the second degree, whether such act is accomplished by means of force or with consent.—*Morris v. State*, 131 P. 731.

§ 16 (Okl.Cr.App.) Since a female child under the age of consent is legally incapable of consenting to carnal knowledge of her person, she is incapable of consenting to an assault with intent to commit rape, and every act done with such intent is felonious.—*Bouie v. State*, 131 P. 953.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 52 (Okl.Cr.App.) Evidence held sufficient to support a conviction of statutory rape.—*Brooks v. State*, 131 P. 728.

§ 53 (Okl.Cr.App.) Evidence in a prosecution for assault with intent to commit rape upon a female child under the age of consent, held to support a conviction.—*Bouie v. State*, 131 P. 953.

§ 54 (Okl.Cr.App.) When the evidence in a rape case is inherently improbable and almost incredible, there must be corroboration by other evidence as to the principal facts to sustain a conviction.—*Morris v. State*, 131 P. 731.

III. CIVIL LIABILITY.

§ 65 (Okla.) Rape of a female gives her a cause of action for damages against the perpetrator.—*Watson v. Taylor*, 131 P. 922.

"Rape" under Comp. Laws 1909, § 2353, subsec. 2, is an act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female is over the age of 16 years and under the age of 18, and of previous chaste and virtuous character.—*Id.*

To show that a female over 16 and under 18 years of age consented to the act or acts of sexual intercourse will not constitute a defense to a civil action for damages for rape.—*Id.*

§ 66 (Okla.) Evidence, in an action for damages for rape, *held* to authorize submission of the cause to the jury and to sustain the verdict for plaintiff.—*Watson v. Taylor*, 131 P. 922.

RATE.

See Interest, § 34.

RATIFICATION.

See Partnership, § 157.

REAL ACTIONS.

See Ejectment.

REAL PROPERTY.

See Property, § 4.

REASONABLE CARE.

See Negligence, § 136; Waters and Water Courses, § 252.

REASONABLE DOUBT.

See Homicide, § 151.

RECEIPTS.

See Compromise and Settlement, §§ 16, 23.

RECEIVERS.

See Banks and Banking, §§ 77, 246; Corporations, §§ 211, 553.

I. NATURE AND GROUNDS OF RECEIVERSHIP.**(A) Nature and Subjects of Remedy.**

§ 1 (Wash.) The power to appoint a receiver should always be exercised with caution.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

§ 6 (Wash.) A receiver should not be appointed if there is any other adequate remedy.—*Bergman Clay Mfg. Co. v. Bergman*, 131 P. 485.

(B) Grounds of Appointment of Receiver.

§ 16 (Kan.) In an action by the vendor for the price of a stock of merchandise which the purchaser had refused to accept, it is proper to appoint a receiver to sell the goods; the proceeds to be applied on plaintiff's claim.—*Swisher v. Dunn*, 131 P. 571.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 29 (Okla.) Under Comp. Laws 1909, § 5772, the district judge at chambers has jurisdiction to appoint a receiver in a cause pending in another county within his district.—*Pyeatt v. Prudential Ins. Co.*, 131 P. 914.

§ 35 (Okla.) Where the petition for the appointment of a receiver fails to state facts showing that the delay which would result from giving notice of the application to the adverse party would defeat petitioner's rights or injure him, it is error to appoint a receiver without notice.—*Pyeatt v. Prudential Ins. Co.*, 131 P. 914.

RECEIVING STOLEN GOODS.

§ 4 (Okla.Cr.App.) Manual possession of the property is not essential to the crime of knowingly receiving stolen property, but it is sufficient if the property be received by defendant's authorized agent.—*Price v. State*, 131 P. 1102.

§ 8 (Okla.Cr.App.) That the evidence in a prosecution for receiving stolen goods tends to establish that defendant was a principal in the original larceny will not prevent a conviction.—*Price v. State*, 131 P. 1102.

Where a defendant received stolen property under such circumstances that he must have believed that it was stolen, a conviction for knowingly receiving stolen property will not be reversed for want of evidence.—*Id.*

RECORDS.

See Appeal and Error, §§ 511-702; Bankruptcy, § 161; Corporations, § 181; Criminal Law, §§ 103, 1088-1128; Evidence, § 332; Mortgages, § 163; Shipping, § 33; Vendor and Purchaser, §§ 33, 133.

§ 2 (Wash.) Recording statutes are remedial, and must be liberally construed, so as to attain the object intended by them.—*Benner v. Scandinavian American Bank*, 131 P. 1149.

REFORMATION OF INSTRUMENTS.

See Judgment, § 256.

I. RIGHT OF ACTION AND DEFENSES.

§ 2 (Cal.App.) Where a conveyance of water rights by mistake conveyed only 75 cubic inches, instead of 75 miner's inches, the grantee's right to a reformation of the contract did not necessarily depend upon a showing of actual injury.—*Lillis v. Silver Creek & Panoche Land & Water Co.*, 131 P. 344.

II. PROCEEDINGS AND RELIEF.

§ 36 (Cal.App.) Complaint in action to reform recorded agreement between defendant and plaintiff's grantor conveying water rights *held* to allege by inference that plaintiff purchased after such agreement was recorded.—*Lillis v. Silver Creek & Panoche Land & Water Co.*, 131 P. 344.

In action to reform conveyance of water rights, complaint, alleging prospective injury to plaintiff's crops unless the amount of water claimed by him was furnished, *held* to sufficiently show damage or injury from the mistake.—*Id.*

§ 43 (Cal.App.) In an action to reform conveyance of water rights, where plaintiff's grantor used the amount of water which plaintiff claimed was intended to be conveyed from the date of the agreement, and was using it when plaintiff purchased, and plaintiff continued to use that amount, it would not be presumed that plaintiff examined the record, and knew the terms of the recorded conveyance.—*Lillis v. Silver Creek & Panoche Land & Water Co.*, 131 P. 344.

§ 45 (Cal.App.) In action to reform agreement conveying all the water in a canal when it did not exceed 75 cubic inches per second, so as to convey 75 miner's inches, complaint *held* sufficient as against the contention that it did not show that either 75 cubic inches or 75 miner's inches had ever flowed in such canal.—*Lillis v. Silver Creek & Panoche Land & Water Co.*, 131 P. 344.

§ 45 (Colo.App.) Evidence, in an action for the reformation of an agreement transferring water shares, *held* to sustain a decree reforming the agreement so as to read "five water rights," instead of "five shares of water."—*Park v. McKee*, 131 P. 279.

REHEARING.

See Appeal and Error, §§ 832, 835; New Trial.

RELEASE.**I. REQUISITES AND VALIDITY.**

§ 16 (Or.) Under ordinary circumstances, one is not excused from the consequences of signing a release which he has negligently failed to read.—*Foster v. University Lumber & Shingle Co.*, 131 P. 736.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 57 (Wash.) Evidence held not to sustain a finding that a release for personal injuries was procured through fraud.—*Nath v. Oregon R. & Navigation Co.*, 131 P. 251.

RELEVANCY.

See Evidence, §§ 113–151.

REMITTITUR.

See Appeal and Error, § 1140.

REMOVAL.

See Officers, § 74.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL.

See Landlord and Tenant, § 83.

RENT.

See Landlord and Tenant, §§ 194–199½; Wills, § 723.

REPAIRS.

See Easements, § 53; Negligence, § 131.

REPEAL.

See Statutes, § 153.

REPLEVIN.

See Fixtures.

I. RIGHT OF ACTION AND DEFENSES.

§ 8 (Kan.) Where, in replevin, plaintiff fails to show completed sale to him or any other right to possession, he cannot recover.—*Singer Mfg. Co. v. Godding*, 131 P. 572.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 107 (Wash.) While Rem. & Bal. Code, § 434, is not mandatory in terms as to rendering judgment in the alternative in claim and delivery, either party may insist upon such a judgment.—*Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co.*, 131 P. 1156.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 120 (Wash.) In claim and delivery under Rem. & Bal. Code, §§ 434, 711, where property is tendered plaintiff after judgment in a substantially depreciated condition, he may reject it and sue on the redelivery bond for its value as fixed by the judgment.—*Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co.*, 131 P. 1156.

REPLICATION.

See Pleading, §§ 165, 180.

REPLY.

See Pleading, §§ 165, 180.

REPRESENTATIONS.

See Insurance, §§ 250, 256.

RESCISSION.

See Cancellation of Instruments; Contracts, §§ 265, 269; Exchange of Property; Vendor and Purchaser, § 31.

RESERVOIRS.

See Waters and Water Courses, § 29.

RESIDENCE.

See Domicile; Venue, § 22.

RESPONSIVENESS.

See Witnesses, § 248.

RESTAURANTS.

See Licenses, § 6.

RESTRAINT OF TRADE.

See Contracts, §§ 116, 117.

RETURN.

See Certiorari, § 49; Process, §§ 141, 143.

REVENUE.

See Taxation.

REVERSIONS.

See Mortgages, § 536.

REVIEW.

See Appeal and Error; Certiorari.

REVOCATION.

See Brokers, § 10; Principal and Agent, §§ 34, 41; Wills, §§ 79, 191, 796.

RIGHT OF WAY.

See Easements.

RIPARIAN RIGHTS.

See Navigable Waters, § 42; Waters and Water Courses, §§ 52, 86, 140.

RISKS.

See Master and Servant, §§ 203–226.

ROADS.

See Highways.

ROBBERY.

See Homicide, §§ 166, 339.

ROYALTIES.

See Indians, § 16.

SALARY.

See Schools and School Districts, § 144.

SALES.

See Attachment, § 241; Corporations, §§ 117–121, 432; Evidence, §§ 82, 113, 471; Executors and Administrators, §§ 326–383; Factors; Frauds, Statute of, §§ 87–90, 112; Licenses, § 7; Mortgages, § 534; Receivers, § 16; Shipping, § 33; Taxation, §§ 662, 686, 749, 764; Vendor and Purchaser; Waters and Water Courses, §§ 249, 254.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 24 (Colo.) A memorandum noting the delivery of pictures on approval *held* not to constitute a sale, but merely an option to purchase, so that no sale resulted unless the option was exercised.—*Steinhauer v. Henson*, 131 P. 255.

§ 48 (Kan.) A contract for the sale of a drug store, including the stock and business, is not unenforceable because the business had been conducted in violation of law, requiring the owner or an employé to be a pharmacist.—*Swisher v. Dunn*, 131 P. 571.

II. CONSTRUCTION OF CONTRACT.

§ 77 (Kan.) A contract for the appraisalment of a stock of merchandise "at the invoice purchase price" means that the goods are to be appraised at what had been paid for them when they were bought.—*Swisher v. Dunn*, 131 P. 571.

§ 79 (Okl.) In the absence of any contrary provision in a contract of sale, the place of delivery is the place where the goods are located when sold.—*Lodwick Lumber Co. v. E. A. Butt Lumber Co.*, 131 P. 917.

Where plaintiff, a lumber company, with its mills at A., contracted to sell and deliver to defendants, a lumber company with its yards at W., a car of lumber, the contract being silent on the subject, the place of delivery is at A.—*Id.*

Where defendant, a lumber company with its yards at W., ordered of plaintiff, with its mills at A., a car of lumber to be delivered at that place, it was not bound to accept delivery of the lumber from another lumber company at another place.—*Id.*

IV. PERFORMANCE OF CONTRACT.**(A) Title and Possession of Seller.**

§ 135 (Or.) Where the seller of land agreed to deliver the purchaser a fixed number of feet of saw logs within a stipulated period, the fact that he did not own the logs at the time of the sale does not constitute a breach.—*Page v. Ford*, 131 P. 1013.

(C) Delivery and Acceptance of Goods.

§ 153 (Cal.App.) Seller of grain *held*, in view of Civ. Code, § 1858b, making the transfer of negotiable warehouse receipts a symbolic delivery, to have made a timely tender of delivery of grain or a valid offer to perform.—*A. Widemann Co. v. Digges*, 131 P. 882.

§ 168 (Cal.App.) A seller of grain to be delivered within a certain time at warehouses not designated by the contract was bound to give reasonable notice, in advance, of the time and place at which delivery would be made, and a notice two days before the expiration of the time was sufficient to afford a reasonable opportunity for inspection before acceptance and payment.—*A. Widemann Co. v. Digges*, 131 P. 882.

§ 176 (Cal.App.) Under the express provisions of Civ. Code, §§ 1511, 1512, a buyer, through whose fault a notification of delivery was not received until after the time limited by the contract, could not complain.—*A. Widemann Co. v. Digges*, 131 P. 882.

VI. WARRANTIES.

§ 284 (Kan.) Where a hay press, designed to make bales of a certain size, was sold under a warranty that it would work satisfactorily, the fact that it did not work satisfactorily in making bales of a larger size was not a breach of the warranty.—*Auto-Fedan Hay Press Co. v. Ward*, 131 P. 595.

§ 285 (Kan.) Under a contract providing that, if the farm implement sold did not work satisfactorily, the purchaser should notify the seller to adjust it, and, if it did not then work, the

seller would take it back and refund the price, the purchaser was obligated, if the machine proved unsatisfactory, to give the required notice and to return the machine within a reasonable time if it then failed to work satisfactorily.—*Auto-Fedan Hay Press Co. v. Ward*, 131 P. 595.

§ 287 (Kan.) Where the purchaser of a farm implement was obligated by the contract to return the implement within a reasonable time if the seller after notice failed to make it work satisfactorily, the question of what constituted a reasonable time was to be determined from all the circumstances of the case, in an action on a purchase-money note.—*Auto-Fedan Hay Press Co. v. Ward*, 131 P. 595.

VII. REMEDIES OF SELLER.**(E) Actions for Price or Value.**

§ 345 (Okl.) Where property is to be delivered at the place where it is located when sold, the seller, before he can recover the price, is bound to prove delivery at that place.—*Lodwick Lumber Co. v. E. A. Butt Lumber Co.*, 131 P. 917.

§ 353 (Cal.App.) A complaint, alleging the execution of a contract for the sale of barley, that defendant failed and refused to accept the barley and pay the purchase price, or any part thereof, for which reason the seller was compelled to sell it to another person, sufficiently alleged the fact of nonpayment; the word "fail" meaning to leave unperformed; to omit; to neglect.—*A. Widemann Co. v. Digges*, 131 P. 882.

IX. CONDITIONAL SALES.

§ 472 (Colo.App.) A conditional sale reserving a secret lien to the vendor is void in Colorado as against creditors or subsequent holders having no notice thereof, and who are injuriously affected thereby, being treated as to such persons as an absolute sale.—*Puzzle Mining & Reduction Co. v. Morse Bros. Machinery & Supply Co.*, 131 P. 791.

Where a lessee of mining ground purchased certain machinery under a conditional sale to comply with the requirements of the lease, the lessor having no knowledge of the condition, the sale as to him was absolute and not conditional.—*Id.*

§ 474 (Wash.) Under Rem. & Bal. Code, § 3670, providing that conditional sales of personality shall be absolute as to subsequent creditors unless filed in the county where the buyer resides, a conditional sale contract to a corporate buyer must be filed in the county specified in the articles of incorporation as its principal place of business.—*Casey-Hedges Co. v. Wilcox*, 131 P. 205; *Borroughs Adding Mach. Co. v. Same*, *Id.* 206.

SATISFACTION.

See Chattel Mortgages, § 239; Payment.

SCAFFOLDS.

See Master and Servant, §§ 190, 196.

SCHOOLS AND SCHOOL DISTRICTS.**II. PUBLIC SCHOOLS.****(G) Teachers.**

§ 144 (Kan.) Where the school board, in order that the older boys might engage in farm work, closed the school a month earlier than the teacher's contract provided for, the teacher was entitled to recover his salary for the full term.—*Smith v. School Dist. No. 64 of Marion County*, 131 P. 557.

A teacher whose contract makes no provision for deduction in salary while the school is closed, and who stands ready to teach, and is prevented only because the board closed the school on account of the prevalence of a con-

tagious disease, is entitled to the compensation agreed on.—Id.

SECONDARY EVIDENCE.

See Evidence, §§ 178-186.

SERVANTS.

See Master and Servant.

SERVICE.

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SERVITUDE.

See Easements.

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SETTING ASIDE.

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SHAM PLEADING.

See Pleading, § 359.

SHEEP.

See Animals.

SHERIFFS AND CONSTABLES.

See Counties, § 206; Prohibition, § 19.

II. COMPENSATION.

§ 30 (Nev.) The constable of a town, who performs services the fees for which are fixed by statute, may not accept a greater sum, nor may the county commissioners tender a less sum; and an agreement to accept a greater or less sum is void.—Wolf v. Humboldt County, 131 P. 964.

§ 61 (Kan.) Where a sheriff with a warrant from a justice went to Colorado and apprehended defendant, who, on return without a requisition, was convicted of a felony, he was entitled to mileage only for the distance traveled in the state.—State v. Martin, 131 P. 1190.

III. POWERS, DUTIES, AND LIABILITIES.

§ 88 (Cal.App.) It is the duty of the constable to remove property attached from the attachment debtor's premises within a reasonable time, and he has no right to exclude the debtor from the premises by permitting the property to remain thereon.—Stevenson Bros. Co. v. Robertson, 131 P. 326.

§ 116 (Cal.App.) A constable, who used leased premises as a storeroom for attached property of a tenant, held not liable to the lessor for the rent where the tenant did not surrender the premises and no notice to quit was given until about the time the constable vacated the premises.—Stevenson Bros. Co. v. Robertson, 131 P. 326.

While the failure of a constable to remove attached property of a tenant from the leased premises within a reasonable time was an invasion of the rights of the tenant, it did not render the constable liable to the lessor for the rent, where the tenant did not abandon the lease or surrender the premises.—Id.

Where a tenant after an attachment of his property did not abandon the lease or surrender the premises, a promise by the constable to the lessor to look after the rent, if considered as an agreement to pay rent to the

lessor, was unenforceable, because the lessor had no authority to re-lease.—Id.

SHIPPING.

See Bankruptcy, § 184; Ferries; Maritime Liens.

II. TITLE.

§ 33 (Wash.) Under Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837), requiring the recording of bills of sale of vessels, an unrecorded bill of sale of a vessel is invalid as against a creditor of the vendor who seeks to sequester the property to the satisfaction of his debt.—Benner v. Scandinavian American Bank, 131 P. 1149.

SIDEWALKS.

See Municipal Corporations, §§ 284, 444, 771, 821.

SIGNALS.

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SIGNATURES.

See Evidence, § 459; Vendor and Purchaser, § 23.

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See Judges, § 15.

SPECIAL LAWS.

See Statutes, §§ 76-94.

SPECIFIC PERFORMANCE.

See Corporations, § 183.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 10 (Colo.App.) Where a vendor agrees to convey a body of land for a fixed consideration, and then by his own act renders himself incapable of wholly fulfilling the contract, the purchaser may obtain specific performance in so far as the vendor is able to give it with an abatement of the contract price.—Wellington Realty Co. v. Gilbert, 131 P. 803.

§ 13 (Wash.) In an action for specific performance of a contract to convey land, where plaintiff is not asking for damages in the alternative, and is claiming that defendant has not disqualified himself to convey title, that defendant may have no title is no defense; he not being concerned with any ensuing controversy plaintiff may have with others.—Wright v. Suydam, 131 P. 239.

II. CONTRACTS ENFORCEABLE.

§ 32 (Wash.) The fact that the purchaser in a contract for the sale of land is liable on a breach only for liquidated damages does not affect his right to enforce specific performance on the ground of want of mutuality of remedies, where he has tendered the agreed price and has kept the tender good.—Wright v. Suydam, 131 P. 239.

§ 41 (Kan.) A wife's oral agreement to will her property to her husband in consideration of his conveying his realty to her is enforceable where, in part performance, title to his realty is taken in her name as agreed, and she makes such will, and he thereafter, in reliance thereon, improves the property.—Nelson v. Schoonover, 131 P. 147.

III. GOOD FAITH AND DILIGENCE.

§ 101 (Wash.) An owner cannot claim that a contract of sale for land, where the payment of the purchase price was to be concurrent with the delivery of the deed, has lost its vitality on account of delay, where he has not at any time offered to perform or made any demand and has not sought to rescind.—*Wright v. Suydam*, 131 P. 239.

SPEED.

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See Municipal Corporations, § 120.

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See Appeal and Error, §§ 562-564; Elections, § 285; Witnesses, §§ 379-388.

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See Corporations, § 391; Criminal Law, § 18; Extradition; Ferries; Municipal Corporations, § 29; Navigable Waters, § 38.

STATUTES.

See Frauds, Statute of; Limitation of Actions. For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 21 (Colo.) Under Const. art. 6, § 14, providing that, two-thirds of each house concurring, the General Assembly may alter the number of judicial districts, the concurrence of two-thirds is not necessary to the change of a county from one district to another.—In re Senate Resolution No. 9, 131 P. 257.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 76 (Kan.) Laws 1907, c. 88, purporting to amend Laws 1905, c. 88, relating to the building of certain bridges in Neosho county, is a special act, the purpose of which could be effected by a general law, and is a violation of Const. art. 2, § 17.—*Atchison, T. & S. F. Ry. Co. v. Board of Commissioners of Neosho County*, 131 P. 581.

§ 85 (Colo.App.) Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; *Mills' Ann. St.* [1912 Ed.] § 3812), relative to service of process in proceedings to secure permission to change the point of diversion of water rights, held not violative of the constitutional requirements as to uniformity of proceedings.—*Farmers' High Line Canal & Reservoir Co. v. Wolff*, 131 P. 291.

§ 94 (Mont.) Rev. Codes, § 2897, requiring a newspaper unable to complete a contract for county printing to sublet it to some competent printing establishment within the state, held not to conflict with Const. art. 5, § 28, forbid-

ding the passage of local or special laws regulating county affairs.—*Hersey v. Nelson*, 131 P. 30.

III. SUBJECTS AND TITLES OF ACTS.

§ 107 (Cal.) St. 1891, p. 68 (Code Civ. Proc. § 1767) entitled "An act to add another section to the Code of Civil Procedure relating to incompetent persons," which defined the phrases "incompetent," "mentally incompetent," and "incapable," as used in the chapter relating to appointment of guardians for incompetents, held not to violate Const. art. 4, § 24, requiring every act to embrace but one subject.—In re Coburn, 131 P. 352.

§ 111 (Cal.) St. 1891, p. 68 (Code Civ. Proc. § 1767) entitled "An act to add another section to the Code of Civil Procedure * * * relating to incompetent persons," defining the phrases "incompetent," "mentally incompetent" and "incapable," as used in the chapter, to mean any person who, by reason of old age, etc., is unable to properly care for himself or his property, does not violate the constitutional requirement that the subject of an act be embraced in its title.—In re Coburn, 131 P. 352.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 141 (Cal.) Const. art. 4, § 24, prohibiting amendments by reference to the title of the statute, without re-enacting and publishing at length the amended section, does not apply to amendment by implication, such as St. 1891, p. 68, and Code Civ. Proc. § 1767, defining the phrase "incompetent," etc., as used in the chapter.—In re Coburn, 131 P. 352.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 158 (Cal.App.) Repeals by implication are not favored.—*Booth v. A. Levy & J. Zentner Co.*, 131 P. 1062.

VI. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 200 (Cal.) Grammatical defects in a statute will not impair its validity if it may be interpreted.—In re Coburn, 131 P. 352.

§ 207 (Colo.) The court in construing a statute must consider all provisions pertaining to the same subject, especially where different sections of a statute are, when read separately and considered literally, inconsistent.—*Montezuma Valley Irr. Dist. v. Longenbaugh*, 131 P. 262; *Same v. Johnson*, Id. 265.

§ 211 (Wash.) The court, in construing a statute, must ascertain the legislative intent, and to do so the title of the statute may be considered.—*State v. Pacific American Fisheries*, 131 P. 452.

§ 226 (Mont.) Where a statute has been adopted from another state, the construction thereof by the highest court of such state before such adoption will also be held to have been adopted.—*Miller v. Miller*, 131 P. 23.

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§ 18 (Cal.App.) An agreed statement of facts stating that administrator was the sole heir and next of kin of the intestate was not conclusive that he was entitled to the entire estate, where it also showed that the property had been community property and that the other claimants were the next of kin of intestate's deceased husband.—*In re Davidson's Estate*, 131 P. 67.

STOCK.

See Wills, § 754.

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See Banks and Banking, § 246.

STREET RAILROADS.

See Carriers, §§ 287-347; Eminent Domain, § 100; Trial, §§ 229, 252, 256, 260.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 28 (Colo.) A street railroad company, as well as abutting property owners and the public generally, are each entitled to the reasonable use of the streets, having due regard to the rights of the others.—*Harrison v. Denver City Tramway Co.*, 131 P. 409.

II. REGULATION AND OPERATION.

§ 90 (Mont.) A motorman need not stop his car on first observing one approaching on horseback, or on observing that the horse is becoming unmanageable; but he is chargeable with the duty, on observing that the horse is likely to go in front of the car, to take immediate precautions to avoid a collision.—*Singer v. Missoula St. Ry. Co.*, 131 P. 630.

§ 93 (Colo.) Where a woman stepped in front of a moving street car only a few feet away, which struck her almost the instant that she was on the track, it was not negligence for the motorman to fail to drop the fender.—*Liutz v. Denver City Tramway Co.*, 131 P. 258.

§ 117 (Mont.) One riding a horse, who entered on a bridge over which a street railway company maintained a single track, held not guilty of contributory negligence, as a matter of law, either in going on the bridge, or in remaining thereon, though he saw a car approaching.—*Singer v. Missoula St. Ry. Co.*, 131 P. 630.

Whether a motorman, operating a car colliding with a traveler on horseback, was guilty of negligence in failing to take proper precautions after discovering the peril held for the jury.—*Id.*

STREETS.

See Municipal Corporations, §§ 293, 304, 342, 385, 437, 444, 657-706, 757-821.

STRIKING OUT.

See Appeal and Error, § 655.

SUBCONTRACTORS.

See Mechanics' Liens, § 156.

SUBLETTING.

See Landlord and Tenant, § 76.

SUBROGATION.

§ 14 (Okla.) A vendee who as part of the price pays the indebtedness secured by a first mortgage is not subrogated to the lien as against a second mortgagee whose mortgage is recorded at the time of the purchase.—*Kahn v. McConnell*, 131 P. 682.

SUBSCRIPTIONS.

See Corporations, §§ 83, 92.

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See Action.

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SUNDAY.

§ 30 (Colo.App.) The fact that a notice of sale for delinquent taxes was posted up on Sunday will not render the notice ineffective where excluding Sunday and either the following day or the day of sale the notice remained posted for full 28 days before the sale.—*Pelton v. Muntzing*, 131 P. 281.

SUPERSEDEAS.

See Mandamus, § 57.

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See Adverse Possession, §§ 79, 95; Bills and Notes, § 161; Evidence, §§ 186, 387; Judgment, §§ 589, 950; Licenses; Municipal Corporations, §§ 413-538, 957, 974; Sunday; Tenancy in Common, § 20; Time, § 9.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

§ 76 (Kan.) Contracts for conveyance of real estate for a consideration, the vendee also agreeing to pay taxes, are taxable against the vendor though they provide that the vendee shall have possession and cultivate the land, and that the contracts shall be void on default of the vendee, who may then be treated as a tenant.—*Motzner v. Bogan*, 131 P. 1193.

A contract for the sale of land is taxable to the vendor though in the contract time is the essence of the performance.—*Id.*

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

§ 531 (Wash.) Evidence held to show that one suing to foreclose a lien for taxes had paid the taxes in good faith, believing that he was the owner of the premises on which the same were assessed authorizing foreclosure.—*Egbers v. Fischer*, 131 P. 1128.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 662 (Colo.App.) Under Mills' Ann. St. §§ 3883-3885, providing for the publication and posting of notice of sales for delinquent taxes and proof of publication by the affidavit of the publisher and of posting by affidavit of the county treasurer, a certificate of the county treasurer as to publication is extrajudicial and must be disregarded in a suit to try title against a claimant under a tax deed.—*Pelton v. Muntzing*, 131 P. 281.

The affidavit of a newspaper publisher that the notice and list were published in the newspaper once each week for four successive weeks, the last of which publication was made prior to the date of sale conforms to Mills' Ann. St. § 3883, and need not state the date of the first publication.—*Id.*

§ 686 (Idaho) A tax sale certificate describing lands sold as "S. $\frac{1}{2}$ N. W. 4, sec. 1, twp. 4, range 2," held insufficient to furnish a description on which a valid tax deed could be issued.—*Wilson v. Jarron*, 131 P. 12.

XL TAX TITLES.

(B) Tax Deeds.

§ 749 (Colo.App.) Under Rev. St. 1908, § 5728, providing that the purchaser at a tax sale at any time after three years may demand a deed, a purchaser or his assignee is vested with the right to demand a deed at any time after three years, at least within the period of prescription and delay for 15 years will not invalidate the deed.—*Pelton v. Muntzing*, 131 P. 281.

§ 764 (Idaho) Where the tax sale certificate described the lands sold as "S. $\frac{1}{2}$ N. W. 4, sec. 1, twp. 4, range 2," and the tax deed described the land as "The South $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of sec. one (1), twp. four (4) north, range two (2) West of Boise Meridian, Canyon county, state of Idaho," there was not sufficient compliance with Rev. Codes, §§ 1763, 1764, which require a tax deed to contain the same description and recitals as are contained in the certificate.—*Wilson v. Jarron*, 131 P. 12.

While the officer executing a tax deed may extend abbreviations in the certificate and more completely describe land sufficiently described therein, he cannot complete an incomplete description, or go beyond the certificate for extraneous evidence in describing the property in the deed.—*Id.*

§ 769 (Colo.App.) Where an original tax deed was void on its face, because the certificate was assigned by the county clerk more than three years after the sale, a correction deed, which did not disclose what officer of the county assigned the certificate, nor when it was assigned, would be presumed to have been issued pursuant to the same assignment, and also void for the same reason.—*Empire Ranch & Cattle Co. v. Lumelius*, 131 P. 796.

§ 788 (Colo.App.) A plaintiff in a suit to quiet title against a tax deed valid on its face and admitted in evidence, without objection, has the burden of establishing a failure of the revenue officers to follow the statutes in proceedings culminating in the deed.—*Pelton v. Muntzing*, 131 P. 281.

(C) Actions to Confirm or Try Title.

§ 790 (Colo.App.) In an action to quiet title to land as against a tax deed, void on its face, a stipulation that the treasurer might compute the taxes and interest, and that the amount should be inserted in the judgment, converted the action into one to recover land sold for taxes, authorized by Rev. St. 1908, § 5733.—*Empire Ranch & Cattle Co. v. Lumelius*, 131 P. 796.

§ 796 (Kan.) Defendant in foreclosure, who claims title and seeks to set aside a tax deed and conveyances thereunder, must show some title or interest in the land.—*Dyer v. Marriott*, 131 P. 1185.

§ 799 (Colo.App.) A statutory action to quiet title, authorized by Mills' Ann. Code, § 255, may be maintained to set aside a tax deed void on its face.—*Empire Ranch & Cattle Co. v. Wilson*, 131 P. 779.

§ 805 (Colo.App.) A tax deed, void on its face, is not sufficient on which to base a defense of limitations, under Rev. St. 1908, § 5733, providing that no action for land sold for taxes shall lie, unless brought within five years after the execution and delivery of the tax deed.—*Empire Ranch & Cattle Co. v. Howell*, 131 P. 798.

§ 810 (Colo.App.) In a suit to try title against a claimant under a tax deed, evidence

held to support a finding that the notice and lists were advertised in the manner and for the length of time prescribed by law.—*Pelton v. Muntzing*, 131 P. 281.

Where plaintiff, in a suit to quiet title against a tax deed under which defendant claimed, did not introduce a subsequent tax deed as a muniment of title, and it appeared that two other subsequent tax sales had been redeemed by plaintiff's predecessor, plaintiff could not recover on the theory that three subsequent tax sales had rendered defendant's tax title void.—*Id.*

§ 813 (Colo.App.) In a statutory action to recover possession of land sold for taxes, defendant having pleaded a general denial, where a county court decree sustaining the tax title was not referred to in the pleadings, a judgment for plaintiff should have been limited to a statement that the county court decree should have no force against plaintiff's title, and it was error to decree that it was void.—*Empire Ranch & Cattle Co. v. Lumelius*, 131 P. 796.

§ 813 (Colo.App.) Where defendant, in an action to recover land sold for taxes, introduced void county court decrees quieting its title, without pleading them, the court's judgment should have been limited to a determination that the decrees were ineffective as to plaintiff's title, and should not have set them aside.—*Empire Ranch & Cattle Co. v. Farmer*, 131 P. 799.

TEACHERS.

See Schools and School Districts, § 144.

TELEGRAPHS AND TELEPHONES.

See Railroads, §§ 217, 226.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 15 (Kan.) A telephone company selling to another the right to maintain a wire on its poles is liable for injury to the employé of the other company free from fault by failure of the owning company to use reasonable diligence in maintaining its poles.—*Aaron v. Missouri & K. Telephone Co.*, 131 P. 582.

Where a telephone company sells to another the right to maintain a wire upon its poles, and has stripped its wires from the old poles to install new ones, and an employé of the leasing company is killed while removing the remaining wire by the breaking of a pole, the owning company is not relieved from liability because it was replacing the old poles.—*Id.*

Where a telephone company sells the right to use its poles to another, and while changing its poles an employé of the leasing company is injured by the fall of a pole, a warning to him to be careful is not necessarily sufficient to relieve the owning company from further responsibility.—*Id.*

Where a telephone company sold the right to another to use its poles, and an employé of the leasing company is injured by a fall of one of the poles, the owning company is not exempt from liability on the ground that the employé was bound at his peril to ascertain the condition of the pole.—*Id.*

II. REGULATION AND OPERATION.

§ 51 (Wash.) Whether the sendee of a telegram should, in the exercise of ordinary care, have been misled by an error in quoting the price of a commodity should be determined upon the principles applying to contributory negligence.—*Henry v. Western Union Telegraph Co.*, 131 P. 812.

§ 66 (Wash.) Where a telegram sent by an agent to his principal erroneously stated that sheep could be purchased for \$4.20 instead of \$4.70, causing the principal to order them to be purchased, evidence held to sustain a finding

that the principal was not negligent in not discovering the discrepancy in price.—Henry v. Western Union Telegraph Co., 131 P. 812.

Evidence, in an action against a telegraph company for damages for misstating in a message the price at which plaintiff's agent could purchase sheep at D., held to sustain a finding that the market price at D. at the time was \$4.25 a hundredweight.—Id.

§ 70 (Wash.) A sendee's measure of damages for the negligent transmission of a telegram to him by his agent to buy sheep, that they could be purchased for \$4.70, so as to read \$4.20, causing sendee to order them to be bought, was the excess of the price paid, because of such error, over the market price at the time and place of delivery, plus the cost of the message.—Henry v. Western Union Telegraph Co., 131 P. 812.

TENANCY IN COMMON.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 15 (Cal.) Where a land company and the purchasers of parcels of land from it were tenants in common of water, and the company occupied, as to the purchasers, the relation of trustee of the water right, the mere fact that the company took possession of water rights owned by another corporation and acquired title to same by adverse possession as against the corporation did not divest the purchasers of their title in the water right.—Copeland v. Fairview Land & Water Co., 131 P. 119.

That a company, which was a tenant in common of the water right with purchasers of land from it and occupied toward them the position of trustee, imposed a charge upon them for water did not make its possession of the water right adverse, where the original sale agreement imposed upon the purchasers a duty to pay a part of the expenses of repair and distribution, and the circumstances under which the charge was made were such that they could reasonably presume that it represented merely their share of the expenses.—Id.

§ 20 (Wash.) Where plaintiff's cotenant had possession of the property and let plaintiff believe that he would pay the taxes as previously done, upon which assurance plaintiff relied, such cotenant was plaintiff's agent for the purpose of paying taxes.—Dahlstrom v. Beard Fruit Co., 131 P. 450.

If plaintiff's cotenant, who was her agent for paying taxes, wrongfully, without plaintiff's knowledge, permitted them to become delinquent and had the land purchased for himself, plaintiff could recover a half interest in the tract so purchased.—Id.

§ 37 (Wash.) Although one tenant may sell his interest without informing his cotenant of matters which he might ascertain for himself, yet, where they both deal jointly in a sale of their interests as a whole, any secret consideration received by one must be accounted for to the other; the relation being confidential, if not fiduciary.—Briggle v. Cox, 131 P. 209.

TENDER.

See Chattel Mortgages, § 239; Quietening Title, § 14; Vendor and Purchaser, §§ 148, 323.

§ 4 (Kan.) Tender is unnecessary when its futility is shown.—Smethers v. Lindsey, 131 P. 563.

§ 14 (Kan.) Where a larger sum than that tendered is in good faith claimed to be due, the tender is ineffectual if its acceptance involves the admission that no more is due.—Smith v. School Dist. No. 64, of Marion County, 131 P. 557.

TICKETS.

See Carriers, §§ 256, 380.

TIDE LANDS.

See Municipal Corporations, § 7.

TIMBER.

See Logs and Logging.

TIME.

See Appeal and Error, §§ 338, 623-627, 765; Bills and Notes, § 165; Criminal Law, § 1069; Exceptions, Bill of; Mortgages, § 460.

§ 9 (Colo.App.) An affidavit of a county treasurer averring the posting of notice of sale for delinquent taxes on September 6, 1891, and that the notice of sale and delinquent tax list remained posted for four weeks next preceding the commencement of sale on October 5th, shows compliance with Mills' Ann. St. § 3883 requiring four weeks' publication, since excluding Sunday, September 6th, by also excluding September 7th and including October 5th, or by including September 7th and excluding October 5th, there would still be 28 days.—Pelton v. Muntzing, 131 P. 281.

In making the computation of time it is proper to include the first day and exclude the last or exclude the first and include the last.—Id.

§ 10 (Cal.App.) Under Code Civ. Proc. § 859, where the last day of a period of ten days after notice of entry of justice's judgment was Sunday, an application to open the default could be made the following day.—Townsend v. Parker, 131 P. 766.

§ 11 (Okla.Cr.App.) A day, in legal consideration, is punctum temporis; fractions of a day under the express provision of Comp. Laws 1909, § 2962, being disregarded in computations which include more than one day and involve no question of priority.—Franklin v. State, 131 P. 183.

TITLE.

See Adverse Possession; Descent and Distribution, § 75; Easements, § 5; Ejectment; Eminent Domain, § 244; Executors and Administrators, § 66; Navigable Waters, §§ 36, 37; Quietening Title; Sales, § 135; Statutes, §§ 107, 211; Taxation, §§ 749-813; Vendor and Purchaser, § 133; Waters and Water Courses, § 153.

TORTS.

See Counties, § 146; Damages; False Imprisonment; Fraud; Highways, § 187; Injunction, § 261; Libel and Slander; Limitation of Actions, § 55; Malicious Prosecution; Master and Servant, §§ 88-330; Municipal Corporations, §§ 741-821; Negligence; Nuisance; Rape, §§ 65, 66; Telegraphs and Telephones, § 15; Trespass; Trover and Conversion.

§ 22 (Wash.) A recovery may be had against all joint tort-feasors jointly, or against a number less than the whole.—Thoresen v. St. Paul & Tacoma Lumber Co., 131 P. 645.

TOWNS.

See Evidence, § 32; Highways, § 187; Municipal Corporations.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 45 (Okla.) A township is not liable in a civil action for damages for the neglect of its officers in performing, or failing to perform, an official duty.—Howard v. Rose Tp., Payne County, 131 P. 683.

TRADE-MARKS AND TRADE-NAMES.**I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.**

§ 3 (Cal.) Under Civ. Code, § 991, *held* that the name "Los Angeles Van, Truck & Storage Company" could not be the subject of exclusive trade-mark, since it referred to the description of the business.—*Dunston v. Los Angeles Van & Storage Co.*, 131 P. 115.

§ 9 (Cal.) Under Civ. Code, § 991, *held*, that the name "Los Angeles Van, Truck & Storage Company" could not be the subject of exclusive trade-mark, since it referred to the place where the business was carried on.—*Dunston v. Los Angeles Van & Storage Co.*, 131 P. 115.

IV. INFRINGEMENT AND UNFAIR COMPETITION.**(B) What Competition Unlawful.**

§ 70 (Cal.) In the interest of fair trade dealing, courts of equity will protect the one who has been first in the field doing business under a given name, to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon such business and upon the public; but, where there is no fraud, no relief can be granted.—*Dunston v. Los Angeles Van & Storage Co.*, 131 P. 115.

(C) Actions.

§ 92 (Cal.) In an action to enjoin alleged unfair trade dealing with respect to a business name, fraud will not be presumed, but must be pleaded and shown.—*Dunston v. Los Angeles Van & Storage Co.*, 131 P. 115.

TRANSCRIPTS.

See Appeal and Error, §§ 511-702.

TREES.

See Municipal Corporations, §§ 663, 669.

TRESPASS.

See Animals, § 100; False Imprisonment; Railroads, § 359.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

§ 10 (Colo.) A person has no right to enter and search another's home, and seize, carry away, or destroy his property without proceeding according to the law of the land.—*Wolfe v. Abbott*, 181 P. 386.

II. ACTIONS.**(C) Evidence.**

§ 45 (Wash.) In an action for damages for cutting and removing timber from plaintiffs' land, a question as to what timber of a certain quality was selling for in the market at the time of the trespass was competent.—*Hertzog v. Star Logging Co.*, 131 P. 806.

§ 46 (Wash.) Evidence, in an action for damages to timber by trespass, *held* to sustain a finding for plaintiffs as to the value of the timber taken.—*Hertzog v. Star Logging Co.*, 131 P. 806.

Evidence, in an action for damages from trespass, *held* to sustain a finding for plaintiffs to the amount expended by them in removing brush left on the land by defendant after the trespass.—*Id.*

TRIAL.

See Bankruptcy, § 304; Banks and Banking, § 21; Bills and Notes, § 539; Boundaries, § 41; Brokers, § 88; Carriers, §§ 320, 348, 383, 384; Continuance; Contracts, §§ 91, 176; Costs; Criminal Law, §§ 622-874; Damages, § 208; Evidence, §§ 54, 504; Ex-

ceptions, Bill of; Executors and Administrators, § 380; Explosives; Factors; Homicide, §§ 288, 308; Hospitals, § 8; Insurance, §§ 668, 825; Jury; Malicious Prosecution, §§ 71, 72; Master and Servant, §§ 18, 286-297; Municipal Corporations, §§ 706, 821; Navigable Waters, § 39; Negligence, § 136; New Trial; Railroads, § 446; Rape, § 66; Stipulations; Street Railroads, § 117; Trover and Conversion, § 66; Venue; Waters and Water Courses, § 263; Witnesses, § 79; Work and Labor, § 30.

II. DOCKETS, LISTS, AND CALENDARS.

§ 13 (N.M.) As used in Laws 1909, c. 36, § 12, providing that an action for removal of an officer must be "immediately set down for trial," the words quoted secure merely to the public and the defendant a preference of right of trial over other cases.—*State v. Medler*, 181 P. 978.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 25 (Wyo.) In an action by factors for advances, where defendant counterclaimed for loss occasioned by their failure to sell at the market price, the counterclaim being in the nature of a plea of confession and avoidance casts the burden of proof on defendant, and he is entitled to open and close.—*Justice v. Brock*, 131 P. 38.

§ 29 (Colo.App.) Trial court's action in charging witnesses with perjury and ordering them to be placed under bond to await the action of the district attorney *held* reversible error, although not in the presence of the jury.—*Hill v. Sullivan*, 131 P. 1040.

IV. RECEPTION OF EVIDENCE.**(B) Order of Proof, Rebuttal, and Re-opening Case.**

§ 63 (Or.) In an action by an injured servant, testimony by another witness as to the condition of the same machine when he worked with it *held* properly admitted over an objection that it was not rebuttal; it appearing that the witness was not present when plaintiff closed his case.—*Marien v. M. J. Walsh & Co.*, 131 P. 505.

§ 66 (Cal.) An application to reopen the case for the introduction of further evidence was addressed to the court's discretion.—*In re Coburn*, 131 P. 352.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 84 (Cal.App.) Where expert testimony was objected to on the ground that no foundation had been laid and that it was immaterial, irrelevant, and incompetent, but no objection was made to the competency of the witness, his qualifications to testify as an expert were conceded.—*Reardon v. Richmond Land Co.*, 131 P. 894.

§ 95 (Wash.) A general objection by merely moving to strike an answer to a question would not reach an objection that the answer was not responsive.—*Hertzog v. Star Logging Co.*, 131 P. 806.

VI. TAKING CASE OR QUESTION FROM JURY.**(A) Questions of Law or of Fact in General.**

§ 139 (Ok.) A verdict should be directed only when the facts are such that all reasonable men must draw the same conclusion from them.—*Continental Casualty Co. v. Owen*, 131 P. 1084.

§ 139 (Wash.) The test of whether a question is for the jury or for the court, as a matter of law, is whether the minds of reasonable men

would differ thereon.—*Worpers v. City of Spokane*, 131 P. 230.

§ 140 (Colo.) The credibility of a boy under 10 years of age as a witness and the weight to be given to his testimony, in view of his age, are for the jury.—*City of Victor v. Smilanich*, 131 P. 392.

§ 140 (Wash.) The credibility of witnesses is for the jury.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

§ 142 (Or.) Where more than one inference may be legitimately drawn from the evidence, one favorable and the other unfavorable to the defendant, there is a question for the jury.—*Devroe v. Portland Ry., Light & Power Co.*, 131 P. 304.

§ 142 (Wash.) The inferences to be drawn from the testimony are for the jury.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

§ 143 (Colo.) Where circumstantial evidence is of a nature from which it can be reasonably inferred that it contradicts direct testimony, the jury must determine the weight thereof.—*City of Victor v. Smilanich*, 131 P. 392.

Where circumstantial evidence contradicting direct testimony is of sufficient strength to justify a reasonable inference by reasonable men that the fact in dispute is established thereby, the question must be submitted to the jury.—*Id.*

(B) Demurrer to Evidence.

§ 150 (Or.) Motions for a judgment of nonsuit and for a directed verdict in defendant's favor are tantamount to demurrers to the evidence, and the same rule for determining the sufficiency of the testimony is applicable to each.—*Sorenson v. Smith*, 131 P. 1022.

(C) Dismissal or Nonsuit.

§ 165 (Cal.App.) On motion for nonsuit in an action brought by the assignee of a claim due a corporation, the assignment having been admitted in evidence subject to be stricken out later as incompetent, it must be considered by the court and assumed to be true, where no motion to strike out was made.—*Leitch v. Marx*, 131 P. 328.

On motion for nonsuit the question of the credibility of witnesses does not arise, but the testimony in favor of plaintiff is assumed as true; consequently testimony by a plaintiff, who was the assignee of a claim due a corporation, as to the validity of the assignment must be accepted as true.—*Id.*

(D) Direction of Verdict.

§ 169 (Wash.) Where the court must say, as a matter of law, that no recovery can be had under any reasonable view of the evidence, a verdict for defendant will be directed.—*Jensen v. T. H. Williams Co.*, 131 P. 204.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Colo.App.) An instruction assuming facts within the exclusive province of the jury is properly refused.—*Finding v. Gitzen*, 131 P. 1042.

§ 191 (Wash.) Where the sole issue was whether defendant's automobile struck plaintiff, an instruction which assumed that plaintiff was standing at a street intersection, whereas evidence showed him to be three or four feet from it, held not erroneous, though the city ordinance prescribed a different speed limit at street intersections.—*Heath v. Seattle Taxicab Co.*, 131 P. 843.

§ 194 (Wash.) A requested instruction, that one injured from lumber falling from a tram car could not recover if he was apprised of the approach of the car in time to avoid injury therefrom and could have avoided it, was properly refused, where the evidence made it a jury question whether the injured person was neg-

ligent in trying to stop the car.—*Thoresen v. St. Paul & Tacoma Lumber Co.*, 131 P. 645.

(B) Necessity and Subject-Matter.

§ 203 (Idaho) That instructions state the law applicable to opposite theories of the case does not render them erroneous, where there is any evidence which would justify the jury in adopting the theory advanced by either instruction.—*Keim v. Gilmore & P. R. Co.*, 131 P. 656.

§ 219 (Cal.App.) Failure to define the word "preponderance" is not of itself prejudicial error.—*Franklin v. Visalia Electric R. Co.*, 131 P. 776.

(C) Form, Requisites, and Sufficiency.

§ 229 (Colo.) In an action against a street railway for wrongful death, where there was considerable confusion, as plaintiff relied on two causes of action, the giving of instructions directing that under certain circumstances verdict should be for defendant, although to some extent a repetition, held not reversible error.—*Liutz v. Denver City Tramway Co.*, 131 P. 258.

§ 234 (Utah) Where defendant by counterclaim set up the conversion of scrap iron, an instruction held improper in casting upon plaintiff the burden of proof.—*Utah Foundry & Machine Co. v. Utah Gas & Coke Co.*, 131 P. 1173.

(D) Applicability to Pleadings and Evidence.

§ 251 (Cal.App.) Where, in an employee's action for injuries, no issue of assumed risk is raised by the pleadings or evidence, instructions on assumed risk are properly refused.—*Campbell v. Southern Pac. Ry. Co.*, 131 P. 80.

§ 252 (Cal.App.) In an action for injuries to a street car passenger by the sudden starting of the car while she was alighting, a requested charge on the contributory negligence of plaintiff's husband, who was with her, was not applicable where the evidence merely showed that no employé was on the ground to assist ladies to alight, which the husband observed without himself assisting his wife.—*Franklin v. Visalia Electric R. Co.*, 131 P. 776.

§ 252 (Colo.App.) Where, in an action for injuries to an employé, there is no evidence of contributory negligence, the employer is not entitled to an instruction on that question.—*Finding v. Gitzen*, 131 P. 1042.

§ 252 (Wash.) In an action for injuries to an employé pushed from the footboard of a dinkey engine, an instruction held erroneous as submitting an issue not justified by the evidence.—*Rastelli v. Henry*, 131 P. 643.

It is error to submit a vital issue to the jury when there is no evidence pertaining thereto and a specific request has been made to withdraw it from the jury.—*Id.*

§ 252 (Wash.) An instruction, that if the jury should find from the evidence that defendant was negligent in any one of the "three particulars" previously mentioned in another instruction, and that such negligence was the proximate cause of plaintiff's injury, they should find for plaintiff, was proper.—*Wainwright v. United States Lumber Co.*, 131 P. 820.

§ 252 (Wyo.) In an action by factors for advances where defendant set up a loss occasioned by plaintiffs' failure to sell at the market price, where there was no evidence of any bad faith on the part of the factors, an instruction that, in considering whether any latitude was given them in handling the consignment, the jury should consider their good faith, is improper.—*Justice v. Brock*, 131 P. 38.

(E) Requests or Prayers.

§ 256 (Or.) In an action against a street railway company for the wrongful death of a passenger, where the court at the request of the defendant instructed the jury that they could not find for plaintiff, unless the accident hap-

pened as alleged in the complaint, that instruction is sufficient, in the absence of a request for a more specific instruction.—Devroe v. Portland Ry., Light & Power Co., 131 P. 304.

§ 260. Requested instructions covered by instructions given were properly refused.

—(Cal. App.) Franklin v. Visalia Electric R. Co., 131 P. 776;

(Mont.) Blaustein v. Pincus, 131 P. 1064.

§ 260. It is not error to refuse instructions which are substantially covered by the instructions given.

—(Colo. App.) Finding v. Gitzen, 131 P. 1042; (Idaho) Breshears v. Callender, 131 P. 15.

§ 260 (Or.) In an action against a street car company for the wrongful death of a passenger, the refusal of an instruction *held* proper, being covered by those given.—Devroe v. Portland Ry., Light & Power Co., 131 P. 304.

§ 260 (Or.) In an action for injuries to a street car passenger while attempting to alight, instructions requested as to plaintiff's obligation to prove her case by a preponderance of the evidence, etc., *held* covered by instructions given.—Guild v. Portland Ry., Light & Power Co., 131 P. 810.

§ 260 (Or.) Requested instruction as to knowledge of a paper or release signed by one who had an opportunity to read it *held* covered by the general instruction given, so that its refusal was not error.—Foster v. University Lumber & Shingle Co., 131 P. 736.

§ 260 (Wash.) It is not necessary to give a request to charge in the form requested, or at all, if the subject is amply covered.—Wainwright v. United States Lumber Co., 131 P. 820.

§ 261 (Colo. App.) It is not error to refuse an instruction misstating the law or failing to properly define the law as applicable to the subject-matter of the instruction.—Finding v. Gitzen, 131 P. 1042.

§ 261 (Mont.) Requested instructions framed on an erroneous theory or inaccurate in phraseology were properly refused.—Blaustein v. Pincus, 131 P. 1064.

§ 261 (Okla.) In an action on an accident insurance policy, a requested instruction relative to the statements made by insured in his application, correct only in part, *held* properly refused.—Continental Casualty Co. v. Owen, 131 P. 1084.

(G) Construction and Operation.

§ 295 (Idaho) That an instruction does not state all the law applicable is not ground for reversal, where the instructions as a whole state all the law applicable to the case and the jury, considering the instructions as a whole, could not have been misled.—Breshears v. Callender, 131 P. 15.

§ 295 (Or.) An instruction that a master's duty as to a reasonably safe place and appliances for work is greater than that required of the servant, and he may be chargeable in certain circumstances with negligence in this respect in failing to ascertain a danger where a servant would not, *held* not objectionable when taken in connection with the entire charge.—Foster v. University Lumber & Shingle Co., 131 P. 736.

§ 295 (Wash.) In considering the sufficiency of a particular instruction, the entire charge must be considered.—Independent Asphalt Paving Co. v. Hein, 131 P. 471.

§ 296 (Wash.) An instruction that if defendant's driver was acquitted of the charge of having driven a taxicab into plaintiff he could not be again prosecuted for the same offense *held* harmless, though reference to a second prosecution was unnecessary, where the same instruction stated that such acquittal or nonacquittal was immaterial to the case at bar.—Heath v. Seattle Taxicab Co., 131 P. 843.

VIII. CUSTODY, CONDUCT, AND DE-LIBERATIONS OF JURY.

§ 306 (Wash.) A verdict must be based on the evidence, and the jury may not indulge in conjecture.—Rastelli v. Henry, 131 P. 643.

IX. VERDICT.

(A) General Verdict.

§ 323 (Idaho) An objection that a verdict not agreed to by the entire jury is not signed by each juror agreeing to same, as required by Rev. Codes, § 4894, is waived, where the jury is polled in open court, and no objection is taken to the form of the verdict, and no request is made to have it signed by the jurors agreeing to it.—Keim v. Gilmore & P. R. Co., 131 P. 650.

§ 333 (Idaho) A verdict for more than prayed for is not fatally defective where it does not exceed the sum prayed for and interest, or where it exceeds this amount but is sustained by the evidence; Rev. Codes, § 4229, authorizing amendment of prayer to conform to the verdict.—Unfried v. Libert, 131 P. 660.

§ 337 (Mont.) A verdict is contrary to law when the condition of the evidence is such that the jury may not find otherwise than in accordance with the theory of the instructions and yet have ventured to do so.—Previsich v. Butte Electric Ry. Co., 131 P. 25.

§ 343 (Kan.) Where there is obscurity as to the kind of damages included in the general verdict, consideration may be given to the allegations in the petition and to the testimony and instructions.—Foltz v. Buck, 131 P. 587.

(B) Special Interrogatories and Findings.

§ 350 (Kan.) Only single ultimate facts are to be submitted in any special interrogatory.—Foltz v. Buck, 131 P. 587.

In an action for malicious prosecution, the court's refusal to submit a special question, asking the jury to state the material facts which defendant withheld when he consulted the county attorney, *held* not error.—Id.

§ 365 (Kan.) Where the jury in answer to an interrogatory whether it was the intention that the mortgagor should remain in possession, selling the goods as he saw fit, replied, "Yes; to carry on in regular way," such reply meant that the intention was that the mortgagor was to sell the goods in the usual way, though such construction resulted in the conflict between the finding and general verdict.—First Nat. Bank v. Hardman, 131 P. 602.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 373 (Mont.) In suits in equity, no instructions, except the formal ones, should be given, and no general verdict submitted, and error cannot be predicated on the giving or refusal of instructions.—Moss v. Goodhart, 131 P. 1071.

§ 374 (Colo. App.) Where a jury is had in a suit in equity, the verdict is merely advisory.—Johnson v. First Nat. Bank, 131 P. 284.

(B) Findings of Fact and Conclusions of Law.

§ 397 (Cal. App.) Where there is no evidence that the action was barred by limitations, a finding thereon is unnecessary.—Smith v. J. R. Newberry Co., 131 P. 1055.

§ 398 (Cal. App.) In an action for breach of a contract by a seller not to re-engage in the hotel business, a finding that plaintiff was damaged to the amount of \$1,300 *held* not invalidated by a further finding as to monthly profits on the theory that plaintiff was entitled to profits lost only up to the filing of the complaint, the finding as to the monthly profits be-

ing only of an evidentiary fact.—Goodman v. Dailey, 131 P. 335.

§ 398 (Idaho) Special findings of the trial court which can be reconciled when considered as a whole will not be held inconsistent.—Brinton v. Steele, 131 P. 662.

TRIAL OF RIGHT OF PROPERTY.

See Attachment, § 308.

TROVER AND CONVERSION.

See Evidence, § 54.

II. ACTIONS.

(C) Evidence.

§ 35 (Utah) Where defendant set up as a counterclaim its right to compensation for scrap iron which it claimed had been converted by plaintiff, defendant has the burden of proving the conversion and the amount of iron converted.—Utah Foundry & Machine Co. v. Utah Gas & Coke Co., 131 P. 1173.

§ 40 (Utah) Evidence held insufficient to sustain a finding in favor of defendant who by counterclaim set up plaintiff's conversion of scrap iron.—Utah Foundry & Machine Co. v. Utah Gas & Coke Co., 131 P. 1173.

(D) Damages.

§ 46 (Idaho) Where defendant wrongfully took possession of sheep belonging to plaintiffs, plaintiffs were entitled to recover their market value when they were taken.—Unfried v. Libert, 131 P. 660.

(E) Trial, Judgment, and Review.

§ 66 (Utah) In an action for the conversion of an automobile, evidence of conversion held insufficient to go to the jury.—Parker v. Sloan, 131 P. 1171.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Equity; Limitation of Actions, § 19.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 44 (Wash.) Evidence held to show that defendant's deceased husband held certain city lots in trust for plaintiff and to secure advances made to pay taxes, etc., and defendant, having sold the lots after her husband's death, was liable to plaintiff for the price, less such advances.—Lehman v. Heuston, 131 P. 825.

(C) Constructive Trusts.

§ 96 (Cal.) Where a voluntary conveyance is made by a grantor to a grantee between whom relations of confidence existed, in reliance on such relations, and under a parol agreement of the grantee to hold the real estate in trust for the grantor, a trust will be impressed on repudiation of the agreement.—Bradley Co. v. Bradley, 131 P. 750.

UNDERTAKINGS.

See Bail.

UNDISCLOSED AGENCY.

See Principal and Agent, § 145.

UNDUE INFLUENCE.

See Bills and Notes, § 105; Wills, § 166.

UNITED STATES.

See Ferries; Indians; Navigable Waters, § 36; Trade-Marks and Trade-Names.

UNLAWFUL DETAINER.

See Landlord and Tenant, §§ 63, 291.

USAGES.

See Customs and Usages.

USE AND OCCUPATION.

§ 1 (Colo.App.) Where plaintiff had the title and right of possession to premises occupied by defendant, and under circumstances showing that a demand for rent would have been useless, he was entitled to recover the reasonable value of the use and occupation, though he made no demand for rent.—Nathan v. Crouse, 131 P. 287.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 41 (Wash.) Contract by which money was loaned under an agreement that on a specified date payment should be made either in cash or lots at an agreed price of \$50, although they were worth much more, and a subsequent agreement by which notes worth \$6,098 and lots worth \$2,500 were taken on a loan of \$4,098, held evasions of the statute against usury. Rem. & Bal. Code, § 6251.—Lay v. Bouton, 131 P. 1153.

II. PENALTIES AND FORFEITURES.

§ 143 (Wash.) Under Rem. & Bal. Code § 6255, where on a loan of \$4,098 creditor received lots worth \$2,500 as interest, held, that there was nothing due, double the value of the lots exceeding the principal.—Lay v. Bouton, 131 P. 1153.

VALUE.

See Evidence, § 474; Fraud, § 58.

VENDOR AND PURCHASER.

See Evidence, §§ 433, 434, 461; Exchange of Property; Execution; Fraud, § 13; Frauds, Statute of, §§ 129, 131; Sales; Specific Performance; Taxation, §§ 76, 662, 686, 749, 764.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3 (Wash.) A contract expressly stating that \$100 was received as part payment upon the purchase price of land, followed by provisions clearly contemplating the consummation of a sale of land, although providing that the purchaser, if he breaches the contract, should be only liable to the extent of such payment, was not an option, but was a contract for the sale of land.—Wright v. Suydam, 131 P. 239.

§ 3 (Wash.) Though the consideration of a conveyance was other property, where the real property involved is dealt with as having a fixed and agreed value, the transaction is usually regarded as a sale and not an exchange.—Ross v. Kenwood Inv. Co., 131 P. 649.

§ 13 (Wash.) An obligation to forfeit \$100 was a sufficient consideration to support a promise of another to convey land valued at about \$8,000 upon the payment of the balance of the purchase price.—Wright v. Suydam, 131 P. 239.

§ 23 (Wash.) The fact that a contract for the sale of land was signed only by the owner does not show a want of mutuality.—Wright v. Suydam, 131 P. 239.

§ 31 (Or.) Complainant having purchased an option on certain selections of unsurveyed public land under the belief by both parties that, when surveyed, the tract would contain 400 acres, when, in fact, it contained only 224.41 acres, complainant was entitled to rescind for

mutual mistake.—*McCrea v. Hinkson*, 181 P. 1025.

Rescission of a contract for the sale of land for mutual mistakes will be granted if the mistake was so material that the agreement would not have been made had the truth been known.—*Id.*

§ 33 (Colo.App.) Where identified land was described in the contract of purchase as a certain numbered block "according to the recorded plat thereof," the fact that the plat was not recorded will not invalidate the contract.—*Wellington Realty Co. v. Gilbert*, 131 P. 803.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 48 (Colo.App.) Where a vendor, by a written contract containing every condition necessary to make a complete agreement, agreed to sell land, and the vendee, who also signed the instrument, agreed to purchase and pay the purchase price, the contract was consummated on the date of the written agreement, for a contract is consummated when the minds of the parties meet, understandingly, in the same sense.—*Wellington Realty Co. v. Gilbert*, 131 P. 803.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

§ 82 (Colo.App.) The re-execution of a contract for the sale of land, to correct a mistake in the name of the vendor corporation, held, not to consummate a new contract.—*Wellington Realty Co. v. Gilbert*, 131 P. 803.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 133 (Wash.) A contract for the sale of land, providing that the title must be satisfactory to the purchaser, does not give the purchaser an arbitrary right to reject a good marketable title, so as to thereby lack mutuality.—*Wright v. Suydam*, 131 P. 239.

§ 133 (Wash.) Under Rem. & Bal. Code, § 7831, providing that any person laying off any town shall, previous to the sale of any lots therein, record in the proper office a plat showing the streets, etc., a purchaser agreeing to convey a lot according to an unrecorded plat was not required to procure the plat to be filed.—*Opejon v. Engebo*, 131 P. 1146.

§ 144 (Wash.) Where one of the parties to a contract for the sale of land encouraged the prosecution of a suit to quiet the other's title so that conveyance might be made to him and acquiesced in the delay in tendering the deed and abstracts of title, he could not assert a breach of the contract upon the part of the other in failing to convey within the time agreed upon.—*Opejon v. Engebo*, 131 P. 1146.

(B) Conveyance.

§ 147 (Wash.) After a party to a contract for the sale of realty has waived the clause providing that time should be of the essence of the other party's obligation to convey, such other party will not be in default until after a demand upon him for a compliance with his obligation and a reasonable time in which to do so.—*Opejon v. Engebo*, 131 P. 1146.

§ 148 (Kan.) While a vendor need not give a deed which does not comply with his contract, a request for such a deed does not relieve him from his duty to either grant the request or tender performance in accordance with the contract.—*Jones v. Hedstrom*, 131 P. 145.

(C) Quantity of Land and Appurtenances.

§ 160 (Wash.) Where the description in a deed tendered in performance of a contract for the sale of land conveyed the identical prop-

erty agreed to be conveyed, and calculation would disclose that it was definite and easily susceptible of identification, it was all that the law required.—*Opejon v. Engebo*, 131 P. 1146.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

§ 229 (Cal.App.) A grantor in a deed, in fact a mortgage, who notifies a third person that he still owns the property, thereby puts the third person on inquiry, so that his subsequent purchase from the grantee without inquiry is not a bona fide purchase without notice.—*Smith v. J. R. Newberry Co.*, 131 P. 1055.

§ 239 (Wash.) One purchasing land need only notice that a sufficient consideration is named in the deeds constituting his chain of title, not being bound to compare the consideration with the market value of the property at the time the several conveyances were executed.—*Ross v. Kenwood Inv. Co.*, 131 P. 649.

§ 242 (Cal.App.) Where a grantor in a deed, in fact a mortgage, showed that he had, through an intermediary notified a third person that he owned the property, the third person, on subsequently purchasing from the grantee, had the burden of showing that he paid the price in good faith without notice.—*Smith v. J. R. Newberry Co.*, 131 P. 1055.

VI. REMEDIES OF VENDOR.

(C) Actions for Damages.

§ 323 (Cal.App.) Where, in an action for breach of defendant's contract to accept a reconveyance of certain land, there was evidence that defendant had refused and was unable to comply with his contract, a tender of a sufficient deed of reconveyance within the time specified was not necessary to put defendant in default.—*Dean v. Hawes*, 131 P. 885.

§ 329 (Cal.App.) In an action for breach of a contract to accept a reconveyance of land, evidence of the value of the land to plaintiff held insufficient to sustain a recovery of damages, under Civ. Code, § 3307, under which the measure of damages is the difference between the contract price and the market value of the land at the time of the breach.—*Dean v. Hawes*, 131 P. 885.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 334 (Kan.) Where the vendor made a positive statement that the land contained 272 acres, when, in fact, it contained 257.71 acres, the vendee was entitled to recover the excess consideration paid, though the vendor's statement was honestly made.—*Maffet v. Schaar*, 131 P. 589.

In a statement in a deed that the land contained 272 acres "more or less," the quoted words were words of description only, and did not relieve the vendor from liability because the contract contained only 257.71 acres.—*Id.*

Where a vendor honestly states that the land contains more acres than it in fact contains, and the vendee relied on such statement, the vendee may recover on account of the deficiency in quantity, irrespective of any question of fraud.—*Id.*

Where a vendor under an honest mistake misstated the number of acres contained in the tract conveyed, the purchaser was not entitled to recover for the deficiency on the ground of willful fraud.—*Id.*

VENUE.

See Attachment, §§ 71, 74; Corporations, § 503; Criminal Law, §§ 121-134, 1150.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 22 (Cal.App.) Under Code Civ. Proc. § 395, requiring actions to be brought in the county in which defendants or "some of them" reside at the commencement of the action, an action against a corporation and others to declare invalid an assessment upon corporate stock was properly brought in the county in which the defendants other than the corporation resided.—*Aisbett v. Paradise Mountain Min. & Mill Co.*, 131 P. 330.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 41 (Cal.App.) That the resident defendants joined nonresident defendants in a demand for removal of the cause to another county would not entitle them to a change of venue under Code Civ. Proc. § 395, requiring such an action to be brought in the county in which "some of" defendants resided at the commencement of the action.—*Aisbett v. Paradise Mountain Min. & Mill Co.*, 131 P. 330.

VERDICT.

See Criminal Law, §§ 874, 1040; New Trial, § 143; Trial, §§ 523-365.

VERIFICATION.

See Attorney and Client, § 52; Elections, § 285; Pleading, §§ 290-304.

VICE PRINCIPALS.

See Master and Servant, §§ 170-201.

VILLAGES.

See Municipal Corporations.

VINDICTIVE DAMAGES.

See Damages, §§ 87, 91.

VOTERS.

See Elections.

WAITING ROOMS.

See Railroads, §§ 58, 217, 226.

WAIVER.

See Appeal and Error, § 1075; Chattel Mortgages, § 136; Contracts, § 305; Courts, § 486; Criminal Law, §§ 627, 629; Estoppel; Executors and Administrators, § 314; Indictment and Information, § 196; Insurance, § 755; Parties; Pleading, §§ 406-418; Principal and Surety, § 129; Process, § 68; Trial, § 323.

WAREHOUSEMEN.

See Sales, §§ 153, 168.

WARNING.

See Negligence, § 52.

WARRANTY.

See Bills and Notes, § 296; Sales, §§ 284-287.

WATERS AND WATER COURSES.

See Action, § 38; Constitutional Law, § 309; Contracts, §§ 265, 269; Election of Remedies; Eminent Domain, §§ 13, 271; Evidence, § 10; Judgment, §§ 256, 956; Limitation of Actions, § 96; Mandamus, § 73; Municipal Corporations, §§ 271, 279, 321, 341, 918, 957; Navigable Waters; Negligence, §§ 39, 134; Property, § 4; Reformation of Instruments, §§ 2, 45; Statutes, § 85; Witnesses, § 236.

L APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

§ 21 (Wash.) Under U. S. Rev. St. §§ 2339 and 2340 (U. S. Comp. St. 1901, p. 1457), and despite Act of Congress March 3, 1891, § 18, all relating to water rights and canals upon public domain, *held* that an irrigation corporation, which began the construction of its ditch before plaintiffs' grantor filed its lieu land selection upon the same public lands, has priority.—*Lynch v. Lower Yakima Irr. Co.*, 131 P. 829.

§ 27 (Wyo.) Delay by applicant for permission to construct reservoir from May 14th to June 26th in furnishing additional information requested by the state engineer *held* not an abandonment of the application as against a subsequent applicant.—*Laughlin v. State Board of Control*, 131 P. 62.

§ 33 (Wash.) An action may be maintained to quiet title to water rights acquired by appropriation in the same manner as an action to quiet title to real property.—*Barnes v. Belsaas*, 131 P. 817.

II. NATURAL WATER COURSES.

(B) Obstruction and Detention.

§ 52 (Wash.) An upper riparian owner is entitled to a reasonable use of the stream, and any interruption in its flow unavoidable by a reasonably proper use is permissible, although it diminishes the natural flow to the lower owner.—*Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 131 P. 220.

(D) Diversion.

§ 86 (Utah) In an action for a wrongful diversion of the water of a creek and springs, *held*, that the owner, who had conveyed it by pipes to his ranch and used it for irrigation, and for culinary, domestic, and stock-raising purposes, was entitled to pecuniary damages measured by a consideration of the different uses to which he had applied it, not including the value of the pipe line, rendered useless by the diversion.—*Whitmore v. Utah Fuel Co.*, 131 P. 907.

VI. APPROPRIATION AND PRESCRIPTION.

§ 128 (Colo.App.) Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; Mills' Ann. St. [1912 Ed.] § 3812), relative to service of process in proceedings to secure permission to change the point of diversion of water rights, *held* not violative of the Constitution.—*Farmers' High Line Canal & Reservoir Co. v. Wolff*, 131 P. 291.

§ 137 (Wash.) Defendants *held* not to have acquired rights to water as against prior appropriators by limitation, where they had not for ten years continuously deprived such appropriators of water to which they were entitled under prior appropriations.—*Barnes v. Belsaas*, 131 P. 817.

§ 139 (Wash.) Where no notice of appropriation is required for taking water for power purposes, the right relates back to the first substantial act of the appropriator for its acquisition, whether that act be the actual commencement of construction work or other necessary work incidental thereto, provided that reasonable diligence is exercised in finally perfecting the appropriation.—*Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 131 P. 220.

§ 140 (Wash.) A power company acquiring riparian rights of all lands abutting a river on either bank between its intake and tailrace, and establishing its rights as an appropriator, was entitled to such riparian rights as against land subsequently becoming riparian by reason of a change in the river's course.—*Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*, 131 P. 220.

§ 145 (Colo.App.) Where, in proceedings to secure permission to change the point of di-

version of water rights, it appeared that such change would decrease the amount of return or seepage water to the injury of the holders of junior water rights, the petition should have been denied.—*Farmers' High Line Canal & Reservoir Co. v. Wolff*, 131 P. 291.

The right to change the point of diversion of a water right does not exist unless it can be exercised without injury to other vested rights, nor can it be exercised until permission has been obtained in a special statutory proceeding of the character authorized by Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; *Mills' Ann. St.* [1912 Ed.] § 3812).—*Id.*

Injury, to the holder of junior water rights, which will deprive the holders of senior water rights of any right to change the point of diversion, must be substantial, and it is not necessary that it be in proportion to the right sought to be changed.—*Id.*

§ 152 (Colo.App.) The holder of a water right, who asserts the right to change the place of diversion, has the burden of proving that such change will not injuriously affect the vested rights of others.—*Farmers' High Line Canal & Reservoir Co. v. Wolff*, 131 P. 291.

In a statutory proceeding to secure permission to change the point of diversion of water rights, evidence of nonuser of the water by plaintiffs was inadmissible to show that they had abandoned their water rights.—*Id.*

Evidence of such nonuser was admissible on the question of injurious effect of the change on the water rights of a junior appropriator.—*Id.*

The proceedings under the irrigation acts of 1879 and 1881 are purely statutory and in the nature of police regulations to secure the orderly distribution of water for irrigation purposes.—*Id.*

In proceedings under Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; *Mills' Ann. St.* [1912 Ed.] § 3812), to secure permission to change the point of diversion of water rights, persons whose rights would be directly affected were entitled to personal service, and a mere publication notice was not sufficient.—*Id.*

That two copies of the notice in proceedings under Laws 1903, p. 278, as amended by Laws 1905, p. 244 (Rev. St. 1908, § 3289; *Mills' Ann. St.* [1912 Ed.] § 3812), were posted outside the irrigation district was immaterial where the notice was duly posted within the district.—*Id.*

§ 152 (Mont.) In an action to determine the rights of plaintiff and defendant in certain water rights, a complaint alleging title and right in plaintiff to an undivided one-half interest thereof and an adverse claim by defendant, which was without right, stated a cause of action.—*Bennett v. Quinlan*, 131 P. 1067.

Rev. Codes, § 4852, held permissive, and not mandatory as to the determination of the rights of defendants *inter sese*, in an action for the protection of water rights.—*Id.*

VII. CONVEYANCES AND CONTRACTS.

§ 153 (Cal.) The transfer of water rights to an irrigation district, which had no legal existence, was void and the title remained in the transferor.—*Copeland v. Fairview Land & Water Co.*, 131 P. 119.

§ 156 (Cal.) Where a company, having diverted water and thereby acquired a water right, sold an interest in it to another, and thereafter continued to divert the water for the vendee, the mere failure of the vendee to demand or use the water did not forfeit his right thereto to the vendor.—*Copeland v. Fairview Land & Water Co.*, 131 P. 119.

The doctrine that an easement acquired by use is lost by disuse under the express pro-

visions of Civ. Code, §§ 811, 1411, does not, so far as the company is concerned, apply to a water right acquired from a company by conveyance.—*Id.*

§ 156 (Cal.App.) Where a right of way for an irrigation ditch is located and established, it becomes the permanent way, and neither party may change the location without the consent of the other.—*Brown v. Ratliff*, 131 P. 769.

Where a right of way for an irrigation ditch was located by the owner of the servient estate or established by usage, the owner of the servient estate could not justify a destruction of the ditch on the ground that a mistake was made in locating it, or that it was located on the part of his land which made the servitude more burdensome than was necessary.—*Id.*

The consent of an irrigation company, contracting to furnish lands of another with water for irrigation to a change in the location of a right of way over the land of a third person for an irrigation ditch, is without legal effect.—*Id.*

§ 158 (Colo.App.) Under a lease of farming lands for three years, with an option to purchase at the end of the term, which provided that the lessees should have the right to use the seepage water, subject to use by the lessors when they should need it, the lessees, on their election to purchase the land, were not entitled to a specific conveyance of the right to the seepage water, free from any prior right of the lessors.—*Castrilla v. Velotta*, 131 P. 794.

§ 158½ (Cal.App.) A complaint in a suit to quiet title to an easement for an irrigation ditch, which alleges that the ditch is appurtenant to plaintiffs' lands, and which describes the location of the ditch over defendant's lands and which avers that plaintiffs have a joint easement of way for the ditch by purchase and grant, and that the ditch is along the right of way, shows a claim of an easement in defendant's lands for a specific right of way, and is sufficient.—*Brown v. Ratliff*, 131 P. 769.

Where, in a suit to quiet title to a right of way for an irrigation ditch, there was evidence of an intention of the former owner of the servient estate to designate the route for the ditch which was constructed thereon, a finding that the former owner when locating the line of the ditch caused the same to be surveyed was immaterial, so that its lack of support in the evidence was also immaterial.—*Id.*

Evidence held to warrant a finding that the owner of the servient estate over which an unlocated right of way for an irrigation ditch was granted located the line of the ditch.—*Id.*

In a suit to quiet title to a right of way for an irrigation ditch, evidence held to support a finding that the ditch as maintained was sufficient and practical, and imposed no greater servitude on the servient estate than was required.—*Id.*

§ 158½ (Colo.App.) In a lessor's action for the recovery of farming lands for which the lessee had paid a rental of \$150 a year for three years, in which the evidence as to damages claimed to have been suffered by the lessee from the lessor's failure to furnish water was conflicting, the court could not say that a finding of \$150 for each of the two years that the lessee held over was unreasonable.—*Castrilla v. Velotta*, 131 P. 794.

IX. PUBLIC WATER SUPPLY.

(B) Irrigation and Other Agricultural Purposes.

§ 225 (Colo.) Where an owner signed a petition for the organization of an irrigation district under Acts 1901, p. 198, and paid district taxes on his land, and took no appeal from a judgment adjudging the validity of the district and confirming the issuance of bonds, he was estopped from attacking the validity of the district.—*Montezuma Valley Irr. Dist. v.*

Longenbaugh, 131 P. 262; Same v. Johnson, Id. 265.

§ 242 (Idaho) An irrigation district, organized under Sess. Laws 1903, p. 150, authorizing it to include town lots, has implied power to enter the streets and alleys of an included town or village to construct ditches and laterals necessary to the delivery of water to consumers.—City of Nampa v. Nampa & Meridian Irr. Dist., 131 P. 8.

The implied power conferred on irrigation districts organized under Sess. Laws 1903, p. 150, to enter the streets and alleys of towns within the district, and to construct therein ditches to deliver water, does not deprive a town of its control and right to direct the manner of the construction of such ditches.—Id.

§ 247 (Cal.) Where, until recently, no water was ever demanded under a contract executed between two water companies in 1887, which contract provided that, if the water supply of one proved insufficient at any time, as in fact it was at all times, it should be supplied with water by the other, the right to enforce the contract in equity was barred by laches.—Copeland v. Fairview Land & Water Co., 131 P. 119.

§ 249 (Cal.) A compromise agreement relative to a division of water between the F. Water Company, which was obligated to supply plaintiffs, and the H. Water Company held merely an executory contract of sale and not to transfer to the F. Company any interest in the water supply of the H. Company, and hence not to give plaintiffs any right in the water belonging to the H. Company.—Copeland v. Fairview Land & Water Co., 131 P. 119.

A public service corporation engaged in distributing water to the public for irrigation purposes will not be required to furnish water to certain lands where it is not shown that the lands are within the area to which the water has been dedicated, or that they are entitled to such water, or that the company has any surplus to supply to lands not within the original dedication.—Id.

§ 252 (Cal.) Where a land company organized and controlled a holding corporation and transferred to it a riparian water right, and then sold its land in small parcels, giving a certificate of stock with each parcel, which certificate declared the holder entitled to a certain part of the water right, each purchaser became vested with a proportional part of the water right.—Copeland v. Fairview Land & Water Co., 131 P. 119.

§ 252 (Colo.App.) It is the duty of a water supply company to exercise reasonable care in procuring and distributing water to its stockholders, and keeping its reservoirs in repair, and where a stockholder's land can be irrigated from only certain reservoirs, if practicable, to retain a sufficient amount of water in such reservoirs for his lands.—Mountain Supply Ditch Co. v. Lindekugel, 131 P. 789.

Ditch company held not to have performed duty to stockholder by limiting him to his strict pro rata share of water while water was being held unused, where it was not distributing the water in proportion to the stockholders' shares.—Id.

§ 254 (Wash.) Irrigation company held to have complied with contract to deliver water to a point at such elevation as would permit it to be carried to the highest point on an owner's land by gravity flow, where it could be delivered from its pipes through a pipe line by means of hydraulic pressure furnished by gravity, or through flumes by means of standpipes, which it offered to construct.—Pasco Reclamation Co. v. Rankert, 131 P. 1143.

§ 257 (Wash.) Under a contract between landowner and irrigation company and subsequent deed conveying water rights to the owner, held, that he was liable for a maintenance charge of \$5 an acre per year, which he could

not avoid by refusing to use any water.—Pasco Reclamation Co. v. Rankert, 131 P. 1143.

§ 263 (Colo.App.) Whether a ditch company willfully or negligently diverted water from upper to lower reservoirs from which a stockholder's land could not be irrigated as shown by his evidence, or whether it exercised reasonable care for the protection of his rights, were questions for the jury.—Mountain Supply Ditch Co. v. Lindekugel, 131 P. 789.

WEIGHTS AND MEASURES.

See Municipal Corporations, §§ 112, 625.

§ 1 (Wash.) Laws providing for the detection and prevention of imposition and fraud by securing honest weights and measures are within the police power.—City of Seattle v. Goldsmith, 131 P. 456.

The state's power to regulate weights and measures is delegated to cities of the first class by Const. art. 11, §§ 10, 11, and Rem. & Bal. Code, § 7507, subds. 16, 36.—Id.

Under Rem. & Bal. Code, § 7507, subd. 16, cities of the first class have implied power to require the true weight or measure to be stated on the package or other container in which food and drink is sold.—Id.

Ordinance requiring the weight or measure to be stamped on packages in which commodities are sold held not unreasonable or invalid because it made no allowance for loss by evaporation.—Id.

§ 1 (Wash.) Spokane city ordinance regulating weights and measures (sections 22-25) held not unconstitutional as beyond the city's power.—City of Spokane v. Arnold, 131 P. 815.

§ 6 (Wash.) Sale of butter in cartons in the city of Spokane containing less than a pound avoirdupois held not a violation of Spokane city ordinance regulating weights and measures (sections 22-25), where there was plainly marked on each end of the carton the words, "Full weight 15 oz. net 16 oz. gross."—City of Spokane v. Arnold, 131 P. 815.

WIDOWS.

See Executors and Administrators, § 326.

WILLS.

See Attachment, §§ 60, 217, 219; Descent and Distribution; Executors and Administrators; Specific Performance, § 41.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 2 (Cal.) Under Civ. Code, §§ 1285, 1313, a foreign will of a testator leaving heirs, bequeathing more than one-third of his estate to charity, though valid in the state of testator's domicile, was invalid in so far as it attempted to pass property in California.—In re Lathrop's Estate, 131 P. 752.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 79 (Kan.) A will executed under a contract founded upon a valuable consideration may be revoked without the consent of the beneficiary by the execution of a new will only in so far as the new will does not violate such agreement.—Nelson v. Schoonover, 131 P. 147.

Where a wife wills all her property to her husband pursuant to a contract, with a proviso that he shall pay a stated amount to her son, a subsequent will undertaking to give half her property to a trustee for her son's benefit may be enforced to the extent of paying the stated amount to the trustee.—Id.

(B) Form and Contents of Instruments.

§ 100 (Ariz.) An instrument executed by husband and wife owning community property and having no issue, whereby each gave to the other

all his or her interest in the property, effective on his or her death with remainder over after the death of the survivor to the heirs at law of both, is a joint and mutual will.—In re Anderson's Estate, 131 P. 975.

(D) Holographic Wills.

§ 130 (Cal.App.) The date of an olographic will under Civ. Code, § 1277, must contain the year, month, and day, and the omission of the month was therefore fatal.—In re Anthony's Estate, 131 P. 96.

Two letters, one of which was not dated as required by statute, could not be taken together as decedent's olographic will unless the one which was dated was testamentary in character and so referred to the other as to incorporate it therein.—Id.

Two letters written by decedent, one of which was not properly dated as required by statute, held not sufficient as an olographic will because the one which was dated was not of a testamentary character but merely narrated what had already been otherwise accomplished.—Id.

Assuming that a letter written by a decedent was of a testamentary character and if dated constituted an olographic will, held, that it did not sufficiently refer to another letter containing directions for disposition of decedent's property to incorporate the other letter therein and supply the date essential to validity.—Id.

(F) Mistake, Undue Influence, and Fraud.

§ 166 (Wash.) On an application to admit three wills executed by testatrix to probate, evidence held to warrant a finding that she either had no mental capacity when she executed the last two wills, or was induced to execute them by undue influence, and that the first in point of time was the one entitled to probate.—In re Jeffs' Estate, 131 P. 847.

(G) Revocation and Revival.

§ 191 (Ariz.) Under Civ. Code 1901, par. 4216, providing that, if after making a will the testator marries and the wife survives, the will shall be revoked, a will is revoked by the marriage of testator after executing the will, where his wife survives, and no provision is made for her in a marriage contract or in the will.—In re Anderson's Estate, 131 P. 975.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(K) Review.

§ 358 (Kan.) An appeal will lie to the district court from a decision of the probate court refusing to admit the will to probate; the remedy provided by the amendment of 1907 (Laws 1907, c. 429), sections 19 and 20 of the act relating to wills (Gen. St. 1901, §§ 7956, 7957), authorizing a civil action in such cases, being merely cumulative to Gen. St. 1909, § 3624, authorizing appeals from final decisions of the probate court.—In re Durant's Will, 131 P. 613.

VI. CONSTRUCTION.

(A) General Rules.

§ 448 (Cal.App.) The rule of law that favors testacy as against intestacy only applies where the existence of the testamentary intent is ascertained and the subject-matter of the doubt is one of construction, and when there is a doubt as to the existence of the testamentary intent the rule does not apply.—In re Anthony's Estate, 131 P. 96.

§ 489 (Wash.) In construing a bequest, to "my friend Richard H. Simpson," parol evidence is admissible to show that testator intended to make the bequest to "Hamilton Ross Simpson," though testator had an acquaintance named "Richard H. Simpson."—Siegley v. Simpson, 131 P. 479.

(D) Description of Property.

§ 561 (Cal.) A devise to grandchildren, share and share alike, of 5 acres of a 25-acre tract, in which testatrix owned an undivided three-fourths interest, was a devise of a full 5 acres in the tract rather than an undivided three-fourths of 5 acres.—In re De Bernal's Estate, 131 P. 375.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 728 (Cal.) As between the residuary legatee primarily liable for debts and specific devisees of mortgaged land, held that, where there was sufficient other estate to enable the residuary legatee to pay all the debts and expenses, the devisees were entitled to the rents and profits, less their proportion of the taxes paid.—In re De Bernal's Estate, 131 P. 375.

(B) Specific, Demonstrative, and General Devises and Bequests.

§ 751 (Cal.) In view of Civ. Code, § 1357, defining a specific legacy of personal property, held, that a devise to grandchildren of 5 acres of a certain tract of 25 acres, in which testatrix had an undivided three-fourths interest, was a specific devise.—In re De Bernal's Estate, 131 P. 375.

§ 754 (Cal.) A gift of a specific and designated amount of the very shares in a corporation which testator then owned, as, for instance, all of the shares, or one-half of them, or a designated number thereof, is a specific legacy.—In re De Bernal's Estate, 131 P. 375.

(D) Election.

§ 792 (N.M.) An election to take under a will may be inferred from the conduct of a party, his acts, omissions, modes of dealing with either property, acceptance of rents and profits, and the like.—Owens v. Andrews, 131 P. 1004.

Equity has never laid down any rules determining what conduct shall amount to an implied election to take under a will, and each case must depend on its own circumstances.—Id.

To raise an inference of election to take under a will from the party's conduct merely, it must appear that she knew of her right to election, and not merely that the instrument gave such right and she had full knowledge as to the property.—Id.

§ 793 (Kan.) While, under the express provisions of Gen. St. 1909, § 9819, it is essential that the probate court explain to a widow her right, both under and not under her husband's will, it is only essential, in case of a written consent by her that her husband dispose of more than one-half of his property to others, that she act freely and understandingly.—Weisner v. Weisner, 131 P. 608.

§ 796 (N.M.) The doctrine of estoppel precludes the revocation of an election to take under a will only where there is a resulting injury.—Owens v. Andrews, 131 P. 1004.

§ 797 (Kan.) Where the court finds, upon sufficient testimony, that a widow's consent to her husband's bequeathing more than one-half of his property to others was not given freely and understandingly, such finding will not be disturbed.—Weisner v. Weisner, 131 P. 608.

(E) Abatement.

§ 812 (Cal.) Specific devise of realty to grandchildren, with residuary devise over to the son and executor of testatrix, whose estate was sufficient to pay all debts and expenses of administration, held, under the express provision of Code Civ. Proc. § 1563, exempt from liability for debts and expenses, regardless of whether that provision conflicted with Civ. Code, § 1359.

providing the order of liability for debts.—In re De Bernal's Estate, 131 P. 875.

Mortgage debt of testatrix, created before the execution of her will, held as much a "debt" within the probate act for the payment of debts as an unsecured liability, so that, as between a residuary legatee and specific devisees of a part of the realty, the former was first chargeable with the mortgage debt without credit for an amount paid on account of the principal.—Id.

(H) **Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.**

§ 856 (Colo.) Where a testator bequeathed \$50,000 to a home and hospital in a city named for a building provided the donee would support it, otherwise to revert back to and be divided among certain legatees, on the primary gift being declared void as depending on an unenforceable condition precedent, the money should go to the legatees named and not to the residuary legatee.—Board of Regents of State University v. Wilson, 131 P. 422.

WITNESSES.

See Appeal and Error, §§ 206, 971, 994; Depositions; Evidence; New Trial, § 35.

II. COMPETENCY.

(A) **Capacity and Qualifications in General.**

§ 40 (Colo.) Rev. St. 1908, § 7273, providing that children under 10 years of age who appear incapable of receiving just impressions of the facts or of relating them, shall not testify, implies that the competency of a child under that age is addressed to the sound discretion of the trial court.—City of Victor v. Smilanich, 131 P. 392.

The action of the trial court in permitting a boy about six years old, who fairly understood the obligation of an oath and the facts which he detailed, to testify, is not an abuse of discretion.—Id.

§ 46 (Colo.) In a prosecution for embezzlement against accused, who dominated an insolvent corporation, the fact that an employé of the insolvent corporation had been supported, pending trial, by the one who procured the prosecution does not render the testimony of that employé incompetent.—Le Master v. People, 131 P. 269.

§ 48 (Okla. Cr. App.) That a witness has been convicted of any felony except perjury does not disqualify him.—Price v. State, 131 P. 1102.

§ 52 (Okla.) The wife is incompetent to testify, where husband is interested in the result of the case, though the action is in the name of a third party.—Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691.

§ 56 (Okla.) Under Comp. Laws 1909, § 5842, a wife may testify concerning a transaction in which she acted as her husband's agent, though her husband was present when the transaction occurred.—Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691.

§ 64 (Okla.) Though under Comp. Laws 1909, § 5842, one spouse cannot testify against the other concerning privileged communications either during or after the marital relation has ceased, this does not prevent one from testifying against the other after the marriage relation has terminated regarding independent facts which are not privileged communications.—Adkins v. Wright, 131 P. 686.

§ 78 (Okla.) Evidence on the question of the wife's competency to testify held to show that she acted as her husband's agent in the transaction on which her testimony was sought.—Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691.

§ 79 (Okla.) The competency of a witness is for the court and not for the jury.—Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691.

(C) **Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§ 133 (Cal. App.) In an action by an executor to quiet title to realty claimed by defendant under a deed from testator, defendant was not rendered incompetent to testify as to conversations with testator in his lifetime, by Code Civ. Proc. § 1880, subd. 3, prohibiting parties to an action against executors or administrators on a claim against the state from being witnesses.—Gernon v. Sisson, 131 P. 85.

§ 159 (Kan.) The surviving husband was incompetent to testify to a conversation with his wife, since deceased, by which he claimed that the postnuptial contract between them, that he should take nothing of her estate, had been abrogated.—Eberhart v. Rath, 131 P. 604.

(D) **Confidential Relations and Privileged Communications.**

§ 195 (Okla.) A woman cannot testify against her former husband concerning any communication made by one to the other while the marriage relation existed.—Adkins v. Wright, 131 P. 686.

§ 219 (Okla.) Testimony of a physician as to any communication made by his patient as to her disease, or knowledge obtained by him, may be given under Comp. Laws 1909, § 5842, if the patient testifies on the same subject.—Roesser v. Pease, 131 P. 534.

III. EXAMINATION.

(A) **Taking Testimony in General.**

§ 236 (Cal. App.) On the issue whether another route for an irrigation ditch would be less burdensome to the servient estate than the route established, questions to a former owner of the servient estate whether he ever had any trouble with the water from the ditch were indefinite as to meaning and scope and properly excluded.—Brown v. Ratliff, 131 P. 769.

§ 240 (Kan.) Where a witness for the state testified to a scuffle, it was error to exclude as leading a question asking defendant whether a scuffle had preceded the shooting.—State v. Alexander, 131 P. 139.

§ 248 (Idaho) Where a witness was asked under what circumstances he saw defendant, and replied that the porter at his house "pointed him out to me, and told me to be careful of him," it was not error to refuse to strike out the answer as not responsive.—State v. Allen, 131 P. 1112.

§ 248 (Or.) Where the court had ruled that testimony should be confined to or about a certain time, and a witness was asked what a certain person was doing about the date given, a motion to strike the answer unless the witness specified the time was properly denied.—City of Woodburn v. Aplin, 131 P. 516.

§ 248 (Wash.) An answer, "Yes, sir, it was selling at \$3 a thousand," was not responsive to a question, "Do you know what timber of that quality was selling for in the market at that time? You can say whether you know or not."—Hertzog v. Star Logging Co., 131 P. 806.

(B) **Cross-Examination and Re-Examination.**

§ 268 (Kan.) On cross-examination, a witness may be asked questions to test his knowledge as to the matters concerning which he has testified, or to elicit evidence favorable to the cross-examiner, if the questions are not otherwise objectionable.—Polley v. Kansas City Oil Co., 131 P. 577.

§ 268 (Mont.) It was error to restrict defendant's cross-examination of plaintiff's witnesses as to matters tending to throw light upon any of the issues involved.—Moss v. Goodhart, 131 P. 1071.

(C) Privilege of Witness.

§ 293½ (Cal.) In view of Code Civ. Proc. § 1763, requiring that the person alleged to be incompetent must be "produced at the hearing" for the appointment of a guardian, the alleged incompetent may be called as a witness, as against the objection that one cannot be compelled to be a witness against himself, which only applies to a criminal proceeding.—*In re Coburn*, 131 P. 352.

§ 294 (Cal.) That evidence given might be detrimental to witness' interest in another pending litigation is not ground for the refusal of a party to testify in a special proceeding.—*In re Coburn*, 131 P. 352.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.**(A) In General.**

§ 321 (Kan.) It was discretionary with the court to permit the state to prove that a witness for the state was drunk at a certain time about which he testified both on direct and on cross examination.—*State v. Alexander*, 131 P. 139.

§ 331½ (Wash.) On a trial for adultery with C., where she testified for the defense, a copy of a letter couched in endearing terms, which she admitted writing to another man and intrusting to accused unaddressed for delivery, was admissible as affecting her credibility.—*State v. Moss*, 130 P. 1132.

(B) Character and Conduct of Witness.

§ 350 (Colo.) In a criminal prosecution, where a witness, who had been incarcerated with accused in the county jail, testified to a conversation with accused, it was not error for the trial court to refuse to make witness state, on cross-examination, upon what charge he had been incarcerated.—*Le Master v. People*, 131 P. 269.

(C) Interest and Bias of Witness.

§ 372 (Cal.) It was proper in proceedings for the appointment of a guardian for an alleged incompetent to ask petitioner on cross-examination how much money he had spent in the proceeding.—*In re Coburn*, 131 P. 352.

(D) Inconsistent Statements by Witness.

§ 379 (Colo.) Where a sheriff testifies orally in support of his return of service of process, contradictory statements made by him are then admissible for the purpose of impeaching his testimony, when a proper foundation has been laid.—*Pinnacle Gold Mining Co. v. Popst*, 131 P. 413.

§ 380 (Or.) In an action on a liquor dealer's bond, plaintiff can introduce affidavits of two of its witnesses made in a criminal action in regard to the same violation of law to explain the apparent inconsistency of using such witnesses who gave evidence palpably adverse to the plaintiff.—*City of Woodburn v. Aplin*, 131 P. 516.

§ 383 (Kan.) A witness cannot be impeached by contradiction upon a collateral matter brought out on cross-examination.—*State v. Alexander*, 131 P. 139.

§ 388 (Cal.App.) Under Code Civ. Proc. § 2062, a witness cannot be impeached by showing that he testified differently at the preliminary examination, without showing him the transcript of his testimony then taken, though he testified at that time through an interpreter.—*People v. Lopez*, 131 P. 104.

(E) Contradiction and Corroboration of Witness.

§ 398 (Ariz.) On a criminal trial, the testimony of a witness, given on a preliminary examination, could not be contradicted and im-

peached without laying a foundation therefor.—*Webb v. State*, 131 P. 970.

§ 409 (Colo.) A witness may be contradicted by circumstances as well as by statements of others contrary to his own, and the jury and the court may exercise their own judgment as to the probative value of his testimony.—*City of Victor v. Smilanich*, 131 P. 392.

WOMEN.

See Master and Servant, § 13.

WORDS AND PHRASES.

"Accessory before the fact."—*Rhea v. State*, (Okl. Cr. App.) 131 P. 729.

"Accommodation party."—*Noble v. Beeman-Spaulling-Woodward Co. (Or.)* 131 P. 1006.

"Accomplices."—*People v. Lawlor (Cal. App.)* 131 P. 63.

"Account stated."—*Atkinson v. Golden Gate Tile Co. (Cal. App.)* 131 P. 107; *Rosenbaum v. McEwen (Colo. App.)* 131 P. 780.

"Adequate facilities."—*Seward v. Denver & R. G. R. Co. (N. M.)* 131 P. 980.

"Adverse party."—*Templeton v. Morrison (Or.)* 131 P. 319.

"Alimony."—*Simpson v. Simpson (Cal. App.)* 131 P. 99.

"Amount in controversy."—*State v. Superior Court for King County (Wash.)* 131 P. 466.

"And."—*Lawton v. Morgan, Fliedner & Boyce (Or.)* 131 P. 314.

"Any person."—*Benner v. Scandinavian American Bank (Wash.)* 131 P. 1149.

"Apprehension."—*State v. Martin (Kan.)* 131 P. 1190.

"Arrest."—*State v. Martin (Kan.)* 131 P. 1190.

"Art or trade."—*Miller v. State (Okl. Cr. App.)* 131 P. 717.

"Attractive nuisance."—*Charvoz v. Salt Lake City (Utah)* 131 P. 901.

"Canning fish."—*State v. Pacific American Fisheries (Wash.)* 131 P. 452.

"Cash capital."—*Union Pac. Life Ins. Co. v. Ferguson (Or.)* 131 P. 1012.

"Claims."—*Boulden v. Thompson (Cal. App.)* 131 P. 765.

"Claims arising out of the same transaction."—*Boulden v. Thompson (Cal. App.)* 131 P. 765.

"Consent."—*Weisner v. Weisner (Kan.)* 131 P. 603.

"Counties."—*Hersey v. Nelson (Mont.)* 131 P. 30.

"County powers."—*Hersey v. Nelson (Mont.)* 131 P. 30.

"Day."—*Franklin v. State (Okl. Cr. App.)* 131 P. 183.

"Debt."—*In re De Bernal's Estate (Cal.)* 131 P. 375.

"Decide such cases on their merits."—*Seward v. Denver & R. G. R. Co. (N. M.)* 131 P. 980.

"Defeasible."—*Kinney v. Heatherington (Okl.)* 131 P. 1078.

"Dictum."—*Boulden v. Thompson (Cal. App.)* 131 P. 765.

"Election."—*Owens v. Andrews (N. M.)* 131 P. 1004.

"Eminent domain."—*Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43.

"Engaged in interstate commerce."—*Montgomery v. Southern Pac. Co. (Or.)* 131 P. 507.

"Expert."—*Miller v. State (Okl. Cr. App.)* 131 P. 717.

"Fail."—*A. Widemann Co. v. Digges (Cal. App.)* 131 P. 882.

"Fence."—*Midland Valley R. Co. v. Bryant (Okl.)* 131 P. 678.

"Ferry franchise."—*Vallejo Ferry Co. v. Solano Aquatic Club (Cal.)* 131 P. 864.

"Final judgment."—People v. District Court of Sixth Judicial Dist. (Colo.) 131 P. 424; State v. Superior Court for King County (Wash.) 131 P. 1136.

"Fixed or determinable time."—De Groat v. Focht (Okl.) 131 P. 172.

"Founded on."—Springhetti v. Hahnwald (Colo.) 131 P. 206.

"Funeral expenses."—Nelson v. Schoonover (Kan.) 131 P. 147.

"Gambling."—State v. Anthony Fair Ass'n (Kan.) 131 P. 626; Salt Lake City v. Doran (Utah) Id. 636.

"General circulation."—In re Green (Cal. App.) 131 P. 91.

"Gravity flow."—Pasco Reclamation Co. v. Rankert (Wash.) 131 P. 1143.

"Immediately set down for trial."—State v. Medler (N. M.) 131 P. 976.

"Incompetent, mentally incompetent, and incapable."—In re Coburn (Cal.) 131 P. 352.

"Independent contractor."—Simila v. Northwestern Improvement Co. (Wash.) 131 P. 831.

"Indorser."—Noble v. Beeman-Spaulling-Woodward Co. (Or.) 131 P. 1006.

"Invoice purchase price."—Swisher v. Dunn (Kan.) 131 P. 571.

"Itinerant merchant."—Ex parte Stoddard (Nev.) 131 P. 133.

"Jeopardy."—Rupert v. State (Okl. Cr. App.) 131 P. 713.

"Larceny."—John Lee Clarke v. Fidelity & Deposit Co. of Maryland (Wash.) 131 P. 468.

"Local law."—Hersey v. Nelson (Mont.) 131 P. 30.

"Look out."—Stern v. Issitt (Kan.) 131 P. 551.

"Malicious prosecution."—Foltz v. Buck (Kan.) 131 P. 587.

"Manner."—Williams v. Pomona Valley Hospital Ass'n (Cal. App.) 131 P. 888.

"Manufacturing establishment."—Bubb v. Missouri, K. & T. Ry. Co. (Kan.) 131 P. 575.

"Merits."—Seward v. Denver & R. G. R. Co. (N. M.) 131 P. 980.

"Minutes of the court."—Moore v. Butte Electric Ry. Co. (Mont.) 131 P. 635.

"Misrepresentation in bad faith."—Continental Casualty Co. v. Owen (Okl.) 131 P. 1084.

"More or less."—Maffet v. Schaar (Kan.) 131 P. 589.

"Municipal."—Hersey v. Nelson (Mont.) 131 P. 30.

"Municipal corporation."—Hersey v. Nelson (Mont.) 131 P. 30.

"Navigable or floatable stream."—Sumner Lumber & Shingle Co. v. Pacific Coast Power Co. (Wash.) 131 P. 220.

"Negotiable instrument."—Quast v. Ruggles (Wash.) 131 P. 202.

"New acquisition."—Pigeon v. Buck (Okl.) 131 P. 1083.

"Novation."—Young v. Benton (Cal. App.) 131 P. 1051.

"Nuisance."—Wolfe v. Abbott (Colo.) 131 P. 386.

"Obstructions."—La Caff v. Roslyn-Cascade Coal Co. (Wash.) 131 P. 194.

"Olographic will."—In re Anthony's Estate (Cal. App.) 131 P. 96.

"Pandering."—People v. Lawlor (Cal. App.) 131 P. 63.

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